STATE OF MAINE
DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION
BUREAU OF INSURANCE

***In re* PAUL E. RICHARD** **Maine License No. PRR24006** **National Producer No. 2288808** **DOCKET NO. INS-08-305**	**AMENDED** **DECISION AND ORDER**

The Staff of the Bureau of Insurance has requested that the Superintendent revoke the insurance license of Paul E. Richard and to impose other appropriate disciplinary sanctions as permitted by law, for multiple violations of the Maine Insurance Code. As discussed more fully below, Mr. Richard induced a chronically ill, totally disabled customer to surrender a life insurance policy for a cash value that was 12% of the policy's death benefit, and engaged in multiple deceptive acts to conceal his policy replacement activities. His Resident Insurance Producer License is therefore revoked, and he is ordered to pay a civil penalty in the amount of $12,500 and repay all commissions earned on the transactions that are the subject of this proceeding.

Both parties have requested reconsideration in part of the Decision and Order issued on July 21, 2012. This Amended Decision and Order corrects an error in the statement of facts and clarifies the basis of the restitution order. The error is not material to the decision, which is otherwise reaffirmed.

Procedural History

Paul E. Richard has been licensed by the Superintendent as a resident insurance producer since October, 1989. On November 30, 2009, Bureau of Insurance Staff filed a Petition for Enforcement against Mr. Richard alleging numerous violations of the insurance laws. The petition was amended pursuant to a motion filed by Bureau of Insurance Staff, by an order dated June 13, 2011. The Superintendent issued a Notice of Hearing on May 12, 2011, and held a public adjudicatory hearing on June 21, 2011, with Bureau Staff appearing as a party pursuant to 5 M.R.S.A. § 9054(5).[1]

The Requests for Reconsideration[2]

On July 22, 2011, the day after the Decision and Order in this matter was issued, the Staff notified the Superintendent that the Decision twice described one of his other customers as Ms. O's sister, but she was actually Mr. O's sister. That fact is not in dispute. *(Tr. 32; Exh. 8)*

On August 2, Mr. Richard advised the Superintendent that he did not object to correcting the factual error. He added: "I am curious about part of the Order that has Mr. Richard refunding the commissions earned to [Ms. O]. If [Ms. O] has kept the annuities, then the commissions were not paid by [Ms. O] but ....by the insurance company. If [Ms. O] followed their option and got a refund of the annuities, then she has already been refunded the commissions from the way you are looking at these matters. Do we know, or should we find out, whether [Ms. O] actually received a refund of the annuities from American Equity?"

Pursuant to its consent agreement in No. INS-10-202, American Equity has made restitution to Ms. O. in the amount of $104,446.40 for the lost value of Mr. O's life insurance policy, and has reimbursed Ms. O's legal fees. *(Exh. 32 at ¶¶ 36(A), 40)* However, American Equity is not eligible to receive restitution under 24-A M.R.S.A. § 12-A(6), which only grants the Superintendent the authority to order restitution "for any insured or applicant for insurance injured by a violation."[3] As the Law Court has observed when upholding the continuing validity of the collateral source rule in Maine, "The philosophy underlying the Collateral Source Rule seems to be that either the injured party or the tortfeasor is going to receive a windfall, if a part of the pecuniary loss is paid for by an outside source and that it is more just that the windfall should inure to the benefit of the injured party than that it should accrue to the tortfeasor. This conclusion seems to be based on substantial justice." *Werner v. Lane,* 393 A.2d 1329, 1335-36 (Me. 1978),*quoting Olivas* v. *United States,* 506 F.2d 1158, 1163-64 (9th Cir. 1974). The same rationale applies here.

American Equity's refund of the purchase price *(Exh. 32 at ¶ 36(B))* does not substitute for restitution by Mr. Richard for two reasons. First, the record strongly suggests that this refund was in consideration for the surrender of the annuities. *(Exh. 31)* Second, irrespective of what amends American Equity has made, it is unjust for Mr. Richard to retain commissions that he earned in the manner described below. Therefore, after full reconsideration of this question, the original order of restitution is reaffirmed.

