

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NEUMA, INC., d/b/a NEUMA, INC.)
OF ILLINOIS,)
)
Petitioner,)
)
vs.) Case No. 02-2224
)
DEPARTMENT OF INSURANCE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Administrative Law Judge Don W. Davis of the Division of Administrative Hearings (DOAH) conducted a final hearing in the above-styled cause on September 9 through 11, 2002, in Tallahassee, Florida. The following appearances were entered:

For Petitioner: Jeffrey L. Frehn, Esquire
Katz, Kutter, Haigler, Alderman,
Bryant & Yon, P.A.
106 East College Avenue, Suite 1200
Post Office Box 1877
Tallahassee, Florida 32302-1877

For Respondent: Michael H. Davidson, Esquire
Florida Department of Insurance
200 East Gaines Street
612 Larson Building
Tallahassee, Florida 32399-0333

STATEMENT OF THE ISSUE

Whether Neuma, Inc. (Petitioner), should be granted licensure as a "viatical settlement provider" as defined by Section 626.9911(6), Florida Statutes.

PRELIMINARY STATEMENT

Petitioner applied to the Florida Department of Insurance (Respondent) for licensure as a viatical settlement provider on or about August 20, 2001. Respondent concluded that the application should be denied. Respondent's representative then informed Petitioner of this decision by telephone and, simultaneously, allowed Petitioner the opportunity to withdraw the application and submit another. Petitioner took advantage of that offer and on or about January 15, 2002, it withdrew the August 2001 application.

On or about February 4, 2002, Petitioner submitted a second application for licensure as a viatical settlement provider. For the reasons stated in its letter dated March 28, 2002 (basically that Petitioner had made material representations and omissions of material fact in its first application), Respondent announced its intent to deny that application. Respondent provided Petitioner access to formal administrative proceedings pursuant to Chapter 120, Florida Statutes.

Petitioner timely filed a Petition For Formal Administrative Proceedings on or about April 22, 2002. Following Respondent's dismissal of that Petition without prejudice, Petitioner filed an Amended Petition For Formal Administrative Proceedings on or about May 22, 2002. Respondent forwarded the matter to DOAH on June 3, 2002. Following recusal

of Administrative Law Judge Harry Hooper upon motion of Petitioner, the case was assigned to the undersigned on June 25, 2002.

At the final hearing, Petitioner presented testimony of three witnesses and four exhibits. Respondent presented no witnesses but offered seven exhibits.

The Transcript of the proceeding was filed on September 26, 2002. The parties were granted leave to file proposed recommended orders by October 22, 2002. Both parties filed Proposed Recommended Orders which have been reviewed and utilized, when possible, in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner applied to Respondent for licensure as a viatical settlement provider on or about August 20, 2001. After denial of the first application, Petitioner submitted a second application on February 4, 2002, for licensure as a viatical settlement provider. On March 28, 2002, Respondent denied that application.

2. At all times relevant to these proceedings, David Irwin Binter was the sole owner and President of Petitioner. Further, Binter was also the sole owner and President of AMG, Inc. (AMG), incorporated by Binter in the State of Delaware in December of 1996.

3. In other states the direct affiliation of the two corporations has led to the acquisition by Petitioner of viatical settlements directly from insured individuals for Petitioner's own account with money raised by AMG from investors. Consequently, purchase of a viatical settlement from Petitioner by AMG cannot be considered an "arms length transaction" in view of the close relationship and common ownership of the two corporations.

4. Petitioner not only has previously purchased interests in certain viators life insurance policies using investor monies solicited by AMG, but if licensed in Florida, Petitioner would raise investor money through AMG.

5. Petitioner's representations in its "Viatical Settlement Disclosure Document," given to each AMG investor, and Petitioner's Florida application correspondence stating that if granted a Florida viatical settlement provider license, Petitioner intended to use AMG to solicit investors monies, also corroborate the finding that Petitioner would raise investor money through AMG, if licensed in Florida.

6. In his initial application on behalf of Petitioner for licensure as a viatical settlement provider, Binter did not reveal his involvement with AMG. In response to Question 8 of the Biographical Statement and Affidavit portion of the application, requesting the listing of all current business

activity, Binter responded with the notation "N/A." Binter did this although he was the owner of AMG, the entity otherwise represented in Petitioner's application correspondence as the affiliate through which Petitioner intends to sell to investors interests in life insurance policies purchased by Petitioner. Binter's answer to Question 8 of the Biographical Statement and Affidavit portion of the first application was false.

