CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA

IN THE MATTER OF:

DFS Case No. 116998-11-AG
DOAH Case No. 11-3982PL

WILLIAM P. McCLOSKEY
_____/

FINAL ORDER

THIS CAUSE came on for consideration and final agency action. On June 7, 2011, the Department of Financial Services filed an Administrative Complaint alleging that Respondent, William P. McCloskey, had violated various statutes regulating his conduct as a life and variable annuity and health insurance agent, life and variable annuity insurance agent, life insurance agent, and life and health insurance agent.[1]

Respondent replied in writing to the allegations of the Administrative Complaint and timely requested a formal hearing pursuant to Section 120.57(1), Florida Statutes. Pursuant to notice the matter was heard before Administrative Law Judge Susan Belyeu Kirkland of the Division of Administrative Hearings on January 24 and 25, 2012, via video teleconference with sites in Sebastian and Tallahassee, Florida.

Both parties filed Proposed Recommended Orders. After consideration of the evidence, argument and testimony presented at the hearing, the Administrative Law Judge issued her Recommended Order on April 18, 2012. A true and correct copy of the Recommended Order is

[1] Respondent holds other licenses including non-resident life and health and variable annuity agent, nonresident life insurance agent and general lines insurance agent licenses.

attached hereto as Exhibit "A". The Administrative Law Judge recommended that a Final Order be entered finding that Respondent did not violate Sections 626.611(7), 626.611 (9), 626.621(2), 626.621(60, 6269541(1)(e)1., 626.9927(1), 626.99275(1)(b) and 626.99277(6); finding that Respondent did violate Section 626.611(16); and recommending that Respondent's licenses be suspended for two months for each of the three violations for a total of six months. The Petitioner and the Respondent filed post-hearing exceptions.

STANDARD OF REVIEW

When reviewing a recommended order, an agency may adopt a recommended order as the final order of the agency. § 120.57(1)(1), Florida Statutes (2012). However, with respect to a recommended order's conclusions of law or interpretations of administrative rules, in its final order, an agency, may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. § 120.57(1)(1), Florida Statutes (2012).

With respect to findings of fact, "[t]he agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." § 120.57(1)(1), Florida Statutes (2012).

Competent substantial evidence "is defined as 'such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *Manassa v. Manassa*, 738 So.2d 997 (Fla. 1st DCA 1999) (citing *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957). The evidence "should be 'sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.'" *Id.* "Neither may an agency's responsibility to determine if substantial evidence supports the administrative law judge's findings of fact be avoided by merely labeling, either by the administrative law judge or the agency, contrary findings as conclusions of law." *Gross v. Dept. of Health*, 819 So.2d 997, 1001 (Fla. 5th DCA 2002).

Finally, an agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefore in the order, by citing to the record in justifying the action. § 120.57, Florida Statutes (2012).

RULINGS ON PETITIONER'S EXCEPTIONS

1. The Petitioner's exception number 1 takes exception to the Administrative Law Judge's conclusion of law set out in paragraph 47 of the Recommended Order finding that the Department did not prove that Respondent violated Section 626.611(7), Florida Statutes demonstrating a lack of fitness and trustworthiness to sell insurance by his selling of unregistered securities. The Recommended Order places great emphasis on its conclusions that Respondent did not knowingly sell an unregistered security and that he did not realize that viaticals were securities. These conclusions, true or not, are irrelevant. Willfulness, intent and *scienter* are not elements in the finding of a violation of either Section 626.611(7) or (16), Florida Statutes, or Chapter 517, Florida Statutes. Chapter 517 *et. seq.* is a strict liability statute. *Santacroce v. State Dept. of Banking and Finance, Div of Sec. and Inv. Protection,* 608 So.2d 134 (Fla. 4th DCA