Factual Background

The following facts are not in dispute:

On October 9, 2006, Mr. Richard contacted a couple in their early sixties, Mr. O and Ms. O, to discuss retirement planning. They had been referred by Mr. O's sister, one of Mr. Richard's customers. *(Tr. 31–32; Exh. 8)*[4] Ms. O worked for TD Banknorth following up on bad checks. *(Tr. 110–11)* Mr. O had formerly worked as a baker, but was totally and permanently disabled as a result of a work-related lung condition. Mr. Richard observed that Mr. O was continuously receiving oxygen from a nasal tube. *(Tr. 34–35, 112)*

Mr. Richard first met with them on October 11, 2006, when he made a "fact finding visit to find out what their financial situation was" at their home in Auburn, Maine. *(Tr. 33, 41)* At that visit, he also discussed "The potential annuities that I was recommending for them." *(Tr. 53)* "At the conclusion of the first meeting," according to Mr. Richard's testimony, he "instructed the [O's] to call me when all the funds that they had intended to put into annuities were available and we'd set up an appointment to take care of the application process." *(Tr. 95)* He left them some literature on annuities offered by American Equity Investment Life Insurance Company and some handwritten instructions on how to roll over an individual retirement account. *(Tr. 43–45, 98, 152; Exh. 36)*

His second visit was on November 28. *(Tr. 52–53; Exh. 18, 20, 22)* During the period between those two visits, the O's liquidated the following assets and deposited the proceeds in Ms. O's bank account *(Exh. 15,18, 20, 22, 35; Tr. 36, 75–77, 146, 148, 150):*

Mr. O, Qualified Retirement Plan Assets:	Annuity, Modern Woodmen:	$19,058.41
	Annuity, Pacific Life:	$ 1,602.11
	Total:	**$20,660.52**
Mr. O, Nonqualified Assets:	Life Insurance Policy, Conseco:[5]	$11,935.33
	Bonds, Raymond James Brokerage:	$ 3,083.64
	Total:	**$15,018.97**
Ms. O, Qualified Retirement Plan Assets:	Annuity, Modern Woodmen:	**$ 2,455.95**

At the November 28 meeting, Mr. Richard filled out applications and suitability acknowledgment forms for three American Equity annuities: qualified retirement annuities for both of the O's, and a nonqualified annuity for Ms. O.[6] Ms. O wrote out three separate checks for these annuities, for $20,660.52, $15,018.97, and $2,455.95, the same amounts shown on the preceding page as the totals for each of the three asset categories.[7] *(Tr. 60, 68–69; Exh. 18, 20, 22)* The application form asked: "Will this annuity replace any existing insurance or annuities in this or any

other company? (If Yes, complete replacement forms.)" Mr. Richard checked "No" on two of the applications *(Exh. 18, 20),* and left the box blank the third application, without filling out a replacement form *(Exh. 22).* The suitability acknowledgement forms specified that the source of the funds was "IRA Rollover" for the two qualified annuities *(Exh. 18, 22),*[8] and "Savings" for the nonqualified annuity *(Exh. 20).*

The O's signed the applications, and received their annuities. *(Exh. 18–23)* Slightly over a year later, on February 3, 2008, Mr. O died. *(Exh. 7)* The Conseco policy, which was surrendered for $11,935.33 *(Exh. 14),* would have paid a death benefit of $100,000 *(Exh. 16; Tr. 43).*

Ms. O filed a complaint with the Bureau of Insurance. *(Exh. 7)* American Equity asked Mr. Richard for a response to the allegations in the complaint. He wrote to American Equity on July 15, 2008, denying that he "persuaded [Mr. O] to cash in his life insurance policy in order to fund an annuity being proposed by me." *(Exh. 8)* Mr. Richard explained that it "became apparent that Mr. [O] was suffering from a respiratory illness.... He indicated that it would probably be the cause of his demise, although he could not say how long into the future that might be....
By *[sic]* advising Mr. [O] to surrender a policy worth potentially $100,000 for an annuity worth $12,000 would have been totally unprofessional on my part, and would have been totally unsuitable." *(Id.)* On April 13, 2010, American Equity agreed to compensate Ms. O for her loss.[9] *(Exh. 31)*

Recommendation to Surrender the Conseco Policy

The violations alleged in the Amended Petition are based on four underlying allegations of wrongful acts:[10] (1) that Mr. Richard recommended that Mr. O surrender the Conseco Policy in order to buy an annuity; (2) that Mr. Richard misrepresented the source of funds when he filled out the annuity applications and suitability questionnaires; (3) that Mr. Richard took advantage of the O's lack of information and inability to make informed decisions; and (4) that the products he sold the O's were unsuitable.

