

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES,)
)
Petitioner,)
) Case No. 09-2344PL
vs.)
)
PETER S. TUST,)
)
Respondent.)
_____)

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on September 1, 2009, at sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: James A. Bossart, Esquire
Department of Financial Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333

For Respondent: Douglas J. Kress, Esquire
Schwed McGinley & Kahle
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Palm Beach Gardens, Florida 33418

STATEMENT OF THE ISSUES

The primary issue in this case is whether Respondent misrepresented or failed to disclose material terms and conditions pertaining to annuities that he sold to several

senior citizens. If Respondent were found guilty of any disciplinable offense, then the next issue would be whether Petitioner should impose discipline for such violations as Respondent may be found to have committed.

PRELIMINARY STATEMENT

On March 11, 2009, Petitioner Department of Financial Services issued an Administrative Complaint against Respondent Peter S. Tust, charging him with several disciplinable offenses arising from two separate transactions in which he had sold equity index annuities to senior consumers, allegedly inducing them to make unsuitable or inappropriate investments through fraud, misrepresentation, or nondisclosure of material terms and conditions.

Mr. Tust timely exercised his right to be heard in a formal administrative proceeding. On May 1, 2009, the Department referred the matter to the Division of Administrative Hearings, where the case was assigned to an Administrative Law Judge. Thereafter, the Department sought, and on August 3, 2009, was granted, leave to file an Amended Administrative Complaint, which it did.

The final hearing took place as scheduled on September 1, 2009, with both parties present. The Department called three witnesses: Elaine Gelch and Dora Indiviglia, alleged victims of Mr. Tust's offenses; and David J. Nye, Ph.D., an expert in

finance and insurance. The Department also offered Petitioner's Exhibits 1 through 12, which were received in evidence without objection. Mr. Tust testified on his own behalf; presented the testimony of David Paulukaitis, an expert in regulatory compliance issues affecting agents, brokers, and dealers; and offered Respondent's Exhibits 1 through 66, which were admitted into evidence without objection.

The final hearing transcript was filed on September 18, 2009. Thereafter, each party timely submitted a Proposed Recommended Order on or before October 12, 2009, in accordance with the deadline established at the conclusion of the hearing, as subsequently enlarged at the Department's request.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2009 Florida Statutes.

FINDINGS OF FACT

1. At all times relevant to this case, Respondent Peter S. Tust ("Tust") held a valid license to transact business in Florida as a life insurance agent, which authorized him to sell products such as life and health insurance policies and fixed and variable annuities. This case arises from two separate transactions in which Tust sold an insurance product known as an equity index annuity to (a) Dora Indiviglia and (b) Abraham and Elaine Gelch.

2. Petitioner Department of Financial Services ("DFS" or the "Department") is the state agency charged with administering the provisions of the Florida Insurance Code, among other responsibilities. The Department alleges that Tust fraudulently induced Ms. Indiviglia and the Gelchs to purchase annuities that were not suited to their respective financial needs. Because Tust is a licensed insurance agent, he falls within the Department's regulatory and disciplinary jurisdiction.

3. Broadly speaking, an annuity is a contractual arrangement pursuant to which an insurance company, in exchange for a premium (or purchase price), agrees to pay the owner or his beneficiary a specified income for a period of time. Annuities are generally classified as "fixed" or "variable." Under a fixed annuity, the benefit is paid according to a predetermined interest rate. With a variable annuity, the premium is invested on the owner's behalf in, for example, stocks or bonds, and the amount of the benefit, when paid, reflects the performance of that investment, be it positive or negative.

4. Fixed annuities can be either "immediate" or "deferred." An immediate fixed annuity is one under which the insurer begins paying the benefit upon purchase of the annuity. Under a deferred annuity, in contrast, the premium is allowed to

grow over time, until the contract "matures" or is "annuitized" and the insurer begins paying the benefit.

