THE TREASURER OF THE STATE OF FLORIDA
DEPARTMENT OF INSURANCE

TOM GALLAGHER

IN THE MATTER OF:

FUTURE FIRST FINANCIAL GROUP, INC. / CASE NO: 34196-00-CO

FINAL ORDER

THIS CAUSE came on for consideration and final agency action. On January 12, 2001, an Amended Order to Show Cause was issued by the Department of Insurance against the Respondent, Future First Financial Group, Inc., alleging that Respondent knew or should have known that certain life insurance policies purchased for re-sale to customers may have been fraudulently procured by the insureds (viators); that the Respondent failed to report the alleged fraudulent conduct to the Department; and that certain "contestable" policies purchased by the Respondent for re-sale to customers may not have been sold to them under proper legal circumstances. Respondent timely filed a request for a proceeding pursuant to Section 120.57(1), Florida Statutes. Pursuant to notice, the matter was heard before P. Michael Ruff, Administrative Law Judge, Division of Administrative Hearings, on August 28, 2001.

After consideration of the record and argument presented at hearing, the Administrative Law Judge issued his Recommended Order on February 18, 2002. (Attached as Exhibit A). The Administrative Law Judge recommended that the Respondent be fined an administrative penalty of $10,000.00 and that its license be placed on probation for two (2) years from the date of the Final Order, conditioned on such reporting requirements to the Department concerning Respondent's operations as the Department shall reasonably require.

On March 14, 2002, the Department timely filed exceptions to the Recommended Order. The Department excepted to the Conclusions of Law, and the Recommendation. On March 5, 2002, Respondent timely filed exceptions to the Recommended Order. The Respondent excepted to the Findings of Fact and Conclusions of Law. In addition, on March 5, 2002, the Department filed a Notice of Supplemental Authority and on March 4, 2002, William F. Sweeney filed a Motion to Intervene, Exceptions to Recommended Order and Motion for Name-Clearing Hearing. On March 12, 2002, the Department filed a Response to Mr. Sweeney's Motion. Neither the Department nor the Respondent filed responses to each other's exceptions. The Exceptions, Motion and Notice will each be addressed below.

RULING ON DEPARTMENT'S NOTICE OF SUPPLEMENTAL AUTHORITY

The Department filed a notice of the Opinion of the Court, the Department's Motion for Reconsideration and Clarification and the Corrected Opinion of the First District Court of Appeal, State of Florida, in Accelerated Benefits Corporation v. Department of Insurance, Case No. 1D01-853, corrected opinion entered February 26, 2002. The case was offered relative to the issue of whether Section 626.989(6), Florida Statutes requires actual knowledge on the part of the licensees required to make reports to the Department.

At the hearing, this case was offered for official recognition by the Department in the form of the lower tribunal proceedings, Department of Insurance vs. Accelerated Benefits Corporation, DOAH Case No. 00-3073, and was accepted for official recognition without objection. The Corrected Opinion of the First District Court of Appeal affirms the Final Order revoking Accelerated Benefits Corporation's license as a viatical settlement provider. There being no objection filed by the Respondent, in the present case, to the Notice of Supplemental

Authority, the opinion entered by the First District Court in Accelerated Benefits Corporation v. Department of Insurance, Case No. 1D01-853 is accepted as part of this record.

RULING ON WILLIAM F. SWEENEY'S MOTION TO INTERVENE, EXCEPTIONS TO RECOMMENDED ORDER AND MOTION FOR NAME CLEARING HEARING

Counsel for William F. Sweeney, filed a Motion to Intervene, to file exceptions and for a hearing to have his name cleared on the basis that he was defamed by the Recommended Order in this case, and had no opportunity to be heard. The record is clear, from his deposition, that Mr. Sweeney invoked his fifth-amendment privileges and refused to participate in this case. He cannot now complain that he was not given an opportunity to be heard when he previously had declined to participate in this matter.

