

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF )  
FINANCIAL SERVICES, )  
 )  
Petitioner, )  
 ) Case No. 07-4701PL  
vs. )  
 )  
GEORGE MARSHALL SMITH, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Notice was provided and on February 20 and 21, 2008, a formal hearing was held in this case. Authority for conducting the hearing is set forth in Sections 120.569 and 120.57(1), Florida Statutes (2007). The hearing was conducted in the Ingraham Building Conference Room, 317 South Ingraham Avenue, Tavares, Florida. The hearing was held before Charles C. Adams, Administrative Law Judge.

APPEARANCES

For Petitioner: Robert Allen Fox, Esquire  
Department of Financial Services  
Division of Legal Services  
612 Larson Building  
200 East Gaines Street  
Tallahassee, Florida 32399-0333

For Respondent: H. Richard Bisbee, Esquire  
H. Richard Bisbee, P.A.  
1882 Capital Circle, Northeast, Suite 206  
Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

Should discipline be imposed by Petitioner against Respondent's license as a life including variable annuity agent (2-14), life agent (2-16), and health agent (2-40), held pursuant to Chapter 626, Florida Statutes?

PRELIMINARY STATEMENT

By an Administrative Complaint in Case No. 89790-07-AG, dated August 22, 2007, Petitioner accused Respondent in three separate counts of violations of Subsections 626.611(7), (8), (9), and (16); 626.621(2) and (6); 626.9541(1)(e)1., Florida Statutes; violations in relation to Chapter 626, Part X, according to Subsection 626.9927(1), Florida Statutes, and associated with Sections 626.9521 and 626.9541, Florida Statutes, and violations of Subsections 626.99275(1)(b) and 626.99277(6), Florida Statutes.

Unlike Counts I and II, Count III made no reference to Subsections 626.9541(1)(e), and 626.99277(6), Florida Statutes.

Alleged violations were in relation to the 2002 and 2003 Florida Statutes, depending on the count within the Administrative Complaint.

Based upon these allegations, Respondent was advised that Petitioner intended to take action imposing penalties in accordance with Sections 626.611, 626.621, 626.681, 626.691, 626.692 and 626.9521, Florida Statutes.

The substance of the Administrative Complaint was in relation to the alleged sales made by Respondent pertaining to "viatical settlement purchase agreements," according to the Administrative Complaint, securities as defined in Section 517.021(20)(q), Florida Statutes.

Respondent was provided with a form to be executed electing the manner of proceeding when addressing the Administrative Complaint. He chose to dispute one or more of the factual allegations in the Administrative Complaint, as contemplated by Section 120.57(1), Florida Statutes. This election of proceeding was executed on September 11, 2007. In keeping with instructions found in the form and in accordance with Florida Administrative Code Rule 28-106.201, Respondent filed a separate petition for formal hearing. On September 13, 2007, in the course of that petition for administrative hearing, Respondent "admitted" allegations within the Administrative Complaint found at paragraphs 1 through 4, 20, 31 and 42. This indicated that Respondent did not contest those facts. Otherwise Respondent disagreed with the factual allegations found in the Administrative Complaint.

On October 11, 2007, the case was referred to the Division of Administrative Hearings (DOAH) to conduct a formal hearing pursuant to Sections 120.56(9) and 120.57(1), Florida Statutes (2007). It was assigned as DOAH Case No. 07-4701PL. It was

originally noticed to be heard on January 23 and 24, 2008, in Tavares, Florida.

On November 28, 2007, Respondent filed a motion to compel discovery. On December 3, 2007, Petitioner filed a response to the motion to compel.

On December 6, 2007, Petitioner filed a motion for official recognition.

On December 10, 2007, an order was entered addressing the Respondent's motion to compel discovery.

On December 13, 2007, Respondent filed a response to Petitioner's motion for official recognition. On December 7, 2007, an order was entered addressing that request for official recognition.

On December 17, 2007, Respondent filed a motion to continue the final hearing.

On December 21, 2007, Respondent filed a motion for official recognition.

On December 28, 2007, Petitioner filed a response to Respondent's motion for official recognition.

On January 7, 2008, an order was entered concerning Respondent's motion for official recognition.

On January 10, 2008, Respondent amended his motion to continue the final hearing. On that same date Petitioner filed a motion to limit the scope of the hearing and a motion to amend

its Administrative Complaint. On that date Petitioner filed another motion for official recognition.

On January 11, 2008, an order was entered granting a continuance and rescheduling the hearing to be heard on February 20 and 21, 2008, in Tavares, Florida, and the hearing proceeded on those dates.

On January 16, 2008, Respondent filed a response to Petitioner's motion to limit the scope of the hearing.

On January 17, 2008, Respondent filed a response to the motion to amend the Administrative Complaint.

On January 25, 2008, an order was entered addressing Petitioner's motion to limit the scope of the hearing.

On January 25, an order was entered on Petitioner's more recent motion for official recognition.

On January 28, 2008, an order was entered granting Petitioner's motion to amend the Administrative Complaint.

On February 7, 2008, Respondent filed a second motion for official recognition and a motion to stay or abate the proceedings and to continue the final hearing.

On February 12, 2008, Petitioner filed a response to Respondent's more recent motion for official recognition.

On February 13, 2008, Petitioner filed a response to Respondent's motion for continuance.

On February 14, 2008, Respondent filed a third motion for official recognition.

On February 15, 2008, an order was entered concerning Respondent's second motion for official recognition. On that same date an order was entered denying Respondent's motion to stay or abate and to continue the hearing date.

On February 20, 2008, when the hearing commenced, official recognition was extended in relation to Respondent's third motion for official recognition, as reflected in the hearing transcript.

At hearing Petitioner presented the testimony of Daniel Colozzo, Wanda Colozzo, George Andrade, Douglas Murray and Veronica Murray. Petitioner's Exhibits numbered 1, 2a, 2b, 4a, 4b, 5 through 14, 16 through 23, 23a, 24, 24a, 25, 25a, 26, 27, 27a, 28, 29, 32 through 39, 39a, 40, 40a, 41 and 41a were admitted as evidence. Petitioner's Exhibit numbered 42 was denied admission. Ruling was reserved on the admission of Petitioner's Exhibits numbered 52 through 56. Having considered argument by counsel, Petitioner's Exhibit numbered 52 is admitted. Petitioner's Exhibits numbered 53 through 56 are denied admission. All exhibits admitted and denied are included with the record.

