

EVIDENTIARY RULINGS

The Division offered Exhibits A1 through A26; all but A21 through 23 were admitted into evidence. Licensee initially objected to Exhibits A5, A16, and A17, three interview transcripts that he claimed were incomplete, but withdrew the objections on the condition that the digital recordings of those interviews be admitted into evidence as well. Those recordings were identified as Exhibits A21 through 23 and admitted into evidence in advance of my receipt of them. At the end of the hearing, Licensee withdrew his objection to the three transcripts, so the recordings were no longer necessary. Consequently, Exhibits A21 through 23 do not exist.

Licensee offered Exhibit L1, a document purporting to be an affidavit of Jane Cassidy. The Division objected, but I overruled the objection because Licensee had made numerous references to the document in his testimony. However, because it is not notarized, I do not consider it an affidavit, as Licensee claims.

FINDINGS OF FACT

1. Licensee has been a licensed insurance producer in the State of Oregon since July 18, 2005, with a gap in licensure between August 1, 2007 and September 4, 2007. (Ex. A1). At all times relevant to this proceeding, he was an agent of Bankers Life (BL), in its Eugene office. (Test. of Licensee).

Marjory Brown

2. Marjory Brown was 80 years old at the time she purchased an annuity through Licensee. Licensee came to see her because he wanted to sell her a long term care policy. In the meeting, Licensee asked Brown if she would be interested in purchasing a BL annuity that would make more money for her than the Standard Insurance annuity she already had. (Ex. A2 at 3). Licensee told Brown that the return on the BL product could rise as high as 16 percent, and was protected from ever going below a 3.25 percent return on her investment. He indicated that she could not lose on the investment. (Test. of Licensee). Brown believed Licensee promised her an interest rate of at least five percent. (Ex. A5 at 12).

3. Licensee filled out a Bankers Life suitability questionnaire with Brown, noting she had savings of \$3,500, real estate worth \$300,000, the Standard annuity worth \$24,000, a certificate of deposit (CD) worth \$15,000, and monthly income of \$1442. The purpose for the new annuity was to provide money for "future expenditures." (Ex. A2 at 24). Brown was concerned about having yearly income to pay the property taxes on her home. Licensee believed her yearly property taxes were \$2200. (Ex. A16 at 15). Brown told Division investigators that the taxes were more than twice that amount. (Ex. A5 at 19).²

² Brown stated that the ten percent yearly withdrawal of \$2400 "would pay half my property taxes." (Ex. A5 at 19).

4. Brown paid a single premium of \$22,400.33 for the annuity, and the date of issuance was March 23, 2007. Income from the annuity was to begin on March 23, 2017, ten years later. (Ex. A2). If Brown needed access to those funds in the first few years of the new annuity, she would lose money because of surrender penalties. (Ex. A2). Her Standard annuity was fully matured, and she would have had no penalty upon withdrawal of all or a portion of the funds. She was earning 3.56 percent interest, with an increase to 3.6 on the following January 1. (Ex. A4).

5. The product Licensee sold to Brown included substantial penalties for early withdrawal, and did not guarantee 3.25 percent interest through the life of the annuity, as Licensee believed. (Ex. A14). Licensee believed that a client could not lose money on the annuities because of the guarantee, but was not thinking in terms of the costs of early surrender. (Test. of Licensee). The annuities are complex contracts by which the client can lose money for early withdrawal and will not "break even" on the value of the annuity for several years. (Ex. A19). The annuities tied up approximately 70 percent of Brown's liquid assets. (Test. of Hardiman, White).

6. Brown purchased a second annuity through Licensee, using \$10,500 as a one time premium. The policy issued on May 7, 2007, with a maturity date of May 7, 2026. (Ex. A3). Brown's daughter, Linda, was made the beneficiary of the annuity because Brown wanted Linda to receive those funds without going through probate. Licensee went through the suitability criteria with Brown and Linda, who was also present, but did not ask about Brown's monthly expenses. (Test. of Linda Brown). Brown later decided that she did not want this second annuity and was successful in getting her money back. (Ex. A5).

7. Brown died some time between 2007 and the hearing in 2010, and her heirs received the death benefit of the initial annuity. (Test. of Linda Brown).

Adela Haines

8. Adela Haines was 79 years old when she entered into an equity-indexed annuity with BL, with Licensee as the producer. Licensee had attempted to qualify Haines for long term health care insurance, but she did not qualify. He then offered her a chance, he said, to make more money with an annuity that could earn up to 16 percent and never go below three percent. (Ex. A9). Haines paid a single premium of \$30,235.31. The date of issue of the annuity was June 29, 2007, and the maturity date was to be June 29, 2027. (Ex. A6 at 2). For the first five years of the annuity, the surrender value was less than the initial premium. (*Id.* at 3). Licensee was incorrect about the guarantee over the life of the annuity. (Ex. A14).

