

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES,)
)
Petitioner,)
)
vs.) Case No. 11-3982PL
)
WILLIAM P. MCCLOSKEY,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on January 24 and 25, 2012, by video teleconference with sites in Tallahassee and Sebastian, Florida, before Susan Belyeu Kirkland, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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

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

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent violated sections 626.611(7), 626.611(9), 626.611(16), 626.621(2), 626.621(6), 626.9541(1)(e)1., 626.9927(1), 626.99275(1)(b), and 626.99277(6), Florida Statutes (2003),^{1/} and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

On June 7, 2011, Petitioner, Department of Financial Services (Department), filed a three-count Administrative Complaint against Respondent, William P. McCloskey (Mr. McCloskey), alleging that he violated sections 626.611(7), 626.611(9), 626.611(16), 626.621(2), 626.621(6), 626.9541(1)(e)1., 626.9927(1), 626.99275(1)(b), and 626.99277(6). Mr. McCloskey requested an administrative hearing, and the case was forwarded to the Division of Administrative Hearings on August 8, 2011, for assignment to an administrative law judge to conduct the final hearing. The final hearing was originally set for October 27, 2011, but was continued twice.

Official recognition was taken of matters as set forth in Orders dated January 5, 2012; January 23, 2012; and January 24, 2012. At the final hearing, official recognition was taken of Securities and Exchange Commission v. Mutual Benefits, Corp., No. 04-60573-CIV-Moreno (S.D. Fla. February 14, 2005) (order granting preliminary injunction) and In the Matter of: Life

(Fla. DBF Nov. 26, 1996).

At the final hearing, the Department called George Bode as its witness. The testimony of Allen J. Clemente and Julia Teny was presented by deposition. Petitioner's Exhibits 1 through 10 were admitted in evidence. Official recognition was taken of exhibits marked for identification as Petitioner's Exhibits 11 and 12.

At the final hearing, Mr. McCloskey testified on his own behalf and called Robert Miles, Matthew Tamplin, Jose Flores, and Susan Gorton as witnesses. Respondent's Exhibits 1 through 13 were admitted in evidence. As a late-filed exhibit, Respondent filed Respondent's Exhibit 14, which was admitted in evidence.

The two-volume Transcript of the portion of the hearing held on January 24, 2012, was filed on February 10, 2012. The one-volume Transcript of the portion of the hearing held on January 25, 2012, was filed on February 23, 2012. The parties agreed to file their proposed recommended orders within ten days of the filing of the last volume of the Transcript.

On February 28, 2012, Mr. McCloskey filed Respondent's Motion for Extension of Time to File Proposed Recommended Order. The motion was granted by Order dated February 29, 2012, extending the time to file proposed recommended orders to March 15, 2012. On March 13, 2012, Mr. McCloskey filed

Respondent's Second Motion for Extension of Time to File Proposed Recommended Order, which was unopposed. The motion was granted by Order dated March 14, 2012, and the time for filing proposed recommended orders was extended to March 30, 2012. The parties timely filed their proposed recommended orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material to the Administrative Complaint, Mr. McCloskey was licensed in Florida as an insurance agent. He currently is licensed as a life and variable annuity agent and health agent, life and variable annuity insurance agent, life insurance agent, life and health insurance agent, non-resident life and health and variable annuity agent, non-resident life insurance agent, and a general lines insurance agent. He has been working in the insurance business for approximately 24 years. No prior disciplinary actions have been taken against Mr. McCloskey.

2. In the latter part of 2003, a representative from Mutual Benefits Corporation (Mutual Benefits) visited Mr. McCloskey to discuss the offering of Mutual Benefits' viatical settlement products to Mr. McCloskey's clients. A viatical settlement (viatical) is the purchase of an interest in the death benefits of a life insurance policy for an economic benefit.