7. Binter's answer to Question 20(b)9 of the Biographical Statement and Affidavit required that he reveal any entity with which he was associated, or had been associated within the previous 12 months, that had been enjoined temporarily or permanently by any judicial, administrative, regulatory or disciplinary action from violating any federal or state law regulating the business of insurance, securities, or banking. Binter answered "No" to the question despite the existence of such actions against AMG by the states of Kansas, Illinois, and Alabama within the stated time frame.

8. Petitioner's website, open to the general public, made material misrepresentations relative to the existence of a contingency insurance program between AMG and Lloyd's of London, stating that the program was in existence and would insure investors against the contingency of viators living past the death dates projected by physicians designated by Lloyds to render those projections. Those representations are untrue

because Lloyds actually provided no such coverage at the time the website was open to the public, and has not actually provided any to this date.

9. Petitioner's website contained terminology that was specifically prohibited by Florida law. An examination of the website shows that it uses the words, "A no-risk investment," and "insured safe shelter," both of which are prohibited by Section 626.99277(6), Florida Statutes, which specifically bans the use of the words "no-risk" and "safe" relative to investments in viatical settlement purchase agreements. Petitioner's Admission 11 confirms the usage of those terms.

10. Petitioner, at the time of its first application, had no viatical settlement provider application on file with the State of Connecticut, although Petitioner's application represented that it did. Petitioner's employee at the time, Denise Randall, testified that while she thought that she had filed such an application with Connecticut on behalf of Petitioner, she may have inadvertently mailed the Connecticut application to Mississippi and that when informed by Respondent's personnel that no Petitioner application was on file with Connecticut, she did not bother to check with Connecticut but merely sent Respondent's office a copy of the application she thought she had mailed to Connecticut and

continued to represent that the same was on file with Connecticut.

11. Petitioner/AMG made demands on their investors for monies in addition to the stated purchase price of their viatical interests in violation of express representations in the contracts between Petitioner/AMG and those investors that additional premiums, due to an underestimation of life span, would be paid out of the share of Petitioner/AMG. An examination of the contracts at issue fails to reveal any provision authorizing demands on investors.

12. Despite Respondent's repeated requests for the same, Petitioner never produced a trust or escrow agreement between Petitioner and its purported trustee, Larry Silver. The presence and use of an independent third party trustee or escrow agent is expressly required for the completion of any viatical settlement transaction in the State of Florida. Section 626.9924(3), Florida Statutes. All that was done in response to Respondent's repeated requests was to re-submit the same unsigned, three-party contract form. No document establishing the actual existence of an independent third-party trustee or escrow agent required by Florida law for any viatical settlement transaction was ever produced by Petitioner.

13. Randall exclusively prepared the first application submitted on Petitioner's behalf. Binter signed the application

without reading any of it, even though his signature verified under oath and penalty of perjury that the had carefully examined each question in the biographical statement and affidavit and answered each truthfully.

14. Randall's prior employment was in office administration in banks and mortgage companies. She had never worked in the viatical industry before, had never worked for Binter before, and had no independent knowledge of his business affairs. Her primary job function with Petitioner was completing and filing viatical settlement provider applications with state regulators. Binter provided no advice, assistance, or guidance. All that Randall had for guidance was a 1996 biographical statement that she found among other office files. Binter did not provide her with any information updating that statement and he specifically did not tell her about the securities actions in Alabama, Kansas, and Illinois.

15. Binter did not have the first application reviewed by his attorney, who had actual knowledge of the securities actions. The attorney, however, did review the second application submitted after the securities actions omissions were discovered and the first application withdrawn.

16. Binter had actual knowledge of all three securities actions at the time of the first application. He did not share

that knowledge with Randall nor did he seek his attorney's review of the application.

CONCLUSIONS OF LAW

17. The Division Of Administrative Hearings has jurisdiction over this matter and the parties hereto. Sections 120.57(1), 120.569, and 120.60, Florida Statutes.

18. A "viatical settlement provider" is defined by Section 626.9911(6), Florida Statutes, as follows:

"Viatical settlement provider" means a person who, in this state, from this state, or with a resident of this state, effectuates a viatical settlement contract. The term does not include:

- (a) Any bank, savings bank, savings and loan association, credit union, or other licensed lending institution that takes an assignment of a life insurance policy as collateral for a loan;
- (b) A life and health insurer that has lawfully issued a life insurance policy that provides accelerated benefits to terminally ill policyholders or certificateholders; or
- (c) Any natural person who enters into no more than one viatical settlement contract with a viator in 1 calendar year, unless such natural person has previously been licensed under this act or is currently licensed under this act.
- (d) A trust that meets the definition of a "related provider trust."
- (e) A viator in this state.