5. The equity index annuities which Tust sold to Ms. Indiviglia and the Gelchs are considered fixed deferred annuities. An equity index annuity is a contract under which the insurer agrees to pay a benefit based on a premium that earns interest at a rate determined by the performance of a designated market index such as the S&P 500. The premium is not invested in the market for the owner's account (as would be the case with a variable annuity). Rather, to explain the concept in the simplest terms, the interest rate rises (or falls) in relation to the index's performance, within predetermined limits. (None of the annuities involved in this case permitted the interest to fall below zero; that is, an owner's principal was never at risk of being lost due to the market's performance.) It is undisputed that the equity index annuities which Tust sold to Ms. Indiviglia and the Gelchs were approved for sale to senior investors by the Department.

6. Equity index annuities are typically long-term investments. Owners of such annuities have limited access to the funds invested and accumulating in their accounts, although some equity index annuities permit yearly penalty-free withdrawals at set percentages. The accrued interest is generally not taxed until the funds are withdrawn or the benefit

is paid under annuity. Besides taxes, the purchaser may incur substantial surrender penalties for canceling the contract and receiving his funds ahead of a specified date.

7. Some equity index annuities identify a date—often many years in the future—on which the insurer will "annuitize" the contract if it has not done so already at the purchaser's request. This date is sometimes called the "maturity date." The benefit payable under the annuity is determined based on the account's value as of the maturity date, and the payments to the owner or beneficiary of the annuity begin at that time.

8. Under the annuities in question here, the purchaser was not required to keep his or her funds invested until the maturity date. Rather, subject to certain limitations not at issue, the purchaser could elect to "annuitize" his or her contract practically at any time and thereby begin receiving the annuity payments. Therefore, in this case at least, the fact that the maturity date was beyond a purchaser's expected lifespan is not, of itself, compelling proof that the annuity was an unsuitable investment for him or her.

9. The Indiviglia Transaction.

In February 2005, Ms. Indiviglia attended one of the luncheon seminars that Tust routinely conducted in restaurants near his place of business in Boca Raton, Florida. At these seminars, Tust provided a meal and a sales presentation to his

invitees. Tust made clear to those in attendance that he was selling equity index annuities and would recommend the purchase of this sort of annuity to anyone interested for whom such an investment would be suitable.

10. Ms. Indiviglia was interested and made an appointment to meet with Tust. She was 65 years old at the time. As she told Tust when they met on February 25, 2005, Ms. Indiviglia's annual income was about \$41,000, which she received from pensions and Social Security. She had recently sold some property and wanted to invest the proceeds, which amounted to about \$150,000.

11. Ms. Indiviglia had made financial investments before meeting Tust. She had invested in the stock market beginning in the late 1970s. Additionally, she had invested in a 401k account when she worked for the investment bank J.P. Morgan, had purchased mutual funds outside of the 401k, and had bought a variable annuity through another broker in 2003 or 2004. Ms. Indiviglia told Tust her goals were safety, growth, and future income.

12. Upon meeting with Tust, Ms. Indiviglia agreed to purchase an equity index annuity from Fidelity and Guaranty Life Insurance Company ("F&G") for a premium of approximately \$149,000. By purchasing this particular product, Ms. Indiviglia was eligible for, and received, a bonus of approximately

\$15,000, which was added to her account. If she surrendered (or canceled) this annuity during the first 14 years, however, Ms. Indiviglia would pay a penalty, starting at 18% for a cancellation during the first year and declining each year thereafter until the fourteenth year, when the surrender penalty would be 1%. The maturity (or annuity) date on Ms. Indiviglia's annuity was April 22, 2030. (Because she would be 90 years old by that time, the chances were good that Ms. Indiviglia would surrender or annuitize the contract before the maturity date.)

13. In applying for the F&G annuity, Ms. Indiviglia executed an Annuity Application, a Confirmation Statement, and a Senior Annuity Suitability Acknowledgement. On page one of the Senior Annuity Suitability Acknowledgement, Ms. Indiviglia declined to answer certain questions related to her financial needs and objectives by placing a check mark beside the following statement: "No, I decline to answer the questions below, but I believe a Fidelity and Guaranty Life or Americom Life and Annuity annuity contract meets my needs for my financial situation." Ms. Indiviglia placed her signature and the date (3/8/2005) beneath this statement.