3. Mr. McCloskey was not familiar with viaticals. He checked on Mutual Benefits by researching Mutual Benefits on the internet. He called the Department's predecessor, the Department of Insurance, and also looked on the Department of Insurance's website. When he contacted the Department of Insurance, he was advised that viaticals were regulated by the Department of Insurance. Everything that he learned led him to believe that Mutual Benefits was a legitimate business. Mr. McCloskey also called the office of Mutual Benefits and talked to representatives who seemed to be familiar with insurance products and who answered questions that he had concerning Mutual Benefits.

4. After researching Mutual Benefits, Mr. McCloskey decided to offer viaticals from Mutual Benefits to his customers. On October 9, 2003, Mr. McCloskey entered into a Sales Representative Agreement with Mutual Benefits. The agreement contained the following provision:

Representative [Mr. McCloskey] hereby warrants to MBC that he/she has obtained and holds valid and current securities and/or insurance licenses that are required by the law of a prospective purchaser's and Representative's respective state of residence, if any, to market, solicit, offer, or sell viatical or life settlements to that prospective purchaser.

Mr. McCloskey understood that he would be selling the viaticals pursuant to his life insurance license. Mr. McCloskey understood

that there were many other insurance agents in Florida who were selling Mutual Benefits' viatical products.

5. When Mr. McCloskey sold a viatical from Mutual Benefits, he received a commission. The total percentage of his income derived from the sale of viaticals was approximately five percent of his total business income.

6. The viatical settlement purchase agreement forms at issue in this case had been approved for use by the Department of Insurance on February 5, 2002. The viatical settlement purchase agreements provided:

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.

* * *

WHEREAS, both parties understand and agree that neither Mutual Benefits Corp., nor any representative of Mutual Benefits Corp., is in any way acting as an insurance agent, broker, dealer, or representative, or a securities broker, dealer or representative, and the parties further agree that this transaction does not constitute the offer for sale or the sale of a security.

* * *

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

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.

* * *

Purchaser hereby represents and warrants that he/she is sophisticated in financial matters and/or has access to professional services, has adequate means for providing for current financial needs and possible personal contingencies, 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.

* * *

This agreement is voidable by the Purchaser at any time within three (3) days after the disclosures mandated by Florida Statute § 626.99236 are received by the Purchaser.

* * *

Pursuant to the terms of the Viatical Settlement Purchase Agreement, Mutual Benefits Corp. will escrow with a trustee funds for future premium payments for a minimum of the projected life expectancy of the insured, or longer at the company's discretion, and has agreed that the interest on those funds and any unused premiums may be retained as a reserve for payment on those policies where the insured outlives his/her projected life expectancy. Additionally, Viatical Services, Inc., a company the Purchaser may select to perform post closing services, has agreed to establish a premium reserve account to pay unpaid premiums for those policies that exceed their projected life expectancy if the above referenced trustee premiums are ever exhausted. Viatical Services, Inc.'s agreement to pay any unpaid premiums is limited to the exhaustion of the funds in its premium reserve account. In the event the trustee 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 returns referenced above.

* * *

The purchase of the death benefit of one or more life insurance policies should be 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.

7. Mutual Benefits estimated the life expectancies of the insureds and determined which policies would meet the estimated life expectancies chosen by the purchasers. The choice of which policies would be purchased would be done after the closing of the purchase agreement between the purchaser and Mutual Benefits. Mutual Benefits would provide the medical records of the insureds to the purchasers after the execution of the purchase agreement. In some instances, the purchasers would not be purchasing a full interest in the insurance benefits, but would be one among others who were purchasing interests in a specific insurance policy. Mutual Benefits would determine the amount that needed to be escrowed for the payment of future premiums, and the escrow agent would disburse the funds for the premiums as they came due.

8. The viaticals offered by Mutual Benefits were investment contracts that were required to be registered in accordance with chapter 517. At the time that Mr. McCloskey offered the viaticals to his clients, he did not understand that the viaticals could be considered as securities which had to be registered. Neither Mutual Benefits nor Mr. McCloskey was registered with the Office of Financial Regulation (OFR) of the Financial Services Commission at the time the viaticals at issue were sold.