1992); *Huff v. State*, 646 So.2d 742 (Fla. 2d DCA 1994); *State v. Houghtaling,* 181 So.2d 636 (Fla. 1965); for or a similar analysis of a similar statute under Chapter 626, Florida Statutes, *See Beshore v. Department of Financial Services,* 928 So.2d 411 (Fla. 1st DCA 2006)(section of statue prohibiting insurance agents from representing insurers not authorized to transact insurance in the state did not require that agent knowingly represented an unauthorized insurer). The Administrative Law Judge's conclusion ignores a line of precedent whereby the Division has found (and the Department adopted) that as a matter of law the sale of unregistered securities does demonstrate a lack of fitness or trustworthiness to sell insurance and constitutes a violation of Section 626.611(7), Florida Statutes. See *In the Matter of Sean Darrin Hoyt,* Case No. 33608-02-AG (November 19, 2002); *In the Matter of Stuart Daniel Goldfarb,* Case No. 33613-02-AG (June 5, 2003); *Department of Financial Services v. Kline,* Case No. 07-1218PL (Fla. DOAH Oct. 9, 2007), modified in part, Case No. 84956-07-AG, FO at 2 (Fla. DFS Dec. 21, 2007), per curiam aff'd, 980 So.2d 1065 (Fla. 1st DCA 2008). It is a more reasonable interpretation of the statute, which the Department has substantive jurisdiction over, for the Department to find that an agent who sells an unregistered and illegal security to a Florida insurance consumer directly resulting in actual, significant and irreparable financial harm to the victim lacks fitness or trustworthiness to sell insurance. Therefore, the Department accepts the Petitioner's exception to the ALJ's Conclusion of Law Number 47 and finds that the Respondent violated Section 626.611(7), Florida Statutes.

2. Petitioner's second exception is to the ALJ's recommended penalty. Both parties excepted to this recommendation and these exceptions will be addressed below.

RULINGS ON RESPONDENT'S EXCEPTIONS

1. The Respondent's first exception is to paragraph 8 of the Administrative Law Judge's Findings of Fact and corresponding paragraphs 37, 38, 39 and 40 of the Administrative Law Judge's Conclusions of Law. The weight to which the facts should be given is within the province of the Administrative Law Judge and should not be disturbed unless the facts are not supported by competent substantial evidence.

The Respondent apparently disputes two of three sentences in paragraph 8. The Respondent disputes the first sentence in paragraph 8 that reads: "The Viaticals offered by Mutual Benefits were investment contracts that were required to be registered in accordance with chapter 517." The Respondent argues that he disputed that the products sold were securities or investment contracts and alleged that the status of the laws in Florida in 2003 and 2004 (when the transactions occurred) was, at best, unclear in terms of the regulatory treatment of viatical settlement purchase agreements.

At the time Respondent sold the viaticals to Mr. Clemente, Mrs. Tenys, and Mr. Bode, the Mutual Benefit viatical purchase agreements were clearly securities; securities that were required to be registered with the Department of Banking and Finance (now Office of Financial Regulation). See *Securities & Exchange Commission v. Mutual Benefits Corporation., et al.,*408 F.3d 737 (11th Cir. 2005)(viaticals offered by MBC were investment contracts and therefore securities under Federal Law), affirming *Securities & Exchange Commission v. Mutual Benefits Corp., et al.,* 323 F.Supp.2d 1337 (S.D. Fla. 2004). See also *Department of Financial Services v. Kline,* Case No. 07-1218PL (Fla. DOAH Oct. 9, 2007), modified in part, Case No. 84956-07-AG, FO at 2 (Fla. DFS Dec. 21, 2007), per curiam aff'd, 980 So.2d 1065 (Fla. 1st DCA 2008)(a [Mutual Benefits] viatical met the definition of a security under the law that existed in 2003); *In*

the Matter of George Marshall Smith, DOAH 07-4701PL (May 8, 2008), *per curiam affirmed* 14 So.3d 1009 (1st DCA 2009) (The transactions entered into .., in which the 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); *Kligfeld v. State of Florida Office of Financial Regulation,* 876 So.2d 36 (4th DCA 2004)(Investment contracts are expressly defined as securities under Section 517.021(20)(q), Florida Statutes and the [viatical agreements] clearly meet the investment contract analysis as adopted by Florida courts, citing *Faraq v. Nat'l Databank Subscriptions, Inc.* 448 So.2d 1098, 1101 (Fla. 2d DCA 1984)).