Intervention is appropriate only when the final hearing has not yet occurred. Rule 28-106.205, Florida Administrative Code requires the filing of a petition for intervention at least 20 days prior to the final hearing. No such petition was filed by Mr. Sweeney and therefore he was not granted status as an intervenor in this case. Mr. Sweeney had and has no substantial interest in this cause. This cause was directed at Future First Financial Group, Inc., and not Mr. Sweeney. Mr. Sweeney is not and was not a Department licensee. No penalty of any kind was either sought or recommended against Mr. Sweeney, and because no property right peculiar to Mr. Sweeney was involved in this cause, none of his legal rights, constitutional or otherwise, have been affected in this cause. His alleged "substantial interest" being the besmirching of his "good name" within certain facts found by the Administrative Law Judge in his Recommended Order, was not and is not an injury of the type or nature that an administrative hearing is designed to protect. Thus, he had no standing to intervene to begin with. Royal Palm Square Ass'n. v. Sevco Land Corp., 623 So.2d 533 (Fla. 2nd DCA 1993); AmeriSteel Corp. v. Clark,

691 So.2d 473 (Fla. 1997). His reputation may be involved in his pending criminal trial, but it is not involved in the present case. Even if it had been, his failure to timely intervene has waived that opportunity. A person, who is not a party or an intervenor, has no standing to file exceptions to the Recommended Order. Accordingly, Mr. Sweeney's Motions are denied and not accepted.

RULINGS ON DEPARTMENT'S EXCEPTIONS

1. The Department filed an extensive number of exceptions to the Recommended Order of the Administrative Law Judge. When these exceptions are examined closely, the Department's exceptions ultimately are to the Recommendation and Conclusions of Law #95, #102 and #104.

2. With respect to the Department's exceptions to the recommended penalty, the Department argues that the Administrative Law Judge failed to consider the Penalty Guideline Rule found in Rule Chapter 4-231, Florida Administrative Code, when determining the penalty, and improperly considered various mitigating factors to justify that penalty. The Scope section of Rule 4-231.020(1), Florida Administrative Code provides that, "[T]his rule chapter shall apply to all resident and nonresident insurance agents, customer representatives, solicitors, adjusters, and claims investigators licensed under Chapter 626, Florida Statutes, who are subject to discipline under Sections 626.611 and 626.621, Florida Statutes." Not only does this Rule Chapter not list specifically viatical settlement providers, viatical settlement providers are not subject to discipline under Sections 626.611 and 626.621, Florida Statutes. Viatical settlement providers are subject to discipline under Section 626.9914, Florida Statutes, with statutory guidelines therein for the discipline of said providers. For these reasons, the Department's reliance on Rule 4-231, Florida Administrative Code, for disputing the Administrative Law Judge's recommendation, is rejected. However, the Department's exceptions to the

Recommendation do raise a valid point relative to the Administrative Law Judge's reasoning for recommending a fine and probationary period for the Respondent. Further discussion of the Recommendation will be made below.

3. The Department excepts to Conclusion of Law #95 in paragraphs 6-8 of its exceptions. This Conclusion of Law relates to the "Analysis of Unfair Trade Practices Allegations" and the Department contends that this Conclusion of Law contradicts the Findings of Fact relative to the same Counts addressed in the "Additional Findings" section of the Recommended Order. One of the exceptions to this Conclusion of Law is that the Administrative Law Judge incorrectly stated that the Department conceded that no evidence was produced to support an "Unfair Trade Practice" allegation for Count 42. A review of the Department's Proposed Recommended Final Order supports the Administrative Law Judge in this regard. Paragraph #364 of the Department's Proposed Order states "[T]he evidence does not support the department's allegations relative to the violation of the Unfair Insurance Trade Practices Act alleged in Counts Thirty-six, Thirty-eight, Thirty-nine, Forty, Forty-two, and Forty-five." [Emphasis added]. Accordingly, the Department's exception with regard to the Administrative Law Judge's discussion of Count 42 from the Amended Order to Show Cause is rejected.