9. In December 2003, George Bode, who was retired and approximately 74 years old, saw a newspaper advertisement placed

by Mr. McCloskey concerning various types of investments.

Mr. Bode contacted Mr. McCloskey and made an appointment to meet with Mr. McCloskey at his office in Melbourne, Florida, to discuss potential investments for Mr. Bode.

10. One of the types of investments that was discussed was viaticals. Mr. McCloskey never represented that viaticals were securities and made no guarantees concerning the outcome of the purchase of viaticals. Mr. Bode understood that there was some risk involved in the purchase of the viaticals and that the insured might not die within the estimated life expectancy. Mr. Bode was also aware that he might have to pay additional funds for premiums depending on the longevity of the insured.

11. On December 9, 2003, Mr. Bode entered into a Viatical Settlement Purchase Agreement with Mutual Benefits. The purchase price was \$10,000.00. The estimated life expectancy of the insured was 36 months. The rate of return if the insured died within the 36 months was 42 percent. The insured did not expire within the estimated 36 months, and Mr. Bode was required to pay for additional premiums for the viaticated insurance policy after the expiration of the 36 months.

12. Sometime in November 2003, Alan Clemente (Mr. Clemente) saw an advertisement placed in a newspaper by Mr. McCloskey. The advertisement was for annuities. Mr. Clemente went to Mr. McCloskey's office to discuss possible investments.

Mr. Clemente told Mr. McCloskey that he had lost \$100,000.00 with a financial planner and was looking for a safe investment.

13. Mr. McCloskey talked with Mr. Clemente about several types of products that his agency offered, including annuities, certificates of deposit, and viaticals. Mr. Clemente was not interested in certificates of deposits, but was very interested in annuities, such as Mr. McCloskey had advertised in the newspaper. Mr. Clemente was also interested in viaticals, and Mr. McCloskey made a presentation to Mr. Clemente concerning viaticals. Mr. Clemente did not make a purchase at the first meeting with Mr. McCloskey.

14. A few weeks after his initial visit with Mr. McCloskey, Mr. Clemente came to Mr. McCloskey's office and purchased an annuity for \$50,000.00. The annuity policy was delivered to Mr. Clemente on December 5, 2003, at Mr. McCloskey's office.

15. When Mr. Clemente came to pick up his annuity policy, he again discussed viaticals with Mr. McCloskey. Mr. Clemente understood that a viatical was the purchase of an insurance policy of someone who was terminally ill and when the person died that he would get his money back plus a return on the investment depending on when the person died. He wanted to invest in a viatical for which the insured's life expectancy was estimated at three years, which would result in a 42 percent return on his

money. He also understood that he would be responsible for the payment of the premiums on the policy until the insured died.

16. Mr. McCloskey went over the Viatical Settlement Purchase Agreement with Mr. Clemente. He told Mr. Clemente that he thought it was a good investment. Mr. McCloskey never guaranteed that Mr. Clemente would get a 42 percent return on his money. Mr. McCloskey told Mr. Clemente that "in the last ten years that no one [had] lost any money in the contracts, principal and interest, and no one [had] to pay premiums."

17. Mr. Clemente entered into a Viatical Settlement Purchase Agreement with Mutual Benefits on December 5, 2003. The purchase price was \$20,539.00 for two policies for insureds whose life expectancies were estimated to be three years. The return listed in the policy was 42 percent. This return was conditioned on the insureds dying within the three-year period.

18. Mr. Clemente initialed each page of the agreement and signed the agreement. Additionally, Mr. Clemente executed a Purchaser Suitability Questionnaire which stated:

I have carefully examined my financial resources, investment objectives, and tolerances for risk. After conducting this examination and reviewing the terms of the Viatical Settlement Purchase Agreement, I have determined that this purchase is appropriate for me.

