



REPRESENTING
ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

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DIVISION OF
ADMINISTRATIVE
HEARINGS

Docketed by: EU

IN THE MATTER OF:

BRADLEY WAYNE KLINE

Case No. 84956-07-AG

FINAL ORDER

This cause came on for consideration of and final agency action on the Recommended Order rendered by Administrative Law Judge Bram D.E. Canter (ALJ) on October 9, 2007, after a formal hearing conducted in accordance with Sections 120.569 and 120.57, Fla. Stat. The Recommended Order ultimately concluded that this Department should enter a Final Order revoking the Respondent Kline's insurance licenses and eligibility for licensure. Respondent Kline timely filed exceptions to that Recommended Order, to which the Department timely responded. A copy of Recommended Order, those exceptions and responses are attached as Exhibit A. The Recommended Order, the transcript of the hearing, the exhibits admitted into evidence, the exceptions and responses, and applicable law have all been considered during the promulgation of this final order.

Initially, it must be noted that an examination of the ALJ's Conclusions of Law shows a misstatement of the law in one regard. In Paragraph 53 of the Recommended Order, the ALJ stated:

"Petitioner is correct that a viatical met the definition of a security under the law that existed in 2003. However, the Administrative Law Judge does not agree with the petitioner's argument that this interpretation of the law was clear and settled in 2003. The regulation of viaticals under the insurance code was a cause of confusion."

The first sentence of Paragraph 53 is a correct statement of the law. The second and third sentences are incorrect statements of the law.

By their very nature, "viaticals", as colloquially denominated by the ALJ, [under then extant Florida law, those "viaticals" were actually "viatical settlement purchase agreements", as defined by Section 626.9911(8), Fla. Stat. (2003)], inherently and since their inception, have met the Howey test, established in 1946 for the determination of security status. In S.E.C. v. W.J. Howey Co., 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946), the U.S. Supreme Court established a three prong test to prove the existence of an investment contract that constitutes a security. The three prongs are: 1) an investment of money; 2) in a common enterprise; and 3) an expectation of profits to be derived solely from the efforts of another. Viatical settlement purchase agreements, as defined by then Section 626.9911(8), Fla. Stat. (2003), uniformly required a purchaser to invest money into the common enterprise of the sale and purchase of interests in a "viaticated policy" [Section 626.9911(11), Fla. Stat., (2003)], with the expectation of a profit from that investment, which expectation is derived solely from the occasion of the death of the "viator", who was screened and approved for these purposes exclusively by the viatical settlement provider. [Sections 626.9911(6),(12), Fla. Stat., (2003)] Thus, the viatical settlement purchase agreements here at issue inherently met the Howey test, and were, therefore and at all relevant times, investment contracts regulated by the State of Florida as securities. [Section 517.021(20)(q), Fla. Stat. (2003); Section 517.021(21)(q), Fla. Stat. (2006)]

As the Howey test was established in 1946, and has not varied since that time, it is incorrect to state or imply, as did the ALJ in the second and third sentences of

Paragraph 53, that the law regarding what constitutes an investment contract (security) was not clear and established and was the cause of confusion in 2003, some 57 years later. The test established by the law in that regard had been in place for 57 years *before* Respondent Kline opted to offer those agreements to his customers. As with all securities, the law imposed a strict liability on Kline to know what he was selling before he did so. That, in the instances alleged in the Administrative Complaint, he failed to do.

What the ALJ erroneously interjected into the Howey test was the insular question of whether viatical settlement purchase agreements could be subjected to dual regulation under Chapter 517 and Chapter 626, Fla. Stat. The question of dual regulation of those agreements is a matter separate and apart from the singular matter of whether those agreements constituted securities under Howey and Florida law. Therefore, the question of dual regulation should not have been co-mingled with the Howey security analysis so as to create, rather than find, "confusion" in the law. By doing so, the ALJ erred as a matter of law on a legal issue over which this Department has substantive jurisdiction.

With regard to the matter of dual regulation, it was determined in Kligfeld v. State, Office of Financial Reg., 876 So.2d 36 (Fla. 4th DCA 2004), that such dual regulation is appropriate because viatical settlement purchase agreements regulated under Chapter 626, Fla. Stat., since 1996 (well before Kline's 2003 transgressions), also meet the 1946 Howey test for investment contracts, and thus are securities that can be subject to simultaneous regulation under Chapter 517, Fla. Stat. Accordingly, the second and third sentences of Paragraph 53 are rejected and deleted as incorrect statements of the

law over which this agency has substantive jurisdiction. This rejection and deletion is more reasonable than the rejected statements.

Concomitantly, the mitigation announced in the first two sentences of Paragraph 58 of the Recommended Order must also be rejected and deleted, and the following substituted therefor:

"The total applicable penalty to be imposed after consideration of the administrative rules referenced in Paragraphs 54, 55, 56, and 57, is 48 months."

This substitution is more reasonable than the rejected and deleted sentences of Paragraph 58.

