BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION

In the Matter of:	)	
	)	
JAMES S. GEORGEN, Licensee	)	**PROPOSED ORDER**
	)	
	)	Case No. INS 04-10-006
	)	

HISTORY OF THE CASE

The Insurance Division of the Department of Consumer and Business Services (Department) issued a Notice of Proposed Action to James S. Georgen (Licensee) on October 25, 2004. The Notice proposed to revoke Licensee's Oregon individual resident insurance agent license and to assess a civil penalty of $8,550. Licensee timely requested a hearing. His request was referred to the Office of Administrative Hearings (OAH) on November 10, 2004.

A hearing was held on February 8, 2005, at the OAH office in Salem, Oregon, and conducted by Administrative Law Judge Lawrence S. Smith. Licensee did not appear, but was represented by his attorney, Andrew Ositis. The Department was represented by Assistant Attorney General Kathleen Dahlin, who called two witnesses—complainant Douglas Berwick and David Weiss, Enforcement Officer for the Division of Finance and Corporate Securities. The hearing record was closed that day.

ISSUES

1. Whether Licensee's limited securities license was revoked and if so, whether dishonesty, fraud or deception was involved.

2. Whether Licensee used fraudulent, coercive or dishonest practices or demonstrated untrustworthiness or financial responsibility in his business conduct.

3. Whether Licensee failed to notify Department's director of his use of an assumed business name.

EVIDENTIARY RULINGS

Exhibits A1 through A10 and R1 through R3 were admitted and considered. Licensee's objection to Exhibit A2 based on hearsay is overruled. The Findings of Fact and Conclusions of Law in the Order to Cease and Desist (Ex. A2) and hearsay portions of Weiss's testimony were supported by statements from Licensee and his admission that

the facts in the Order to Cease and Desist are true and correct[1] and the lack of rebuttal evidence. This evidence is reliable and persuasive. It is the type reasonably prudent persons would rely upon in conduct of their serious affairs and are admitted pursuant to ORS 183.450(1).

FINDINGS OF FACT

1. The Insurance Division of the Department of Consumer and Business Services (Department) is the state agency responsible for licensing sellers of life and resident insurance in Oregon. Licensee has had an Oregon individual resident insurance agent license from January 28, 1981 until January 17, 1990, and from January 31, 1990, to the present. His current address of record with the Department is in Lake Oswego, Oregon. He has been a registered agent in Oregon to sell life insurance for various companies. (Ex. A1.) He also holds a license to sell life insurance and variable annuity contracts in California. (Ex. R3.)

2. In 1992, Licensee obtained a limited securities license (Series 6 license) from the Oregon Division of Finance and Corporate Securities of the Department of Consumer and Business Services. The license authorized him to sell only mutual funds or variable annuities. As part of the licensing test, he was advised he could not sell securities, including investment contracts, and could not sell securities that were not registered with the Oregon Division of Finance and Corporate Securities. (Test. of Weiss.)

3. Licensee's limited securities license (Series 6 license) was revoked by the Oregon Division of Finance and Corporate Securities on December 18, 2003, in an Order to Cease and Desist, Denying Exemptions, Revoking Licensure, and Assessing Civil Penalties and Consent to Entry of Order (Order to Cease and Desist). The Order contained Conclusions, supported by Findings of Fact, that Licensee offered and sold unregistered securities without a license to do so and that he made misrepresentations or omissions of material fact while doing so. (NOTE: The evidence supporting these findings is below, separated by each security.) During these offers and sales, Licensee's business address was in southwest Portland, Oregon. With the Order to Cease and Desist, Licensee signed a Consent to Entry of Order, which said in one part, "[T]hat I admit that the factual allegations stated herein [the Order to Cease and Desist] are true and correct;" (Ex. A2 at 21.) The Order to Cease and Desist says in the introduction, "NOW THEREFORE, the Director hereby issues the following Findings of Fact and Conclusions of Law, which [Licensee] neither admits nor denies, and issues the following Order, to which [Licensee] has consented, as evidenced by the signature of [Licensee] in the Consent to Entry of Order attached hereto." (Ex. A2 at 2.)

[1] Licensee argued that his signing the admission was not an admission because the first part of the Order to Cease and Desist says: "NOW THEREFORE, the Director hereby issues the following Findings of Fact and Conclusions of Law, which [Licensee] neither admits nor denies, and issues the following Order, to which [Licensee] has consented, as evidenced by the signature of [Licensee] in the Consent to Entry of Order attached hereto." (Ex. A2, set out in Finding of Fact 3.) This part says he neither admitted nor denied the facts, but he admitted them in the Consent to Entry of Order, so he admitted them.