Respondent cites part of a finding by an Administrative Law Judge (ALJ) in *DFS vs. Kline*, DOAH Case Number 07-1218PL. The Respondent points out that the ALJ stated that "...the administrative law judge does not agree with Petitioner's [DFS] argument that this interpretation of the law was clear and settled in 2003. The regulation of viaticals under the insurance code was a cause of confusion." Notably, Respondent left out the sentence preceding his quotation which stated: "Petitioner is correct that a viatical met the definition of a security under the law that existed in 2003." Respondent also failed to mention that the Department rejected the findings quoted by the Respondent in the Final Order in this case and that the Department's Order was upheld on appeal. *Kline v. Department of Financial Services*, 990 So.2d 1065 (Fla.1st DCA 2008). In the Kline Final Order, the Department ruled that:

> By their very nature, "viaticals," ... actually "viatical settlement purchase agreements," as defined by Section 626.9911(8), Florida Statutes, (2003), inherently and since their inception have met the *Howey* test, established in 1946 for the determination of security status. In *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946), the U.S. Supreme Court established a three-prong test to prove the existence of an investment contract that constitutes a

security. The three prongs are: 1) an investment of money; 2) in a common enterprise; and 3) an expectation of profits to be derived solely from the efforts of another. Viatical settlement purchase agreements, as defined by Section 626.9911(8), Florida Statutes (2003), uniformly required a purchaser to invest money into the common enterprise of the sale and purchase of interests in a "viaticated policy" [Section 626.9911(11), Florida Statutes, (2003)], with the expectation of a profit from that investment, which expectation is derived solely from the occasion of the death of the "viator," who was screened and approved for these purposes exclusively by the viatical settlement provider. [Sections 626.9911(6), (12), Florida Statutes, (2003)]. Thus, the viatical settlement purchase contracts here at issue inherently met the *Howey* test, and were, therefore and at all relevant times, investment contracts regulated by the State of Florida as securities. [Section 517.021(20)(q), Florida Statutes (2003); Section 517.021(21)(q), Florida Statutes (2006)].

In the Kline Final Order, the Department also relied on *Kligfeld v. State, Office of Financial Reg.*, 876 So.2d 36 (Fla. 4th DCA 2004), where "the appellants conceded at oral argument that the VSPA's [viatical settlement purchase agreements] involved in this cause meet the *Howey* test and therefore constitute securities which would ordinarily be subject to regulation under Chapter 517." *Id* at 38. In a consolidated appeal, *Kligfeld* upheld two final orders (*State of Florida, Office of Financial Institutions and Securities Regulation v. Torchia*, 2003 WL 22098873 (Fla. Dept. Bank. Fin.) and *State of Florida, Office of Financial Institutions and Securities Regulation v. Kligfeld*; et al, 2003 WL 21649063 (Fla. Dept. Bank. Fin.) finding that two life and health insurance agents acted as unregistered securities dealers and offered and sold unregistered securities to Florida investors in violation of Chapter 517, Florida Statutes, when they sold them viatical settlement purchase agreements. In both cases, these sales occurred in 1998 and 1999. Contrary to Petitioner's contention that *Kligfeld* did not address the *Howey* test when determining that the VSPAs sold in these two cases were securities, the Final Order in

Kligfeld contains an extensive analysis of the VSPA in accordance with *Howey* and concluded that it was a security. Also, the ALJ in *Torchia* did an extensive analysis of the VSPA in accordance with *Howey* and concluded that it was a security. This analysis was adopted in the Final Order and upheld in the *Kligfeld* appeal.