14. On the second page of the Senior Suitability Acknowledgement, Ms. Indiviglia manifested her understanding of several statements, including the following, which she checked:

✓ This is not a short-term investment.

✓ Cash withdrawals from or a complete surrender of the contract are subject to certain limitations and charges as described in the contract.

✓ Surrender charges/fees may be incurred as a result of liquidating certain existing accounts; however, I believe this transaction to be in my best interest.

Ms. Indiviglia placed her signature and the date (3/8/2005) below these statements.

15. Tust delivered the F&G annuity contract to Ms. Indiviglia on May 16, 2005. Ms. Indiviglia executed a Delivery Receipt acknowledging that she had received not only the annuity contract, but also a contract summary. On the "Policy Information" page of the contract, which is Page 1, in boldfaced type, were the following provisions:

RIGHT TO CANCEL. If you decide not to keep this policy, return it within 10 days after you receive it. It may be returned to any of our agents or it may be mailed to us. The return of this policy will void it from the beginning. Any premium paid will be refunded within 10 days of our receipt of this policy.

YOU HAVE PURCHASED AN ANNUITY POLICY. CAREFULLY REVIEW THIS POLICY FOR LIMITATIONS. CANCELLATION MAY RESULT IN A SUBSTANTIAL PENALTY KNOWN AS A SURRENDER CHARGE.

16. On Page 2 of the contract, the Annuity Date of April 22, 2030, was plainly disclosed, as was the "Surrender Factor" for each policy year from first (18%) to the fourteenth (1%). Three pages later, on Page 5, under the boldfaced heading, "**SURRENDERS**," appeared the following:

Surrender Charge

A surrender charge may be imposed on withdrawals and at death. The surrender charge equals the surrender factor for the appropriate policy year, as shown on the policy information page, multiplied by the amount of the account value withdrawn. The account value withdrawn consists of the amount paid upon a surrender request, or applied to an annuity option, and the surrender charge thereon.

Waiver of Surrender Charges

The surrender charge will not apply to the account value if payments are made under an annuity option.

17. The Policy Information page clearly identified the Riders and Endorsements to the contract, one of which was entitled, "Partial Withdrawals Without Surrender Charges Rider." That Rider, which was attached to the contract, provided as follows:

After the first policy anniversary, a portion of the account value withdrawn will not be subject to a surrender charge. The amount, which can be surrendered without a surrender charge, is up to 10% of the premiums paid, less any amounts previously surrendered in the current policy year which were not subject to the surrender charges.

Maximum Benefit: the total maximum amount, which can be surrendered without a charge, is 25% of the premiums paid. Once the maximum amount has been surrendered without charges, any additional surrenders will incur a charge, unless additional premium is paid.

18. Ms. Indiviglia held the F&G annuity into the third policy year. In or around July 2007, she made a penalty-free withdrawal of \$12,000. Then, about a month later, she elected to surrender the contract, incurring a 16% penalty for the early withdrawal of her account balance. Although the evidence is not clear as to precisely how Ms. Indiviglia fared, financially, in this transaction, it is undisputed that, notwithstanding the surrender penalty, she actually made money on the investment—at least about \$2,000 and perhaps as much as \$14,000 or so.

19. The provisions of the F&G annuity which DFS alleges Tust misrepresented or failed to disclose to Ms. Indiviglia were clearly stated, unambiguously, in the contract itself. The evidence fails to convince the undersigned to find, without hesitancy, that Tust misrepresented or failed truthfully to disclose to Ms. Indiviglia any of the F&G annuity contract's material terms and conditions, knowingly made other false representations of material fact about the product, or otherwise made any false promises in connection with the investment.

20. Likewise, the evidence is insufficient to convince the undersigned that the F&G annuity was an inappropriate investment

for Ms. Indiviglia, taking into account her stated financial needs and goals, age, wealth, and relative sophistication as an investor. To the contrary, viewing the evidence as a whole, the undersigned determines that the F&G annuity fell squarely within the range of reasonable investments for a person having Ms. Indiviglia's investment profile.