Mr. Richard has repeatedly acknowledged that the surrender of the Conseco Policy was not in the O's best interest. In his letter to American Equity, he agrees that such a recommendation would have been "idiotic," "totally unprofessional," and "completely unsuitable." *(Exh. 8)* In his testimony at the hearing, he stated that regardless of the health of the customer, circumstances where he might recommend surrendering a whole life policy to buy an annuity would be "extremely rare and probably inconceivable," and that in all his experience selling annuities, he had never encountered such a situation. *(Tr. 195–96)*

A factor weighing even more strongly in favor of keeping the Conseco Policy was the waiver-of-premium rider, which provided that if Mr. O became totally disabled before July 23, 2004, his premium would be waived as long as he remained disabled. *(Exh. 16)* The Social Security Administration determined that Mr. O became totally disabled on December 15, 2003, and he began receiving Social Security disability benefits in June of 2004. *(Exh. 17)* Mr. Richard testified that he knew Mr. O was receiving disability benefits from his employer and was also receiving Social Security benefits, but did not ask what type of Social Security benefits. *(Tr. 35–36)* He testified that he was familiar with waiver-of-premium riders, but did not ask the O's whether the Conseco Policy had such a rider. *(Tr. 48–49)*

Therefore, as to the Staff's first allegation, that Mr. Richard wrongfully recommended that Mr. O surrender the Conseco Policy, the only question in dispute is whether Mr. Richard in fact made that recommendation. Ms. O has repeatedly asserted that he did, in her original complaint *(Exh. 7),* in an affidavit executed on November 5, 2008 *(Exh. 11),* and in her testimony at the hearing *(Tr. 126–28).* In the affidavit, Ms. O stated:

> Mr. Richard said to us that we didn't need all that life insurance because our mortgage had been paid up. Mr. Richard said there would be more money for those expenses if we didn't have to pay on the life insurance. Mr. Richard told my husband to contact the insurance company for surrender forms and my husband called for them that same afternoon. *(Exh. 11;* see also *Tr. 126, 128)*

Mr. O did call for the surrender forms that afternoon. *(Exh. 12)* He signed the forms 11 days later, on October 22 *(Exh. 13),* and Conseco Life Insurance Company issued Mr. O a check for $11,935.33 on November 3 *(Exh. 14).*

Although Mr. Richard has always denied that the policy surrender was the result of his recommendation, his denials are contradicted by the written list of assets he provided the O's on a notepad with the American Equity logo and promotional slogan *(Exh. 35):*

[MR. O][11] – 62			
	IRA – Modern	18,892	┐ 27
	Woodmen Q	8,045	┘
	Union Retirement Plan Q		
	Raymond James NQ	1,577	┐ 5K
	Pacific Life NQ	1,460	┘
	Life Insurance	12,400	
[MS. O] – 62			
	IRA – Modern	2,435	

Woodmen Bonds	3,500

Although Ms. O testified, when she was shown Exhibit 35, that she could not remember when she received it *(Tr. 116–17),* she also testified that at the first meeting, Mr. Richard "jotted everything down on a piece of paper" that he left with the O's *(Tr. 137–38)*. I find that Exhibit 35 was that piece of paper.

Mr. Richard's testimony that Exhibit 35 was prepared at the November 28 meeting *(Tr. 40, 42),* and that he took no notes and put nothing in writing at the October 11 meeting *(Tr. 41–42, 54),* is not plausible. None of the dollar values in Exhibit 35 coincides with any of the actual liquidation values for the assets, which are shown in the table on Page 3,[12] and the qualified Pacific Life annuity is flagged as "NQ." The three qualified annuities had all increased in value, and the life insurance (for which part of the premium was being paid using the cash value) had decreased in value, consistent with what would be expected to happen between the last statement period before October 11 and the time the assets were liquidated. Mr. Richard initially testified that the figures in Exhibit 35 are different because they were just "ballpark estimates" the O's had given him.[13] *(Tr. 54–55)* However, when questioned about the level of precision in figures such as $18,892 and $8,045, he acknowledged that the O's "may have had some of the documentation right there in front of them." *(Tr. 56)* There would be no reason to jot down a proposal based on either rough estimates or old account statements at the November 28 meeting, however, because the November 28 meeting was called only after the O's had notified Mr. Richard that they had liquidated all the assets that would be used to fund the annuities. The exact final values were already available before the meeting began, and everyone knew those were the relevant figures.[14]