Respondent also asserts that the record is entirely devoid of any testimony or other evidence offered to support a finding of fact that the viaticals offered by Mutual Benefits Corporation (MBC) were investment contracts governed by Chapter 517, Florida Statutes. Respondent then contradicts this assertion by stating that the Department's evidence consisted solely of the lay witness testimony of certain consumers regarding their purchases through the Respondent. First of all, the testimony of these witnesses provided competent substantial evidence to support the ALJ's finding. Secondly, further evidence is contained in the Petitioner's exhibits, including the Respondent's Sales Representative Agreement with Mutual Benefits Corporation for the solicitation/sale of MBC's viatical business (Pet. Ex. 4 at pg. 18; Ex. 5 attached to Pet. Ex. 4), the MBC viatical settlement purchase agreements with Mr. Clemente, Mrs. Tenys, and Mr. Bode. (Ex. 1 and 2 attached to Pet. Ex. 2; Exhibit 5 attached to Pet. Ex. 3; Pet. Ex. 5).

The Respondent also claims that the finding is not supported by any expert testimony provided by the Department. The Department rejects the Respondent's contention that expert testimony was necessary in rendering a determination as to whether the products sold by Respondent were securities at the time of their sale. Section 90.702, Florida Statutes, states: "If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however,

the opinion is admissible only if it can be applied to evidence at trial." This is a permissive law, not a mandate. This same issue was raised in a previous case involving the sale of viatical settlement purchase agreements. *In The Matter of George Marshall Smith*, DOAH 07-4701PL (May 8, 2008), *per curiam affirmed* 992 So.2d 259 (Fla. 1st DCA 2008), the Department rejected this argument, stating:

> Respondent cites no authority, nor could he, that dictates that the Department was required to present expert testimony. Expert testimony is generally admitted to assist the court in deciding a case involving scientific or specialized knowledge, or to ascertain the truth in areas beyond common knowledge. *Sidran v. DuPont*, 925 So.2d, 1040 (Fla. 3d DCA 2006). In the instant case, the meaning and import of the term "investment contract" neither involves scientific or specialized knowledge, nor involves an area beyond common knowledge of the trier of fact such that expert testimony was needed before the ALJ could determine the issue.

Based on the forgoing, the Department rejects the Respondent's exception to the ALJ's finding in paragraph 8 that "The Viaticals offered by Mutual Benefits were investment contracts that were required to be registered in accordance with chapter 517."

Secondly, the Respondent disputes the last sentence in paragraph 8 that reads: "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." Respondent's position is that he was not required to be registered with OFR in 2003 and 2004 in order to sell viatical settlement purchase agreements. Since the Respondent sold viaticals offered by Mutual Benefits that were investment contracts that were required to be registered in accordance with chapter 517, the Respondent was clearly required to be registered with the Office of Financial Regulation. Section 517.12, Florida Statutes (2002, 2003, 2004)

Based on the forgoing, the Department rejects the Respondent's exception to the ALJ's findings in paragraph 8.

In Respondent's first exception, he also excepts to Conclusions of Law in paragraphs 37-40 and 44. The exceptions to these Conclusions of Law are contingent on the exception to Finding of Fact number 8. Based on the forgoing rejection of the exception to paragraph 8 of the Findings of Fact, the entirety of Respondent's Exception Number 1 is rejected. The ALJ's Conclusions of Law in paragraphs 37-40 and 44 appropriately and adequately detail the state of the law in Florida as it related to investment contracts and viatical settlement agreements at the time of the transactions that are involved in this matter and the cases cited above clearly support her conclusions.

2. Respondent's Exception Number 2 takes exception once again to the Conclusions of Law in paragraphs 38 and 39 and to the ALJ's disciplinary recommendation. The conclusion in paragraph 38 is that at the time that the Respondent, Mr. McCloskey, sold viaticals to the three consumers involved in this case the viatical industry was regulated pursuant to Sections 626.991-626.99295, Florida Statutes, and that these laws did not preempt Chapter 517, Florida Statutes, in determining whether viaticals were securities that had to be registered pursuant to Chapter 517. In paragraph 39, the ALJ cites "*Kligfield*" (sic), supra, as support for the conclusion in paragraph 38. Paragraph 39 simply contains a correct and straight forward summary of the *Kligfeld* decision, including the finding that Chapter 517 does not preempt Chapter 626. The Petitioner has not in any way distinguished or diminished the holdings in this case.