(f) A viatical settlement purchaser.

(g) A financing entity.

19. The application for licensure as a viatical settlement provider is controlled by Section 626.9912, Florida Statutes, which reads as follows:

626.9912 Viatical settlement provider
license required; application for license.--

(1) A person may not perform the functions of a viatical settlement provider as defined in this act or enter into or solicit a viatical settlement contract without first having obtained a license from the department.

(2) Application for a viatical settlement provider license must be made to the department by the applicant on a form prescribed by the department, under oath and signed by the applicant. The application must be accompanied by a fee of \$500. If the applicant is a corporation, the application must be under oath and signed by the president and the secretary of the corporation.

(3) In the application, the applicant must provide all of the following:

(a) The applicant's full name, age, residence address, and business address, and all occupations engaged in by the applicant during the 5 years preceding the date of the application.

(b) A copy of the applicant's basic organizational documents, if any, including the articles of incorporation, articles of association, partnership agreement, trust agreement, or other similar documents, together with all amendments to such documents.

(c) Copies of all bylaws, rules, regulations, or similar documents regulating the conduct of the applicant's internal affairs.

(d) A list showing the name, business and residence addresses, and official position of each individual who is responsible for conduct of the applicant's affairs, including, but not limited to, any member of the applicant's board of directors, board of trustees, executive committee, or other governing board or committee and any other person or entity owning or having the right to acquire 10 percent or more of the voting securities of the applicant.

(e) With respect to each individual identified under paragraph (d):

1. A sworn biographical statement on forms supplied by the department.
2. A set of fingerprints on forms prescribed by the department, certified by a law enforcement officer, and accompanied by the fingerprinting fee specified in s. 624.501.
3. Authority for release of information relating to the investigation of the individual's background.

(f) All applications, viatical settlement contract forms, viatical settlement purchase agreement forms, escrow forms, and other related forms proposed to be used by the applicant.

(g) Such other information as the department deems necessary to determine that the applicant and the individuals identified under paragraph (d) are competent and trustworthy and can lawfully and successfully act as a viatical settlement provider.

(4) The department may not issue a license to an entity other than a natural person if it is not satisfied that all officers, directors, employees, stockholders, partners, and any other persons who exercise or have the ability to exercise effective control of the entity or who have the ability to influence the transaction of business by the entity meet the standards of this act and have not violated any provision of this act or rules of the department related to the business of viatical settlement contracts or viatical settlement purchase agreements.

(5) Upon the filing of a sworn application and the payment of the license fee, the department shall investigate each applicant and may issue the applicant a license if the department finds that the applicant:

(a) Has provided a detailed plan of operation.

(b) Is competent and trustworthy and intends to act in good faith in the business authorized by the license applied for.

(c) Has a good business reputation and has had experience, training, or education that qualifies the applicant to conduct the business authorized by the license applied for.

(d) If the applicant is a corporation, is a corporation incorporated under the laws of this state, or is a foreign corporation authorized to transact business in this state.

(e) Has designated the Insurance Commissioner and Treasurer as its agent for service of process.

(f) Has made the deposit required by s. 626.9913(3).

20. The licensure applied for by Petitioner, as a viatical settlement provider, enables Petitioner to legally effectuate viatical settlement contracts with viators. Section 626.9911(5), Florida Statutes. Without that license, effectuation of such contracts would be illegal in Florida. There is, however, no licensure requirement relative to entry into viatical settlement purchase agreements which are defined by Section 626.9911(9), Florida Statutes, as follows:

"Viatical settlement purchase agreement" means a contract or agreement, entered into by a viatical settlement purchaser, to which the viator is not a party, to purchase a life insurance policy or an interest in a life insurance policy, which is entered into for the purpose of deriving an economic benefit. The term also includes purchases made by viatical settlement purchasers from any person other than the provider who effectuated the viatical settlement contract.

