

STATE OF FLORIDA  
PETITIONER OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL  
SERVICES, DIVISION OF  
INSURANCE AGENTS AND AGENCY  
SERVICES,

Petitioner,

Case No. 13-3820PL

vs.

MARTA R. DE LA PAZ,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted by video teleconference at sites in Tallahassee and Miami, Florida, on December 5, 2013, and January 7, 2014, before Administrative Law Judge, Mary Li Creasy.

APPEARANCES

For Petitioner: David J. Busch, Esquire  
Department of Financial Services  
612 Larson Building  
200 East Gaines Street  
Tallahassee, Florida 32399-0333

For Respondent: N. Fraser Schuh, Esquire  
704 Southeast Third Avenue Extension  
Hallandale, Florida 33009

STATEMENT OF THE ISSUES

Whether Respondent acted as an agent for a membership organization, International Water Safety Foundation (IWSF), and

its insurance underwriter, North American Marine (NAM), that had been ordered to cease and desist transacting insurance related business in this state; if so, whether (and what) discipline should be imposed on Respondent's license to transact business as an insurance agent.

PRELIMINARY STATEMENT

On August 27, 2013, the Department of Financial Services, Division of Insurance Agents and Agency Services (Petitioner), filed an Administrative Complaint against Marta R. De La Paz (Respondent). The Administrative Complaint, consisting of one count, alleged a violation of chapter 626, Florida Statutes, and sought revocation of Respondent's Florida insurance agent license, No. A182193 (license).

On or about September 19, 2013, Respondent executed an Election of Proceeding, in which she disputed Petitioner's factual allegations and requested a formal administrative hearing. An Answer to the Administrative Complaint was filed with Petitioner on September 20, 2013. On September 30, 2013, the matter was referred to the Division of Administrative Hearings (DOAH) for further proceedings. The final hearing was scheduled for December 5, 2013. Respondent filed a Request to Reschedule Hearing (Request) on November 27, 2013, which was opposed by Petitioner. The Request was denied by Order filed December 2, 2013.

At the final hearing, on December 5, 2013, Respondent's counsel made an ore tenus motion to postpone the hearing based upon Respondent's unavailability due to her participation in an unrelated criminal trial. The motion was denied. However, with the agreement of both parties, the undersigned ordered that the hearing would go forward but would remain open and another hearing date would be scheduled to take the testimony of Respondent and to permit rebuttal. The second day of hearing occurred as scheduled on January 7, 2014.

During the hearing, Petitioner called the following witnesses: Marlene Suarez, Jorge Saez, Carlos Guzman, Odayls Chiullan, and Matthew Guy. Petitioner's Exhibits 1 through 14 were admitted in evidence on December 4, 2013. Petitioner's Rebuttal Exhibits 1 through 11 were admitted into evidence on January 7, 2014. Respondent testified on her own behalf. Respondent's Exhibits 1 through 15 were admitted.

The final hearing transcripts, consisting of two volumes, were filed on December 27, 2013, and February 12, 2014. Petitioner and Respondent timely filed written post-hearing closing arguments and proposed recommended orders that have been considered in the preparation of this Recommended Order.

Unless otherwise noted, citations to all rule and statutory references refer to the version in effect at the time of the alleged misconduct.

## FINDINGS OF FACT

### A. The Parties

1. Petitioner is the state agency charged with the licensing and regulation of insurance agents in Florida and is responsible for administering the disciplinary provisions of chapter 626, pursuant to section 20.121(2)(g) and (h), Florida Statutes.

2. At all times material to this case, Respondent was a licensed general lines insurance agent in the state of Florida. Respondent also is a director and officer of the Marta De La Paz Agency, Inc. (MDLPA), which she has co-owned with her daughter, Jenny Mondaca Toledo, since 2000.

3. Respondent was a "captive agent" of Allstate Insurance Company (Allstate) for the period of 2000 to 2010. During this time, pursuant to an agreement with Allstate, Respondent could only sell Allstate insurance products. If Allstate did not carry a particular insurance product line, Respondent was allowed to sell the products of other carriers to her clients if the other carrier was approved by Allstate.

### B. The Events Giving Rise to the Recommended Revocation

4. Insurance agents licensed by the State of Florida are only permitted to sell insurance provided by entities which have a "certificate of authority" and which are authorized to sell in Florida. Agents are fiduciaries of the consumers who use their

services. Sales of insurance through unauthorized entities place the consumer at risk because unauthorized entities do not participate in the Florida Insurance Guarantee Fund (FIGA), a fund maintained by the State to protect consumers from losses should an authorized insurance carrier become insolvent or unable to pay claims.

