

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES,)
)
Petitioner,)
)
vs.) Case No. 07-1808PL
)
LAURA J. KING,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, this cause was heard by Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, on August 14 and August 21, 2007, in New Port Richey, Florida.

APPEARANCES

For Petitioner: Greg S. Marr, Esquire
Thomas A. David, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399-0333

For Respondent: L. Michael Billmeier, Jr., Esquire
Galloway, Brennan & Billmeier
240 East Fifth Avenue
Tallahassee, Florida 32303

Michael Rothschild, Esquire
Law Offices of Larry S. Davis, P.A.
1926 Harrison Street
Hollywood, Florida 33020

STATEMENT OF THE ISSUE

The issue presented is whether Respondent is guilty of the allegations contained in the Administrative Complaint, and, if so, what disciplinary action should be imposed.

PRELIMINARY STATEMENT

On March 28, 2007, Petitioner, the Department of Financial Services (the "Department") issued a 14-Count Administrative Complaint against Respondent, Laura J. King, alleging that she had violated several provisions of the Florida Insurance Code¹ by selling ancillary products to her automobile insurance customers without the customers' informed consent, a practice referred to as "sliding," by selling a surplus lines insurance product without making a diligent effort to place the coverage with an insurer authorized to transact that type of insurance in this state, and by failing to notify the Department of a change of address as required by law. Respondent denied the allegations and requested a formal hearing. On April 20, 2007, the matter was referred to the Division of Administrative Hearings ("DOAH") for the assignment of an Administrative Law Judge and the conduct of a formal hearing. The matter was continued twice before commencing on August 14, 2007, and concluding on August 21, 2007. By stipulation of the parties, the record was left open to provide the parties the opportunity to take the deposition of a witness who was unavailable for the hearing. On

September 7, 2007, counsel for Petitioner filed a Letter notifying this tribunal that the parties had agreed that the testimony of the witness was no longer required. By Order, dated September 11, 2007, the record in this proceeding was closed.

On August 6, 2007, the parties filed a Pre-Hearing Stipulation in which the Department dismissed Counts XI, XII, XIII, and XIV of the Administrative Complaint, which were the counts relating to the "diligent effort" requirement associated with placing surplus lines coverage. As to the remaining allegations, the Pre-Hearing Stipulation contained the following Statement of Facts Admitted:

1. Respondent is licensed by Petitioner as a life including variable annuity and health, life and health, and a general lines insurance agent, and has been issued license number A046962.
2. Respondent was so licensed at all times relevant to the dates and occurrences referenced in the Administrative Complaint.
3. The Department has jurisdiction over Respondent's insurance licenses and appointments.
4. At all times relevant to the dates and occurrences referenced in the Administrative Complaint, Respondent was employed or affiliated with Direct General Insurance Agency, Inc., a Tennessee corporation, doing business in Florida as Cash Register Insurance.

5. On or about October 7, 2005, Respondent sold James Gatlin a private passenger automobile insurance policy as evidenced by Joint Exhibit 2.
6. On or about October 7, 2005, Respondent sold James Gatlin a travel protection plan as evidenced by Joint Exhibit 2.
7. On or about October 7, 2005, Respondent sold James Gatlin an accident medical protection plan as evidenced by Joint Exhibit 2.
8. On or about October 7, 2005, Respondent sold James Gatlin a term life insurance policy as evidenced by Joint Exhibit 2.
9. On or about August 17, 2006, Respondent sold Gabriella Jungling a private passenger automobile insurance policy as evidenced by Joint Exhibit 3.
10. On or about August 17, 2006, Respondent sold Gabriella Jungling a vehicle protection plan as evidenced by Joint Exhibit 3.
11. On or about August 17, 2006, Respondent sold Gabriella Jungling a term life insurance policy as evidenced by Joint Exhibit 3.
12. On or about August 19, 2006, Respondent sold Bruce Hansen a private passenger automobile insurance policy as evidenced by Joint Exhibit 4.
13. On or about August 19, 2006, Respondent sold Bruce Hansen a vehicle protection plan as evidenced by Joint Exhibit 4.
14. On or about August 19, 2006, Respondent sold Bruce Hansen a term life insurance policy as evidenced by Joint Exhibit 4.
15. On or about July 20, 2006, Respondent sold Sidney Dossantos a private passenger

automobile insurance policy as evidenced by Joint Exhibit 5.

16. On or about July 20, 2006, Respondent sold Sidney Dossantos a vehicle protection plan as evidenced by Joint Exhibit 5.

17. On or about July 20, 2006, Respondent sold Sidney Dossantos a term life insurance policy as evidenced by Joint Exhibit 5.

18. On or about August 9, 2006, Respondent changed her principal business street address from 6318 U.S. Highway 19, North, New Port Richey,^[2] Florida, to 5116 U.S. Highway 19, North, New Port Richey, Florida, but did not, until on or about March 3, 2007, notify Petitioner of this change in principal business street address.

19. During the period covered by the Administrative Complaint, Respondent earned approximately thirty-four percent (34%) of her total compensation from Direct General Insurance Agency, Inc., from commissions on the sale of the accident medical protection plan, the travel protection plan, the vehicle protection plan, and the term life policy.

During its case-in-chief at the final hearing, the Department presented the testimony of Carol Lee Burinskas, Susan Jordan, James Gatlin, Sidney Dossantos, Bruce Hansen, and Gabriella Johnson, nee Jungling. The Department also presented the rebuttal testimony of Susan Jordan, Tracie Drake, Iraida Holland, Miranda Clay, and Joan Levandowski. Respondent testified on her own behalf and presented the live testimony of Tim Arnold and the deposition testimony of David Lane.

Joint Exhibits 1 through 7 and 12 were admitted by stipulation of the parties. The Department's Exhibits 8, 9, and 10 were also admitted into evidence. Respondent objected to the introduction of Department Exhibits 8 and 9, and did not object to Department Exhibit 10.

The four-volume Transcript was filed at DOAH on September 12, 2007. On September 13, 2007, the parties filed a joint motion to extend the time for filing proposed recommended orders until October 15, 2007. This motion was granted by an Order dated September 13, 2007. On October 10, 2007, the parties filed a second joint motion seeking an extension of the time for filing proposed recommended orders until October 22, 2007. By Order dated October 11, 2007, the motion was granted. The parties timely filed their Proposed Recommended Orders in compliance with the Order of October 11, 2007.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made to supplement and clarify the extensive factual stipulations set forth in the parties' Statement of Facts Admitted³:

1. Respondent works as the manager of a Cash Register Insurance ("Cash Register") office in New Port Richey. Cash Register is owned by Direct General Insurance Agency, Inc. ("Direct General").

2. Respondent sells automobile insurance to individual customers. During the relevant period, Respondent also sold four ancillary products: a vehicle protection plan, an accident medical protection plan, a travel protection plan, and a term life insurance policy.⁴ Respondent is paid a salary, and receives no commission on the sale of automobile insurance. Respondent does receive a ten percent commission on the sale of ancillary products. Respondent received 34 percent of her overall income from the sale of ancillary products during the relevant time period.

3. Respondent deals with at least 50 customers per day, six days per week. She sells between seven and ten automobile insurance policies per day, on average.

4. Given her customer volume, Respondent cannot remember each customer to whom she has sold insurance. Respondent frankly testified that she had no specific recollection of selling the policies to the individuals named in the Statement of Facts Admitted.