The other portion of the Department's exception to Conclusion of Law #95 relates to the Administrative Law Judge concluding that the evidence in support of the non-conceded group of counts was essentially identical to the evidence in support of the conceded groups of counts and consequently the non-conceded counts should be dismissed along with the conceded counts. The Administrative Law Judge's conclusion that the evidence of unfair trade practices set forth in the exhibits relative to the conceded counts is essentially identical in quantity, quality and weight to

the non-conceded counts is refuted by the findings as to each of those same counts in the "Additional Findings" section, and by the record exhibits relative to each count in question. The Department's exhibits were placed into individually bound volumes, each related to an individual count. In the conceded counts, a single document conclusive to proof of commission of an unfair trade practice was missing from the Department's exhibits. In the non-conceded counts, that some document was present. In each case, that document was Future First's "Purchase Request Agreement" through which the respective investors purchased interests in a given insurance policy. (See, Future First Financial Group, Inc., Purchase Request Agreements, Admitted Trial Exhibits for Counts 2, 5, 41, 43 and 44).

The Purchase Request Agreements in question all represented that the investors' monies would be used to purchase death benefit interests in policies beyond the two-year contestability period. By juxtaposing the date of that agreement with other exhibits showing the identity of and the date on which the policy in question was issued, the Department's allegations that Future First unlawfully placed investors' monies into policies still within the two-year contestability period were conclusively established, as expressly found in the "Additional Findings" section. In the conceded counts, the absence of the respective "Purchase Request Agreement" precluded such a juxtaposition and proof. Combining the two groups together in the Conclusions of Law and dismissing the non-conceded counts with the conceded counts was an error by the Administrative Law Judge. Because the Administrative Law Judge erroneously concluded that the nature of the evidence was the same for both the conceded and non-conceded counts, this portion of the Department's exception to Conclusion of Law #95 is accepted. The third and fourth sentences of Conclusion of Law #95 are rejected and the following Conclusion of Law is substituted:

> "The allegations in Counts 2, 5, 41, 43 and 44 which were not referenced in the Petitioner's concession, are not identical charges and were the subject of evidence not identical in quantity, quality and weight. Consequently, it is determined that the evidence adduced does support the Department's allegations regarding the purported violations of the "Unfair Insurance Trade Practice Act" with regard to Counts 2, 5, 41, 43 and 44 and these Counts should not be dismissed."

This substituted Conclusion of Law is as or more reasonable than that portion of Conclusion of Law #95 that was rejected.

4. The Department excepts to Conclusion of Law #102 relative to the Respondent's compliance with reporting requirements. The Department argues that the Administrative Law Judge should give no mitigation to the Respondent's "after-the-fact" reporting of fraudulent insurance practices. Reporting back to the Department what it already knew and had taken action on does not fulfill the reporting provisions of Section 626.989(6), Florida Statutes, which imposes a duty to report suspected fraudulent insurance practices to the Department when the licensee knows or believes that such practices have been or are being committed. In his findings of fact, and Conclusions of Law, the Administrative Law Judge specifically found such knowledge on the part of the Respondent at some point prior to the Department's audit in February 1999. (See, Findings of Fact #19 and #43, and Conclusions of Law #99, and #100, of the Recommended Order). (Finding of Fact #43 specifically relates to the business practices of the Respondent and finds that Mr. Sweeney's responsibilities included the verification, at the time a policy was viaticated, that the insurance information provided with any particular file was correct and complete). He further found that such knowledge was not reported until after the audit and filing of the Order to Show Cause. (See, Finding of Fact #75 of the Recommended Order). Reporting "after-the-fact" information to the Department should not be considered as

mitigation. Accordingly, this exception is accepted. The first sentence of Conclusion of Law #102, is rejected, and the remaining sentence of that Conclusion is accepted as follows:

> "The fact remains that the unrefuted evidence, culminating in the above Findings of Fact shows that for a substantial period of time after it surely had knowledge or belief that such wrongful conduct had occurred on the part of the viators, the Respondent failed to report these matters"

This modified Conclusion of Law is as or more reasonable than that portion of Conclusion of Law #102 that was rejected.