21. The Gelch Transaction.

In September 2006, Abraham Gelch, 73, and his wife Elaine, 68, attended one of Tust's luncheon seminars. Mr. Gelch was a retired accountant; to that time he had been primarily responsible for his family's financial decisions. Although Mrs. Gelch denied being knowledgeable regarding investments when she testified in this proceeding, she is well-educated, holding a bachelor's degree and a master's degree, and was sufficiently conversant at hearing regarding the subject annuities to persuade the undersigned that she was and is able to comprehend the particulars of the transaction in issue.

22. After the seminar, the Gelchs met with Tust to discuss purchasing equity index annuities. At the time, they were living on Social Security plus the returns on their investments. The Gelchs had, in 2006, financial investments totaling nearly \$2 million, most of which wealth was held in a brokerage account at Morgan Stanley. According to their U.S. income tax return, which they gave to Tust, the Gelchs' adjusted gross income for

2005 was approximately \$100,000, about \$35,000 of which was derived from investments, according to other information the Gelchs provided Tust.

23. At the meeting with Tust, Mr. Gelch completed a "financial goals and needs" form on which he ranked his investment objectives in order of importance. He ranked the items from 1 to 6, with "1" being the most important, as follows:

Protecting my assets from losses	<u>1</u>
Growing my assets	<u>2</u>
Generating more income	<u>3</u>
Leaving money to my children/heirs	<u>6</u>
Replacing my pension income for my spouse if I pass first	<u>4</u>
Protecting my assets from taxes at death	<u>5</u>

Mr. Gelch placed his signature and the date (09/27/06) below this enumeration of his priorities as an investor.

24. On the same form, Mr. Gelch expressed his agreement with the statement, "It is important that my investments are 100% safe from this point forward," and he expressed disagreement with the statement, "I am willing to take some risk (and possible losses) with my investments." Mr. Gelch disclosed on the form that he and his wife had suffered investment losses of \$300,000 between 2000 and 2002. In completing the statement,

"My greatest financial concern is _____," Mr. Gelch wrote:
"OUTLIVING MY INCOME."

25. Ultimately, Mr. and Mrs. Gelch agreed to purchase six equity index annuities, two issued by Allianz Life Insurance Company of North America ("Allianz"), and four by Midland National Life Insurance Company ("Midland"), for premiums totaling, in the aggregate, approximately \$1.4 million. These annuities were similar in concept to the F&G annuity that Ms. Indiviglia had purchased, having interest rates pegged to market indices, surrender charges for early termination, limitations on penalty-free withdrawals, annuity dates some years in the future, and strong protection against loss of principal.¹

26. With the Allianz annuities, surrender penalties declined over ten years, from 15% in the first year down to 2.14% in the tenth policy year. After one year, the Gelchs could withdraw up to 10% of the premium annually without penalty, to a maximum (over the first 10 policy years) of 50% of the premium paid. Under the Allianz annuities, the Gelchs could begin making systematic withdrawals of credits—that is, they could take distributions of interest earned on their accounts—without penalty after the fifth policy year. The maturity dates for the Allianz annuities were in 2016.

27. The Midland annuities, like the others, provided for surrender penalties, which declined from 18% to 2% over fourteen

years. After the first year, the Gelchs could withdraw up to 10% of the "accumulation value" (premiums paid plus interest earned) of each policy annually without penalty, up to the entire value of the respective annuity. The maturity dates for the Midland annuities fell in 2048 and 2053.

28. In connection with the applications for the Allianz annuities, Mr. and Mrs. Gelch each completed the following forms: Application for Annuity, Product Suitability Form, and Statement of Understanding.

29. In the Product Suitability Form, the Gelchs identified a net worth of more than \$1 million and confirmed prior investments in certificates of deposit, fixed annuities, variable annuities, and stocks/bonds/mutual funds. In a section entitled, "Accessing your money," the Gelchs indicated that they intended to access the funds in "10 or more years" as a lump sum.

30. Each Allianz Statement of Understanding is a five page document that identifies the terms of the annuities, including the surrender charges and the methods of calculating interest. The Statements of Understanding do not guarantee a 6-9% return, which is what Mrs. Gelch testified Tust had promised the annuities afforded. Instead, for an indexed investment, each document states, "At the end of each contract year, the capped monthly returns are added together to calculate your indexed

interest for that year. If this sum is negative, the indexed interest for that year will be zero."