5. However, Respondent also testified that she sells insurance according to a script, and that in light of this unvarying practice she could state with confidence whether she had or had not engaged in the specific sales techniques alleged by the Department and its witnesses.

6. Respondent testified at length as to her sales routine. When talking to potential customers on the telephone, Respondent must follow the script provided by Direct General. Respondent testified that agents are not required to follow the script when customers come in to the office, but that she generally adheres to the format provided by her employer. All of the sales at issue in this proceeding were generated via in-person sales at Respondent's Cash Register office.

7. Respondent first obtains basic information from the customer: name, address, date of birth, Social Security number, whether there are persons over age 14 in the household and whether those persons will drive the insured vehicle. She then asks the type of vehicle and the type of coverage the customer wants to purchase.

8. Respondent enters the information into her computer, which generates a price quote. If the customer wants only basic personal injury protection ("PIP") and property damage coverage, Respondent informs the customer that the quoted price includes PIP with an optional deductible of \$1,000, a coverage limit of \$10,000, and property damage coverage of \$10,000.

9. The price quote includes a down payment and monthly payments. The quoted amounts vary depending on whether the customer chooses to make 10 or 12 payments. During her

presentation, Respondent mentions that the price quoted for the monthly payments includes the ancillary products.

10. Once the customer has agreed to the price quote, Respondent makes a computer inquiry to obtain the customer's driving record. While waiting on these records, Respondent goes over a "pen sale" document with the customer. The pen sale document is a handwritten sheet that Respondent draws up in the presence of the customer to explain the policies.

11. Respondent's pen sale sheets for Mr. Gatlin, Ms. Johnson, Mr. Hansen, and Mr. Dossantos (hereinafter referred to collectively as the "Complaining Customers") were admitted into evidence. At the top of the page, under the heading "Mandatory," Respondent outlined the PIP and property damage coverages, with the customer's options regarding deductibles. Lower on the page, under the heading "Optional," Respondent outlined the details of the ancillary coverages included in the price quote.

12. Respondent testified that she sits with the customer and uses the pen sale sheet to explain the mandatory coverages in detail. She explains that Florida law requires that she offer bodily injury liability coverage, but that the customer has the option to reject it, and she indicates the customer's decision on the pen sale sheet. She explains the ancillary policies, and indicates on the pen sale sheet which of these

policies the customer accepts and which ones the customer rejects. The customer is asked to sign the bottom of the sale sheet.

13. When shown the pen sale sheet for each Complaining Customer, Respondent was able to state with confidence which ancillary policies each of them has accepted or rejected. None of the Complaining Customers denied having been shown the pen sale sheet, though none of them appeared to grasp its significance. Each of the Complaining Customers conceded that the signature at the bottom of his or her respective pen sale sheet was genuine.

14. After Respondent obtains the customer's signature on the pen sale sheet, and has received the customer's driving records, she prints out the policy paperwork and goes over it with the customers.

15. The earliest of the Complaining Customers was James Gatlin (Counts I, II, and III of the Administrative Complaint), who purchased insurance from Respondent on October 7, 2005.⁵ Mr. Gatlin's signed pen sale sheet indicated that he accepted the accident medical protection plan, the travel protection plan, and the term life policy. It also indicated that he rejected optional uninsured motorist, medical payment, accidental death, and comprehensive and collision policies

offered by Respondent. Mr. Gatlin's policy paperwork was admitted into evidence.

16. After explaining the automobile policy, Respondent explained the ancillary products that Mr. Gatlin had initially accepted on the pen sale sheet.⁶ Respondent first showed Mr. Gatlin a spreadsheet titled, "Explanation of Policies, Coverages and Cost Breakdown (Including Non-Insurance Products)." Under the subheading "Auto Policy Coverages," the spreadsheet set forth the amount and type of coverage for each of the two cars for which Mr. Gatlin was buying insurance, as well as a premium estimate for each vehicle. Under the subheading "Optional Policies," the spreadsheet set forth the following: "American Bankers Travel Protection Plan," "Lloyds Accident Medical Protection Plan," and "Life Insurance." A monthly premium amount was set forth next to each of the three optional coverages.

17. The subheading "Optional Policies," the list of the optional policies, the premium amounts for each optional policy, and the total estimated cost of all products are separately circled by hand on the spreadsheet. Respondent testified that it is her practice to circle these items as she explains them to the customer. Mr. Gatlin's initials appear above the list of optional policies.

18. Below the grids of the spreadsheet is the following text (emphasis added):

I, the undersigned, acknowledge that:

The above premiums are estimates and that the actual premium charged to me will be determined by the Insurance Company issuing the policy. Further, I am responsible for the amount of the premium charged at the time the policy is issued.

I agree that if my down payment or full payment check is returned by the bank for any reason, coverage will be null and void from the date of inception.

I acknowledge that I have been advised of and understand the above coverage(s), and cost breakdowns, including non-insurance products, if any, and further [sic] that I have received a complete copy of this product.

This document is only an explanation of insurance coverage and other products, if applicable—it is not a contract. The policy, if issued, will contain the terms and conditions of coverage. The level of coverage illustrated above is based on preliminary information which I have supplied. My eligibility for coverage is subject to the acceptance of my application in accordance with the Insurance Company's underwriting requirements.

Customer Signature

Date

19. The signature line was signed by "James D. Gatlin" and dated October 7, 2005. At the hearing, Mr. Gatlin conceded the authenticity of his initials and signature on the spreadsheet.

20. Respondent next explained the details of the accident medical protection plan to Mr. Gatlin. She explained the coverage options (individual, husband and wife, or family), and the annual premium for each. On the application, Respondent circled the "Individual Coverage Only" option. Mr. Gatlin placed his initials in the space provided to indicate his choice of coverage, and signed the application on the line provided.

21. A second page, titled "Accident Medical Protection Plan," detailed the coverage provided and the method of filing a claim under the policy. The following text is provided at the bottom of the page (emphasis added):

THE ACCIDENT MEDICAL PLAN IS A LIMITED POLICY. READ IT CAREFULLY.

I, the undersigned, understand and acknowledge that:

The Accident Medical Plan does not provide Liability Coverage insurance for bodily injury or property damage, nor does it meet any financial responsibility law. I am electing to purchase an optional coverage that is not required by the State of Florida. My agent has provided me with an outline of coverage and a copy of this acknowledgement.

If I decide to select another option, or cancel this policy, I must notify the company or my agent in writing.

I agree that if my down payment or full payment check is returned by the bank for any reason, coverage will be null and void from the date of inception.

Insured's Signature

Date

I hereby REJECT this valuable coverage:

Insured's Signature

Date

22. Mr. Gatlin signed and dated the form on the first line provided, indicating his acceptance of the accident medical protection plan.

23. Respondent next explained the travel protection plan. The two forms associated with this plan set forth the coverages provided, the limits of those coverages, and the premium associated with the plan. The first form was titled, "American Bankers Insurance Company Optional Travel Protection Plan." After listing the coverages and their limits, the form read as follows:

Purchasing the Optional Travel Protection Plan is not a condition of purchasing your automobile liability policy.

I hereby acknowledge I am purchasing an Optional Travel Protection Plan, and that I have received a copy of this acknowledgement.