4. **ETS Payphones Program**. Licensee became a sales agent for ETS, a Georgia company, to sell payphones. He contacted his life insurance customers in Oregon, who were usually retired and 60 years old or older, to sell them payphones. The offer was for the investor to pay $7,000 for a payphone in Georgia, a price considerably above the retail cost, with the expectation that the investor would lease the phone back to ETS, who would manage it and pay the investor $75 per month. Licensee told potential investors that they would receive a good return of 14 percent annual return on their investment. He also told them that they would receive their total investment back after the five or 10-year lease contract ended. Such a sale is described as an "investment contract" and a sale of a security by the United States Supreme Court in *SEC v. Edwards*, 540 U.S. 389, 124 S.Ct. (2004). Such sale of payphones by ETS has never been registered as a sale of securities in Oregon. (Ex. A2; Test. of Weiss.)

5. Licensee told potential investors that the monthly payments were guaranteed and that their investment was safe because their principal would be returned. He did not provide financial statements for ETS or the backgrounds of its executives or provide written information regarding the risks. All such information is required by Oregon securities law when offering securities for sale. Major risks not revealed were the substantial drop in income for payphones due to the increasing use of cell phones and the high risk of the investments due to the lack of significant communications experience of ETS's management. ETS's income from the payphones was not enough to cover the monthly payments to its investors and it had to rely on future sales to make the payments, which was in effect a Ponzi scheme. (Ex. A2; Test. of Weiss.)

6. Licensee sold 177 payphones to 12 Oregonians for a total investment of $1,163,500. One investor purchased 51 payphones at a cost of $344,250, mortgaging his house to do so. ETS collapsed into bankruptcy and paid nothing to the Oregon investors or returned their capital. (Ex. A2; Test. of Weiss.)

7. **GBS Funding**. Licensee co-founded this company with two partners to sell investments in what he called "high yield trading programs." These programs were investment contracts or securities that have never been registered as securities for sale in Oregon. These programs were to amass investments so that individual investors together could buy discount loans held by large offshore banks. Licensee promised potential investors that he could double their investment in a year. Investors were required to sign confidentiality agreements that prohibited them from revealing details to others, even though they received only sketchy and vague information that was not proprietary. The purpose of the confidential agreement was to discourage investors from contacting governmental regulators. (Ex. A2; Test. of Weiss.)

8. During the last months of 1999, Licensee solicited investments in the program from his life insurance clients in Oregon. He told them it was a trading program and sold 10 investments of $10,000 each, earning a commission of two percent. He provided few specifics to the investors besides the promise of doubling their money within a year. He did not provide financial statements for GBS Funding or the backgrounds of him and his

partners or provide written information regarding the risks. All such information is required by Oregon securities law when offering securities for sale. The investment was highly risky, based on the lack of details. On November 6, 2000, Licensee wrote to the those who had invested, saying "The risk with facilitators who aggregate funds . . . [is] that the funds aren't always returned promptly, if at all." Oregon investors in GBS have received no income or return of their principal. (Ex. A2; Test. of Weiss.)

9. **Douglas Network Enterprises**. Licensee became a sales agent for Douglas Network Enterprises (Douglas), a California company, to sell money voucher processors (MVPs). MVPs are like ATMs, except they give credit for purchases only at a particular store. Merchants like MVPs because customers can only use the vouchers at their stores. He solicited investments from his life insurance customers in Oregon. The offer was for the investor to pay $4,000 for an MVP, a price considerably above the retail cost, with the expectation that the investor would lease the MVP back to Douglas, who would manage it and pay the investor $53.40 per month. Licensee described this monthly payment as a good return on the investment. Licensee also told potential investors that Douglas would return the investor's investment at the end of the three-year contract. Such sale of MVPs by Douglas was a sale of an investment contract or security, which has never been registered in Oregon. (Ex. A2; Test. of Weiss.)

10. Licensee told potential investors that the monthly payments were guaranteed and that their investment was safe because they would get their principal back. He did not provide financial statements for Douglas or the backgrounds of its executives or provide written information regarding the risks. All such information is required by Oregon securities law when offering securities for sale. The investment was highly risky as a new enterprise. Douglas's income from the MVPs was not enough to make the monthly payments and it had to rely on future sales to make the payments, which was in effect a Ponzi scheme. (Ex. A2; Test. of Weiss.)