Petitioner's reliance on the Florida Legislature's failure to adopt a bill in 2004 that would defined viatical settlement contracts as securities under Chapter 517 as evidence that the Legislature did not intend for these contracts to be regulated as securities is not justified. He cites

no support for this proposition. In fact, the Florida Legislature adopted legislation in 2005 (Ch. 2005-237, Laws of Florida) that amended Chapter 517 to clarify the law by including viatical settlement investments in the definition of security (Section 517.021(21)(w), Florida Statutes.) This change did not alter the dual nature of the regulation of the viatical industry. On the contrary, the statutes have, and continue to, harmoniously coexist, complementing each other to achieve the legislative purpose of protecting investors from fraudulent schemes.

Petitioner's reliance on the ALJ's Conclusion of Law in paragraph 41 as an argument against her previous conclusions in paragraph's 38 and 39 is misplaced. In paragraph 41, the ALJ found that:

> 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 the post-purchase managerial of entrepreneurial efforts of the viatical settlement provider.

Paragraphs 38 and 39 deal with the finding that viatical settlement contracts have to be registered as securities under Florida law. *Life Partners*, a case from 1996 dealing with registration with the SEC, is not pertinent to understanding the state of the law in Florida in 2003-2004 regarding registration as a security under Florida law. It may not have been settled with regard to the SEC, however it was settled as far as Florida's securities regulators were concerned.

In fact, on November 20, 2002, an ALJ issued a Recommended Order in *Department of Banking and Finance v. Denton*, 2002 WL 31936480 (Fla. Dept. Bank. Fin.) rejecting the notion

that *Life Partners* stands for the proposition that viaticals were not securities, in the following Conclusions of Law:

> 47. Whether or not the sale of viatical was a securities transaction was at issue in the federal case *Securities & Exchange Commission v. Life Partners*, 87 F.3d 536 (D.C. Cir.) reh'g denied, 102 F.3d 587 (D.C. Cir. 1996). The *Life Partners* case is distinguishable from the case at bar because in *Life Partners* the investors had a direct contractual relationship with the insurance companies and the scheme did not include an offer of monthly payments or a guaranteed return if a policy did not mature.
>
> 48. The emerging trend in state courts is to reject *Life Partners*. For instance, in Colorado, *Joseph v. Viatical Management, LLC*, 55 P.3d 264 (Colo. App. 2002); in Maryland, *First Penn-Pacific Life Insurance Company v. William Evans, Chartered,* 200 F.R.D. 532 (D. Md. 2001); in Arizona, *Siporin v. Carrington*, 23 P.3d 92 (Ariz. App. Div. 1 2001. These courts have found that the sale of interests in a trust for interests in viaticated life insurance policies amounts to the sale of investment contracts and thus a securities transaction regulated by state laws.

The Department adopted the Recommended Order and the ALJ's conclusions that insurance agent Denton was guilty of selling viatical insurance benefits participation agreements that were unregistered securities. The Department's Final Order was affirmed without opinion in *Denton v. Office of Fin. Regulation*, 869 So.2d 569 (Fla. 5th DCA 2004).

The trend in rejecting *Life Partners* continued. In the Department's Final Order in *Kline*, the Department found that the Respondent's reliance on *Life Partners* for the proposition that viaticals are not securities was misplaced, citing *Kligfeld.* The Order stated that:

> "Secondly, the *Life Partners* case stands alone in isolation from other, similar cases, and has been roundly criticized for its incorrectness by courts that expressly declined to follow it. *See, e.g., Siporin v. Carrington*, 23 P.3d 92 (Ariz. App. Dive. 1, 2001); *Wuliger v. Christie*, 310 F.Supp.2d 897 (N.D. Ohio 2004);

Reiswig v. Dept. of Corp. for the State of California, 50 Cal. Rptr. 3d 386 (Cal. 4th DCA 2006; *Poyser v. Flora*, 780 N.E.2d 1191, Ind. App. 2003); *SEC v. Mutual Benefits Corporation*, 323 F. Supp.2d (S.D. Fla. 2004); and *SEC v. ETS Payphones, Inc.*, 300 F.3d 1281 (11th Cir. 2002); *Life Partners*, therefore is neither persuasive nor controlling over contrary Florida case law in this regard.