31. In connection with the applications for the Midland annuities, the Gelchs were provided Annuity Disclosure Statements, which identified the liquidity provisions and contained the following declaration:

I understand that [this] annuity is a long-term contract with substantial penalties for early surrenders. A surrender charge is assessed, as listed below on any amount withdrawn, whether as a partial withdrawal or full surrender, that is in excess of the penalty-free amount applicable. The surrender charges vary by product option and decline as [shown in the table.]

(Emphasis in original; table in original not reproduced here.)

Mr. And Mrs. Gelch each signed and dated this declaration, manifesting their understanding of the surrender charges, which charges, as the disclosure form further explained, "allow the company to invest long-term, and in turn, generally credit higher yields."

32. In addition, on the respective disclosure forms that the Gelchs signed, each of them specifically refused (by signing or placing initials next to the word "Decline"), a 7-year surrender charge option offering no bonus; and a 10-year surrender charge option offering a 5% bonus. Instead, Mr. And Mrs. Gelch each separately requested (by signing or placing

initials next to the word "Elect"), the 14-year surrender charge option offering a 10% bonus.

33. Mr. Gelch also completed a Deferred Annuity Suitability Form for Midland, which among other things included the following:

4. An annuity is a long-term contract with substantial penalties for early surrenders and/or distributions.

In answering the following question, do not include the funds used to purchase this annuity contract, or any funds from annuities already owned.

Do you have sufficient available cash, liquid assets or other sources of income for monthly living expenses and emergencies?

Yes No

(Emphasis in original; check mark handwritten on original.) Mr. Gelch affixed his signature to the suitability form, immediately below a declaration stating:

I acknowledge that I have read this Deferred Annuity Suitability Form and believe this annuity meets my needs and is suitable. To the best of my knowledge and belief, the information above is true and complete.

34. Mr. and Mrs. Gelch owned the Allianz and Midland annuities for a little more than a year before surrendering them in January of 2008. The surrender penalties for such early terminations, which charges had been fully disclosed to the Gelchs, were steep: 18% on the Midland annuities and 15% on the Allianz annuities. Despite the surrender penalties, which totaled approximately \$200,000, the Gelchs' net loss on the

investments (owing to their decision to surrender the annuities so soon after purchasing them) was only about \$23,000, due to the investment gains and the bonuses.

35. The provisions of the Allianz and Midland annuities which DFS alleges Tust misrepresented or failed to disclose to the Gelchs were clearly stated, unambiguously, in the written disclosures provided to the Gelchs, not to mention in the contracts themselves. The Gelchs, in turn, gave Tust (and through him the issuing insurers) numerous objective manifestations, in writing, of their understanding of these material terms and conditions. The evidence fails, ultimately, to convince the undersigned to find, without hesitancy, that Tust misrepresented or failed truthfully to disclose to the Gelchs any of the annuity contracts' material terms and conditions, knowingly made other false representations of material fact about the products, or otherwise made any false promises in connection with the Gelchs' investments.

36. Likewise, the evidence is insufficient to convince the undersigned that the Allianz and Midland annuities were inappropriate investments for the Gelchs, taking into account their stated financial needs and goals, respective ages, health, wealth, and relative sophistication as investors. To the contrary, viewing the evidence as a whole, the undersigned determines that the annuities fell squarely within the range of

reasonable investments for persons having the Gelchs' investment profile.

37. Ultimate Factual Determinations.

In view of the historical facts found above, the undersigned has determined, based the appropriate standard of proof (discussed below) as applied to the evidence adduced at hearing, that Tust is *not guilty* of any of the following offenses with which he was charged: (a) willfully misrepresenting the terms of any annuity contract as proscribed in Section 626.611(5), Florida Statutes; (b) demonstrating a lack of fitness or trustworthiness to engage in the business of insurance, which is punishable under Section 626.611(7), Florida Statutes; (c) engaging in fraudulent or dishonest practices, a disciplinable offense pursuant to Section 626.611(9), Florida Statutes; (d) willfully failing to comply with, or of violating, a provision of law, which is punishable under Section 626.611(13), Florida Statutes; violating any applicable provision of law, which may subject the violator to discipline under Section 626.621(2), Florida Statutes; (e) engaging in unfair methods of competition or deceptive acts, as prohibited in Section 626.9541, Florida Statutes; and (f) failing to present accurately and completely every fact essential to a client's decision, as required under Florida Administrative Code Rule 69B-215.210.