I sufficiently understand the risk factors and objectives associated with this investment, either independently or as

explained to me by one or more professional financial advisors not affiliated with or in any way compensated by Mutual Benefits Corporation or its representatives.

I have adequate means of providing for my current financial needs and personal contingencies, have no need for liquidity of this investment, and I am able to bear the financial risk of a purchase of life insurance policy death benefits for an indefinite period of time.

19. In the early part of 2004, Carol Mauter (Ms. Mauter) came to Mr. McCloskey's office seeking some information about products that would generate an income for her mother, Julia Teny (Ms. Teny). Mr. McCloskey discussed various products with Ms. Mauter, including single premium immediate annuities and viatical settlements.

20. A few days after Ms. Mauter's initial visit, she returned to Mr. McCloskey's office with Ms. Teny, who was approximately 87 years old. On March 3, 2004, Ms. Teny purchased a single premium immediate annuity for \$30,000.00. This annuity was purchased to provide an income stream for Ms. Teny for five years.

21. Mr. McCloskey discussed the purchase of a viatical settlement for an insured whose life expectancy was 48 months. It was decided that the purchase of the viatical would suit Ms. Teny's needs since it was estimated that the return on the viatical purchase would occur shortly before the annuity ended,

and the proceeds from the viatical could be used to purchase another single premium immediate annuity to continue a stream of income for Ms. Teny.

22. Mr. McCloskey gave Ms. Mauter and Ms. Teny a brochure from Mutual Benefits concerning viaticals. He did not guarantee a return on the purchase of the viatical nor did he guarantee that Ms. Teny would never have to pay any premiums on the policy. He did tell Ms. Mauter and Ms. Teny that as of the date of their visit to his office persons purchasing viatical settlements from Mutual Benefits had not lost any principal or interest or paid any premiums. There was no evidence presented to show that this statement was not true or that Mr. McCloskey knew that the statement was not true at the time the statement was made.

23. On March 8, 2004, Ms. Teny executed a Viatical Settlement Purchase agreement with Mutual Benefits for policies on insureds whose life expectancies were estimated to be 48 months. The purchase price was \$70,000.00.

24. Ms. Teny initialed each page of the purchase agreement, but she relied on the judgment of her daughter concerning the understanding of the terms of the purchase agreement.

25. On May 3, 2004, the Securities and Exchange Commission (SEC) filed in the United District Court of the Southern District of Florida an Ex Parte Motion for Temporary Restraining Order and Other Relief and Entry of Preliminary Injunction against Mutual

Benefits and others, claiming Mutual Benefits was defrauding investors by offering unregistered securities in the form of investment interests in viatical settlement contracts. The motion for a temporary restraining order was granted. On February 14, 2005, the court entered an Order Granting Motion for Preliminary Injunction, finding that there was sufficient evidence of fraud committed by Mutual Benefits, specifically that the announced life expectancies of the insureds were a product of fraud. The court enjoined Mutual Benefits from further violations of the anti-fraud and registration provisions of the Federal Securities Laws in connection with the offering of viatical settlement products. SEC v. Mutual Benefits, Corp., No. 04-60573-CIV-Moreno (S.D. Fla. February 14, 2005) (order granting preliminary injunction). On May 4, 2005, the court entered an Order Appointing Receiver for Mutual Benefits. SEC v. Mutual Benefits, No. 04-60573-CIV-Moreno (S.D. Fla. May 4, 2005) (order appointing receiver).

26. Mr. Clemente received notice about a year and a half after he entered into the viatical settlement agreement with Mutual Benefits that Mutual Benefits had been placed in receivership. He was instructed by the receiver that premiums were due on the insurance policies that were covered by Mr. Clemente's viatical settlement agreement and that in order to preserve his investment, Mr. Clemente would be required to pay

the premiums on the policies. Due to the high cost of the premiums, Mr. Clemente elected to forfeit three of the policies covered by his viatical settlement agreement. Mr. Clemente is currently paying the premiums on one policy. To date, the receivership had paid Mr. Clemente approximately \$5,000.00 out of his original purchase price.