At hearing Respondent testified in his own behalf. Respondent's Exhibits numbered 1 through 7 were admitted.

As the transcript reflects, Respondent was allowed to preserve constitutional arguments and arguments concerning Petitioner's alleged "non-rule policies" through proffers in the record. Those subjects were not deemed appropriate for consideration on this occasion for reasons explained in the hearing transcript.

On March 25, 2008, the hearing transcript was filed. On April 4, 2008, the parties filed their respective Proposed Recommended Orders which have been considered in preparing the Recommended Order.

#### FINDINGS OF FACT

##### Respondent's Licenses and Background

1. Pursuant to Chapter 626, Florida Statutes, Respondent is currently licensed in this states as a resident life including variable annuity agent (2-14), life agent (2-16), and health agent (2-40).

2. At all times pertinent to the dates and occurrences referred to herein, Respondent was licensed in this state as a resident life including variable annuity agent (2-14), life agent (2-16) and health agent (2-40).

3. Pursuant to Chapter 626, Florida Statutes, the Florida Department of Financial Services has jurisdiction over Respondent's insurance licenses and appointments.

4. Respondent's formal education includes a bachelors in business management and a masters in science and health service administration.

5. Over time Respondent has worked in the financial services industry.

6. At present Respondent is a supervisor or principal of Capitol City Bank Investments.

#### Securities Registration

7. Respondent also has registration by the Office of Financial Regulation pursuant to Chapter 517, Florida Statutes, the "Florida Securities and Investor Protection Act." His registration is CRD No. 2016997, current as of January 9, 2008. He served as an "associated person" of a "dealer" as early as November 14, 2002. He acted in that capacity for Now Trade, Corp., from the date in November through March 22, 2004.

#### Mutual Benefits Corporation (MBC)

8. The State of Florida, the Department of Insurance (now the Office of Insurance Regulation of the Financial Services Commission, "the Office") licensed MBC as a viatical settlement provider on May 13, 1997, in accordance with Chapter 626, Part X, Florida Statutes, the "Viatical Settlement Act."

9. The Office took action against MBC in Case No. 77358-04-CO, in accordance with Chapter 626, Part X, Florida Statutes. On March 29, 2005, a Consent Order was entered by the Office.



In an agreement between the Office and MBC by and through a court appointed receiver for MBC, the Office revoked MBC's license as a "viatical settlement provider" pursuant to the terms and conditions within the Consent Order.

10. The Consent Order in Case No: 77358-04-CO, before the State of Florida, Department of Financial Services, Office of Insurance Regulation, in the matter of: Mutual Benefits Corporation in pertinent part stated:

THIS CAUSE came on for consideration as the result of an agreement between MUTUAL BENEFITS CORPORATION (hereinafter referred to as 'MBC'), by and through its duly court-appointed Receiver, Roberto Martinez ('Receiver'), and the OFFICE OF INSURANCE REGULATION (hereinafter referred as the ('OFFICE')). . . . the OFFICE hereby finds as follows:

1. The OFFICE has jurisdiction over the subject matter of, and parties to, this proceeding.
2. MBC was granted a license by the Department of Insurance (now the Office of Insurance Regulation) on May 13, 1997, to act as a viatical settlement provider pursuant to the provisions of Chapter 626, Part X, Florida Statutes.
3. The OFFICE conducted an examination of the business and affairs of MBC and thereafter issued, on May 3, 2004, an Emergency Cease and Desist Order suspending the license of MBC, effective immediately upon service of the order upon MBC.

4. The Securities Exchange Commission of the United States has instituted an action in United States District Court for the Southern District of Florida, City Action Number 04-60573 (hereinafter 'the SEC Action'), and secured, on an ex parte basis, an Order Appointing Receiver dated May 4, 2004, which order granted the Receiver full and exclusive power, duty, and authority to administer and manage the business affairs, funds, assets, choses in action and any other property of MBC and several entities alleged to be related to it and to take whatever actions are necessary for the protection of investors.

5. The United States District Court for the Southern District of Florida (hereinafter 'the Court'), has held further hearings, including an evidentiary hearing on the application of the SEC to enter a preliminary injunction against MBC. On November 10, 2004, Magistrate Garber recommended that the Motion for Preliminary Injunction be granted. On February 14, 2005, the Court adopted that recommendation.

6. Therefore, the OFFICE and MBC hereby agree and consent to the following terms and conditions:

\* \* \*

(b) MBC and the OFFICE agree that MBC's viatical provider license shall be revoked by issuance of this Consent Order.

\* \* \*

(d) In the event that the Receivership in the SEC Action is dissolved and any restraining order issued by the U.S. District Court of the Southern District of Florida is modified to allow MBC to conduct its viatical settlement business or upon the Court issuing any other order allowing MBC

to conduct its viatical settlement business, MBC would be free to apply for a license from the state of Florida.

\* \* \*

The receiver is now responsible for activities involving viatical settlement purchase agreements or contracts, to include those associated with the viatical settlement purchasers in this case, not concluded by the agreement(s) to return on the investment(s) described in the viatical settlement purchase agreements or contract(s).

MBC and Respondent

11. Prior to the entry of the Consent Order involving MBC, Respondent, as an employee of First Liberty Group LLC (First Liberty), had sold interests in life insurance policies offered by viators, under terms set forth in a "viatical settlement purchase agreement" offered by MBC as the viatical settlement provider, all within the purview of Chapter 626, Part X, Florida Statutes, the "Viatical Settlement Act." (In addition, Respondent as an employee of First Liberty offered for sell financial products, e.g. annuities and certificates of deposit (CDs).) The relevant time period in relation to employment with First Liberty was the years 2002 and 2003, as more specifically explained in findings of fact that follow.