5. For the reasons set forth in paragraph 4, above, the Department's exception to Conclusion of Law #104 is also accepted, and the Conclusion of Law is rejected in part. The last sentence of Conclusion of Law #104 is rejected and the following Conclusion of Law is substituted:

> "...The violation should not be mitigated by the fact that it did report the wrongful acts or fraudulent representations during the de novo stage of this proceeding before final agency action and cooperated freely with the Department throughout the investigation and "free-form" stage of this proceeding.

This substituted Conclusion of Law is as or more reasonable than that portion of Conclusion of Law #104 that was rejected.

RULINGS ON RESPONDENT'S EXCEPTIONS

1. The Respondent excepts to the Preliminary Statement of the Administrative Law Judge in his Recommended Order relative to admission of Petitioner's Exhibits pursuant to the "business records" exception to the hearsay rule found in Section 90.803(6), Florida Statutes. The direct and cross-examination of Mr. Stelk, corroborated the testimony of the Department's witness as to the nature and origin of the documents in question. (Tr. 159-160). Mr. Stelk admitted that the "Purchase Request Agreements" (viatical settlement purchase agreements) in

question were proprietary to Future First (Tr. 179-180). Mr. Stelk also admitted that the initials of William Sweeney, then a Future First Vice President in charge of underwriting, appeared on several of the Department's exhibits, stipulated that the Purchase Request Agreements in question contained instructions not to use the investors' monies to purchase contestable life insurance policies, and admitted that contestable policies were nonetheless purchased pursuant to three Purchase Request Agreements. Additionally, Respondent's own Exhibit 3, offered as a summary of certain past-sale occurrences relative to the Purchase Request Agreements at issue, inherently conceded that the three Agreements were Future First business records. Therefore, even if the Respondent's hearsay objection were appropriate when made, the Respondent's later testimony and exhibits rendered the challenged exhibits admissible to supplement Mr. Stelk's testimony.

Respondent objected to the admission of other Department exhibits relative to the allegations of failure to report known or believed fraudulent insurance practices on the grounds that said exhibits constituted written hearsay. The Administrative Law Judge admitted these exhibits correctly because they were not being submitted to prove the truth of the matters asserted therein, but rather submitted only to show the triggering of the reporting requirement in Section 626.989(6), Florida Statutes. Therefore, those exhibits were not subject to the application of the hearsay rule. Accordingly, Respondent's exceptions to the Preliminary Statement of the Recommended Order are rejected.

2. The Respondent excepts to Findings of Fact 6, 13, 17, 18, 19 and 49 of the Recommended Order, pertaining to the admission of exhibits over the Respondent's hearsay objection. In addition to the reasons set forth in the paragraph immediately above, the Respondent's exceptions to the Findings of Fact are further rejected because of the following.

The agency's authority to reject or modify findings of fact is limited by the provisions of Section 120.57(1)(l), Florida Statutes, which provides that "the 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."

Because there is competent substantial evidence in the record to support the Administrative Law Judge's findings of fact, the Department would have to improperly reject the Administrative Law Judge's findings of fact to permit the adoption of the Respondent's exceptions. The Department cannot reweigh the evidence. The weight given to the evidence is the province of the Administrative Law Judge and cannot be disturbed by the agency unless the findings are not supported by competent substantial evidence. Brogan v. Carter, 671 So.2d 822 (Fla. 1st DCA 1996). Accordingly, Respondent's exceptions to the Findings of Fact are rejected.

3. The Respondent excepts to Conclusion of Law #97 of the Recommended Order and argues that the Administrative Law Judge disregarded several points with regard to Mr. Sweeney's knowledge of what was in his own file, and that the Administrative Law Judge could not infer "actual knowledge" based on circumstantial evidence. The Administrative Law Judge correctly determined that Section 626.989(6), Florida Statutes requires reporting if the person licensed under the Code, or an employee thereof, has knowledge or "believes" that a fraudulent act has occurred. The Administrative Law Judge goes on to correctly state in Conclusion of Law #98 that the use of the term "believes" by the Legislature would indicate that a reasonably informed, subjective opinion by a licensee, chargeable with knowledge of the provisions of the insurance code, could make a layman's decision that such a wrongful act or practice had

occurred without the necessity of arriving at a legal conclusion that all of the elements of fraud were actually present. Accordingly, this exception is rejected.