Insured Signature

Date

I HEREBY REJECT THIS VALUABLE COVERAGE:

Insured Signature

Date

24. Mr. Gatlin signed and dated the first line of the form, indicating his acceptance of the policy. The second form, titled "Travel Protection Plan-Florida Declarations," listed the effective dates of the policy, the premium, the automobile covered, repeated the coverages and their limitations, and gave notice to the insured of his 30-day right to examine the policy and return it for a full refund provided no loss has occurred. Mr. Gatlin signed and dated the "Applicant's Signature" line.

25. Respondent next went over the documents relating to the term life policy that Mr. Gatlin accepted on the pen sale sheet. The policy named Carol Burinskas, with whom Mr. Gatlin lived, as the beneficiary on the \$10,000 policy, and stated an annual premium of \$276.00. Mr. Gatlin initialed his "no" answers to six standard insurability questions dealing with recent medical history and exposure to HIV. Mr. Gatlin signed and dated his acceptance of the policy on the signature line provided.

26. After completing her explanation of the various policies and obtaining Mr. Gatlin's acceptance, Respondent next explained the premium finance agreement. On the first page of the agreement, under the heading, "Itemization of Amounts Financed," was stated the type of policy, the insurance company, and the annual premium for each of the four policies accepted by

Mr. Gatlin, totaling \$1,363.00, plus \$4.55 in documentary stamp tax, less a down payment of \$151.00, for a total amount financed of \$1,216.55. The page disclosed the finance charge (\$139.99) and the annual percentage rate of the loan (24.37%). Mr. Gatlin opted to make 10 monthly payments of \$135.65, and initialed the bottom of the first sheet of the premium finance agreement, then signed the second page to indicate his acceptance of the loan terms.

27. Finally, Respondent showed Mr. Gatlin a document titled "Insurance Premium Financing Disclosure Form," which redundantly set forth in a simplified form exactly what Mr. Gatlin was purchasing and a breakdown of what each element of his purchase contributed to the total cost of the loan. The itemization read as follows:

Insurance you are REQUIRED by law to have:

Personal Injury Protection (PIP)	\$578
Property Damage Liability (PD)	\$314

Other insurance which you MAY be required by law to have:

Bodily Injury (if an SR-22 has been issued) ⁷	\$0
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OPTIONAL insurance coverage:

Bodily Injury (if an SR-22 has NOT been issued)	\$0
Medical Payments	\$0
Uninsured Motorist	\$0
Comprehensive	\$0
Collision	\$0
Accidental Death	\$0
Towing	\$0
Travel Protection Plan	\$60

Rental	\$0
Hospital Indemnity	\$110
Life Insurance	\$266
Life Policy Fee	\$10
SR-22 Fee	\$0
Recoupment Fee, if applicable	\$0
Policy Fee, if applicable	\$25
TOTAL INSURANCE PREMIUMS	\$1,363
Document Stamp Tax, if applicable	\$4.55
Less Down Payment applied	\$151.00
AMOUNT FINANCED (loaned to you)	\$1,216.55

I, James Gatlin, have read the above and understand the coverages I am buying and how much they cost.

Signature of Named Insured

Date

28. Mr. Gatlin signed and dated the Insurance Premium Financing Disclosure Form on the spaces indicated.

29. As noted above, Carol Burinskas lives with Mr. Gatlin and was named as the beneficiary in the term life policy the Respondent sold to Mr. Gatlin. Ms. Burinskas testified that she went into Respondent's Cash Register office on Mr. Gatlin's behalf a day or two before he completed the transaction. Ms. Burinskas had obtained quotes from several agencies in the course of doing the legwork for Mr. Gatlin's insurance purchase.

30. Ms. Burinskas testified that she told Respondent that she was shopping for Mr. Gatlin, and was seeking quotes on the bare minimum insurance, "just what we needed to get a tag for

the car." Based on information provided by Ms. Burinskas, Respondent provided a price quote, which Ms. Bruinskas showed to Mr. Gatlin at home that evening. Mr. Gatlin looked over the quote and pronounced it acceptable. He told Ms. Burinskas that he would stop in at the Cash Register office the next day and complete the paperwork for the policy.

31. Mr. Gatlin testified that he believed the Cash Register quote offered the most reasonable price he had seen, but he was unaware that Respondent's quote included the ancillary policies discussed above. When he went into Respondent's office, he reiterated to her that he wanted only "the bare minimum insurance." Mr. Gatlin owned his vehicles outright and saw no need to carry extra coverage on them.

32. Mr. Gatlin testified that Respondent asked him if he wanted life insurance, and he declined. Mr. Gatlin already had a \$250,000 life insurance policy through his employer, Pasco County, for which Mr. Gatlin's sister is the beneficiary. He testified that if he had known he was purchasing a life insurance policy from Respondent, he would have made his sister the beneficiary. As noted above, Ms. Burinskas is the stated beneficiary of the term life policy Respondent sold to Mr. Gatlin.

33. Mr. Gatlin testified that Respondent "was speaking very quickly and putting the papers in front of me just as fast

as she was talking, so I was busy signing and dating." By the end of the process, "there was a stack of papers, rather thick" in front of Mr. Gatlin.

34. Mr. Gatlin never heard Respondent say that some of the items he was purchasing were optional. In fact, he could not remember much at all about the content of Respondent's presentation. He remembered that Respondent talked while he initialed and signed in the places where she pointed.

35. On cross-examination, Mr. Gatlin conceded that Respondent may have explained the ancillary policies, but so fast that he could not understand. He even conceded that he had allowed Respondent to talk him into buying the policies, though he later amended his answer to assert that he had been "bamboozled."

36. Mr. Gatlin made no effort to slow down Respondent's presentation, and he had no questions about anything Respondent was saying. Mr. Gatlin stated that his only concern was how much he was paying, and that he was satisfied with the price quoted by Respondent at the time he bought the policies.

37. Mr. Gatlin stated that it should have been obvious to Respondent that he was not reading the documents he was signing. He trusted Respondent to treat him the right way, and not sell him products without his knowledge.

38. Respondent denied that she ever rushes anyone through the sales process, or has ever sold a customer a policy the customer did not agree to purchase.

39. Ms. Burinskas discovered the ancillary policies only after reading a newspaper article about Direct General and the practice of sliding. She asked Mr. Gatlin if he had purchased any policies mentioned in the article, and he said that he had not, "as far as he knew." Ms. Burinskas pulled out the insurance paperwork, and in short order was able to ascertain that Mr. Gatlin had purchased the ancillary products described above.

40. The next Complaining Customer was Gabriella Jungling, now known by her married name of Johnson (Counts IV and V). On August 17, 2006, Ms. Jungling and her future husband, Jeremy Johnson, were at a Division of Highway Safety and Motor Vehicles ("DHSMV") office. Mr. Johnson was attempting to have his suspended license reinstated, but was informed that he must obtain the SR-22 form before his license could be issued. A DHSMV employee gave Ms. Jungling the names of several insurance companies that could immediately write a policy. Ms. Jungling noted that Respondent's Cash Register office was near the DHSMV office. Ms. Jungling and Mr. Johnson drove to Respondent's office.

41. Ms. Jungling testified that she handled all the transactions that occurred at Respondent's office. She and Mr. Johnson intended to obtain "full coverage," whatever they needed to fulfill the SR-22 requirement and satisfy the bank that financed Mr. Johnson's truck, which was the only vehicle on the resulting policy. Ms. Jungling told Respondent that she wanted full coverage for a financed truck.