11. Licensee sold nine MVPs to one Oregon resident, for a total investment of $36,000. Douglas remains in business, but is the subject of state and federal investigations. The Oregon resident who bought the MVPs from Licensee has received no income or return of principal. (Ex. A2; Test. of Weiss.)

12. **Mobile Cash**. Licensee became a sales agent for Mobile Cash, a Nevada company, to sell hand-held credit card processors. He solicited sales from his life insurance customers in Oregon. The offer was for the investor to pay $4,500 for the credit card processor, a price considerably above the retail cost, and lease the processor back to Mobile Cash, who would manage it and pay the investor the first $60 in fees collected each month by the processor and 50 percent of the rest of the fees. Licensee told potential investors that it was a safe program for someone near retirement, with a good return because the processors would be placed in lucrative areas. Licensee also told them that their initial investment would be returned. Sale of credit card processors by Mobile Cash was a sale of an investment contract or security, which has never been registered in Oregon. (Ex. A2; Test. of Weiss.)

13. Licensee did not provide financial statements for Mobile Cash or the backgrounds of its executives or provide written information regarding the risks. All such information is required by Oregon securities law when offering securities for sale. One major risk not revealed was the lack of experience of Mobile Cash's managers. (Ex. A2; Test. of Weiss.)

14. Licensee sold no shares, but his partner did. Mobile Cash failed, and its investors lost their money. (Ex. A2; Test. of Weiss.)

15. **Liberte` Capital**. Licensee became a sales agent for Liberte` Capital (Liberte`), an Ohio company, to sell investments in "viatical" policies. The investment was buying life insurance policies of terminally ill patients at a discounted rate and earning income when the patients died or from the sale of the policies to a secondary market. Licensee responded to an ad from Liberte` Capital in 1997 and solicited investments in Liberte` from his life insurance customers in Oregon. Licensee told potential investors that they would receive their principal plus 24 to 40 percent return per year for up to two years, when either the individual died or the policy was sold to a secondary market. He assured them that Liberte` would pay the monthly premiums for the purchased policies and that there was little risk with high "fixed" returns. Sales of Liberte`s life insurance policies is a sale of a security that has never been registered in Oregon. (Ex. A2; Test. of Weiss.)

16. Licensee only told potential investors what he wanted them to know and did not provide Liberte`s financial statements or the backgrounds of its executives or provide written information regarding the risks. All such information is required by Oregon securities law when offering securities for sale. The major risks not revealed were the facts that the insured individuals were living longer, that there were no secondary markets for the life insurance policies, and that Liberte` did not have enough money to pay the monthly premiums, so the policies were cancelled. (Ex. A2; Test. of Weiss.)

17. Licensee raised $96,000 from such sales to three Oregon residents. These investors lost their investment and received no payments because Liberte` could not find secondary markets and could not pay the premiums. Liberte` has been shut down by Ohio and federal regulators. (Ex. A2; Test. of Weiss.)

18. In early November 2003, Licensee met with an Oregon resident in his home to sell him a new annuity from Midland National out of Iowa. Licensee promised a much better return than the annuity the resident had sold himself before he retired as a life insurance salesperson. Licensee said the annuity from Midland was not approved by the Department for sale in Oregon, but the resident could apply and then sign the papers in California, where Midland was approved and where Licensee was also licensed as an insurance salesperson. The resident said he was not interested in going to California. Licensee said that the Oregon resident did not have to go to California because he had a bucket of California soil in his office in which the Oregon resident could stand while signing. The Oregon resident declined the offer and filed a complaint against Licensee with the Department. (Ex. A3.)

19. As part of his offer to the resident, Licensee faxed over a brochure from Midland with his card that gave his company name as "Lifespan Financial Company." (Ex. A3 at 3.) Licensee has never notified the Department that he was using this name. (Ex. A1.)

20. On November 25, 2003, Licensee sold a Midland annuity to himself and his wife. He signed the application in Weed, California, after traveling there from his home in Oregon. (Ex. A4 at 6.) The cover letter on the Midland policy states, "Mississippi, Washington and Oregon have regulations that severely limit sales to their residents that take place in another state. Our guideline is as follows: the product being sold must be approved in the client's resident state, regardless of where it is solicited." (Ex. A6.) He received a commission of $8,550 from Midland for the sale. (Ex. A4 at 4 and Ex. A7 at 2-3.)

CONCLUSIONS OF LAW

1. Licensee's limited securities license was revoked, and dishonesty and deception were involved.

2. Licensee used dishonest practices and demonstrated untrustworthiness and financial irresponsibility in his business conduct.