38. Moreover, although Tust did not have the burden to prove his innocence in any respect, the greater weight of the evidence nevertheless persuades the undersigned to determine that he did, in fact, fulfill the obligations he owed to Ms. Indiviglia and the Gelchs under Section 627.4554, Florida Statutes, which governs transactions involving sales of annuities to senior consumers.

CONCLUSIONS OF LAW

39. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

40. The Amended Administrative Complaint in this case contains two counts. The Department alleges in both counts that Tust violated the following statutory provisions: Sections 626.611(5), (7), (9), and (13); 626.621(2); 626.621(6); 626.9541(1)(a)1., and 626.9541(1)(e)1., Florida Statutes. It has also been alleged that Tust violated Florida Administrative Code Rule 69B-215.210.

41. Section 626.611, Florida Statutes (2005), provides in pertinent part as follows:

The department shall . . . 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:

* * *

(5) Willful misrepresentation of any insurance policy or annuity contract or willful deception with regard to any such policy or contract, done either in person or by any form of dissemination of information or advertising.

* * *

(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 or appointment.

* * *

(13) Willful failure to comply with, or willful violation of, any proper order or rule of the department or willful violation of any provision of this code.

42. Section 626.621, Florida Statutes (2005), provides in relevant part as follows:

The department may, in its discretion, . . . 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:

* * *

(2) 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 appointment.

* * *

(6) In the conduct of business under the license or appointment, 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.

43. Section 626.9541, Florida Statutes (2005), defines "unfair methods of competition and unfair or deceptive acts or practices" in part as follows:

The following are defined as unfair methods of competition and unfair or deceptive acts or practices:

(a) Misrepresentations and false advertising of insurance policies.-- Knowingly making, issuing, circulating, or causing to be made, issued, or circulated, any estimate, illustration, circular, statement, sales presentation, omission, or comparison which:

1. Misrepresents the benefits, advantages, conditions, or terms of any insurance policy.

* * *

(e) False statements and entries.--
1. 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.

44. Florida Administrative Code Rule 69B-215.210 provides as follows:

The Business of Life Insurance is hereby declared to be a public trust in which service all agents of all companies have a common obligation to work together in serving the best interests of the insuring public, by understanding and observing the laws governing Life Insurance in letter and in spirit by presenting accurately and completely every fact essential to a client's decision, and by being fair in all relations with colleagues and competitors always placing the policyholder's interests first.

45. Being penal in nature, the foregoing statutes and rule provisions "must be construed strictly, in favor of the one against whom the penalty would be imposed." Munch v. Department of Professional Regulation, Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992).

46. A proceeding, such as this one, to suspend, revoke, or impose other discipline upon a license is penal in nature. State ex rel. Vining v. Florida Real Estate Commission, 281 So.

2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, the Department must prove the charges against Tust by clear and convincing evidence. Department of Banking & Fin., Div. of Sec. & Investor Protection v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996)(citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)); Nair v. Department of Business & Professional Regulation, Bd. of Medicine, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

47. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court developed a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:

clear 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 testimony must be precise and explicit and the witnesses must be lacking 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Id. The Florida Supreme Court later adopted the Slomowitz court's description of clear and convincing evidence. See In re Davey, 645 So. 2d 398, 404 (Fla. 1994). The First District

Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992)(citation omitted).

48. The Department did not charge Tust with violating any of the provisions of Section 627.4554, Florida Statutes (2005), which specifically governs annuity investments by seniors and prescribes certain duties (and limitations on those duties) that an agent owes to a senior consumer. This statute provides in pertinent part as follows:

(1) PURPOSE; CONSTRUCTION.--

(a) The purpose of this section is to set forth standards and procedures for recommendations to senior consumers which result in a transaction involving annuity products to appropriately address the insurance needs and financial objectives of senior consumers at the time of the transaction.