42. Respondent made her standard sales presentation to Ms. Jungling. She gathered the basic information described in Finding of Fact 7 above, then gave Ms. Jungling a price quote that included the amount of the down payment and monthly payment amounts. Included in the price quote were the optional vehicle protection plan and a term life insurance policy. Respondent explained to Ms. Jungling that the optional vehicle protection plan included \$125 per day for hospitalization resulting from an accident and \$25 per day for a rental car if the insured car is in an accident or is stolen. Ms. Jungling agreed to the price quote.

43. Respondent next went over a pen sale sheet with Ms. Jungling. As noted in the general pen sale findings above, Ms. Jungling did not deny having seen the pen sale sheet and admitted that she signed it. The pen sale document was different from that shown to Mr. Gatlin because Direct General

had ceased offering the travel protection plan and instead offered the vehicle protection plan. See footnote 4, supra.

44. The signed pen sale sheet indicated that Ms. Jungling accepted the vehicle protection plan and the term life insurance policy. It also indicated that she rejected optional uninsured motorist, medical payment, accidental death, comprehensive and collision policies.

45. Respondent next printed the policy paperwork and reviewed it with Ms. Jungling. Ms. Jungling signed the vehicle protection plan application on the signature line, directly beneath the following language: "The purchase of this plan is optional and is not required with your auto insurance policy. I hereby request that the above coverages be placed in effect on the date and for the term indicated." The application indicated that Ms. Jungling was opting for a "family plan"⁸ with a term of one year.

46. Ms. Jungling also signed a separate page titled, "Optional Vehicle Protection Plan Summary & Acknowledgement." This form listed the coverages and limitations provided under the vehicle protection plan. Below this listing, in bold type, was the statement, "Please Read Your Policy Carefully For A Full Explanation of Benefits." Beneath the bold type was the following language:

Purchasing the Vehicle Protection Plan is not a condition of purchasing your automobile policy.

I hereby acknowledge that my agent has fully explained to me and I understand:

1. the coverage provided under the Vehicle Protection Plan;
2. that the Vehicle Protection Plan is an optional insurance product that is separate from my automobile insurance policy;
3. that purchasing this optional Vehicle Protection Plan is not a condition of purchasing my automobile insurance policy;
4. I have made an informed decision to purchase the Vehicle Protection Plan, and
5. I have received a copy of my signed acknowledgement.

Insured Signature Date

I HEREBY REJECT THIS VALUABLE COVERAGE:

Insured Signature Date

47. Ms. Jungling signed the first signature line, indicating her acceptance of the policy.

48. Respondent went over the documents relating to the term life policy that Ms. Jungling accepted on the pen sale sheet. The policy named Mr. Johnson as the beneficiary on the \$10,000 policy, and stated an annual premium of \$108.00. Ms. Jungling initialed her "no" answers to the standard

insurability questions, and signed and dated her acceptance of the policy on the signature line provided.

49. Respondent showed Ms. Jungling an "Explanation of Policies, Coverages and Cost Breakdown (Including Non-Insurance Products)" spreadsheet identical in form to that shown Mr. Gatlin. The "Optional Policies" subheading listed the optional policies, their premium amounts, and the total estimated cost of all products. These optional items were individually circled by Respondent and initialed by Ms. Jungling. The spreadsheet contained language identical to that set forth in Finding of Fact 18 above. Ms. Jungling signed and dated the sheet in the spaces provided.

50. Respondent presented the premium finance agreement to Ms. Jungling in the same fashion described in Finding of Fact 26 above. On the first page of the agreement, under the heading, "Itemization of Amounts Financed," was stated the type of policy, the insurance company, and the annual premium for each of the three policies (auto, life, and vehicle protection) accepted by Ms. Jungling, totaling \$3,052.00, plus \$9.80 in documentary stamp tax, less a down payment of \$295.00, for a total amount financed of \$2,766.80. The page disclosed the finance charge (\$308.35) and the annual percentage rate of the loan (23.51%). Ms. Jungling opted to make 12 monthly payments of \$256.26, and initialed the bottom of the first sheet of the

premium finance agreement, then signed the second page to indicate her acceptance of the loan terms.

51. Finally, Respondent showed Ms. Jungling the Insurance Premium Financing Disclosure Form. The itemization for Ms. Jungling's policies read as follows:

Insurance you are REQUIRED by law to have:
Personal Injury Protection (PIP) \$491
Property Damage Liability (PD) \$405

Other insurance which you MAY be required by law to have:

Bodily Injury (if an SR-22 has been issued)^[9] \$0

OPTIONAL insurance coverage:

Bodily Injury (if an SR-22 has NOT been issued) \$782
Medical Payments \$0
Uninsured Motorist \$0
Comprehensive \$131
Collision \$830
Accidental Death \$20
Towing \$0
Rental \$0
Life Insurance \$98
Accident Medical Plan \$0
Vehicle Protection Insurance \$260
Life Policy Fee \$10
SR-22 Fee \$0

Recoupment Fee, if applicable \$0
Policy Fee, if applicable \$25

TOTAL INSURANCE PREMIUMS \$3,052

Document Stamp Tax, if applicable \$9.80

Less Down Payment applied \$295.00

AMOUNT FINANCED (loaned to you) \$2,766.80

I, Gabriella N. Jungling, have read the above and understand the coverages I am buying and how much they cost.

Signature of Named Insured

Date

52. Ms. Jungling signed and dated the Insurance Premium Financing Disclosure Form on the spaces indicated.

53. Ms. Jungling testified that she already has a life insurance policy through her employer, Wells Fargo, and that she told Respondent that she was not interested in buying more. She admitted that the initials and signatures on the life insurance policy were hers, but had no recollection of Respondent's explanation of the policy. Ms. Jungling believed that she would have recalled an explanation had one been given by Respondent, and stated that she would have rejected the policy had Respondent told her it would cost \$108.00 over and above the amount she was paying for auto insurance.

54. However, Ms. Jungling conceded that Respondent did not rush her through the signing process. Ms. Jungling was in a hurry to purchase insurance and get back to her job. She admitted that Respondent presented the paperwork page by page, and that nothing prevented her from reading the paperwork. Ms. Jungling had no problem with the price quoted by Respondent.

55. The life insurance paperwork plainly states, in bold lettering above Ms. Jungling's signature, that the annual

premium for the policy is \$108.00. The price of the policy is also stated on the Explanation of Policies, Coverages and Cost Breakdown page and on the Insurance Premium Financing Disclosure Form, both of which were signed by Ms. Jungling.

56. Ms. Jungling also did not recall the explanation given to her by Respondent of the vehicle protection plan paperwork. She testified that she would have rejected the policy if Respondent had told her that it was separate and apart from the automobile insurance required by law. However, as noted above, the Optional Vehicle Protection Plan Summary & Acknowledgement page clearly stated that the vehicle protection plan was not a condition of purchasing an automobile policy and was an optional product separate from the automobile insurance policy. Ms. Jungling acknowledged that she signed this page.

57. Ms. Jungling testified that she did not really read her insurance paperwork until she received a call from a Department investigator, who asked if she had knowingly purchased life insurance and the vehicle protection plan. Ms. Jungling gave a statement to a Department investigator in February 2007. On March 16, 2007, she went to Respondent's office and signed the paperwork to cancel the term life and vehicle protection policies, for which she received a pro-rated refund.