Mr. Richard's testimony is also inconsistent with his July 2008 letter to American Equity. In that letter, as he did at the hearing, he stated "categorically that the allegations stated in the complaint are totally untrue. I did not urge [Mr. O] to surrender his $100,000 life insurance policy in return for a $12,000 cash value in order to fund an IRA."[15]*(Exh. 8)* As noted earlier, he stated that such a recommendation "would have been totally unprofessional on my part, and would have been completely unsuitable. My ethical standards are completely above any recommendation of that kind." *(Id.)* However, he provided a completely different explanation of what actually happened. In his letter, he never mentioned even being aware of the existence of the policy, let alone recommending that Mr. O surrender it. Instead, he provided the following explanation of the transaction as he remembered it:

During my initial consultation with the [O's], they informed me that they each had IRAs that were not performing to their satisfaction, and that [Ms. O] had additional funds in a regular savings account that was earning minimal interest rates .... I recommended rollovers for their respective IRAs ... with a separate fixed equity indexed annuity for [Ms. O]'s separate savings .... The amount of [Mr. O]'s rollover IRA with American Equity was $29,225.15, with $8,564.63 coming from Nationwide Bank, in which [Mr. O] had an IRA, with the difference coming from [Ms. O]'s personal account. Where that money originated, I do not recall, nor would I be willing to speculate, other than to say that it was from another IRA that existed prior to the transaction. *(Exh. 8)*

As Mr. Richard now acknowledges, at the time of the transaction he knew exactly what all the sources of funds were for each of the three annuities. *(Tr. 101–03)* None of those funds were in Ms. O's bank account until after the initial consultation – they were only held there temporarily after the O's liquidated the original investments. *(Id.; Tr. 95; Exh. 15, 35)* Although Mr. Richard was at some point aware that there were material inaccuracies in the letter, he testified that he never contacted American Equity to correct the record, because "I was never asked to." *(Tr. 106)*

Later, Mr. Richard's attorney furnished him with documentation that described the sources of the funds – including the Conseco Policy surrender – and conclusively demonstrated that he was aware of those sources no later than the time of the application. *(Tr. 100; Exh. 15, 35)* Seeing these documents appears to have significantly refreshed his memory, because at the hearing, he testified that he remembered a number of significant facts he had previously forgotten. In particular, in his July 2008 letter, Mr. Richard wrote:

If I would have recommended the surrender of a $100,000 life insurance policy in return for a cash value of $12,000, [Ms. O] would probably have escorted me to the exit of their home with no future invitation for any future consultation. She would have protested loudly at the thought of such a suggestion of giving up a potential death benefit of $100,000 in return for a cash surrender of his existing whole life insurance policy for a cash surrender value of $12,000. *(Exh. 8)*

At the hearing, by contrast, he testified that the policy surrender was entirely the O's idea – after he arrived at their house on November 28, he "was surprised" *(Tr. 85)* – "shocked" *(Tr. 86)* – to discover that the Conseco Policy was one of the assets they had liquidated. *(Tr. 85)*

According to Mr. Richard's testimony, he had discussed the pros and cons of surrendering the policy with the O's at the October 11 meeting *(Tr. 46–47, 83–84),* and that "My recommendation was to keep the life insurance policy." *(Tr. 46)* He added that "I don't think cashing in the life insurance policy would have been a reasonable option." *(Tr. 85)*However, he was evasive and inconsistent as to whether he actually communicated that recommendation to the O's. At one point, he said unequivocally that he did. *(Tr. 85)*Earlier, however, when asked specifically whether he had told the O's to keep the policy, he replied "I told them ... no, I ... I ... I told

them they'd have to decide between themselves and weigh the advantages and disadvantages as to whether they should keep the policy or ... or surrender it." *(Tr. 47)*

According to Mr. Richard's testimony, after he found out that Mr. O had taken the unreasonable step of surrendering the Conseco policy, despite being shocked by this action and aware that he was the one with expertise in insurance matters, he "wasn't going to criticize that decision" *(Tr. 97)* and did not discuss the possibility that they might be able to undo the policy surrender *(Id.; Tr. 87)*

That is not consistent with the strong feelings he consistently expressed that a policy surrender in these circumstances is unreasonable and unusual, and neither is his testimony that he failed to mention this shocking event in his letter to American Equity because he "didn't remember the specifics" by the time American Equity asked him about Ms. O's complaint. *(Tr. 106)*

I therefore find it more likely than not that both of his versions of events were deliberate lies, not simple lapses of memory.