3. Licensee failed to notify the Department of his use of an assumed business name.

4. Licensee violated insurance law and is liable for a civil penalty of $8,550.

OPINION

1. Revocation based on revocation of another license

The Department may place a licensee on probation or suspend or revoke a licensee's license for the various grounds listed in ORS 744.074(1).[2] One ground is:

[2] ORS 744.074 states in relevant part:

> **Authority of director to place licensee on probation or to suspend, revoke or refuse to issue or renew license.** (1) The Director of the Department of Consumer and Business Services may place a licensee on probation or suspend, revoke or refuse to issue or renew an insurance producer license and may take other actions authorized by the Insurance Code in lieu thereof or in addition thereto, for any one or more of the following causes:
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> * * *
>
> (h) Using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere.
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> * * *

> (j) Cancellation, revocation, suspension or refusal to renew by any state or federal agency, by a Canadian province or by the government of Mexico of the authority to practice law or to practice under any other regulatory authority if the cancellation, revocation, suspension or refusal to renew was related to the business of an adjuster or an insurance producer or consultant, or if dishonesty, fraud or deception was involved. The record of the cancellation, revocation, suspension or refusal to renew shall be conclusive evidence of the action taken.

Licensee's limited securities license was revoked by the Oregon Division of Finance and Corporate Securities, a state agency. Licensee's license to be an insurance agent will be revoked if this revocation of his limited securities license was related to his business as an insurance seller or if dishonesty, fraud or deception was involved. The Department has established both grounds. The revocation of Licensee's limited securities license was related to his business as an insurance seller because he contacted his insurance clients when trying to sell them very poor investments not registered in Oregon for sale. The Department has also established by the facts in the Order to Cease and Desist and Weiss's credible testimony that Licensee was dishonest and deceptive by:

> Offering and selling securities in Oregon that were not registered in the state.
> Offering and selling securities in Oregon that he was not licensed to sell.
> Making numerous dishonest or deceptive representations regarding the projected earnings and safety of the investments.

Licensee must have known he was offering and selling the poor investments, which they turned out to be. As clearly outlined in the Findings of Fact, he was dishonest and deceptive in his solicitations and sales of these securities.

Licensee argues that the revocation of separate licenses by the Insurance Division and by the Division of Finance and Corporate Securities, based on same set of circumstances, was double jeopardy because both divisions are part of the Department of Consumer and Business Services per *State v. Middlestadt*, 82 Or App 366 (1986). The court in *Middlestadt* held that the administrative suspension of a driver's license did not preclude the criminal court from also suspending the driver's license. This case actually supports the Department in this case. Two separate licenses are involved in these cases, and the Department has the authority to proceed against each license, based on the same

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> (j) Cancellation, revocation, suspension or refusal to renew by any state or federal agency, by a Canadian province or by the government of Mexico of the authority to practice law or to practice under any other regulatory authority if the cancellation, revocation, suspension or refusal to renew was related to the business of an adjuster or an insurance producer or consultant, or if dishonesty, fraud or deception was involved. The record of the cancellation, revocation, suspension or refusal to renew shall be conclusive evidence of the action taken.

circumstances, if the circumstances relate to the exercise of the license privileges. To hold otherwise would mean the Department could revoke only one license for circumstances that are serious and grounds for revocation of both licenses.

Licensee also argued that his sales of the various investments listed were not sales of securities, citing *Almaden Plaza Associates v. United Trust Fund Limited Partnership*, 123 Or App 372 (1993), in which the court held that the sale-leaseback package for a building to a singular purchaser was not an investment contract because, in part, there was only one investor. The various programs offered by Licensee had horizontal investment, or many investors, so this case is not controlling. As stated in the findings, the United States Supreme Court in *SEC v. Edwards*, 540 U.S. 389, 124 S.Ct. (2004) specifically concluded that the sales of the ETS Payphones were investment contracts or sales of securities. The sales of the MVPs, handheld credit card processors, and viatical policies were similar and were also sales of investment contracts. Licensee was selling securities when he did not have a license to do so.

Licensee also argued that the Department could not assert issue or claim preclusion, based on the Order to Cease and Desist, but the Department did not allege such preclusion. It relied on Investigator Weiss's testimony to establish the facts and conclusions in the Order.

2. Revocation based on dishonest practices or untrustworthiness or financial irresponsibility

Another ground for revocation in ORS 744.074(1) is:

> (h) Using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere.