58. The next Complaining Customer was Bruce Hansen (Counts VI and VII). On August 19, 2006, Mr. Hansen entered Respondent's Cash Register office to purchase insurance. Mr. Hansen testified that he has done business with Cash Register for years, but this was the first time he had done business with Respondent's office. Mr. Hansen stated that he had never bought anything other than basic auto coverage from Cash Register, and had no intention of buying anything else when he walked into Respondent's office.

59. Mr. Hansen was purchasing new insurance, not renewing an existing policy. In fact, his driver's license had been suspended for lack of insurance coverage. Mr. Hansen testified that he told Respondent he wanted the most basic insurance that would get his license reinstated. He owned his car outright, and therefore was unconcerned about satisfying a financing entity.

60. Respondent made her standard presentation to Mr. Hansen. She gathered the basic information described in Finding of Fact 7 above, then gave Mr. Hansen a price quote that included the amount of the down payment and monthly payment amounts. Included in the price quote were the optional vehicle protection plan and a term life insurance policy. Mr. Hansen agreed to the price quote.

61. Respondent next went over a pen sale sheet with Mr. Hansen. As noted in the general pen sale findings above, Mr. Hansen did not deny having seen the pen sale sheet and admitted that he signed it. The pen sale document was identical to that shown to Ms. Jungling.

62. Respondent used the pen sale sheet to explain to Mr. Hansen that the optional vehicle protection plan included a \$1,000 medical expense that could be used toward his PIP deductible, hospital coverage of \$125 per day, and rental car reimbursement of \$25 per day if the insured car is in an accident or is stolen. Respondent also used the pen sale sheet to explain the term life insurance offered in the price quote.

63. The signed pen sale sheet indicated that Mr. Hansen accepted the vehicle protection plan and the term life insurance policy. It also indicated that he rejected optional uninsured motorist, medical payment, accidental death, comprehensive and collision policies.

64. Respondent next printed the policy paperwork and reviewed it with Mr. Hansen. The paperwork for the vehicle protection plan application was identical to that described in Findings of Fact 45 and 46 relating to Ms. Jungling. Mr. Hansen opted for the "individual plan" with a term of one year. He signed on the signature line of the application page, and signed

the "Optional Vehicle Protection Plan Summary & Acknowledgement" page indicating his acceptance of this optional policy.

65. Respondent went over the documents relating to the term life policy. The policy named Mr. Hansen's mother, who lived with Mr. Hansen, as the beneficiary on the \$10,000 policy, and stated an annual premium of \$108.00. Mr. Hansen initialed "no" answers to the standard insurability questions, and signed and dated his acceptance of the policy on the signature line provided.

66. Respondent showed Mr. Hansen an "Explanation of Policies, Coverages and Cost Breakdown (Including Non-Insurance Products)" spreadsheet identical in form to that shown Mr. Gatlin and Ms. Jungling. The "Optional Policies" subheading listed the optional policies, their premium amounts, and the total estimated cost of all products. These optional items were individually circled by Respondent and initialed by Mr. Hansen. The spreadsheet contained language identical to that set forth in Finding of Fact 18 above. Mr. Hansen signed and dated the sheet in the spaces provided.

67. Respondent presented the premium finance agreement to Mr. Hansen in the same fashion described in Finding of Fact 26 above. On the first page of the agreement, under the heading, "Itemization of Amounts Financed," was stated the type of policy, the insurance company, and the annual premium for each

of the three policies (auto, life, and vehicle protection) accepted by Mr. Hansen, totaling \$833.00, plus \$2.80 in documentary stamp tax, less a down payment of \$92.00, for a total amount financed of \$743.80. The page disclosed the finance charge (\$93.36) and the annual percentage rate of the loan (26.56%). Mr. Hansen opted to make 10 monthly payments of \$83.72, initialed the bottom of the first sheet of the premium finance agreement, then signed the second page to indicate his acceptance of the loan terms.

68. Finally, Respondent showed Mr. Hansen the Insurance Premium Financing Disclosure Form. The itemization for Mr. Hansen's policies read as follows:

Insurance you are REQUIRED by law to have:
Personal Injury Protection (PIP) \$311
Property Damage Liability (PD) \$219

Other insurance which you MAY be required by law to have:

Bodily Injury (if an SR-22 has been issued)^[10] \$0

OPTIONAL insurance coverage:

Bodily Injury (if an SR-22 has NOT been issued) \$0
Medical Payments \$0
Uninsured Motorist \$0
Comprehensive \$0
Collision \$0
Accidental Death \$0
Towing \$0
Rental \$0
Life Insurance \$98
Accident Medical Plan \$0
Vehicle Protection Insurance \$170

Life Policy Fee	\$10
SR-22 Fee	\$0
Recoupment Fee, if applicable	\$0
Policy Fee, if applicable	\$25
TOTAL INSURANCE PREMIUMS	\$833
Document Stamp Tax, if applicable	\$2.80
Less Down Payment applied	\$92.00
AMOUNT FINANCED (loaned to you)	\$743.80

I, Bruce K. Hansen, have read the above and understand the coverages I am buying and how much they cost.

Signature of Named Insured

Date

69. Mr. Hansen signed and dated the Insurance Premium Financing Disclosure Form on the spaces indicated.

70. Mr. Hansen testified that he left Respondent's office believing he had bought only basic automobile insurance. He did not recall Respondent's explanations of the optional policies, and conceded that he was in a hurry to complete the transaction and spent a total of a half-hour in Respondent's office that day. Mr. Hansen testified that "I was flipping page after page, just signing my name to get out of there . . . I was trusting the person I was working with."

71. Mr. Hansen testified that he did not recall Respondent explaining that the vehicle protection plan was a separate optional policy that would cost him an extra \$170. He did

recall Respondent asking the insurability questions related to the life insurance policy, but he thought they were just "procedure." Mr. Hansen conceded that Respondent might have explained every page of the paperwork to him, but that he was not paying attention.

72. Mr. Hansen left Respondent's office with a copy of all the paperwork on his policies. He never looked at the paperwork until he was contacted by a Department investigator in February 2007. Mr. Hansen gave a statement to the Department investigator and agreed to testify in order to "stop stuff like this from happening," as well as try to obtain a full refund for the vehicle protection and term life policies. On March 3, 2007, he went to Respondent's office and signed the paperwork to cancel the term life and vehicle protection policies, for which he received a pro-rated refund.

73. The final Complaining Customer was Sidney Dossantos (Counts VIII and IX). On July 20, 2006, Mr. Dossantos entered Respondent's Cash Register office to purchase insurance. Mr. Dossantos was renewing his policy with Direct General, though this was the first time he had done business with Respondent's office. In August 2005, Mr. Dossantos had purchased auto insurance plus an optional accident medical protection plan, a travel protection plan, and a term life insurance policy. Mr. Dossantos testified that he told

Petitioner that he wished to purchase only basic automobile insurance, and that he rejected the optional term life and vehicle protection policies when Petitioner offered them.

74. Respondent testified that her initial procedure is different with a renewing customer. She looks up the customer on her computer to verify the existing policies and determine if any money is owed. She verifies the customer's name, address and phone number. Respondent testified that the address is important because the customer's zip code is partially determinative of the rates offered on auto insurance.