4. The Respondent excepts to Conclusions of Law #98 of the Recommended Order and argues that the Petitioner should have been required to establish that all the elements of fraud were present in order to hold the Respondent accountable for its failure to report. As previously stated in paragraph 3 above, the Administrative Law Judge's analysis of the legislative intent relative to the use of the word "believes" in Section 626.989(6), Florida Statutes is correct. The legislative intent by the use of the word "believes" is to have the potentially wrongful act be reported to the Department so that the Department can determine if fraud was actually committed. Therefore, Respondent's exception to Conclusion of Law #98 is rejected.

5. The Respondent excepts to Conclusion of Law #99 of the Recommended Order. Because it is not clear from this exception what the Respondent disagrees with in this Conclusion, this exception is rejected.

6. The Respondent excepts to Conclusion of Law #100 of the Recommended Order and argues that there is no evidence in the record to support this conclusion, and that the Administrative Law Judge did not specifically determine which Count in the Amended Order to Show Cause this conclusion relates to. This Conclusion relates to a series of Findings of Fact in the Recommended Order wherein the Administrative Law Judge discusses the overall business practices of the Respondent and further discusses various significant dates relevant to the entire case. It is legally insufficient merely to state that findings are not supported by the record or were not supported by competent substantial evidence. (See, Hoover v. Agency for Health Care Administration, 676 So.2d 1380 (Fla. 3rd DCA 1996). Accordingly, this exception is rejected.

7. The Respondent excepts to Conclusion of Law #101 of the Recommended Order and argues that the Administrative Law Judge should have found the "non-reporting" totally exculpatory. This argument is geared more towards Conclusion of Law #102 rather that #101. Conclusion of Law #102 has previously been discussed and modified in the Rulings on the Department's Exceptions, paragraph #4 and in accordance with that discussion; Respondent's exception is rejected.

Upon careful consideration of the record, the submissions of the parties, and being otherwise fully advised in the premises, it is 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, with the exception of the portions of Conclusion of Law #95 and Conclusions of Law #102 and #104, discussed above, as the Department's Conclusions of Law. With respect to Conclusions of Law in paragraphs #95, #102 and #104, those conclusion are rejected or modified and substituted conclusions described in the Rulings on Petitioner's exceptions are adopted.

3. The Administrative Law Judge's recommendation that the Department enter a Final Order finding that the Respondent has violated Section 626.989(6), Florida Statutes and Section 626.9914(1)(b), Florida Statutes, by being untrustworthy and incompetent in the above particulars and in the pertinent time periods referenced in the Findings of Fact and Conclusions of Law, is accepted. However, the Administrative Law Judge's recommendation that Respondent's licensure be placed on probationary status for a period of two years, conditioned on such reporting requirements to the Department concerning its operations as the Department shall reasonably require and, that it be assessed a fine in the amount of $10,000.00 is rejected.

The Administrative Law Judge made a finding of 40 separate violations of Sections 626.989(6) and 626.9914(1)(b), Florida Statutes, yet recommended only a $10,000.00 fine, with no explanation whatsoever of how he arrived at that figure. Considering the 40 separate violations of Section 626.9914, Florida Statutes by the Respondent, the recommended monetary fine of the Administrative Law Judge is overly lenient. Further, a finding of a violation of Section 626.9914, Florida Statutes provides for a mandatory revocation or suspension, with probation being in addition to, and not in lieu of, a suspension or revocation and/or fine. (See, Section 626.9914(2), Florida Statutes).

After a complete review of the record, giving due regard to the mitigation found by the Administrative Law Judge, and in accordance with the penalties provided for in Section 626.9914, Florida Statutes, it is found that the following penalty should be imposed.

1) The repeated viatication of policies within the contestible period to investors who had requested non-contestible policies as described in Counts 2, 5, 31, 43 and 44, demonstrated untrustworthiness and incompetence in violation of Section 626.9914(1)(b), Florida Statutes and are grounds for the revocation of Future First's license.