27. Sometime after Ms. Teny purchased her viatical, she began receiving letters requesting her to pay the policy premiums on the policies covered by her viatical settlement agreement. Ms. Teny did not know who sent the requests, but given the timing of the appointment of the receiver, it can be inferred that the receiver was requesting the payments. Ms. Teny initially paid the premiums, but as the amounts of the premiums increased to as much as over \$10,000.00 in 2008, Ms. Teny allowed the policies to lapse and lost her entire investment of \$70,000.00.

28. Mr. Bode was also requested to make premium payments on the policies covered by his viatical settlement agreement. Mr. Bode made some payments, but stopped making payments and forfeited his purchase price of \$10,000.00.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2011).

30. The Department has the burden to establish the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

31. The Department alleges that Mr. McCloskey violated sections 626.611(7), 626.611(9), and 626.611(16), which provide:

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

* * *

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

* * *

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

* * *

(16) Sale of an unregistered security that was required to be registered, pursuant to chapter 517.

32. The Department alleges that Mr. McCloskey violated sections 626.621(2) and 626.621(6), which provide:

The department or office may, in its discretion, deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, adjuster, customer representative, service representative, or managing general agent, and it may suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist under circumstances for which such denial, suspension, revocation, or refusal is not mandatory under s. 626.611:

* * *

(2) Material misstatement, misrepresentation, or fraud in obtaining the license or appointment or in attempting to obtain the license or appointment.

* * *

(6) If, as an adjuster, or agent licensed and appointed to adjust claims under this code, he or she has materially misrepresented to an insured or other interested party the terms and coverage of an insurance contract with intent and for the purpose of effecting settlement of claim for loss or damage or benefit under such contract on less favorable terms than those provided in and contemplated by the contract.

33. The Department alleges that Mr. McCloskey violated section 626.9541(1)(e)1., which provides:

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

* * *

(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.

34. The Department alleges that Mr. McCloskey violated section 626.9927(1), which provides:

(1) A violation of this act is an unfair trade practice under ss. 626.9521 and 626.9541 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.

35. The Department alleges that Mr. McCloskey violated section 626.99275(1)(b), which provides:

(1) It is unlawful for any person:

* * *

(b) In the solicitation or sale 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.

36. The Department alleges that Mr. McCloskey violated section 626.99277(6) which provides: "A person may not represent that the investment in a viatical settlement purchase agreement is 'guaranteed,' that the principal is 'safe,' or that the investment is free of risk."

37. The Department has established by clear and convincing evidence that Mr. McCloskey violated section 626.611(16) by selling an unregistered security that was required to be registered pursuant to chapter 517.

38. At the time Mr. McCloskey sold the viaticals to Mr. Bode, Mr. Clemente, and Ms. Teny, the viatical industry was regulated pursuant to sections 626.991-626.99295, the Viatical Settlement Act. However, chapter 626 did not preempt chapter 517 in determining whether viaticals were securities that had to be registered pursuant to chapter 517.

39. In Kligfield v. Office of Financial Regulation, 876 So. 2d 36 (Fla. 4th DCA 2004), OFR had filed administrative complaints against two Florida-licensed life and health insurance agents who were offering viaticals to their clients. OFR took the position that the insurance agents were selling unregistered securities. The insurance agents took the position that the Florida Securities and Investors Protection Act, chapter 517, had been preempted by the Viatical Settlement Act. The court agreed with OFR that chapter 626 did not preempt chapter 517 and that the viatical purchase agreements were investment contracts that should be registered with OFR.