75. Respondent stated that the computer also lists the optional policies that are also due for renewal, and that it is her practice to go over these and inquire whether the customer wants to renew them. Mr. Dossantos' case was complicated by the fact that Direct General no longer offered the travel protection plan as a separate product. In these cases, Respondent would explain the vehicle protection plan, which was the current equivalent of the accident medical protection and travel protection plans that Mr. Dossantos purchased in 2005. See footnote 4, supra.

76. Respondent testified that, after the customer verifies the information on file and states which policies he wishes to renew, she goes over a pen sale sheet with the customer. As noted in the general pen sale findings above, Mr. Dossantos did

not deny having seen the pen sale sheet and admitted that he signed it. The pen sale document was identical to those shown to Ms. Jungling and Mr. Hansen.

77. The signed pen sale sheet indicated that Mr. Dossantos accepted the vehicle protection plan and the term life insurance policy. It also indicated that he rejected optional uninsured motorist, medical payment, accidental death, comprehensive and collision policies.

78. Respondent next printed the policy paperwork and reviewed it with Mr. Dossantos. The paperwork for the vehicle protection plan application was identical to that described in Findings of Fact 45 and 46 relating to Ms. Jungling. Mr. Dossantos opted for the "individual plan" with a term of one year. He signed on the signature line of the application page, and signed the "Optional Vehicle Protection Plan Summary & Acknowledgement" page indicating his acceptance of this optional policy.

79. Respondent went over the documents relating to the term life policy. The policy named Mr. Dossantos' parents as the beneficiaries on the \$10,000 policy, and stated an annual premium of \$108.00. Mr. Dossantos was not asked the standard insurability questions, because this was a renewal of an existing policy. Mr. Dossantos signed and dated his acceptance of the policy on the signature line provided.

80. Respondent showed Mr. Dossantos an "Explanation of Policies, Coverages and Cost Breakdown (Including Non-Insurance Products)" spreadsheet identical in form to that shown to Mr. Gatlin, Ms. Jungling, and Mr. Hansen. The "Optional Policies" subheading listed the optional policies, their premium amounts, and the total estimated cost of all products. These optional items were individually circled by Respondent and initialed by Mr. Dossantos. The spreadsheet contained language identical to that set forth in Finding of Fact 18 above. Mr. Dossantos signed and dated the sheet in the spaces provided.

81. Respondent presented the premium finance agreement to Mr. Dossantos in the same fashion described in Finding of Fact 26 above. On the first page of the agreement, under the heading, "Itemization of Amounts Financed," was stated the type of policy, the insurance company, and the annual premium for each of the three policies (auto, life, and vehicle protection) accepted by Mr. Dossantos, totaling \$913.00, plus \$3.15 in documentary stamp tax, less a down payment of \$80.00, for a total amount financed of \$836.15. The page disclosed the finance charge (\$102.47) and the annual percentage rate of the loan (25.93%). Mr. Dossantos opted to make 10 monthly payments of \$93.86, initialed the bottom of the first sheet of the premium finance agreement, then signed the second page to indicate his acceptance of the loan terms.

82. Finally, Respondent showed Mr. Dossantos the Insurance Premium Financing Disclosure Form. The itemization for Mr. Dossantos' policies read as follows:

Insurance you are REQUIRED by law to have:
 Personal Injury Protection (PIP) \$368
 Property Damage Liability (PD) \$242

Other insurance which you MAY be required by law to have:

Bodily Injury (if an SR-22 has been issued)^[11] \$0

OPTIONAL insurance coverage:

Bodily Injury (if an SR-22 has NOT been issued) \$0
 Medical Payments \$0
 Uninsured Motorist \$0
 Comprehensive \$0
 Collision \$0
 Accidental Death \$0
 Towing \$0
 Rental \$0
 Life Insurance \$98
 Accident Medical Plan \$0
 Vehicle Protection Insurance \$170
 Life Policy Fee \$10
 SR-22 Fee \$0

Recoupment Fee, if applicable \$0
 Policy Fee, if applicable \$25

TOTAL INSURANCE PREMIUMS \$913
 Document Stamp Tax, if applicable \$3.15
 Less Down Payment applied \$80.00
 AMOUNT FINANCED (loaned to you) \$836.15

I, Sidney Dossantos, have read the above and understand the coverages I am buying and how much they cost.

Signature of Named Insured

Date

83. Mr. Dossantos signed and dated the Insurance Premium Financing Disclosure Form on the spaces indicated.

84. As noted above, Mr. Dossantos testified that he told Respondent he only wanted basic automobile insurance.

Mr. Dossantos, a 25-year-old college student at the time he purchased insurance from Respondent, acknowledged having purchased the optional policies the previous year, when he was still living with his parents. However, in July 2006 he was living in an apartment with his girlfriend and money was tighter. He received life insurance through his employer, Publix Supermarkets, and did not want more.

85. Mr. Dossantos conceded that his policy paperwork clearly stated that the vehicle protection plan was optional, but that he did not read it during the sale. Mr. Dossantos simply signed whatever papers Respondent placed in front of him.

86. Mr. Dossantos testified that when he walked out of Respondent's office on July 20, 2006, he believed that he had bought basic auto insurance and nothing else. Like Ms. Jungling and Mr. Hansen, he learned otherwise only after being contacted by the Department's investigator in February 2007. Unlike

Ms. Jungling and Mr. Hansen, Mr. Dossantos did not later cancel the optional policies.

87. All four of the Complaining Customers credibly testified that the Department made no promises that they would obtain full refunds of the premiums paid on the optional policies in exchange for their written statements or their testimony in this proceeding.

88. On or about August 9, 2006, Respondent changed her principal business street address from 6318 U.S. Highway 19 North, New Port Richey, Florida, to 5116 U.S. Highway 19 North, New Port Richey, Florida, but did not notify the Department of this change in principal business street address until on or about March 3, 2007.

CONCLUSIONS OF LAW

89. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto, pursuant to Chapter 120, Florida Statutes.

90. Chapters 624-632, 634, 635, 636, 641, 642, 648, and 651 constitute the "Florida Insurance Code." § 624.01, Fla. Stat. It is the Department's responsibility to enforce the provisions of the Florida Insurance Code, including the licensure and discipline of insurance agents. § 624.307, Fla. Stat.

91. The Department is authorized to suspend or revoke agents' licenses, pursuant to Sections 626.611 and 626.621, Florida Statutes; to impose fines on agents of up to \$500.00 or, in cases where there are "willful violation[s] or willful misconduct," up to \$3,500, and to "augment" such disciplinary action "by an amount equal to any commissions received by or accruing to the credit of the [agent] in connection with any transaction" related to the grounds for suspension or revocation, pursuant to Section 626.681, Florida Statutes; to place agents on probation for up to two years, pursuant to Section 626.691, Florida Statutes¹²; and to order agents "to pay restitution to any person who has been deprived of money by [the agent's] misappropriation, conversion, or unlawful withholding of moneys belonging to insurers, insureds, beneficiaries, or others," pursuant to Section 626.692, Florida Statutes.

92. In its Administrative Complaint, the Department seeks to impose penalties against Respondent that include suspension or revocation of Respondent's license and/or the imposition of an administrative fine. Therefore, the Department has the burden of proving by clear and convincing evidence that Respondent committed the violations alleged in the Administrative Complaint. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); and Ferris v.

Turlington, 510 So. 2d 292 (Fla. 1987). Clear and convincing evidence is the proper standard in license revocation proceedings, because they are penal in nature and implicate significant property rights. See Osbourne Stern, 670 So. 2d at 935.