As noted above in rejecting Respondent's Exception 1, there was no confusion within the Department of Banking and Finance or its successors as to whether viaticals were investments that had to be registered as securities in accordance with Chapter 517, Florida Statutes, at the time Mr. McCloskey sold the viaticals at issue in this case.

Respondent is using Exception Number 2 to re-argue his position that Petitioner did not prove that the viaticals offered by Mutual Benefits Corporation were investment contracts. Respondent has not demonstrated that the ALJ's conclusions are incorrect. Since this issue was addressed above in response to Respondent's Exception Number 1 and since the ALJ's Conclusions of Law in paragraphs 38 and 39 are undeniably correct, Respondent's Exceptions to paragraphs 38 and 39 are rejected.

3. Respondent's Exception Number 3 is to paragraph 44 of the ALJ's Conclusions of Law. In this paragraph, the ALJ notes that several amendments were made in Chapter 517, Florida Statutes, relating to viaticals in 2005. She also concluded that these amendments "were a clarification of existing law that a viatical was a security." The Respondent argues that the ALJ "apparently ignored evidence before her presented, *inter-alia*, through the Respondent's three (3) Motions for Official Recognition that demonstrated the 2005 amendments to Chapter 517 constituted a substantive change in Florida law as it related to the manner in which viaticals would be regulated from that point forward." First of all, Respondent again is simply arguing that viatical settlement purchase agreements were not securities that had to be registered with the Florida Department of Banking and Finance, and its successors, and therefore Respondent did

not have to be registered with the Department in order to sell securities in 2003 and 2004, contrary to the conclusions of the ALJ. The documents that were the subject of the three motions are claimed by Respondent as evidence that the 2005 amendments constituted substantive changes to the regulation of viaticals and that this proves that viaticals were not securities and did not have to be registered as such in 2003 and 2004. Those issues have been thoroughly discussed in rejecting Respondent's Exceptions 1 and 2. Furthermore, those issues are the essential facts at issue in the Respondent's defense. Judicial notice may be taken of matters that are commonly known, but may not be used to dispense with proof of essential facts that are not judicially cognizable. *McDaniels v. State*, 388 So.2d 259 (Fla. 5th DCA 1980). Judicial notice has yet to be extended to fill the vacuum created by the failure of a party to prove an essential fact. *Moore v. Choctawhatchee Elec. Co-op Inc.*, 196 So.2d 788 (Fla. 1st DCA 1967). The documents submitted in the Respondent's Motions consisted of two legislative staff reports and a brochure about viatical settlement agreements published by the Department of Financial Services. The contents of these documents simply do not support a conclusion that as a matter of law the MBC viatical settlement agreements written in 2003 and 2004 by the Respondent were not securities that were required to be registered with Florida's securities regulator.

In our justice system, the practice of taking judicial notice of adjudicative facts should be exercised with great caution. *Makos v. Prince*, 64 So.2d 670, 673 (Fla. 1953). See also *Maradie v. Maradie*, 680 So.2d 538 (Fla. 1st DCA 1996). Thus, historically, "judicial notice applies to self-evident truths that no reasonable person could question, truisms that approach platitudes or banalities." *Hardy v. Johns-Manville Sales Corp.,* 681 F.2d 334, 347-48 (5th Cir.1982).

When the concept of judicial notice was legislatively adopted in the Florida Evidence Code, Chapter 90, Florida Statutes, this historic caution was codified. Thus, Section 90.202,

Florida Statutes permits a court to take judicial notice of only a limited number of matters. Only Subsection 90.202(11), dealing with generally known facts, and Subsection 90.202(12), dealing with indisputable facts, could arguably provide a basis for the judicial notice in the instant case.

To fulfill the requirements for judicial notice under Subsection 90.202(12), Florida Statutes, the facts sought to be noticed must not be subject to dispute "because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned." Obviously, the Respondent is attempting to use the contents of these documents as proof of a position that directly conflicts with the Department's position. Thus, judicial notice of the contents of the three documents would not be appropriate under Subsection 90.202(12), Florida Statutes.