The remainder of Paragraph 58 and the recommendation of revocation are not modified or rejected, and are adopted.

RULINGS ON THE RESPONDENT'S EXCEPTIONS AND DEPARTMENT'S RESPONSES

The Respondent's first exception contends that the Conclusion Of Law stated in Paragraph 51 of the Recommended Order, to the effect that Petitioner's own testimony and the advertisements he used provided clear and convincing evidence that he violated the statutes charged in the administrative complaint, is not supported by competent substantial evidence, and is "legally erroneous" as evidenced by a purportedly contrary Conclusion of Law stated in Paragraph 53 of the Recommended Order.

An examination of the record (TR. 258-317) shows an abundance of competent substantial evidence to support the challenged Conclusion of Law. Moreover, the Respondent did not challenge pertinent Findings of Fact such as those made in paragraphs 16, 17, 18, 22, and 23 of the Recommended Order, all of which support the

challenged Conclusion of Law. Therefore, this portion of the Respondent's first exception is rejected.

Essentially, the second portion of this first exception, that there was "confusion" in the law about "viaticals" is grounded in the same misunderstanding of the law stated by the ALJ in paragraph 53 of the Recommended Order wherein he concluded that the law regarding the status of a "viatical" as a security instrument was not clear and settled in 2003, and that the regulation of "viaticals" under the insurance code was a cause of confusion. The ALJ's misunderstanding of the law was addressed and corrected above. That correction shows that there was no "confusion" in the law regarding "viaticals" in 2003. The lack of such confusion vitiates the second portion of the first exception, thus militating its rejection. Accordingly, entire first exception is rejected.

With further regard to the second portion of the first exception, the Respondent's reliance on Securities & Exchange Commission v. Life Partners, Inc., 87 F. 3d 536 (D.C. Cir. 1996), for the proposition that "viaticals" are not securities is misplaced. First, the weight of Florida law is to the contrary. See, Kligfeld v. State, Office of Financial Reg., 876 So.2d 36 (Fla. 4th DCA 2004), where it was conceded that viatical settlement purchase agreements are securities. Secondly, the Life Partners case stands alone in isolation from other, similar cases, and has been roundly criticized for its incorrectness by courts that expressly declined to follow it. See, e.g. Siporin v. Carrington, 23 P.3d 92 (Ariz. App. Div. 1, 2001); Wuliger v. Christie, 310 F. Supp. 2d 897 (N.D. Ohio 2004); Wuliger v. Anstaett, 363 F. Supp.2d 917 (N.D. Ohio 2005); Reiswig v. Dept. of Corporations for the State of California, 50 Cal. Rptr. 3d 386 (Cal. 4th DCA 2006); Poyser v. Flora, 780 N.E. 2d 1191 (Ind. App. 2003); SEC v. Mutual Benefits Corp., 323

F. Supp.2d 1337 (S.D. Fla. 2004); and SEC v. ETS Payphones, Inc., 300 F.3d 1281 (11th Cir. 2002); Life Partners, therefore, is neither persuasive nor controlling over contrary Florida case law in this regard.

Accordingly, the Respondent's first exception is rejected.

The Respondent's second exception takes issue with a portion of the ALJ's Preliminary Statement wherein he stated that the Department did not state the specific discipline it was seeking against the Respondent. Contending to the contrary, the Respondent notes that every count of the Administrative Complaint ends with the representation that the Department was seeking to suspend or revoke the Respondent's licenses and eligibility for licensure, or to impose lesser penalties.

On review, it appears that the ALJ was simply noting that no specific penalty was being sought to the exclusion of other permissible penalties. Regardless, this exception has no merit. First, it attacks a portion of the Preliminary Statement, not a Finding of Fact, or a Conclusion of Law, or a recommended penalty which is determinative of this action. Secondly, the Respondent fails to show how correcting the purported erroneous statement would in any way change the outcome of this cause, or how permitting it to stand as stated works any prejudice on him. Accordingly, this exception is rejected.

The Respondent's third exception argues that there is no competent substantial evidence to support the recommended penalty of revocation. However, it is clear that this exception, as stated, is no more than a disagreement with the ALJ over the application of Section 626.641(1), Fla. Stat., to the Respondent's fact situation. That statute provides that no suspension of a license or licensure may exceed two years. Essentially, the Respondent contends that if a recommended suspension period for any

infraction(s) in question exceeds two years, the Department cannot proceed to revoke the license and licensure but must confine its disciplinary measures to either a two year suspension or some lesser penalty.

This exception is without merit. If the rationale of this argument were to be accepted and followed, the Department would be unable to revoke licenses and licensure even though that penalty is specifically prescribed in multiple statutes. See, Sections 626.611, 626.6115, 626.621, 626.6215, 626.631, 626.651, and 626.6515, Fla. Stat. Moreover, the Respondent overlooks Rule 69B-231.040(3)(d), Florida Administrative Code, which clearly states that any final penalty calculated to be in excess of 24 months becomes a revocation. Accordingly, this third exception is rejected.