5. IWSF is a membership organization which offers various benefits and services to its members, including watercraft insurance through a master policy with NAM. NAM, an unlicensed and unauthorized insurer, through IWSF, solicited Florida consumers to purchase insurance from NAM.

6. On October 15, 2003, the Office of Insurance Regulation issued a cease and desist order (Order) against IWSF and NAM from conducting insurance related activities in Florida, including but not limited to, "transacting any new or renewal insurance business in this state, and from collecting any premiums from Florida insureds." The unlicensed, unauthorized, and, therefore, illegal transaction of insurance by IWSF and NAM was deemed to present an immediate danger to public health, safety, or welfare of Florida residents.

7. On or about April 14, 2009, Carlos Guzman (Guzman), on behalf of himself and his brother-in-law, Jorge Saez (Saez), sought to purchase watercraft insurance for a boat which they co-own. Guzman went to MDLPA and met with employee, Odayls

Chiullan (Chiullan). Chiullan, who has held a 2-20 Florida general lines insurance license for approximately 15 years, worked at MDLPA as an agent for approximately three months during the spring of 2009. Respondent, as the principal agent of MDLPA, had the responsibility to supervise Chiullan during the period she worked for MDLPA.

8. In April 2009, Allstate was not providing watercraft insurance for customers in Florida. To determine which carrier, if any, could provide the insurance sought by Guzman and Saez, Chiullan referred to a list maintained in the office of MDLPA. Chiullan found the name of IWSF on the list and assumed that it was approved by Allstate as a licensed entity with which MDLPA could do business. Chiullan was unaware of the 2003 Order against IWSF and NAM.

9. Chiullan contacted IWSF and secured an insurance price quote for Guzman and Saez. Chiullan arranged for Guzman and Saez to become members of IWSF, thereby enabling their boat to become insured under the master policy of IWSF with NAM for the initial period of May 6, 2009, through May 6, 2010, which was subsequently renewed for an additional year.

10. Chiullan contacted Standard Premium Finance Company (Standard) on behalf of Saez and Guzman to assist them in financing the premium payments for their boat insurance.

11. Respondent was on a cruise and not in contact with Chiullan during the period when Chiullan assisted Saez and Guzman with securing boat insurance or the financing for their premium payments. Although correspondence to and from IWSF and MDLPA was on MDLPA letterhead and fax transmittal sheets, Respondent had no contact with Saez, Guzman, IWSF, or NAM regarding this May 2009 transaction.

12. Respondent became aware of the purchase of insurance from IWSF by Saez and Guzman when she was asked by Chiullan to sign the premium finance agreement with Standard as the owner of MDLPA. That was the full extent of Respondent's connection to this particular transaction which is at issue.

13. Saez and Guzman renewed their policy through MDLPA with IWSF and NAM for the period of May 6, 2010, through May 6, 2011. Saez and Guzman made no claims against the policy or policies in effect from May 6, 2009, through May 6, 2011.

14. Prior to receipt of the Administrative Complaint, Respondent was unaware of the Order against IWSF and NAM. Respondent was also unaware that neither entity was authorized to transact business in Florida. Respondent received no notice of the Order from Petitioner, Allstate, IWSF, NAM, or Standard.

15. While serving as a captive agent for Allstate, Respondent did not receive alerts from Petitioner regarding unauthorized insurers. Although Respondent was aware of her

obligations under Florida to stay apprised of which entities were authorized to issue insurance in Florida, she did so by maintaining a list in MDLPA, provided by Allstate, which she presumed was vetted and approved as state-authorized insurers.

16. In fact, Respondent sold her son, Osmany Mondaca, insurance for his boat through IWSF and NAM for the period of November 26, 2007, through November 26, 2008, and this policy was renewed for two additional years. Respondent also sold boat insurance through IWSF and NAM for the coverage period of June 24, 2010, through June 24, 2011, to her boyfriend for a boat which they co-own.

17. Prior to purchasing insurance through IWSF for her boyfriend and son, Respondent checked with Petitioner regarding the status of IWSF and was told there was no problem. As recently as December 2013, Respondent checked again with Petitioner and was advised there was no problem writing insurance through IWSF and NAM. Respondent credibly testified that, had she known about the Order, she certainly would not have sold policies through IWSF and NAM for a boat she co-owns with her boyfriend or for her son's boat.