(b) Nothing in this section shall be construed to create or imply a private cause of action for a violation of this section.

(2) APPLICATION.--This section applies to any recommendation to purchase or exchange an annuity made to a senior consumer by an insurance agent, or an insurer where no agent is involved, that results in the purchase or exchange recommended.

(3) DEFINITIONS.--For purposes of this section:

(a) "Annuity" means a fixed annuity or variable annuity that is individually

solicited, whether the product is classified as an individual annuity or a group annuity.

(b) "Recommendation" means advice provided by an insurance agent, or an insurer if no insurance agent is involved, to an individual senior consumer which results in a purchase or exchange of an annuity in accordance with that advice.

(c) "Senior consumer" means a person 65 years of age or older. In the event of a joint purchase by more than one party, a purchaser is considered to be a senior consumer if any of the parties is age 65 or older.

(4) DUTIES OF INSURERS AND INSURANCE AGENTS.--

(a) In recommending to a senior consumer the purchase of an annuity or the exchange of an annuity that results in another insurance transaction or series of insurance transactions, an insurance agent, or an insurer if no insurance agent is involved, shall have reasonable grounds for believing that the recommendation is suitable for the senior consumer on the basis of the facts disclosed by the senior consumer as to his or her investments and other insurance products and as to his or her financial situation and needs.

(b) Before executing a purchase or exchange of an annuity resulting from a recommendation to a senior consumer, an insurance agent, or an insurer if no insurance agent is involved, shall make reasonable efforts to obtain information concerning the senior consumer's financial status, tax status, and investment objectives and such other information used or considered to be reasonable by the insurance agent, or the insurer if no agent is involved, in making the recommendation.

(c)1. Except as provided under subparagraph 2., an insurance agent, or an insurer if no insurance agent is involved, shall not have any obligation to a senior consumer under paragraph (a) related to any recommendation if the senior consumer:

- a. Refuses to provide relevant information requested by the insurer or insurance agent;
 - b. Decides to enter into an insurance transaction that is not based on a recommendation of the insurer or insurance agent; or
 - c. Fails to provide complete or accurate information.
2. An insurer or insurance agent's recommendation subject to subparagraph 1. shall be reasonable under all the circumstances actually known to the insurer or insurance agent at the time of the recommendation.

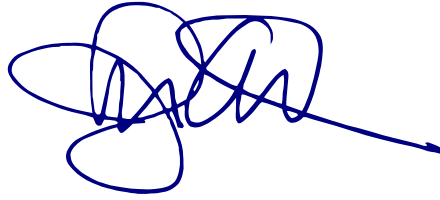
§ 627.4554, Fla. Stat. (2005).

49. The undersigned has determined, as a matter of ultimate fact, that the Department failed to establish Tust's guilt as to the violations alleged. In making these determinations, the undersigned concluded that the plain language of the applicable statutes and rules, being clear and unambiguous, could be applied in a straightforward manner to the historical events at hand without simultaneously examining extrinsic evidence of legislative intent or resorting to principles of interpretation. It is therefore unnecessary to make additional legal conclusions concerning these violations.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Financial Services enter a Final Order finding Peter S. Tust not guilty of the charges that were brought against him in this proceeding.

DONE AND ENTERED this 3rd day of November, 2009, in
Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
Administrative Law Judge
Division of Administrative Hearings
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1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of November, 2009.

ENDNOTE

^{1/} None of the annuities at issue permitted negative returns (or losses). To the contrary, each annuity provided for guaranteed minimum returns, albeit at relatively low interest rates, meaning that the contract would appreciate in value, even if the market index it "followed" happened to decline. Principal could not be lost, therefore, unless the issuing insurer were to become so impaired as to be unable to meet its obligations to policy holders. Although such an occurrence is obviously not beyond the realm of possibility, the evidence adduced in this case establishes that the risk of insurer insolvency vis-à-vis the insurers in question was negligible.

COPIES FURNISHED:

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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.