Viatical Settlement Purchase Agreement and Other Information

12. Pertinent features within all viatical settlement purchase agreements entered into between purchasers in this case and MBC, as presented by Respondent in his capacity as agent are as follows:

VIATICAL SETTLEMENT PURCHASE AGREEMENT  
No modifications to this Contract may be made without the written consent of Mutual Benefits Corp.

. . . the Viatical Settlement Purchaser (is), hereinafter referred to as 'Purchaser', upon the following terms and conditions. This Agreement covers the purchase of an interest in the death benefit of a life insurance policy or policies insuring the life of persons who are either terminally ill or have an estimated life expectancy of 72 months or less.

\* \* \*

. . . the Purchaser acknowledges that the economic benefit derived from the transaction(s) contemplated by this Agreement will result solely from the maturity of the life insurance policy(ies) upon the death of the insured(s), and will not be derived from the efforts of any person or entity employed by or associated with Mutual Benefits Corp. . . . ,

\* \* \*

1) The Purchaser hereby agrees to deposit the sum of \$\_\_\_\_\_ with American Express Tax and Business Services, Inc., the Escrow Agent, for the purpose of acquiring the death benefit of a life insurance policy(ies) which will be allocated as set forth herein.

2) The only benefit the Purchaser will receive pursuant to this Agreement will be payment of the agreed portion of the death benefit upon the maturity of the life insurance policy(ies).

3) Policies are priced at a discount of the death benefit which depends on the projected life expectancy of each insured. Mutual Benefits Corp. makes no representation or warranty as to the specific date when a policy will mature. The return realized by the Purchaser does not represent an annual return. An annual return cannot be determined until the policy(ies) in which the Purchaser obtains an interest matures.

4) Mutual Benefits Corp. shall assist Purchaser in the purchase of the death benefit of life insurance policies of individuals which comply with the following criteria:

\* \* \*

c) All life expectancies of insureds will be determined by either an independent reviewing physician or a medical review company taking into account the insured's age, current medical history, and, where applicable, insurance industry actuarial guidelines.

d) Prior to closing, Purchases will receive from Mutual Benefits Corp. information regarding specific policy(ies) that may be purchased in accordance with the terms of this Agreement to assist the Purchaser in evaluating whether the policy satisfies his/her requirements.

\* \* \*

9) . . . and also acknowledges that once the policy closes the funds committed are not liquid and the funds are not available until the policy matures. Purchaser hereby

also acknowledges that the life expectancy(ies) provided by the reviewing physicians are only estimates. Mutual Benefits Corp. does not make any warranties regarding the accuracy of these estimates. Purchaser further acknowledges that the policy may mature before or after the projected life expectancy. Purchaser also represents that he/she is able to bear the risk of the purchase of a policy(ies) for an indeterminate period and will only commit himself/herself to a purchase which bears a reasonable relationship to his/her net worth.

\* \* \*

22) . . . Viatical Services, Inc.'s agreement to pay any unpaid premiums limited to the exhaustion of the funds in its premium reserve account.

\* \* \*

23) f) This Agreement is voidable by the Purchaser at any time within (3) days after the disclosures mandated by Florida Statutes § 626.99236 are received by the Purchaser.

\* \* \*

25) Type of Death Benefit(s) to be Purchased Life

<u>Estimated Life Expectancy</u>	<u>Dollar Amount of Purchase</u>	<u>Fixed Return on Dollar Amount of Purchase</u>
12 Months	_____	12% fixed return on purchase price
18 Months	_____	21% fixed return on purchase price
24 Months	_____	28% fixed return on purchase price
36 Months	_____	42% fixed return on purchase price
48 Months	_____	50% fixed return on purchase price

60 Months	_____	60% fixed return on purchase price
72 Months	_____	72% fixed return on purchase price
Other	_____	60% fixed return on purchase price

Total amount \$\_\_\_\_\_ to be allocated amongst the above estimated expectancies.

\* \* \*

X. DISCLOSURE TO VIATICAL SETTLEMENT PURCHASERS

Any person considering purchasing any portion of the death benefit of one or more insurance policies should be aware of the following:

33) The returns available on viatical settlement contracts facilitated by Mutual Benefits Corp. directly tied to the projected life expectancy of the insured.

34) The fixed return that a Purchaser may receive under the Viatical Settlement depends upon the price paid for the policy as a discount from its death benefits fixed return is determined by the projected life expectancy of the insured as set forth below.

<u>Projected Life Expectancy</u>	<u>Fixed Return on Dollar Amount of Purchase</u>
A. 12 Months	12% fixed return on purchase price
B. 18 Months	21% fixed return on purchase price
C. 24 Months	28% fixed return on purchase price
D. 36 Months	42% fixed return on purchase price
E. 48 Months	50% fixed return on purchase price
F. 60 Months	60% fixed return on purchase price

G. 72 Months                      72% fixed return on purchase price

The above returns are fixed and not annualized returns.

\* \* \*

35) . . . Viatical Services, Inc.'s agreement to pay any unpaid premiums limited to the exhaustion of the funds in its premium reserve account. In the event the trust and Viatical Services, Inc.'s respective premium reserve accounts are exhausted, the Purchaser may be responsible for a payment of his/her pro rata share of any unpaid premium. In the event the Purchaser is required to pay premiums, such payments will reduce the fixed refund referenced above.

\* \* \*

39) The life expectancy on any particular insured and the rate of return on a viatical settlement contract are only estimates and cannot be guaranteed.

40) The purchase of the death benefit of one or more life insurance policies should not be considered a liquid purchase. While every attempt is made to determine the insured's life expectancy at the time of purchase, it is impossible to predict the exact time of the insured's demise. As a result, the Purchaser's funds will not be available until after the death of the insured. It is entirely possible that the insured could outlive his/her life expectancy, which would delay payment of the death benefits under the Viatical Settlement Purchase Agreement.