The Respondent's fourth exception incorporates his first exception. That incorporated exception is rejected for the reasons stated above relative to that first exception. The fourth exception also argues that there is no competent substantial evidence to support the ALJ's additional conclusion (Paragraph 51 of the Recommended Order) that the Respondent willfully violated the statutes in question. The Respondent contends that there was no proof that he knew that the advertising materials he showed customers contained misrepresentations, so that it was not possible for him to have *willfully* misled his customers by asking them to rely on those materials.

The Respondent misunderstands the law relative to proof of the element of willfulness. The matter of intent is not decided by subjective mind reading, but by circumstantial evidence. Plantation Key Developers v. Colonial Mortg., Etc., 559 F.2d 164 (5th Cir.1979); Florida East Coast Ry. Co. v. Thompson, 111 So. 525 (Fla. 1927);

Phifer v. Steenburg, 64 So. 265, reh. den. 64 So. 265 (Fla. 1914); Heineman v. State, 327 So.2d 898 (Fla. 3rd DCA 1976), cert. den. 336 So.2d 1182; Gavin v. State, 259 So.2d 544 (Fla. 3rd DCA 1972), cert. den. 265 So.2d 370; Edwards v. State, 213 So.2d 274 (Fla. 3rd DCA 1968), cert. den. 221 So.2d 746; State v. Gantt, 217 S.E.2d 3, at 5 (N.C. App. 1975); State v. Evans, 548 P.2d 772, at 777 (Kan. 1976). Here, there is abundant record evidence, much if not all of it from Respondent's own testimony, showing that the Respondent purposefully showed the misleading advertisements to his customers with the expectation that they would rely on the same in deciding whether to buy the products in question. Quite simply, there would have been no point in showing them to customers had he not intended the customers to rely on those advertisements. Moreover, the Respondent admitted that he did nothing to ascertain the validity of the advertising statements he presented to his customers. (Tr. 292-293, 295, 306, 313) Under such circumstances, the element of willfulness is manifest.

The Respondent also misunderstands the law applicable to securities. That law imposes an absolute and strict liability on the part of those who offer securities for sale. Section 517.07, Fla. Stat., states:

It is unlawful and a violation of this chapter for any person to sell or offer to sell a security within this state unless the security is exempt under s. 517.051, is sold in a transaction exempt under s. 517.061, is a federal covered security, or is registered pursuant to this chapter.

The statute does not qualify the words "unlawful and a violation of this chapter" by use of the word "knowingly" or its equivalent. The statute is, therefore, a strict liability statute. It does not matter, therefore, what an individual seller actually knows or does not know about the security offered for sale; the law imposes a strict obligation on the seller to know, at his or her peril, the absolute truth about what they are selling, and to

register or not register that security accordingly. If the seller, through negligence, oversight, or misunderstanding, fails to live up to the registration standards imposed by the law, his or her liability is strict and is not avoidable through lack-of-scienter defenses. Huff v. State, 626 So.2d 742 (Fla. 2nd DCA 1991); State v. Houghtaling, 181 So.2d 636 (Fla. 1965). [For a similar analysis of another strict liability statute, See, Beshore v. Department of Financial Services, 928 So.2d 411 (Fla. 1st DCA 2006)]

Accordingly, this fourth and final exception is also rejected.

Having considered the transcript of the hearing, the exhibits admitted into evidence, the arguments of the parties, the Respondent's exceptions, and applicable law,

IT IS HEREBY ORDERED that the ALJ's Findings of Fact, being supported by competent substantial evidence, are adopted as the Department's Findings of Fact.

IT IS HEREBY FURTHER ORDERED that except as otherwise stated above, the ALJ's Conclusions of Law are adopted as the Department's Conclusions of Law, and that the insurance licenses and eligibility for licensure of the Respondent Bradley Wayne Kline are hereby REVOKED.

Pursuant to Section 626.641, Florida Statutes, during the period of revocation and until reinstatement, which must be applied for in writing, Kline shall not engage in or attempt or profess to engage in any transaction or business for which a license is required under the Florida Insurance Code, or directly or indirectly own, control, or be employed in any manner by any insurance agent, agency, or adjuster or adjusting firm.

DONE AND ORDERED this 21st day of December, 2007.



A handwritten signature in black ink, reading "Karen Chandler", written over a horizontal line.

Karen Chandler
Deputy Chief Financial Officer

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of this Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Fla. R. App. P. Review proceedings must be instituted by filing a petition or notice of appeal with the General Counsel, acting as the agency clerk, at 612 Larson Building, Tallahassee, Florida, and a copy of the same with the appropriate district court of appeal within thirty (30) days of rendition of this Order.

COPIES FURNISHED:

Bram D.E. Canter, Administrative Law Judge
Division of Administrative Hearings
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

Bradley Wayne Kline
7614 Brisbane Ct.
Orlando, Fl. 32835

David Busch Esq.
Department of Financial Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333