Failure to Disclose Policy Replacements

As noted earlier, each application asked: "Will this annuity replace any existing insurance or annuities in this or any other company? (If Yes, complete replacement forms.)," and Mr. Richard checked "No" in two of the applications while leaving the third blank without providing replacement information. *(Exh. 18, 20, 22)* Mr. Richard added in the suitability acknowledgment that the source of funds for each qualified annuity was IRAs *(Exh. 18, 22),* and the source of funds for the nonqualified annuity was savings *(Exh. 20).* In his letter to American Equity, he explained further that the nonqualified annuity was funded by "funds in a regular savings account that was earning minimal interest rates." *(Exh. 8)*

As Mr. Richard acknowledged, he was aware when he filled out the applications that all three annuities were funded in whole or part with the proceeds from the surrender of annuities or of a life insurance policy. *(Tr. 103)* He explained his failure to disclose this fact by stating that the policies were not "existing" policies at the time of the applications because they had already been liquidated. *(Tr.104)*

The policies were, however, existing at the time he made the replacement recommendation. Under Mr. Richard's interpretation of the term "existing policy," the disclosure of replacement sales is only required when the application is completed before the old policy has been surrendered. There is no sensible basis for that distinction, and even if Mr. Richard

sincerely believed that he was giving the precisely correct answer to the specific question that was being asked, he knew or should have known (and I find it more likely than not that he knew very well), that he was omitting material information that he should have disclosed in order to avoid submitting a misleading application.

In addition, Ms. O testified that the proceeds of all but one of the asset liquidations were made payable directly to her or to Mr. O,[16] and deposited into her personal account, because "Mr. Richard told us that he didn't want the original checks, that he wanted a personal check." *(Tr. 147)* I find this testimony credible, and I infer, from his other misrepresentations about his replacement sales practices, that the purpose of his request was to conceal the source of the funds.

Improper Sales Practices

Next, the Petition alleges that Mr. Richard "knew, or should have known, that the [O's] emotional and medical conditions would likely prevent them from making properly considered decisions about purchases," that he deprived them "of a fair opportunity to read and otherwise consider written materials related to products he was selling," and that he failed "to take reasonable efforts to determine whether the [O's] in fact understood the nature of products he recommended that they purchase."

I do not find that Mr. Richard deprived the O's of a fair opportunity to read the product literature – that was dropped off on October 11, and they had ample opportunity to ask questions between then and November 28. However, Ms. O said that during that time, they "read a little bit of it, but didn't understand much about it." *(Tr. 152)* Product literature is helpful, but is not a substitute for face-to-face communication with the customer has a clear understanding.

In addition to the general obligations of an insurance producer, Mr. Richard also had a particular obligation, under a consent judgment of the Maine Superior Court to settle allegations that he had violations of the securities laws, that before making any sales of annuities or life insurance policies, he "must have reasonable grounds for believing that the product is suitable for the particular customer based on the customer's (1) age and health; (2) current and likely future employment status; (3) financial situation, including other investments; and (4) financial needs, goals, and priorities," and must document that he has acquired sufficient information.[17] *(Exh. 28)*

Nevertheless, Mr. Richard testified that he took only "mental notes" at his initial meeting. He took pains to keep the information in the application as minimal as possible, and left no record of any suitability analysis. He testified that when he realized his customers were making an

unreasonable decision, he did not question it. That is not a proper suitability review, an adequate sales presentation, or a fair sales practice.

Suitability Issues

Finally, the Staff alleges that the annuities sold were not suited to the O's insurance and financial needs.

As discussed above, and as acknowledged by Mr. Richard in both his letter to American Equity and his testimony, the nonqualified annuity was unsuitable as a replacement for the Conseco Policy. I do not find sufficient evidence in this record, however, to conclude that the qualified annuities were unsuitable, nor to conclude that the nonqualified annuity was inherently unsuitable for Ms. O's needs or unsuitable in comparison to the Raymond James investments. Although it is Mr. Richard's fault that the application materials do not contain any information comparing the old and new annuities, that is a separate violation. There is no evidence refuting Mr. Richard's statement that the O's existing investments were not performing to their satisfaction. *(Exh. 8)* Ms. O agreed that it was desirable to have all their investments in the same place *(Tr. 124),* and there is no evidence that the O's had any problems with the performance of the annuities.