13. In the transactions in dispute, in the time MBC received funds from the purchaser for purposes of acquiring the death benefit of the life insurance policy or policies, it would



acknowledge receipt of those funds. In writings MBC would send information to the purchaser, described as the client, concerning a specific life insurance policy matching the request made in the purchase agreement. The viator was identified by a number. The estimated life expectancy of the viator was identified. The amount of funds provided toward the purchase was identified. The amount to be paid in relation to the death benefits was identified. Other information was included referred to as "policy detail." That policy detail provided investor information such as the original policy face value, number of investors involved with the policy, the policy number of the insurance policy, the insurance company name, the nature of the plan of the insurance and whether there was a current premium payment obligation, together with an estimated date upon which the investor premium payment obligation, referring to the purchaser's obligation to meet the payments would begin. Some information about the insured was provided concerning HIV status and the last date of contact with the viator/insured.

14. The contact letter concerning the commitment to purchase the interest in a life settlement or viatical settlement, so described by MBC, also set out a opportunity to decline to participate in the purchase where it said:

The policy described in the attached disclosure form satisfies the selection criteria that you provided to us. We will

deem you to accept this placement UNLESS we receive signed, written notice of your disapproval within five (5) business days after you receive this letter.

15. Beyond the date upon which the purchaser received an MBC letter reference "commitment to purchase an interest in a life settlement or viatical settlement," MBC would send the purchaser additional correspondence referring to the viator number as an insured case file restating the amount of purchase, and enclosing an executed assignment of ownership from the life insurance company over to a new owner and designating a beneficiary in accordance with the purchase agreement. This letter would enclose a certificate of insurance and the review medical and physician's report related to the policy with specific information about the insured being redacted as to patient name, date of birth and social security number.

16. Petitioner's Exhibit numbered 20 is an example of a receipt for funds. Petitioner's Exhibit numbered 24 includes a letter of "commitment to purchase an interest in a Life settlement or viatical settlement," together with a policy detail sheet and the follow-up letter, indicating assignment of ownership of the insurance policy, a certificate of insurance and the review medical and physician's report, among other matters.

17. During 2002 and 2003 none of the MBC viatical settlement purchase agreements (contracts) or agreements in this case were registered as securities in accordance with Chapter 517, Florida Statutes.

#### Respondent's Sales Practices

18. First Liberty was an entity separate and apart from MBC. First Liberty employed Respondent at its offices in Summerfield, Florida.

19. In promoting its investment products, First Liberty advertised CDs; it did not advertise viatical sales products. The sale of viatical settlement purchase agreements constituted roughly 30 percent of the business conducted by Respondent as a First Liberty employee. Annuities were sold at First Liberty as an additional investment product.

20. Contract documents associated with MBC viatical sale purchase agreements were prepared by MBC to be utilized by Respondent.

21. When meeting with the customers, Respondent utilized a graph that was designed to portray the experience in investment returns from the MBC viaticals based upon First Liberty's experience with the product.

22. First Liberty had an in-house attorney whom Respondent relied upon in conducting business. That individual did not indicate that MBC viaticals should not be sold or that the

viaticals were securities requiring registration. Respondent's impression of MBC was that MBC provided good service and acted promptly in dealing with its purchasers.

23. Respondent proceeded with a personal belief that the viaticals were insurance products to be regulated as insurance products with the "Florida Department of Insurance." In his belief, this was borne out by an approval affixed from the Florida Department of Insurance to a viatical settlement purchase agreement that Respondent entered into with MBC in the amount of \$9,707.00. Respondent's Exhibit numbered 6. Respondent also sold an MBC viatical settlement purchase agreement to his father Fredrick M. Smith in the amount of \$20,000.00. Respondent's Exhibit numbered 7. The purchases made by Respondent and his father are now controlled in the receivership associated with MBC. Concerning the MBC contracts entered into by Respondent and his father controlled by the MBC receiver, the receiver is responsible for paying premiums for the viator over a finite period during the viator's life expectancy established by the contract. At the expiration of that period, Respondent and his father would be responsible for paying premiums. This is a similar process when compared to other MBC viatical contracts subject to the receiver's control.

## The Murrays

24. Douglas B. Murray was born on March 28, 1934. He retired from work in 1994 from a position as a heating and plumbing sales representative for Sears.

25. He became acquainted with Respondent in late summer or early fall 2002. On August 29, 2002, in response to Mr. Murray's inquiry, Respondent wrote him to invite his business with First Liberty.

26. Subsequently Mr. Murray went to Respondent's office in Summerfield with his wife, Veronica Murray. Ms. Murray was in her early 60s at the time. In 2002 she had retired from her job as a secretary.

27. Mr. Murray had lost money in the stock market. With the money he had left from that venture, he decided to reinvest to supplement his income with interest that might be available from \$100,000 he held. At the time CDs were returning a low percentage, 2 1/2 to 3 percent. This amount of return was not satisfactory to Mr. Murray.

28. In their discussions, Respondent mentioned other possible investments but explained that the return on the investments for other opportunities would not bring about 5 to 7 percent that Mr. Murray was accustomed to. Ultimately, this led to the viatical settlement purchases with returns in excess of 7 percent.

29. After discussing other possibilities for investment, Respondent had mentioned viaticals as a possible investment. The investment strategy under consideration was the purchase of a short term annuity for a period of three years amounting to \$30,000, with an additional \$70,000 being placed in viaticals.

30. The arrangement made by Respondent with the Murrays was to purchase the annuity which paid an income for its period pending the maturity of the viaticals, which was dependent upon the viator's demise.

31. The period contemplated for return on the viaticals purchased by Mr. Murray was three years.

32. Respondent explained to the Murrays that the viaticals were in association with people who were very ill and who had to sell their rights to insurance policies to provide income to the insured to pay for medical expenses or to meet other needs.

33. On September 17, 2002, Mr. Murray made application for an annuity through the Lafayette Life Insurance Company, paying \$29,550 toward that purchase. In addition Mr. Murray through the Murray Family Trust entered into a viatical settlement purchase agreement. On September 17, 2002, the amount of the viatical purchase was \$70,450 paid by check into an escrow account on September 19, 2002. This supported the purchase of five separate viatical transactions. One of the viaticals has paid off in the manner contemplated by the agreement. Four

others have not paid. Mr. Murray is paying premiums on those policies.