9. Licensee went over the application with Haines on May 30, 2007. He noted that she had savings of \$4,000, a house worth \$250,000, life insurance worth \$3,000, CDs worth \$65,000, and an IRA worth \$29,000. Her purpose for switching from her existing IRA, according to Licensee's suitability record, was "initial return." (Ex. A7)

at 8). Another agent, Jane Cassidy, was with Licensee when he sold the annuity to Haines. (Ex. L1; Test. of Licensee).

10. Haines' previous IRA was with Life Investors. It had been issued on April 24, 1997 and had a cash surrender value, without penalties, of \$30,035.19. (Ex. A8). The BL product was similar, but had surrender penalties and a commission that affected the value of the annuity in the first years. (Ex. A6). The Insurance Division views a lateral move from one product to a similar one, where the client gains nothing by the transfer and is less able to access her funds because of increased costs, to be unsuitable. The practice of reselling the same type of policy, with no appreciable difference other than a new commission for the producer, is called "churning." (Test. of Hardiman).

11. On October 14, 2008, Teresa Haines (the client's daughter) filed a complaint with the Division against BL and Licensee. She requested that the annuity transaction be reversed. (Ex. A9). Adela Haines did not understand that it would take six years for her money to break even on the BL annuity, or that she would have penalties for withdrawing her funds. (Test. of Teresa Haines). On November 25, 2008, BL agreed to reverse the transaction and refunded Haines' money. (Ex. A10).

12. Haines lost the interest income she would have earned on the Life Investors' annuity during the time she had invested it with BL. (Test. of Flores, Hardiman).

Doris Hale

13. Doris Hale was 77 years old at the time she entered into an annuity with BL, with Licensee as the producer. She submitted a single premium of \$23,060.48. The policy was issued on July 10, 2008, with a maturity date of July 10, 2030. (Ex. A11).

14. Licensee had visited Hale on several occasions, attempting to sell a long term care policy to her. He helped the son of one of her friends to find a job. When Hale did not qualify for the policy because of her health condition, she was initially grateful enough for Licensee's other help to agree to purchase the annuity. (Test. of Hale).

15. Licensee did a suitability evaluation on Hale, noting she had savings of \$6,000, a house worth \$230,000, mutual funds of \$24,000, life insurance of \$2,000, stocks worth \$14,700, and CDs worth \$15,000. He indicated that the reason for investment was "safety." (Ex. A12). Licensee told Hale the earnings would never drop below 3.25 percent for the life of the annuity, but she did not understand that the surrender value in the first few years would be less than what she invested. (Test. of Hale). Licensee's guarantee statement was incorrect. (Ex. A14). The purchase of the annuity tied up more than 50 percent of Hale's liquid assets. (Test. of Hardiman).

16. After reading an article about BL in the Eugene Register-Guard, Hale contacted the consumer advocate's office at the Division because she was "uncomfortable" with the annuity she had purchased. The advocate's office asked her to

write up her experiences and provide a copy to them. On November 10, 2008, she filed a complaint against Licensee and BL. (Ex. A13).

17. On December 15, 2008, BL voided the annuity transaction and returned Hale's money to her. (Ex. A14).

18. After investigating the three cases, and others, the Division decided to suspend Licensee's producer license for a period of 120 days for violating the suitability rule. On November 19, 2009, the Division sent an Amended Notice of Proposed Action to Licensee. (Doc. P1). Licensee timely requested a hearing on the notice.

CONCLUSION OF LAW

Licensee's insurance producer license should be suspended for violation of the "Suitability Rule" when selling annuities to certain senior citizens.

OPINION

The Insurance Division alleges that Licensee repeatedly violated a portion of the Insurance Code known as the "suitability rule" in his dealings with three clients: Brown, Haines, and Hale. As the proponent alleging such violations, the Division has the burden of producing evidence to support its allegations. ORS 183.450(2). Absent a different standard set by statute, the burden is one of preponderance of the evidence. *Metcalf v. AFSD*, 65 Or App 761, 765 (1983). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

In this case, the Division has carried its burden of showing that Licensee violated the suitability rule in all three cases.

The Suitability Rule

The suitability rule governs what a producer must do to determine whether a product is appropriate for a client. The rule states:

A person may not recommend to a consumer the purchase, sale or replacement of a life insurance policy or annuity, or any rider, endorsement or amendment to the policy or annuity, without reasonable grounds to believe that the recommendation or transaction is not unsuitable for the consumer based upon reasonable inquiry concerning the consumer's insurance objectives, financial situation and needs, age and other relevant information known by the person. For the purpose of this rule, when a person recommends a group life insurance policy or annuity, "consumer" refers to the intended group policyholder.

OAR 836-080-0090 (emphasis added).

The Division interprets the suitability rule to require a producer to do two things. First, he must make a reasonable inquiry into relevant factors to determine whether the product is the correct one for the client. Second, he must reasonably believe the product is suitable—that is, that it meets the requirements of the rule.

Here, Licensee made some inquiry into the needs of each client, but it was not a reasonable inquiry. The record also shows that Licensee believed the products were suitable for the clients. However, that belief was not reasonable in these cases.