21. Such agreements may be entered into with viatical settlement purchasers (investors) as defined by Section 626.9911(10), Florida Statutes, in the following language:

"Viatical settlement purchaser" means a person who gives a sum of money as consideration for a life insurance policy or an equitable or legal interest in the death benefits of a life insurance policy that has been or will be the subject of a viatical settlement contract, for the purpose of deriving an economic benefit, including purchases made from any person other than the provider who effectuated the viatical settlement contract or an entity affiliated with the provider. The term does not

include a licensee under this part, an accredited investor as defined in Rule 501, Regulation D of the Securities Act Rules, or a qualified institutional buyer as defined by Rule 144(a) of the Federal Securities Act, a special purpose entity, a financing entity, or a contingency insurer. The above references to Rule 501, Regulation D and Rule 144(a) of the Federal Securities Act are used strictly for defining purposes and shall not be interpreted in any other manner. Any person who claims to be an accredited investor shall sign an affidavit stating that he or she is an accredited investor, the basis of that claim, and that he or she understands that as an accredited investor he or she will not be entitled to certain protections of the Viatical Settlement Act. This affidavit must be kept with other documents required to be maintained by this act.

22. While viatical settlement sales agents are required to be licensed life insurance agents by Section 626.992, Florida Statutes, the definition of viatical settlement sales agent found in Section 626.9911(11), Florida Statutes, excludes viatical settlement providers. Since a viatical settlement sales agent arranges the purchase of an interest in a viator's life insurance policy by an investor, the net result of the statutory scheme is to allow licensed viatical settlement providers to utilize the services of licensed viatical settlement sales agents to enter into viatical settlement purchase agreements with investors, without any additional licensure. Thus, granting a viatical settlement provider

license inherently includes granting the opportunity to enter into viatical settlement purchase agreements with investors.

23. Entry into viatical settlement purchase agreements is controlled, inter alia, by Section 626.9927, Florida Statutes. That statute provides that a violation of the "Viatical Settlement Act" is a violation of Sections 626.9521 and 626.9541, Florida Statutes, and that Part X of Chapter 626 (the Unfair Insurance Trade Practices Act), Florida Statutes, applies to licensees as if a viatical settlement purchase agreement were an insurance policy. (The 2002 Legislature noted that "Part X" was an incorrect designation, and changed the same to "Part IX".) Thus, the Unfair Insurance Trade Practices Act was by reference incorporated into the Viatical Settlement Act. All this legislation was in force and effect prior to the submission of Petitioner's first viatical settlement provider application on or about August 20, 2001, and was, of course, in force and effect prior to the submission of Petitioner's second application on or about February 4, 2002.

24. The burden of proof is on the Petitioner to show by a preponderance of the evidence that it is qualified for the licensure in question. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Antel v. Department of Professional Regulation, 522 So. 2d 1056, 1058 (Fla. 5th DCA 1988); Cohen v. Department of Business

Regulation, 582 So. 2d 1083, 1086 (Fla. 1st DCA 1991);
Southpointe Pharmacy v. DHRS, 596 So. 2d 106, 109 (Fla. 1st DCA
1992); Metro Dade County v. Coscan Florida, 609 So. 2d 644, 646
(Fla. 3rd DCA 1992); Department of Banking and Finance v.
Osborne Stern, 670 So. 2d 932, 934 (Fla. 1996); Section
120.57(1)(j), Florida Statutes.

25. With the exception of the single ground conceded by Respondent, all factual grounds asserted by Respondent as justification of its denial have been established by the evidence to be true. Those grounds directly relate to Petitioner's competence and/or trustworthiness to operate its business in conformity with Florida law.

26. Petitioner sought to establish entitlement to licensure through explanation and amelioration. The explanations, however, are not so persuasive so as to justify amelioration. More significant than any single disclosure failure in the actual application is the undisputed fact that Binter hired someone totally without knowledge or experience in the viatical industry or his history in that industry to complete the first Florida application form, gave her no guidance or assistance in that endeavor, did not enlist the aid of available and knowledgeable counsel in that process, and provided no review of the final application. Despite the affidavit's specific requirement, under penalty of perjury that

Binter carefully examine each and every question and provide truthful responses thereto, Binter did no more than sign the affidavit without reading so much as a word of it. That cavalier action, alone, demonstrates either incompetence or untrustworthiness sufficient to justify denial.

27. Petitioner has not carried its burden of showing entitlement to licensure by a preponderance of the evidence. Indeed, the preponderance of the evidence strongly supports the Respondent's announced intent to deny licensure.

RECOMMENDATION

In view of the foregoing, it is

RECOMMENDED that a final order be entered by the Florida Department of Insurance denying Petitioner's application for licensure as a viatical settlement provider.

DONE AND ENTERED this 13th day of November, 2002, in Tallahassee, Leon County, Florida.

DON W. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 13th day of November, 2002.

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.