34. Mr. Murray will continue to meet the premium payments on the four viaticals until he exhausts approximately \$19,000 available to meet those premium payments. The viatical that did pay returned approximately \$19,750, which he is applying to meet the premium obligations for the four remaining viaticals.

35. Mr. Murray did not expect to have to pay premiums. On this subject, Respondent provided examples where people had received the return on their investment in the viaticals.

36. Mr. Murray acknowledges that the agreement contemplated that in the event that the viatical settlement purchase agreement premium reserve accounts were exhausted, that the Murrays might be responsible for meeting the costs of premiums.

37. Mr. Murray did not read the viatical settlement purchase agreement entered into carefully, even though he was not familiar with this form of investment. He relied upon Respondent and trusted his judgment.

38. The respective pages within the viatical settlement purchase agreement for the Murray Family Trust were initialed by the Murrays, husband and wife, and signed by those purchasers. As the pages were being initialed by the Murrays, Respondent made explanations of the points set forth on those pages.

39. In the discussion Respondent mentioned that the Murrays could receive copies of physicians' reports concerning the health circumstance for the insured persons, the viators. Respondent told the Murrays that none of the policies under consideration related to HIV patients. The explanation was that the persons were elderly, approaching the end of life.

40. Mr. Murray understood that he could rescind his choice to proceed with the viatical purchases but chose not to having confidence that the investment was sound.

#### The Andrades

41. George F. Andrade was born on June 21, 1940. His wife Elizabeth A. Andrade was born on July 8, 1942.

42. Mr. Andrade had been employed as a commercial fisherman and commercial truck driver. He retired in 2002.

43. Mr. Andrade purchased viatical settlements in his own name and a viatical settlement in both his name and his wife's name. Mrs. Andrade also purchased a viatical settlement. All purchases were from MBC with Respondent acting as agent.

44. The Andrades were interested in supplementing their income. They saw an advertisement in the newspaper for CDs offered by First Liberty. They went to the office where Respondent was employed. The Andrades discussed the possible purchase of CDs with Respondent.



45. Among other investment prospects discussed was a viatical settlement agreement. The Andrades had prior experience with viatical agreements but had declined to complete the transaction from another provider whom they dealt with before the meeting with Respondent. Notwithstanding their impression concerning the earlier viatical agreement, Respondent persuaded the Andrades that the viatical agreements he offered were a good investment. In this discussion, he told the Andrades that he had invested in viatical agreements.

46. When Respondent mentioned that he had entered into a viatical settlement purchase agreement, he also mentioned that in his experience the viatical agreements paid off on time and indicated that the frequency of times in which the viatical agreements met the expected timeline for maturity was "pretty high."

47. During their discussions Respondent suggested that the Andrades might wish to contact the Better Business Bureau concerning the practices of MBC. They did and found no cause for alarm.

48. Ultimately, the Andrades purchased eight viatical agreements from Respondent offered by MBC.

49. On March 18, 2003, George and Elizabeth Andrade entered into a viatical settlement purchase agreement for which they paid \$33,500. On that date there were two separate

viatical settlement purchase agreements entered into by Mr. Andrade alone in an amount of \$21,214.66 and \$15,696.11 respectively.

50. On April 7, 2003, Mrs. Andrade entered into a viatical settlement purchase agreement in the amount of \$21,172.87.

51. Of the eight viatical agreements received pursuant to their purchases, none have provided a return on the investments. In response to six of those viatical agreements, the Andrades have forfeited their rights and lost the investment because they did not feel that they could afford to meet the premium payments due.

52. When executing the viatical settlement purchase agreements, the Andrades did not read those documents. They simply initialed the pages placing their trust in Respondent's explanations concerning the agreements.

53. In his discussion, Respondent reminded the Andrades that if the insured lived longer than the maturity date on the viatical agreement, that the Andrades would be responsible for paying the premiums.

54. The Andrades also purchased an annuity from Respondent as a supplement to their monthly income needs. The annuity that was purchased was for \$30,000.

55. The Andrades staggered the due dates for the viatical agreement purchases over two years, three years and four years. The expectation in the investment planning was that the annuity and the viatical agreements be assembled in a manner that the Andrades would receive income over a period of time.

56. They intended to travel with the money derived from the viatical purchase agreements.

57. Respondent told the Andrades that they could accept or decline the viatical agreements based upon the medical history provided related to the insured. The Andrades did not review any of the medical information related to the insureds. They were aware that there was a rescission period associated with the viatical agreements that was supported by the medical information.

58. The Andrades understood that the estimates on life expectancy for the insureds were not guarantees.

#### The Colozzos

59. Daniel Colozzo and Wanda Colozzo are husband and wife. Mr. Colozzo was born on August 11, 1940. Mrs. Colozzo was born on March 2, 1942.

60. Mr. Colozzo had been a construction worker for about 38 years. Mr. Colozzo has been retired since 1996. Mrs. Colozzo had a retail fabric business before selling the business in 2003.

61. Mr. Colozzo saw a written advertisement related to CDs associated with First Liberty. Based upon that information he went to Respondent's office to discuss investments.

62. Once there he noticed an item, which Mr. Colozzo describes as a flag, explaining viaticals with a percentage return based upon the year that the viatical matured. Wanda Colozzo, Mr. Colozzo's wife was with him at the time.

63. The Colozzos discussed the purchase of CDs. They did not find this desirable. Respondent mentioned the prospect of purchasing annuities. The annuities were also discussed. Mrs. Colozzo was interested in a return on investments of approximately \$2,000 a month and the annuities did not fit their needs.

64. As an alternative, in discussing viaticals, Respondent explained that they were life insurance policies that people had and the Colozzos would be buying a portion of the policy. In the beginning Mr. Colozzo was not interested because he did not wish to wait for someone to die to get a return on his investment. Respondent replied that the Colozzos would be helping someone because the persons who were insured could use the money to survive, to live on. At this meeting no decision was made to purchase viaticals. The Colozzos met several times with Respondent before deciding to buy viaticals.