40. Prior to 2003, OFR had taken the position that viaticals were securities as evidenced by the Stipulation and Consent Agreement entered into in 1996 by the predecessor to OFR, Department of Banking and Finance, Division of Securities and Investor Protection, In the Matter of: Life Options International, Case No. 0069-I-8/96, adopted as a Final Order, November 26, 1996. Additionally, other final orders set forth the position of the Department of Banking and Finance that viaticals were securities that had to be registered pursuant to chapter 517. Dept. Banking & Fin., Case Nos. 3-94-S-2/01, 3094a-D-2/01, 3126-S-2/01 (Fla. DBF December 23, 2002); Dept. Banking & Finance v. Nicholas, Case No. 3183-S-2/01 (Fla. DBF November 28, 2001); Dept. Banking & Fin. v. Priest, Case No. 3185-S-2/01 (Fla.

DBF November 26, 2001); and In Re: Breshnahan, No. 2924-S-2/00 (Fla. DBF November 28, 2000).

41. At the time Mr. McCloskey sold the viaticals at issue, whether a viatical was a security that had to be registered with the SEC was not a settled issue. In Securities & Exchange Commission v. Life Partners, Inc., 87 F.3d 536 (D.C. Cir. 1996), the United States District Court for the District of Columbia held that viaticals were not securities for the purposes of the Securities Act of 1933 and the Securities Exchange Act of 1934 because the viaticals depend entirely on the mortality of the insured rather than the post-purchase managerial or entrepreneurial efforts of the viatical settlement provider.

42. In Securities & Exchange Commission v. Mutual Benefits Corporation, 323 F. Supp. 2d 1337 (S.D. Fla. 2004), the court noted that Life Partners was the only federal appellate decision on the issue of whether a viatical was a security. Id. at 1343, n.9. The court declined to follow the analysis in Life Partners, but stated: "[T]he court hereby certifies that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the action." Id. at 1344. The United States Court of Appeals for the Eleventh Circuit affirmed the ruling that the viaticals offered by Mutual Benefits were

securities. SEC v. Mutual Benefits Corp., 408 F. 3d 737 (11th Cir. 2005).

43. At the time that the three viaticals at issue in this case were purchased, section 517.021(20) provided:

(20) "Security" includes any of the following:

- (a) A note.
- (b) A stock.
- (c) A treasury stock.
- (d) A bond.
- (e) A debenture.
- (f) An evidence of indebtedness.
- (g) A certificate of deposit.
- (h) A certificate of deposit for a security.
- (i) A certificate of interest or participation.
- (j) A whiskey warehouse receipt or other commodity warehouse receipt.
- (k) A certificate of interest in a profit-sharing agreement or the right to participate therein.
- (l) A certificate of interest in an oil, gas, petroleum, mineral, or mining title or lease or the right to participate therein.
- (m) A collateral trust certificate.
- (n) A reorganization certificate.
- (o) A preorganization subscription.
- (p) Any transferable share.
- (q) An investment contract.
- (r) A beneficial interest in title to property, profits, or earnings.
- (s) An interest in or under a profit-sharing or participation agreement or scheme.
- (t) An option contract which entitles the holder to purchase or sell a given amount of the underlying security at a fixed price within a specified period of time.
- (u) Any other instrument commonly known as a security at a fixed price within a specified period of time.

(v) Any receipt for a security, or for subscription to a security, or any right to subscribe to or purchase any security.

44. In 2005, there were several amendments to chapter 517, relating to viaticals. Section 517.021 was amended to include a viatical settlement investment in the definition of a security. § 517.201(20), Fla. Stat. (2005). A viatical settlement investment was defined as "an agreement for the purchase, sale, assignment, transfer, devise, or bequest of all or a portion of a legal or equitable interest in a viaticated policy as defined in chapter 626." § 517.201(23), Fla. Stat. (2005). Section 517.072 was created to provide that the exemptions in sections 517.051(6), (8), and (10) did not apply to a viatical settlement investment. The amendments to chapter 517 were a clarification of the existing law that a viatical was a security.