Remedies

Mr. Richard caused serious harm by persuading a disabled man to cash in his life insurance policy. He agreed that if the allegations in Ms. O's complaints were true, his conduct would have been totally unprofessional. He also engaged in a long-term, complex pattern of deception to conceal not only the true nature and history of this transaction but more generally, to launder his replacement activities through customers' personal bank accounts.

These dishonest practices demonstrate that he is untrustworthy to act as an insurance producer, and call for the revocation of his license pursuant to 24-A M.R.S.A. § 1420-K(1)(H).

In addition, 10 M.R.S.A. § 8003(5)(A-1)(3) authorizes the Superintendent to impose a civil penalty of up to $1500 for each violation by a Bureau of Insurance licensee. Accordingly, I am imposing the following civil penalties for each of the following ten violations, for a total penalty of $12,500:

1. $1500 for persuading someone with a disabling and degenerative condition to surrender his life insurance policy, in violation of 24-A M.R.S.A. §§ 1420-K(1)(H), 2152, and 2155.

2–4. $1500 each for intentionally failing to disclose, on each of three annuity applications, that the new annuities were replacing existing policies

5–7. $1500 each for instructing the O's to deposit the proceeds of the asset liquidations in Ms. O's personal account and pay for each of three annuities by personal check, in order to conceal the source of funds.

8–10. $1500 with respect to the nonqualified annuity that replaced the Conseco Policy, and $250 each with respect to the two qualified annuities, for selling annuities without conducting any meaningful inquiry into their suitability for the O's, and without making a meaningful effort to ensure that the O's understood what they were buying.

Finally, 24-A M.R.S.A. § 12-A(6) authorizes the Superintendent to order restitution for any insured injured by a violation of the Insurance Code. All of Mr. Richard's commissions on sales to the O's were earned through deceptive sales practices, and I am therefore ordering him to repay them to Ms. O as restitution.

Order and Notice of Appeal Rights

It is therefore *ORDERED:*

1. The Petition for Enforcement is *GRANTED.*
2. Mr. Richard's privilege to act as an insurance producer is *REVOKED,* effective immediately.
3. Mr. Richard shall pay a civil penalty of $12,500, by check payable to the Treasurer of State.
4. As restitution, Mr. Richard shall pay to the Treasurer of State, for the benefit of Ms. O, the full amount of commissions and fees he has received for the three annuity transactions described in the proceeding, plus interest at the same rate as specified for civil actions in 14 M.R.S.A. § 1602-B(3).
5. All payments shall be hand-delivered or sent to the attention of Accounts Receivable at the Maine Bureau of Insurance, 34 State House Station, Augusta ME 04333-0034.
6. Payment is due on or before September 1, 2011, except as otherwise agreed to between Mr. Richard and Bureau of Insurance Staff or ordered by a court of competent jurisdiction. The due date shall be tolled during the pendency of any appeal from this Decision and Order, provided that interest on all unpaid penalties and restitution accrues beginning on September 1, 2011, at the same rate as specified for civil actions in 14 M.R.S.A. § 1602-C.

This Amended Decision and Order is a final agency action of the Superintendent of Insurance within the meaning of the Maine Administrative Procedure Act. It reaffirms and supersedes the Decision and Order issued July 2, 2011. It is appealable to the Superior Court in the manner provided in 24-A M.R.S.A. § 236 and M.R. Civ. P. 80C. Any party to the hearing may initiate an appeal within thirty days after receiving this notice. Any aggrieved non-party whose interests are substantially and directly affected by this Decision and Order may initiate an appeal on or before September 21, 2011. There is no automatic stay pending appeal; application for stay may be made in the manner provided in 5 M.R.S.A. § 11004.

[1] By Order dated October 25, 2010, the Superintendent, acting pursuant to 24 M.R.S.A. § 210, appointed Bureau of Insurance General Counsel Robert Alan Wake to serve as hearing officer in this proceeding, with full authority to take final agency action on her behalf.

[2] Neither party's request was formally designated as a motion for reconsideration or otherwise submitted in compliance with Bureau of Insurance Rule 350, § 7(B). However, both requests were made in writing with notice to opposing counsel, and raise points that warrant reconsideration pursuant to Rule 350, § 19(C).