93. In Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), the Court defined clear and convincing evidence as follows:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

94. Judge Sharp, in her dissenting opinion in Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652, 655 (Fla. 5th DCA 1998)(Sharp, J., dissenting), reviewed recent pronouncements on clear and convincing evidence:

Clear and convincing evidence requires more proof than preponderance of evidence, but less than beyond a reasonable doubt. In re Inquiry Concerning a Judge re Graziano, 696 So. 2d 744 (Fla. 1997). It is an intermediate level of proof that entails both qualitative and quantative [sic]

elements. In re Adoption of Baby E.A.W., 658 So. 2d 961, 967 (Fla. 1995), cert. denied, 516 U.S. 1051, 116 S. Ct. 719, 133 L.Ed.2d 672 (1996). The sum total of evidence must be sufficient to convince the trier of fact without any hesitancy. Id. It must produce in the mind of the fact finder a firm belief or conviction as to the truth of the allegations sought to be established. Inquiry Concerning Davey, 645 So. 2d 398, 404 (Fla. 1994).

95. In determining whether Petitioner has met its burden of proof, it is necessary to evaluate its evidentiary presentation in light of the specific allegations of wrongdoing made in the charging instrument. Due process prohibits an agency from taking penal action against an agent based on matters not specifically alleged in the charging instrument, unless those matters have been tried by consent. See Shore Village Property Owners' Association, Inc. v. Department of Environmental Protection, 824 So. 2d 208, 210 (Fla. 4th DCA 2002); Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); and Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

96. The Administrative Complaint, as modified by the Pre-hearing Stipulation, contains 10 counts. Counts I through IX are the "sliding" counts, alleging that Respondent violated Subsections 626.611(7) and (9), 626.621(6), 626.9521(1), and 626.9541(1)(z)1. through 3., Florida Statutes, by selling ancillary insurance products to customers without their

"informed consent." Count I concerns Mr. Gatlin's October 7, 2005, purchase of a travel protection plan from Respondent. Count II concerns Mr. Gatlin's October 7, 2005, purchase of an accident medical protection plan from Respondent. Count III concerns Mr. Gatlin's October 7, 2005, purchase of a term life policy from Respondent. Count IV concerns Ms. Jungling's August 17, 2006, purchase of a vehicle protection plan from Respondent. Count V concerns Ms. Jungling's August 17, 2006, purchase of a term life policy from Respondent. Count VI concerns Mr. Hansen's August 19, 2006, purchase of a vehicle protection plan from Respondent. Count VII concerns Mr. Hansen's August 19, 2006, purchase of a term life policy from Respondent. Count VIII concerns Mr. Dossantos' July 20, 2006, purchase of a vehicle protection plan from Respondent. Count IX concerns Mr. Dossantos' July 20, 2006, purchase of a term life policy from Respondent.

97. Count X alleges that Respondent violated Subsection 626.621(2), Florida Statutes, by failing to "notify the department . . . in writing within 60 days after a change of name, residence address, principal business street address, or mailing address" as required by Section 626.551, Florida Statutes. In the Pre-hearing Stipulation, Respondent conceded the facts establishing that she failed to notify the Department

in writing within 60 days of a change in her principal business street address.

98. At all times relevant to this case, Subsections 626.611(7) and (9), Florida Statutes, has provided as follows, in pertinent part:

The department shall deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, title agency, adjuster, customer representative, service representative, or managing general agent, and it shall suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist:

* * *

(7) Demonstrated lack of fitness or trustworthiness to engage in the business of insurance.

* * *

(9) Fraudulent or dishonest practices in the conduct of business under the license. . . .

99. At all times relevant to this case, Subsection 626.621(6), Florida Statutes, has provided as follows, in pertinent part:

The department may, in its discretion, deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, adjuster, customer representative, service representative, or managing general agent,

and it may suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist under circumstances for which such denial, suspension, revocation, or refusal is not mandatory under s. 626.611:

* * *

(6) In the conduct of business under the license . . . , engaging in unfair methods of competition or in unfair or deceptive acts or practices, as prohibited under part IX of this chapter, or having otherwise shown himself or herself to be a source of injury or loss to the public. . . .

100. At all times relevant to this case, Subsection 626.9521(1), Florida Statutes, has provided as follows:

No person shall engage in this state in any trade practice which is defined in this part as, or determined pursuant to s. 626.951 or s. 626.9561 to be, an unfair method of competition or an unfair or deceptive act or practice involving the business of insurance.

101. At all times material to the instant case, Subsections 626.9541 (1)(z)1. through 3., Florida Statutes, has provided as follows:

(1) UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS. --The following are defined as unfair methods of competition and unfair or deceptive acts or practices:

* * *

(z) Sliding. --Sliding is the act or practice of:

1. Representing to the applicant that a specific ancillary coverage or product is required by law in conjunction with the purchase of insurance when such coverage or product is not required;
2. Representing to the applicant that a specific ancillary coverage or product is included in the policy applied for without an additional charge when such charge is required; or
3. Charging an applicant for a specific ancillary coverage or product, in addition to the cost of the insurance coverage applied for, without the informed consent of the applicant.

102. Case law has established that an agent violates Section 626.9541, Florida Statutes, if he or she fails to provide the applicant an adequate "oral explanation" of the ancillary nature of the product in question, notwithstanding that the applicant is given and signs paperwork that, if "read with care," would provide the applicant with such information. See Mack v. Department of Financial Services, 914 So. 2d 986, 989 (Fla. 1st DCA 2005); Thomas v. State, Department of Insurance and Treasurer, 559 So. 2d 419 (Fla. 2d DCA 1990). The requirement for an oral explanation of the ancillary policy is based on the fiduciary relationship between the insurance agent and her customers. See Thomas, 559 So. 2d at 421; Sewall v. State, 783 So. 2d 1171, 1178 (Fla. 5th DCA 2001) ("[T]he victims' ages coupled with the fact that Sewall, their insurance agent who stood in a fiduciary relationship with them, would be

sufficient" to justify an upward departure from sentencing guidelines.); Natelson v. Department of Insurance, 454 So. 2d 31, 32 (Fla. 1st DCA 1984)("Insurance is a business greatly affected by the public trust, and the holder of an agent's license stands in a fiduciary relationship to both the client and insurance company."); and Beardmore v. Abbott, 218 So. 2d 807, 808-809 (Fla. 3d DCA 1969)("We accept the view that the record herein establishes that a confidential relationship existed between the parties and that it was one in which Beardmore reposed trust and confidence in his insurance counselor, Abbott.").

103. Because they are penal in nature, the foregoing statutory provisions must be strictly construed, with any reasonable doubts as to their meaning being resolved in favor of the licensee. See Capital National Financial Corporation v. Department of Insurance, 690 So. 2d 1335, 1337 (Fla. 3rd DCA 1997); Dyer v. Department of Insurance & Treasurer, 585 So. 2d 1009 (Fla. 1st DCA 1991); Bowling v. Department of Insurance 394 So. 2d 165, 171-172 (Fla. 1st DCA 1981).