65. On June 9, 2003, Daniel and Wanda Colozzo entered into a viatical settlement purchase agreement with MBC in the amount of \$60,000, with Respondent acting as the sales agent. The amount was paid by check written by Mrs. Colozzo to an escrow agent and a receipt was provided for the funds.

66. When Mr. Colozzo asked Respondent whether the viatical purchase was a matter about which tax would be owed on the return of investment, Respondent replied that it could be or could not be. Respondent stated that it was not a security, so it was not registered.

67. The nature of the viatical settlement purchase agreement included one viatical agreement for 36 months at \$15,000; one viatical agreement for 48 months for \$15,000; one viatical agreement at 60 months for \$15,000 and one viatical agreement for 72 months at \$15,000.

68. On June 9, 2003, a fifth viatical was purchased in the amount of \$10,000, as evidenced by a check written by Mrs. Colozzo to the escrow agent. The details of that viatical agreement are not known.

69. On June 27, 2003, the Colozzos purchased a viatical for \$15,000, terms unknown.

70. Commencing on July 15, 2003, the Colozzos were provided assignment of ownership in the viaticals purchased on June 9, 2003, with medical information related to the life

insurance policy holder, information concerning the estimated life-expectancy, the amount of funds made on the purchase and the statement of payment under the death benefit related to the viatical agreement.

71. On September 9, 2003, the Colozzos returned to Respondent's office and purchased two three-year viaticals from Respondent at \$75,000 each.

72. Separate checks were written to the escrow agent for each of the \$75,000 purchases made on September 9, 2003.

73. As before, MBC made assignment of ownership in the life insurance policies related to the viatical agreements entered into on September 9, 2003. That notification included assignment, statement of amount to be paid upon under the death benefits, and medical information and was provided commencing with notification on November 6, 2003.

74. All together the Colozzos purchased eight viaticals worth \$235,000.

75. On the occasions when the Colozzos met with Respondent and entered into the viatical settlement purchase agreements, the Colozzos looked them over and Respondent explained what was contained page-by-page. Each page was initialed by the Colozzos. The Colozzos did not carefully read those pages.

76. When MBC provided information to the Colozzos concerning the viatical agreements, they were aware of their right to rescind the purchases and declined. Under the terms of the viatical settlement purchase agreements initially entered into, there was a clause allowing rescission. When Respondent explained the nature of the viatical settlement purchase agreements, he told the Colozzos that if the expected life expectancy was exceeded that MBC normally granted another year, which would have been a grace period, after which the Colozzos would be responsible for paying premiums.

77. When describing the life insurance policies pertaining to viators, Respondent told the Colozzos that the life insurance policies were from major companies and were safe because they were life insurance policies.

78. Mr. Colozzo had his accountant in New York review the viatical agreements. That individual indicated that he did not know much about viaticals but did not find anything wrong with them. The accountant in New York told the Colozzos that he had checked the MBC website and did not find anything of concern.

79. Of the eight viaticals purchased two have matured and returned money on the investment. The ones that matured were \$15,000 viatical agreements. The Colozzos have forfeited their rights in three viaticals totaling \$165,000 and continue to hold the remaining viaticals.

80. In their discussions Respondent told the Colozzos that he himself owned viaticals.

CONCLUSIONS OF LAW

81. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding in accordance with Sections 120.569 and 120.57(1), Florida Statutes (2007).

82. Petitioner licensed Respondent through license number D034447, as a life including variable annuity agent (2-14), life agent (2-16), and health agent (2-40). At present he holds the license under those license details.

83. Beginning November 14, 2002, through the present, Respondent has been an "associated person" registered pursuant to Chapter 517, Florida Statutes, the "Florida Securities and Investor Protection."

84. Pursuant to Chapter 2003-261, Laws of Florida, pertaining to Chapter 517, Florida Statutes, regulatory functions formerly provided the Department of Banking and Finance were replaced by the Financial Services Commission and the Office Financial Regulation of the Commission. Similarly, under provisions found within Chapter 2003-261, Laws of Florida, regulatory activities in accordance with Chapters 624 and 626, Florida Statutes, passed from the Department of Insurance to the Department of Financial Services, Financial Services Commission



and Office of Insurance Regulation of the Financial Services Commission.

85. Petitioner in an Administrative Complaint, Case No. 89790-07-AG has charged Respondent with violations pertaining to Chapter 626, Florida Statutes (2002 and 2003), associated with his license. Those violations referred to in the Administrative Complaint relate to Respondent's alleged activities for MBC involving "viatical settlement purchase agreements," he offered for sale and sold to several married couples. According to the Administrative Complaint, as amended, those persons were D.M. and V.M. (the Murrays), G.A. and E.A. (the Andrades), and D.C. and W.C. (the Colozzos). The alleged transactions related to those families are described in Counts I through III respectively. The alleged violations resulting from the transactions are found within those counts.

86. In Counts I and II Respondent is charged in paragraphs (a) through (j) with the following violations. Count III makes no reference to violations found in (g) and (j) to Counts I and III. The Administrative Complaint as to all violations states:

IT IS THEREFORE CHARGED that you, GEORGE MARSHALL SMITH, have violated or are accountable under the following provisions of the Florida Insurance Code and Rules of the Chief Financial Officer which constitute grounds for the suspension or revocation of your license(s) and eligibility for licensure:

(a) Demonstrated lack of fitness or trustworthiness to engage in the business of insurance. [Section 626.611(7), Florida Statutes];

(b) Demonstrated lack of reasonably adequate knowledge and technical competence to engage in the transactions authorized by the license or appointment. [Section 626.611(8), Florida Statutes];

(c) Fraudulent or dishonest practices in the conduct of business under the license or appointment. [Section 626.611(9), Florida Statutes];

(d) Sale of an unregistered security that was required to be registered, pursuant to chapter 517. [Section 626.611(16), Florida Statutes];

(e) Violation of any provision of this code or of any other law applicable to the business of insurance in the course of dealing under the license or permit. [Section 626.621(2), Florida Statutes];