Turning to Subsection 90.202(11), to fulfill the requirements of this provision the noticed facts must not be subject to dispute "because they are generally known within the territorial jurisdiction of the court." This subsection is recognized to be a codification of the common law pre-dating the adoption of Florida's Evidence Code under which "Florida courts have taken judicial notice of facts which are 'open and notorious', involve 'common notoriety' or are 'commonly known'." Ehrhardt, *Florida Evidence* § 202.11, at 51 (footnotes omitted). *See also, Makos, supra* (The matter judicially noticed must be of common and general knowledge. Moreover, it must be authoritatively settled and free from doubt or uncertainty.). The Respondent's judicially-noticed documents in the instant case are inappropriate subjects for judicial notice under Subsection 90.202(11), Florida Statutes, because, while the documents themselves are in the public domain and may be known generally within the jurisdiction, they contain numerous statements and conclusions that are not "fact[s]" that are "generally known" within the meaning of the statute.

A review of one of the documents - The Florida Senate, Interim Project Report 2004-111, The Viatical Settlement Industry: Does the Current Law Adequately Protect Florida's Consumers – shows conclusively why it is inappropriate for judicial notice of anything more than the fact that the document is fact what it purports to be: a copy of an interim report by the staff of a Senate Committee. The Respondent has cherry-picked parts of the document that support his position while leaving out those that do not. For example, as reported on page 6:

> Although the Office of Financial Institutions and Securities Regulation (OFR regulates security transactions under Florida's Securities law (ch. 517, F.S.), that office also investigates investor complaints as to viatical settlement transactions if the viatical investment in such a transaction meets the criteria of a "security." Under ch. 517, F.S., the definition of a "security" includes an "investment contract," As an investment contract is not defined in statute, Florida has adopted the U. s. Supreme Court's test in *Securities and Exchange Commission v. W. J. Howey Co.* which contains the standards which are used to determine whether a viatical investment is an investment contract, and therefore a security. .... If a viatical investment meets these elements, Florida law requires the registering of such investments as nonexempt investments with the OFR, and full and fair disclosure of all material terms and conditions of the transaction. For example, the sale of an interest in a pool of viaticated insurance policies would constitute the sale of a security, and compliance with the securities law would be required, according to OFR staff.

This paragraph is in complete contradiction to the Respondent's position on this matter but the Respondent wants the ALJ, by taking judicial notice of the document, to conclude that the documents settle the issue in his favor while ignoring the portions of the document that disprove his position. The ALJ was certainly not required to do so.

The same analysis above applies to the other two documents submitted by the Respondent - the senate staff bill analysis on viatical reform legislation adopted by the Florida

Legislature in 2005 and a brochure published by the Department of Financial Services explaining this new law. However, it must also be pointed out that, although the Respondent submitted three motions seeking judicial notice, the ALJ issued two orders on the Respondent's Motions and neither granted judicial notice to the senate staff bill analysis or the DFS brochure. On page 2 of the ALJ's Recommended Order it states that "[o]fficial recognition was taken of matters as set forth in Orders dated January 5, 2012; January 23, 2012; and January 24, 2012. The Orders issued on these dates did not grant judicial notice to the senate staff bill analysis or the DFS brochure.

Finally, Conclusions of Law 39, 40, 42 and 43 support the logical conclusion of the ALJ that the 2005 amendments "were a clarification of existing law that a viatical was a security." The cases cited herein regarding the state of the law relating to viaticals in 2002-2004 further support this conclusion.

The Department rejects Respondent's Exception Number 3 with regard to the 2005 amendments to viatical laws and will address the issue of the recommended penalty below.