104. The testimonial evidence against Respondent was equivocal at best. None of the Complaining Customers could testify as to a clear recollection of Respondent's sales presentation. The common theme of Mr. Gatlin, Ms. Jungling, and Mr. Hansen was that they were in a hurry and did not bother to

attend to Respondent's presentation or read what they were initialing and signing. Mr. Dossantos had previously purchased ancillary policies from Direct General, and noted that he was signing paperwork for "optional" policies, but asked no questions. Mr. Gatlin at one point conceded that he allowed Respondent to talk him into purchasing the ancillary policies, rendering his assertion of ignorance as to the purchase less than credible.¹³ Lessening the credibility of the Complaining Customers regarding their lack of attention was the fact that their signed pen sale sheets showed that they each rejected several optional policies offered by Respondent.

105. Respondent credibly testified that her practice was to explain that the initial price quote includes the ancillary products, that she used a pen sale sheet to explain the ancillary products to the customers and offer them the option of accepting or rejecting the optional items, and that she then walked the customers through each page of the paperwork. She circled the optional items and had the customers initial them. The paperwork admitted into evidence showed Respondent's markings and the initials of the Complaining Customers, corroborating Respondent's testimony.

106. The undersigned has noted the testimony of the Complaining Customers that they had no intention of purchasing ancillary policies and would have rejected them had Respondent

explained their optional nature. However, these conclusory assertions cannot meet the standard for clear and convincing evidence set forth in Evans Packing, 550 So. 2d at 116, n.5, that "the facts to which the witnesses testify must be distinctly remembered" and that "the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. . . ."

107. The undersigned has also noted the testimony of the Complaining Customers that they left Respondent's office thinking they had purchased only such insurance as required by Florida law to maintain valid registration and licensure. It strains credulity that a customer could look at the policy paperwork discussed and quoted at length above, even if only long enough to sign or initial it, and come away with no inkling that he has purchased optional products.

108. As to Counts I through IX of the Administrative Complaint, the evidence presented in this case has not produced in the mind of the undersigned "a firm belief or conviction as to the truth of the allegations sought to be established." It is therefore concluded that Counts I through IX should be dismissed.

109. As to Count X of the Administrative Complaints, the Department proved by clear and convincing evidence that Respondent failed to notify the Department in writing within 60

days of a change in her principal business street address, as required by Section 626.551, Florida Statutes.

110. No evidence was presented that Respondent's license has previously been subject to discipline for a violation of Section 626.551, Florida Statutes. The undersigned recommends that Respondent be fined \$250.00, the maximum punishment for a first offense under the statute.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that Petitioner issue a final order finding Respondent guilty of committing the violation alleged in Count X of the Administrative Complaint, fining her \$250.00 for such violation, and dismissing the remaining counts of the Administrative Complaint.

DONE AND ENTERED this 8th day of February, 2008, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of February, 2008.

ENDNOTES

^{1/} Chapters 624 through 632, 634, 535, 636, 641, 642, 648, and 651, Florida Statutes, constitute the "Florida Insurance Code." See Section 624.01, Florida Statutes. Because the events at issue in this case were alleged to have taken place during late 2005 through 2006, all references to the Florida Statutes will be to the 2006 codification unless otherwise noted.

^{2/} The Pre-Hearing Stipulation consistently spelled New Port Richey as "New Port Richie." The misspelling has been corrected in the quoted text.

^{3/} The undersigned has accepted these factual stipulations. See Columbia Bank for Cooperatives v. Okeelanta Sugar Cooperative, 52 So. 2d 670, 673 (Fla. 1951)("When a case is tried upon stipulated facts the stipulation is conclusive upon both the trial and appellate courts in respect to matters which may validly be made the subject of stipulation."); Schrimsher v. School Board of Palm Beach County, 694 So. 2d 856, 863 (Fla. 4th DCA 1997)("The hearing officer is bound by the parties' stipulations."); and Palm Beach Community College v. Department of Administration, Division of Retirement, 579 So. 2d 300, 302 (Fla. 4th DCA 1991)("When the parties agree that a case is to be tried upon stipulated facts, the stipulation is binding not only upon the parties but also upon the trial and reviewing courts. In addition, no other or different facts will be presumed to exist.")

^{4/} At the time of the James Gatlin transaction on October 7, 2005, Direct General offered the travel protection plan, which included bail bond coverage, ambulance assistance, and automobile rental reimbursement, and offered the accident medical protection plan, which covered hospitalization and other medical treatment. By the time of the later transactions, Direct General had folded the elements of the travel protection and accident medical protection plans into a new "vehicle protection plan."

^{5/} Mr. Gatlin's insurance purchase was both first in time and the first matter alleged in the Administrative Complaint. The remaining three Complaining Customers will be treated in the

order presented by the Administrative Complaint rather than in chronological order.

^{6/} The findings as to the policy documents are largely based on the documents themselves, supplemented by the testimony of Respondent and the Complaining Customers. As noted above, Respondent had no direct recollection of the transactions with the Complaining Customers, but she was able to explain her sales script and state the likely course of events by reviewing the policy documents.

^{7/} Florida law requires persons who have had their driver licenses suspended or revoked, pursuant to Section 322.26 or 322.27, Florida Statutes, to submit proof of financial responsibility as to all motor vehicles registered by such persons. § 324.072, Fla. Stat. Such person must carry bodily injury liability insurance, in addition to the other required coverages. The SR-22 is the form filed by the insurance company to verify the insured's compliance with the financial responsibility law. See Fla. Admin. Code R. 15A-3.005.

^{8/} Ms. Jungling had a young son who lived with her.

^{9/} Florida law requires persons who have had their driver licenses suspended or revoked, pursuant to Section 322.26 or 322.27, Florida Statutes, to submit proof of financial responsibility as to all motor vehicles registered by such persons. § 324.072, Fla. Stat. Such person must carry bodily injury liability insurance, in addition to the other required coverages. The SR-22 is the form filed by the insurance company to verify the insured's compliance with the financial responsibility law. See Fla. Admin. Code R. 15A-3.005.

^{10/} Florida law requires persons who have had their driver licenses suspended or revoked, pursuant to Section 322.26 or 322.27, Florida Statutes, to submit proof of financial responsibility as to all motor vehicles registered by such persons. § 324.072, Fla. Stat. Such person must carry bodily injury liability insurance, in addition to the other required coverages. The SR-22 is the form filed by the insurance company to verify the insured's compliance with the financial responsibility law. See Fla. Admin. Code R. 15A-3.005.

^{11/} Florida law requires persons who have had their driver licenses suspended or revoked, pursuant to Section 322.26 or 322.27, Florida Statutes, to submit proof of financial responsibility as to all motor vehicles registered by such

persons. § 324.072, Fla. Stat. Such person must carry bodily injury liability insurance, in addition to the other required coverages. The SR-22 is the form filed by the insurance company to verify the insured's compliance with the financial responsibility law. See Fla. Admin. Code R. 15A-3.005.

^{12/} Petitioner may impose a fine or place an agent on probation in lieu of suspension or revocation of the agent's license "except on a second offense or when . . . suspension [or] revocation . . . is mandatory." §§ 626.681(1) and 626.691(1), Fla. Stat.

^{13/} As soon as she looked at the paperwork, Ms. Burinskas ascertained that Mr. Gatlin had purchased three ancillary policies and confronted him about the matter. It appears likely to the undersigned that embarrassment at Ms. Burinskas' learning that he had succumbed to Respondent's sales presentation colored Mr. Gatlin's testimony, leading him to claim that he just wasn't paying attention when he signed the papers.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.