General Comments. The evidence shows that Licensee offered unsuitable products to the three clients whose evidence was presented in this case. Licensee's transgressions, however, came mostly from his incorrect knowledge of the BL product. Whether that arose from improper training by BL or just a misreading and misunderstanding of the terms of the annuities, the guarantees he made to his clients were erroneous. He promised an interest rate through the life of the annuity that was not part of the contract. He told clients they could not lose money on the investment, failing to recognize and mention that the surrender value of the policy would not "break even" for a period of several years. It is primarily this incorrect product knowledge that, as will be seen, made each of the offers of an annuity unreasonable in this case.

Brown. Marjory Brown purchased two annuities from Licensee, one of which she kept and the other she voided. Although Licensee believed he was providing her a product that would meet her needs, the two annuities sold to Brown tied up more than 70 percent of her liquid assets. (Test. of Hardiman, White). Moreover, the larger of the two annuities was similar in size to the one Brown purchased, the only difference being the commission Licensee would receive and the hope of a better return. In fact, it was a worse investment in the first few years, because Brown would have been required to pay surrender penalties had she needed to remove the funds from the annuity.

In Brown's case, it was not reasonable for Licensee to recommend two annuities that tied up such a large percentage of Brown's assets. He asked Brown about her assets, but did not question her about her expenses. His knowledge of the product was incomplete because he guaranteed certain interest rates that were not actually guaranteed under the policy. His inquiry was incomplete, and his belief that the product was suitable was based on incomplete information. The product was, therefore, unsuitable.

Haines. Of the three complainants, Adela Haines was in the best financial position to enter into one of Licensee's annuities. As even Mr. Hardiman admitted on the stand, the suitability question is a closer one because she had several assets that remained liquid and were unaffected by the BL annuity. Licensee's explanations of why he felt the product was suitable for her were reasonable.

However, as with Brown, Licensee sold essentially the same product to Haines that she already had. The only differences were the commission and the potential, as Licensee understood it, for a better return. In the short run, however, the surrender

charges made the product a worse choice than what Haines already had. (Test. of Hardiman). Although the record in this case does not show that Licensee was regularly involved in “churning” business, there does not seem to be any benefit to anyone in the Haines transaction, except to Licensee.

Hale. Doris Hale’s case, like Brown’s, involved a tying up of liquid assets that far exceeded a reasonable percentage. The Division contends that Licensee failed to ask enough questions of Hale, and that the product she received put her in worse position (compared to her old HDVest policy). I agree.

Licensee argues, and the record supports, that Hale is a “letter writer” who was may have filed her complaint because she read the Register-Guard article about BL and about Licensee. However, regardless of the reason Hale filed her complaint, the Division found—and the evidence establishes—that Licensee violated the suitability rule when he sold her an annuity.

In Hale’s case, Licensee’s suitability questioning was incomplete, and his belief that the product was right for her was unreasonable.

The Sanction

Based upon the three violations of the suitability rule, the Division seeks to suspend Licensee for a period of 120 days. The sanction is appropriate under the circumstances, with one caveat.

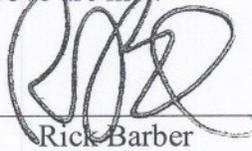
Licensee testified that he was told he was informally suspended by a Division representative (Mitch Curzon), and voluntarily did no insurance work for the period of one month as a result.³ If Licensee has provided sufficient evidence to the Division to show that he voluntarily served a one month suspension at Mr. Curzon’s request, the Division should give him credit for that period of suspension and reduce the suspension accordingly.

³ Licensee’s license history shows a gap of approximately one month in August 2007. It is unclear if this is the period in question.

PROPOSED ORDER

I propose that the Division issue the following order finding:

That the Notice of Proposed Action be AFFIRMED, with modification of the time of suspension if the criteria noted above are met.



Rick Barber
Administrative Law Judge

Notice of Right to File Exception to Proposed Order

If the proposed order is adverse to a party, then the party has the right to file written exceptions to the order and present written argument concerning those exceptions pursuant to ORS 183.460. A party may file the exceptions and argument by sending them to the Insurance Division by delivering them to the Labor and Industries Building, 350 Winter Street NE, Room 440 (4th Floor), Salem, Oregon; or mailing them to P.O. Box 14480, Salem, Oregon 97309-0405; or faxing them to 503-378-4351; or e-mailing them to mitchel.d.curzon@state.or.us. The Insurance Division must receive the exceptions and argument within 30 days from the date this order was sent to the party.

CERTIFICATE OF SERVICE

On 25th day of August 2010, I mailed the foregoing Proposed Order in Reference No. **0906005**.

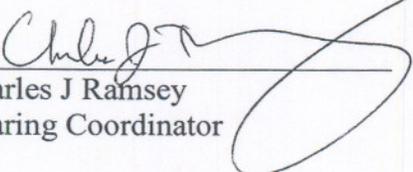
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