RULING ON EXCEPTIONS TO THE RECOMMENDED PENALTY

The Petitioner and Respondent both filed exceptions to the ALJ's recommended penalty. The Respondent did not state with particularity its reasons for excepting to the penalty or cite anything in the record to justify a change in the ALJ's recommendation. The Respondent apparently believes that there should not be any penalty based on his claims that the Department should overrule the ALJ in accordance the exceptions addressed above. Since the Department has rejected all of the exceptions filed by the Respondent, there is no basis on which to totally reject imposition of a penalty. The Respondent has been found guilty of violating two statutory sections.

The Petitioner argues that a more reasonable penalty would be an 18-month suspension of licenses instead of the 6-month recommendation of the ALJ. Based on a review of the complete record, the Department rejects the Petitioner's exception and finds that the recommendation of the ALJ is reasonable.

Therefore, upon careful consideration of the entire record, the submissions of the parties, and being otherwise fully advised in the premises, it is hereby ORDERED:

1. The Findings of Fact of the Administrative Law Judge are adopted in full as the Department's Findings of Fact.

2. The Conclusions of Law of the Administrative Law Judge are adopted in full, except for paragraph 47, as the Department's Conclusions of Law and the Department finds that the Respondent violated Section 626.611(7), Florida Statutes.

3. The Administrative Law Judge's recommendation that the Department enter a Final Order suspending Respondent's license(s) and eligibility for licensure in the State of Florida for a period of six (6) months is approved and accepted as being the appropriate disposition of this case.

ACCORDINGLY, it is ORDERED that:

(a) All licenses and eligibility for licensure of WILLIAM P. McCLOSKEY are hereby SUSPENDED immediately upon issuance of this Final Order for a period of six (6) months. Pursuant to Section 626.651, Florida Statutes, the suspension of WILLIAM P. McCLOSKEY'S licenses and eligibility for licensure is applicable to all licenses and eligibility held by WILLIAM P. McCLOSKEY under the Florida Insurance Code.

(b) Pursuant to Section 626.641(4), Florida Statutes, WILLIAM P. McCLOSKEY shall not engage in or attempt or profess to engage in any transaction or business for which a

license or appointment is required under the Florida Insurance Code or directly or indirectly own, control, or be employed in any manner by any insurance agent or agency during the suspension.

(c) WILLIAM P. McCLOSKEY shall not have the right to apply for and the Department shall not grant another license or appointment under the Florida Insurance Code for six (6) months following the effective date of suspension.

(d) Following the six (6) month suspension, WILLIAM P. McCLOSKEY shall be entitled to file an application for reinstatement of licensure. However, the license of WILLIAM P. McCLOSKEY shall not be reinstated if the circumstance or circumstances for which the license was suspended still exist or are likely to recur, or if WILLIAM P. McCLOSKEY is not otherwise eligible for licensure.

(e) WILLIAM P. McCLOSKEY shall return to the Department of Financial Services, Attention: Bureau of Licensing, 200 East Gaines Street, Tallahassee, Florida 32399-0319, within ten (10) calendar days of the issuance of this order, all licenses issued to WILLIAM P. McCLOSKEY, pursuant to the Florida Insurance Code.

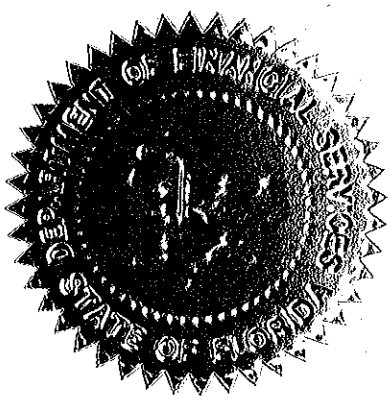
(f) Any person who knowingly transacts insurance or otherwise engages in insurance activities in this state without a license, or while the license(s) is suspended or revoked, commits a felony of the third degree.

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of the Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Fla.R.App.P. Review proceedings must be instituted by filing a petition or Notice of Appeal with the General Counsel, acting as the agency clerk, at 200 East Gaines Street, Tallahassee, FL 32399-0333, and a copy of

the same and the filing fee with the appropriate District Court of Appeal within thirty (30) days of the rendition of this Order.

DONE and ORDERED this 6th day of July, 2012.



Robert Kneip
Chief of Staff

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