2) In addition, there was record evidence that Future First had actual knowledge of inconsistencies in the health status of the viators at some point prior to the time of the Department's February 1999 audit, and there was evidence of at least 20 such inconsistent applications. Further under the Respondent's business practices, Mr. Sweeney received and reviewed the applications for insurance prior to the viatication of the policies (Finding of Fact #43). Despite the knowledge, the Respondent proceeded to viaticate policies, exposing insurers of investors to potential losses. (See, Findings of Fact #12 and #43 and Conclusions of Law # 97, #99, and #103, relative to Counts 2, 5, 8, 9, 10, 11, 13, 14, 17, 18, 19, 23, 24, 27, 30, 31, 32, 33,

40 and 42). This further evidences a violation of Section 626.9914(1)(b), Florida Statutes for its engaging in fraudulent or dishonest practices, or demonstrating incompetence or untrustworthiness and presents grounds for the revocation of Future First's license.

3) As to the Respondent's failure to report inconsistencies as to the insured's health reflected in the insurance application and the viatication application, Future First demonstrated either untrustworthiness or incompetence by failing to report said fraudulent and inconsistent applications to the Department until the information was already known to the Department. As a result, further grounds for the revocation of Future First's license are found for the failure to report the inconsistencies under Section 626.989(6), Florida Statutes.

Therefore, having given careful consideration to all submissions by the parties, the recommendations of the Administrative Law Judge, and the disciplinary provisions of Section 626.9914, Florida Statutes, it is found that the Respondent's license should be revoked.

The Administrative Law Judge relies on the case of Brod v. Jernigan, 188 So.2d 575 (Fla. 2nd DCA 1966) to support his position that the Respondent should not be suspended because no member of the public was hurt or prejudiced by the Respondent's actions. The Brod case is distinguishable from this present case. In Brod, the real estate broker was alleged to have violated a statutory provision when he failed to immediately place $100.00 earnest money in a trust or escrow account. The court found that this was in fact a technical violation, but only in the strictest sense and it involved only one isolated item, with extenuating circumstances. On rehearing the court stated, "what we were doing was merely to point out that the violation defined by said subsection is a technical violation of the law governing the real estate business, not involving actual dishonest or fraudulent conduct or loss to the public, albeit it was a violation for which some penalty or sanction could be imposed." Brod, supra. In the present case there

were numerous violations found to have been committed by the Respondent and they were not merely "technical violations". Because the penalty imposed was "within the permissible range of statutory law" (Weiss v. Dept. of Business and Professional Regulations, 677 So.2d 98 (Fla. 5th DCA 1996), it is appropriate to revoke Respondent's license.

It is well established that an agency may increase or decrease a penalty recommended by an Administrative Law Judge. Criminal Justice Standards v. Bradley, 596 So.2d 661 (Fla. 1992); Department of Law Enforcement v. Hood, 601 So.2d 1194 (Fla. 1992); Section 120.57(1)(l), Florida Statutes. So long as there are standards for the imposition of a penalty, adherence to those standards, and adherence to the requirements of Section 120.57(1)(l), Florida Statutes; an agency is free to increase or decrease a penalty recommended by an Administrative Law Judge. In the present case, the standards for the imposition of a penalty are enumerated in Section 626.9914, Florida Statutes and the increased penalty is in accordance with those standards. Further, a complete review of the record has been made, as evidenced by the above discussions and citations to the record, justifying this action.

ACCORDINGLY, it is ORDERED, as follows:

Respondent's, Future First Financial Group, Inc.'s, license shall be revoked pursuant to Section 626.9914, Florida Statutes immediately upon entry of this Final Order. As a condition of said revocation, Respondent must proceed immediately following the effective date of the revocation, to conclude the affairs it is transacting under its license. The provider may not solicit, negotiate, advertise, or effectuate new contracts. The Department retains jurisdiction over the provider until all contracts have been fulfilled or cancelled or have expired. Respondent may continue to maintain and service viaticated policies subject to the approval of the Department.

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 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 17th day of May, 2002.

KEVIN MCCARTY
Deputy Insurance Commissioner