(f) In the conduct of business under the license or permit, engaging in unfair methods of competition or in unfair or deceptive acts or practices, as prohibited under part X of this chapter, or having otherwise shown himself to be a source of loss to the public. [Section 626.621(6), Florida Statutes];

- (g) Knowingly:
- a. Filing with any supervisory or other public official,
  - b. Making, publishing, disseminating, circulating,
  - c. Delivering to any person,
  - d. Placing before the public,
  - e. Causing, directly or indirectly, to be made, published, disseminated, circulated, delivered to any person,

or placed before the public, any false material statement;  
[Section 626.9541(1)(e), Florida Statutes];

(h) A violation of [Chapter 626.991 et. seq.] is an unfair trade practice under ss. 626.9521 and 626.9541, Florida Statutes, and is subject to the penalties provided in the insurance code. Part X of this chapter applies to a licensee under this act or a transaction subject to this act as if a viatical settlement contract and a viatical settlement purchase agreement were an insurance policy. [Section 626.9927(1), Florida Statutes];

(i) (1) It is unlawful for any person:  
(b) In the solicitation of a viatical settlement purchase agreement:  
1. To employ any device, scheme, or artifice to defraud:  
2. To obtain money or property by means of an untrue statement of a material fact or by any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or  
3. To engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon a person.  
[Section 626.99275(1)(b), Florida Statutes];

(j) A person may not represent that an investment in a viatical settlement purchase agreement is 'guaranteed,' that the principal is 'safe,' or that the investment is free of risk. [Section 626.99277(6), Florida Statutes];

87. The above-cited allegations are set forth in the original Administrative Complaint. The Administrative Complaint related to the alleged substantive violations was refined by the

Amendment to the Administrative Complaint, to indicate that Count I was in association with Florida Statutes (2002) and Counts II and III were in association with Florida Statutes (2003).

88. This is a disciplinary case. Therefore, Petitioner has the burden of proving the allegations in the Administrative Complaint by clear and convincing evidence. See § 120.57(1)(j), Fla. Stat. (2007); see also Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3rd DCA 1998). The term clear and convincing evidence is explained in the case In Re: Davey, 645 So. 2d 398 (Fla. 1994), quoting, with approval from Slomowitz v. Walker, 429 So. 2d 797 (Fla. 4th DCA 1983).

89. Given the penal nature of this case statutory provisions that form the basis for the Administrative Complaint have been strictly construed. Ambiguities favor the Respondent. See State v. Pattishall, 99 Fla. 296 and 126 So. 147 (Fla. 1930) and Lester v. Department of Professional Occupational Regulations, State Board of Medical Examiners, 348 So. 2d 923 (Fla. 1st DCA 1977).

90. With the exception of allegations in association with Section 626.611(16), Florida Statutes (2002 and 2003), found

within Counts I through III, involving "sale of an unregistered security that was required to be registered, pursuant to Chapter 517," Petitioner has abandoned the other allegations in the Administrative Complaint. This realization extends from the conclusions of law suggested through the Proposed Recommended Order filed by Petitioner's counsel. Respondent takes no issue with Petitioner's position in his Proposed Recommended Order, with the exception of allegations made pursuant to Section 626.611(16), Florida Statutes (2002 and 2003), that he does not concede. Setting aside for the moment any discussion concerning any allegations that Respondent violated Section 626.611(16), Florida Statutes (2002 and 2003), other statutory violations alleged in the Administrative Complaint, as amended, have not been proven and should be dismissed.

91. Discussion of any violation of Section 626.611(16), Florida Statutes (2002 and 2003), is made recognizing that at times relevant to the case Respondent was as associated person within the definition set forth in Section 517.021, Florida Statutes (2002 and 2003), in addition to being an insurance agent as defined in Section 626.015, Florida Statutes (2002 and 2003).

92. The transactions involving the Murrays, the Andrades, and the Colozzos, in which the Respondent offered for sale and sold MBC investment products under viatical settlement purchase

agreements were not transactions registered in accordance with Chapter 517, Florida Statutes (2002 and 2003).

93. It must be decided whether the transactions constituted unregistered securities that were required to be registered pursuant to Chapter 517, Florida Statutes (2002 and 2003), and whether Respondent is accountable for lack of registration in the event that the transactions constituted securities that should have been registered.

94. Subsection 517.021(20)(q), Florida Statutes (2002 and 2003), forms the basis for considering the dispute, where it states:

'Security' includes any of the following:

\* \* \*

(q) An investment contract.

Were the transactions at issue "investment contracts"?

95. If the transactions were "investment contracts," they were required to be registered. To do otherwise would be an unlawful activity in the offer for sale or the sale of an "investment contract." It would violate the requirement for registration found at Section 517.07(1) and (2), Florida Statutes (2002 and 2003), which states:

(1) 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.

(2) No securities that are required to be registered under this chapter shall be sold or offered for sale within this state unless such securities have been registered pursuant to this chapter and unless prior to each sale the purchaser is furnished with a prospectus meeting the requirements of rules adopted by the commission.

96. The transactions in question did not correspond with any form of exemption recognized in Sections 517.051 and 517.061, Florida Statutes (2002 and 2003). Therefore if the unregistered transactions were securities, more specifically investment contracts, they are addressed in Section 626.611(16), Florida Statutes (2002 and 2003).

97. The transactions entered into by the Murrays, the Andrades, and the Colozzos, in which Respondent offered for sale and sold interests in the death benefits of life insurance policies for MBC pursuant to viatical settlement purchase agreements involved securities as defined in Section 517.021(20)(q), Florida Statutes (2002 and 2003), as investment contracts. See United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 95 S.Ct. 2051, 44 L.Ed. 2d 621 (1975); Securities and Exchange Commission v. W. J. Howey, Co., 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946); Securities and Exchange Commission v. Mutual Benefits Corp., Joel Steinger, a/k/a Joel Steiner, et al., 408 F.3d 737 (11th Cir. 2005); Farag v. National Data Bank

Subscriptions, Inc., 448 So. 2d 1098 (Fla. 2nd DCA 1984); Adams v. State, 443 So. 2d 1003 (Fla. 2nd DCA 1983); Nelson v. State, 441 So. 2d 659 (Fla. 4th DCA 1983); Rudd v. State, 386 So. 2d 1216 (Fla. 5th DCA 1980); Artistic Door Corp. v. Rheney, 384 So. 2d 179 (Fla. 4th DCA 1980); Le Chateau Royal Corp. v. Pantaleo, 370 So. 2d 1155 (Fla. 4th DCA 1979); and Edwards v. Trulis, 212 So. 2d 893 (Fla. 1st DCA 1968).