45. Florida has adopted the analysis used in Securities and Exchange Commission v. W.J. Howey Co., 328 U.S. 293, 299, 66 S. Ct. 1100, 1102, 90 L. Ed. 1244, 1249 (1946) to determine the existence of an investment contract. Farag v. Nat'l Databank Subscriptions, 448 So. 2d 1098 (Fla. 2d DCA 1984). In Howey, "a three-pronged test must be met in order to prove the existence of an investment contract. . . . First, there must be an investment of money; second, the investment must be in a common enterprise; and third, there must be an expectation of profits to be derived solely from the efforts of another." Id. at 1110-1101.

46. In the instant case, Mr. Clemente, Ms. Teny, and Mr. Bode invested money through the purchase of a viatical. There was a common enterprise because they were not the only purchasers for a specific policy. The monies of several purchasers would be pooled to pay for the policy. There was an expectation of profits to be derived from the efforts of Mutual Benefits based on the evaluations of life expectancies of the insureds by Mutual Benefit. Additionally, Mutual Benefits determined the amount of funds needed to fund the future premiums of the insureds, and the escrow agent disbursed the funds. The viaticals at issue meet the Howey test for the elements of an investment contract, which is listed as a security in section 517.021(20).

47. The Department has failed to establish by clear and convincing evidence that Mr. McCloskey violated 626.611(7). The Department argues that Mr. McCloskey demonstrated a lack of fitness or trustworthiness to engage in the business of insurance because he was not registered pursuant to chapter 517 to sell securities and because the viaticals were not registered. Mr. McCloskey thought that his license to sell life insurance was all that was required to sell viaticals. Section 626.992(4) provided that a sales agent of viaticals had to be licensed as a life agent as defined in section 626.015. Mr. McCloskey did not understand that viaticals were considered securities and that he

had to be registered pursuant to chapter 517. Mr. McCloskey called the Department of Insurance about viaticals and was told that viaticals were regulated by the Department of Insurance.

48. The Department has failed to establish by clear and convincing evidence that Mr. McCloskey violated sections 626.611(9), 626.621(2), 626.621(6), 626.954(1)(e), 626.9927(1), 626.99275(1)(b), and 626.99277(6). The Department argues that these statutes were violated when Mr. McCloskey made the statement that in the last ten years no one had to pay additional premiums or lost any money by purchasing a viatical with Mutual Benefits. There was no evidence at the final hearing that at the time the statement was made that it was not true. There is no evidence to establish that Mr. McCloskey knew that the statement was false.

49. Mr. McCloskey never told Ms. Teny, Mr. Bode, or Mr. Clemente that the investment was guaranteed. The Settlement Agreement clearly states that there is no guarantee that the insured will die within the expected time or that the purchasers will never have to pay additional premiums.

50. Although the viaticals sold by Mr. McCloskey were required to be registered pursuant to chapter 517, Mr. McCloskey was not aware that they had to be registered. He made a good faith effort to research Mutual Benefits by going on line and by calling the Department of Insurance. The viatical settlement

agreement form, which had been approved for use by the Department of Insurance, stated that the viaticals were not securities. There are three instances of selling unregistered securities, and the appropriate penalty would be a two-month suspension for each violation, for a total of six months.

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 that Mr. McCloskey did not violate sections 626.611(7), 626.611(9), 626.621(2), 626.621(6), 626.9541(1)(e)1., 626.9927(1), 626.99275(1)(b), and 626.99277(6); finding that Mr. McCloskey violated section 626.611(16); and suspending his license for two months for each of the three violations for a total of six months.

DONE AND ENTERED this 18th day of April, 2012, in Tallahassee, Leon County, Florida.

Susan Belyeu Kirkland

SUSAN BELYEU KIRKLAND
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of April, 2012.

ENDNOTE

^{1/} Unless otherwise indicated, all references to the Florida Statutes are to the 2003 version.

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.