In its Notice of Proposed Action, the Department did not allege that Licensee's dishonest and deceptive offers and sales of securities was a violation of this section, even though he clearly acted dishonestly when he offered and sold these securities. Instead, the Department alleged that: Licensee's offer of Midland's annuity plan to the Oregon resident demonstrated incompetence or untrustworthiness because he knew the annuity plan was not approved for sale in Oregon,[3] yet told the Oregon resident that he could buy

[3] Sellers of insurance or annuities in Oregon can only sell insurance or annuities approved by the Department. See ORS 742.003, which says in relevant part:

> **Filing and approval of policy forms; rules.** (1) Except where otherwise provided by law, no basic policy form, or application form where written application is required and is to be made a part of the policy, or rider, indorsement or renewal certificate form shall be delivered or issued for delivery in this state until the form has been filed with and approved by the Director of the Department of Consumer and Business Services. * * *

it while standing in a bucket of "California soil" in Oregon; and Licensee's purchase of the annuity plan for himself and his wife also demonstrated incompetence or untrustworthiness because he knew it was not legal to sell it to himself and his wife as Oregon residents.

Licensee's solicitation to the Oregon resident and his sale to himself and his wife demonstrate incompetence and untrustworthiness and are grounds for discipline. The Department did not claim that these demonstrations of incompetence and untrustworthiness alone would necessarily support revocation, but this violation provides further support for revocation of Licensee's license.

3. Assumed business name

The Department's licensees are required to notify the Department of any assumed business name before using the name. ORS 744.068.[4]

Licensee used the name, Lifespan Financial Company, when soliciting a purchase of an annuity by the Oregon resident. (Ex. A3 at 3.) Licensee has never notified the Department that he was using this name in conjunction with his business. (Ex. A1.) He thereby violated ORS 744.068. The Department did not suggest any penalty for this violation, but this violation provides further support for revocation of Licensee's license to sell insurance.

4. Civil Penalty

The Department has the authority to assess a civil penalty against any licensee for violating a provision of the Insurance Code. ORS 731.988(1).[5] The amount of the

[4] ORS 744.068(1) states:

> **Required notifications; maintenance of usual and customary records.** (1) An insurance producer shall notify the Director of the Department of Consumer and Business Services prior to transacting business under the insurance producer license under any name other than the insurance producer's legal name and prior to changing, deleting or adding an assumed business name in connection with the insurance producer's business under the insurance producer license.

[5] ORS 731.988 states in relevant part:

> **Civil penalties.** (1) Any person who violates any provision of the Insurance Code, * * *, shall forfeit and pay to the General Fund of the State Treasury a civil penalty in an amount determined by the director of not more than $10,000 for each offense. In the case of individual insurance producers, adjusters or insurance consultants, the civil penalty shall be not more than $1,000 for each offense. Each violation shall be deemed a separate offense.
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> (2) In addition to the civil penalty set forth in subsection (1) of this section, any person who violates any provision of the Insurance Code, * * *, may be required to forfeit and pay to the General Fund of the State Treasury a civil

penalty may not "exceed the amount by which such person profited in any transaction which violates any such provision, rule, order or judgment." ORS 731.988(2).

The Department assessed a civil penalty of $8,550, the amount of Licensee's commission for making an illegal sale of insurance to himself. This sale was contrary to law because it was a sale to an Oregon resident of an annuity not registered for sale in Oregon. The Department has established the grounds under ORS 731.988(2) for the amount of the civil penalty.

PROPOSED ORDER

It is proposed that the Department issue the following order:

The Notice of Proposed Action issued on October 25, 2004, is affirmed. The insurance license of James S. Georgen is revoked, pursuant to ORS 744.074(1)(h) and (j) and ORS 744.068, and he is liable for a civil penalty of $8,550, pursuant to ORS 731.988(2).

/s/ Lawrence S. Smith
Lawrence S. Smith
Administrative Law Judge
Office of Administrative Hearings

Mailing and Issuance Date: March 9, 2005

NOTICE OF OPPORTUNITY FOR ADMINISTRATIVE REVIEW

NOTICE: Pursuant to ORS 183.460, the parties are entitled to file written exceptions to this Proposed Order and to present written argument concerning these exceptions to the Director. Written exceptions must be received by the Department of Consumer and Business Services within 30 days following the date of service of this Proposed Order. Mail Exceptions to:

Mitchel D. Curzon
Chief Enforcement Officer
Oregon Insurance Division
PO Box 14480
Salem, OR 97309-0405

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penalty in an amount determined by the director but not to exceed the amount by which such person profited in any transaction which violates any such provision, rule, order or judgment.