[3] Although one of the three annuities for which Mr. Richard received commission payments was owned by Ms. O's husband, she is his surviving spouse and the designated primary beneficiary of that annuity. *(Exh. 18)*

[4] Citations to the hearing transcript are abbreviated as *(Tr.),* and citations to the exhibits offered by the Staff and admitted at the hearing are abbreviated as *(Exh.)*

[5] Although the policy was generally referred to as the "Conseco Policy," as it will be in this Decision and Order, the issuing insurer was United Presidential Insurance Company. *(Exh. 16)* United Presidential is in the Conseco group and its representatives used the Conseco brand in their communications. *(Exh. 12–16)*

[6] Although the funds came primarily or entirely from Mr. O *(Exh. 14, 35),* Ms. O was designated as the owner and annuitant. *(Exh. 20–21)*

[7] Mr. O also rolled over a union pension benefit, and received a check for $8,564.63 that was made out directly to "American Equity Investment" for the benefit of Mr. O. *(Tr. 63–64; Exh. 18)* That check was applied to his qualified annuity, for a total premium of $29,225.15. *(Exh. 18)*

[8] Mr. O's application phrased this as "Rollover of IRA's."

[9] American Equity also entered into a consent agreement to resolve a separate adjudicatory proceeding that had been consolidated with this proceeding, No. INS-10-202.*(Exh. 32)* However, I do not find that American Equity's acceptance of responsibility has any probative value as to the allegations against Mr. Richard, and my findings regarding Mr. Richard's conduct are based entirely on the other evidence in the record.

[10] The Petition as originally filed alleged further that Mr. Richard used the nonqualified proceeds of the Conseco Policy to fund a qualified annuity. The Staff acknowledged in its Motion to Amend that this was an error. Mr. Richard may have been the source of the Staff's misunderstanding. In his letter to American Equity, he paraphrases Ms. O's complaint –

inaccurately *(Exh. 7)* – as alleging that he recommended using the policy surrender proceeds "to fund an IRA." *(Exh. 8)* He goes on to describe Mr. O's qualified annuity as the only annuity for which some of the funds were derived from unknown sources, and Mr. Richard took pains to deny that he would knowingly commingle qualified and nonqualified funds. *(Id.)*

[11] He used the familiar short forms of the O's first names.

[12] Those values are derived from a second set of notes which Mr. Richard unquestionably took at the November 28 meeting *(Exh. 15),* and their sums are equal, to the penny, to the amounts in Ms. O's personal checks used to purchase the three annuities *(Exh. 18, 20, 22).*

[13] It is not clear whether he was saying these were estimates the O's gave him at the start of the second meeting, or were based on his recollection of the unwritten "mental notes" he said he took at the first meeting. *(Tr. 41, 54)*

[14] Underneath the figures copied above, Mr. Richard later wrote and circled the figure 20,660.52. *(Tr. 49; Exh. 35)* As Mr. Richard testified, that amount which is the sum of the rollover values of Mr. O's Pacific Life and Modern Woodmen annuities, was not based information available at the October 11 meeting and therefore could only have been written at the November 28 meeting. *(Tr. 93–94)* However, that does not prove that the rest of Exhibit 35 was also prepared at the November 28 meeting. It would be normal for the O's to have this proposal with them when it came time to write the checks and sign the applications regardless of whether it was prepared an hour earlier or a month earlier.

[15] Later in his letter, he clarified that the phrase "to fund an IRA" was not intended to limit the categorical nature of his denial: "I had never recommended that [Mr. O] surrender a life insurance policy with a death benefit of $100,000 in order to get a cash surrender value of $12,000 as alleged in the complaint." *(Exh. 8)*

[16] The one exception, the union pension plan check written directly to American Equity for the benefit of Mr. O, was not for an annuity written by an insurance company and therefore did not constitute an insurance replacement transaction.

[17] The consent judgment also permanently enjoined Mr. Richard "from holding himself out as providing any type of planning services to the elderly." *(Exh. 28)* He explained that his use of "Elder Planning Associates" as his official mailing address *(Exh. 5)* was the result of an inadvertent failure to update his records *(Tr. 200),* and that he did not violate the injunction when he called the O's for "retirement planning" because he did not realize they were elderly. *(Tr. 32, 100)* He did,

however, know that Ms. O's sister was a retiree *(Tr. 32),* and his American Equity customer records show that out of the 39 customers listed, Ms. O, who applied the day before her 62nd birthday, was the second-youngest. The youngest was 55 years old and had a spouse aged 68. *(Exh. 24)*

AUGUST 12, 2011

ROBERT ALAN WAKE
DESIGNATED HEARING OFFICER