18. Although Petitioner offered evidence that it regularly provides updates on its website and in newsletters alerting agents to unauthorized insurers attempting to do business in Florida, including but not limited to alerts about IWSF and NAM,



no evidence was provided that these communications were sent to, received, or reviewed by Respondent or Chiullan. Further, Respondent's testimony, that this information was not available by telephone from Petitioner, was not contradicted.<sup>1/</sup>

CONCLUSIONS OF LAW

19. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 & 120.57, Fla. Stat.

20. This is a disciplinary action by Petitioner in which Petitioner seeks to suspend or revoke Respondent's license as an insurance agent. Petitioner bears the burden of proof to substantiate 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); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

21. As stated by the Florida Supreme Court:

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 lacking in confusion as to the facts in issue. The evidence must be of such a 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.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

22. The Administrative Complaint charges Respondent with violating section 626.611(12), which provides in pertinent part:

The department may in its discretion, deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any 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 . . . licensee, . . . any one or more of the following applicable grounds exist:

\* \* \*

(12) Knowingly aiding, assisting, procuring, advising, or abetting any person in the violation of or to violate a provision of the insurance code or any order or rule of the department, commission, or office.

23. Section 626.734 provides in relevant part that any general lines insurance agent who is an officer, director, or stockholder of an incorporated general lines insurance agency shall remain personally and fully liable and accountable for any wrongful acts, misconduct, or violations of any provisions of this code committed by such licensee or by any person under his or her direct supervision and control while acting on behalf of the corporation.

24. However, in a proceeding to revoke a license, "the licensing body cannot rely solely on wrongdoing or negligence committed by an employee of the licensee; instead, the licensing body must prove that the licensee was at fault somehow for the employee's conduct, due to the licensee's own negligence,

intentional wrongdoing, or lack of due diligence." Bridlewood Group Home v. Ag. for Pers. with Disab., \_\_\_ So. 3d \_\_\_, Case No. 2D13-43 (Fla. 2d DCA December 20, 2013) citing Ag. for Pers. with Disab. v. Help is on the Way, Inc., Case No. 11-1620 (Fla. DOAH Feb. 3, 2012; Fla. APD Apr. 16, 2012); Ganter v. Dep't of Ins., 620 So. 2d 202, 203 (Fla. 1st DCA 1993).

25. Clearly, Respondent did not personally commit the misconduct alleged and she cannot, therefore, be disciplined under the provisions of section 626.611.

26. Respondent, as an officer and director of MDLPA, could have liability for the wrongful actions of Chiullan pursuant to section 626.734, if the actions were due to Respondent's own negligence, intentional wrongdoing, or lack of due diligence.

27. The evidence presented was insufficient to demonstrate that the failure to know about the Order was as a result of Respondent's own negligence, intentional wrongdoing, or lack of diligence. To the contrary, as described above, Respondent contacted Petitioner and reviewed Petitioner's web site on more than one occasion (including at the time of selling insurance through IWSF and NAM to her boyfriend and son) and found no information to suggest that IWSF and NAM were not authorized to provide insurance products in Florida.


28. Consequently, it is concluded that Petitioner failed to establish by clear and convincing evidence that Respondent

has personal liability for the actions of Chiullan pursuant to section 626.734.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Financial Services, Division of Insurance Agents and Agency Services, enter a final order which dismisses the Administrative Complaint filed against Respondent.

DONE AND ENTERED this 28th day of March, 2014, in Tallahassee, Leon County, Florida.



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MARY LI CREASY  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 28th day of March, 2014.

ENDNOTE

<sup>1/</sup> Petitioner offered rebuttal testimony and exhibits that it engaged in some form of communication to insurers with captive agents or those agents regarding unauthorized companies attempting to do business in Florida. However, only one such communication, admitted as Rebuttal Exhibit 6, mentioned IWSF by name or disclosed the fact that IWSF had been prohibited from transacting insurance business in Florida. There is no record

evidence that any of Petitioner's Rebuttal Exhibits 1 through 6 were actually provided to the agent or the agency. Rebuttal Exhibit 7 is a press release regarding the Order, but it was placed online in 2011. Rebuttal Exhibit 8 contained a link to an entry regarding the Order. Rebuttal Exhibit 9 was dated June, 2010, after the renewal of the subject policy. Rebuttal Exhibit 10 was dated March 2011—ten months after the renewal of the policy. Rebuttal Exhibit 11 was released in November 2013—three and one-half years after the issuance of the subject policy. None of the rebuttal exhibits demonstrate whether the agent knew or should have known that IWSF was prohibited from transacting insurance business in Florida, when or how the agent could have known it, and whether she should have known it at any relevant time.

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.