98. Regulatory opportunities envisioned by Chapter 626, Part X, Florida Statutes (2002 and 2003), the "Viatical Settlement Act," do not preempt the regulator from proceeding in accordance with Chapter 517, Florida Statutes (2002 and 2003), the "Florida Securities and Investor Protection Act", in relation to viatical settlement purchase agreements that were unregistered and not exempt from registration. Kligfeld v. Office of Financial Regulation, 876 So. 2d 36 (Fla. 4th DCA 2004). Consequently, unregistered securities required for registration pursuant to Chapter 517, Florida Statutes (2002 and 2003), that are sold can be examined in accordance with Section 626.611(16), Florida Statutes (2002 and 2003).

99. Chapter 2005-237, Laws of Florida, was an act relating to viatical settlements. It made amendments to both Chapters 517 and 626, Florida Statutes. July 1, 2005, was the effective date for the amendments. The amendments do not apply to the



present case, not being in place when the alleged violations occurred.

100. As a result of the amendments Section 517.021(21)(g), Florida Statutes (2005) made reference to "an investment contract" as constituting a security. Section 517.021(21)(w), Florida Statutes (2005), referred to "a viatical settlement investment" as a security.

101. Left undisturbed was Section 626.611(16), Florida Statutes (2005) in its reference to "sale of an unregistered security that was required to be registered, pursuant to chapter 517."

102. Chapter 2005-237, Laws of Florida, added Section 626.611(17), Florida Statutes (2005), which states:

(17) In transactions related to viatical settlement contracts as defined in s. 626.9911:

(a) Commission of a fraudulent or dishonest act.

(b) No longer meeting the requirements for initial licensure.

(c) Having received a fee, commission, or other valuable consideration for his or her services with respect to viatical settlements that involved unlicensed viatical settlement providers or persons who offered or attempted to negotiate on behalf of another person a viatical settlement contract as defined in s. 626.9911 and who were not licensed life agents.

(d) Dealing in bad faith with viators.

103. The more explicit references to "viatical settlement investment" and "viatical settlement contracts" found in the aforementioned provisions at Chapters 517 and 626, Florida Statutes (2005), does not lead to the conclusion that Section 626.611(16), Florida Statutes (2002 and 2003), was unenforceable in relation to viatical settlement agreements, to include the transactions in the present case, when considering the proper construction of statutory language found in the preexisting statute that has application to this case. The more explicit treatment of viatical contracts or agreements under the present statutes, Chapter 517 and 626, Florida Statutes, does not mean that in the past no consideration was given to viatical sales agreements or contracts in accordance with Chapters 517 and 626, Florida Statutes (2002 and 2003).

104. Notwithstanding any lack of intent on his part, Respondent has violated Section 626.611(16), Florida Statutes (2002 and 2003), resulting in a violation of Section 626.621(2), Florida Statutes (2002 and 2003). Respondent is accountable by virtue of his sale of unregistered securities required for registration pursuant to Chapter 517, Florida Statutes (2002 and 2003), in relation to the viatical settlement purchase agreements entered into by the Murrays, the Andrades, and the Colozzos, whatever his motives. See State v. Houghtaling, 181 So. 2d 636 (Fla. 1965); Beshore v. Department of Financial

Services, 928 So. 2d 411 (Fla. 1st DCA 2006) and Huff v. State, 646 So. 2d 742 (Fla. 2nd DCA 1994).

Penalties

105. In determining the appropriate punishment for the violations, resort is made to Section 626.611 and 626.621, Florida Statutes (2002 and 2003), together Florida Administrative Code Rules 69B-231.040, 231.080, 231.090 and 231.160. Recognizing that violations have been proven under Counts I through III to the Administrative Complaint, totaling 36 months, 12 months for each count, as the common expectation and that this results in revocation in accordance with Florida Administrative Code Rule 69B-231.040(3)(d), derived from Florida Administrative Code Rule 69B-231.080(16), the ultimate determination for punishment is made upon a review of criteria set forth in Florida Administrative Code Rule 69B-231.160, relating to aggravating/mitigating circumstances. Respondent's actions in the transactions were not willful. The Murrays, the Andrades, and the Colozzos suffered substantial financial injury. The age and capacity of the Murrays, the Andrades, and the Colozzos were not a contributing factor. Restitution has not been made. Respondent had no ill motives in dealing with his customers. The amount of compensation received for his participation in the offer for sale and sale of the viaticals is not known. Respondent himself entered into a similar

transaction involving the viaticals. The degree of cooperation between Respondent and Petitioner is not known. But Respondent was entitled to defend himself against the allegations without compromise. Respondent bears personally responsibility for the losses to his customers but not total responsibility. No related criminal charges pertaining to Respondent exist. Secondary violations were found in association with Section 626.621(2), Florida Statutes (2002 and 2003). No previous disciplinary action was taken against Respondent. Concerning transactions that took place after November 14, 2002, Respondent could be expected to have greater insight into the nature of the transactions, given his registration as an associated person pursuant to Chapter 517, Florida Statutes.

#### RECOMMENDATION

Upon consideration of the findings of fact and the conclusions of law, it is

#### RECOMMENDED:

That a final order be entered finding Respondent in violation of Subsections 626.611(6) and 626.621(2), Florida Statutes (2002 and 2003), in Counts I through III, dismissing other alleged statutory violations within the Administrative Complaint, as amended, and suspending Respondent's insurance license for a period of six months.

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



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CHARLES C. ADAMS  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
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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.