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BEFORE THE STATE AUDITOR;
EX-OFFICIO COMMISSIONER OF SECURITIES AND INSURANCE
HELENA, MONTANA

IN THE MATTER OF:) CASE NO. I-11-08-04-01
)
MARTIN BOWER,) FIRST AMENDED
) NOTICE OF PROPOSED AGENCY
) DISCIPLINARY ACTION AND
) OPPORTUNITY FOR HEARING
)
Respondent.)

Staff of the Securities and Insurance Departments of the office of the State Auditor as Commissioner of Securities and Insurance of the state of Montana (Department), pursuant to the authority of the Securities Act of Montana, Section 30-10-101, et seq., Montana Code Annotated (2003)(MCA), and the Insurance Code of Montana, Section 33-1-101, et seq., Montana Code Annotated (2003)(MCA), are proposing to the Commissioner that he take specific action against MARTIN BOWER (Bower) for violations of both the Montana Securities Act and the Montana Insurance Code. The Commissioner has authority to take such action under the provisions of Sections 30-10-102, 30-10-107, 30-10-201, 33-10-301, 33-1-102, 33-1-317, 33-17-201, and 33-17-1001, MCA.

In particular, the Department's staff is recommending specific action against Bower including imposition of appropriate fines pursuant to the provisions of the Montana Securities Act and the Montanan Insurance Code, as well as any equitable relief deemed appropriate.

Service of process is made pursuant to Sections 30-10-107 (8), and 33-1-314 (4), MCA.

REASONS FOR ACTION

There is reason to believe that the following facts, if true, justify and support such specific action.

ALLEGATIONS

1. Bower is a licensed insurance producer, license number 901279, issued by the Department. Bower is appointed with Banker's Life and Casualty Company (Banker's) as an insurance producer and is paid a commission on Banker's products that he sells.

2. Bower is not now registered nor has he ever been registered as an investment advisor in Montana, pursuant to § 30-10-201 (3), MCA.

ALLEGATIONS SPECIFIC TO VIOLATIONS OF § 30-10-201 (3), MCA

3. The Department realleges by incorporation the facts contained in paragraphs 1-2, herein.

4. On or about August 9, 2004, staff of the Department received a complaint from a Montana citizen identified herein as "HZ" alleging that HZ was unable to get HZ's stock certificates from HZ's account at Raymond James, broker-dealer firm. HZ is 86 years of age and resides at an assisted living facility in Kalispell, Montana.

5. On or about August 10, 2004, HZ again contacted the Department and alleged that Bower visited HZ at the assisted living facility and urged HZ to sell HZ's Glacier Bancorp stock to purchase an annuity from Banker's. HZ had stock holdings with Glacier Bancorp in

excess of \$500,000. HZ also alleged that Bower convinced her to purchase an additional annuity using \$179,000 in proceeds from HZ's savings account.

6. The Department investigated HZ's complaint, contacting Jean Luckey (Luckey) on or about August 9, 2004. Luckey is HZ's sales representative from Raymond James. Luckey indicated she became HZ's sales representative after Michael Blodnick (hereafter "Blodnick"), the president of Glacier Bancorp referred Luckey to HZ.

7. The Department contacted Blodnick as part of its investigation. Blodnick indicated to the Department that he had contacted Luckey in July 2004 with concerns because HZ's spouse had died in the last year and the spouse handled all the finances during their marriage. HZ indicated to Blodnick that HZ had lots of stock certificates and did not know what to do with them. Blodnick recommended Luckey to HZ as a person who could help HZ with the safekeeping of the stock certificates. Blodnick was aware that someone wanted to liquidate the entire portfolio valued in excess of \$500,000. HZ contacted Blodnick concerned that Luckey may have stolen the stock certificates because the person wanting to liquidate HZ's stock certificates convinced HZ that this was happening. Blodnick calmed HZ's fears by explaining HZ's brokerage statements indicated the stock certificates were intact.

8. In August 2004, HZ contacted Luckey asking Luckey to come to HZ's assisted living apartment with copies of the certificates. When Luckey arrived at HZ's apartment, Bower was present in the apartment. HZ indicated to the Department that Bower told HZ that he could sell the stock certificates for HZ.

9. HZ indicated to the Department that HZ subsequently cancelled the check from HZ's savings account when HZ became concerned about the safety of the Banker's annuity. Additionally, HZ indicated to the Department that HZ decided not to purchase the annuity

because Bower was too insistent, utilizing “pushy” sales tactics. HZ also indicated Bower did not provide HZ with the beneficiary information he had promised.

10. On or about November 4, 2004, the Department received a complaint from a Montana citizen identified herein as “LL”. LL indicated to the Department that LL’s parent, herein identified as “IRL” suffers from Alzheimer’s disease and resides in a small home abutting LL’s own home. LL also indicated that IRL’s Alzheimer’s is readily apparent to anyone and that she has virtually no short-term memory. LL indicated that Bower had contacted IRL by coming personally to her home on several occasions attempting to convince IRL to liquidate IRL’s securities portfolio in order to purchase a Banker’s annuity product. LL indicated that IRL is 79 years of age.

11. The Department investigated LL’s complaint. Tim Skiftun (“Skiftun”) is IRL’s sales representative at Merrill Lynch, the broker-dealer firm where IRL’s securities are held. Based on conversations with Skiftun’s assistant, the Department alleges that Bower sent two different Banker’s “Authorization to Transfer Funds” forms signed by IRL and Bower to Merrill Lynch on or about October 15, 2004. The forms indicated IRL and Bower signed them on or about October 7, 2004. On or about October 19, 2004, Skiftun called IRL to clarify what IRL wanted to do with her securities portfolio as it was unclear based on the submitted forms. IRL did not recall signing the forms when Skiftun called IRL. IRL indicated to Skiftun that IRL did not want to move her accounts or to purchase an annuity.

12. On or about October 26, 2004, IRL sent a letter to Banker’s indicating IRL did not want to purchase an annuity, nor did IRL want to liquidate or transfer her securities portfolio. Then, on or about November 1, 2004, Bower again convinced IRL to sign a Banker’s “Authorization to Transfer Funds” form with an indication that IRL’s portfolio was to be

liquidated in its entirety. IRL did not remember signing the earlier transfer forms, nor did she remember sending the letter to Banker's dated October 26, 2004. Banker's submitted the new form to Merrill Lynch on or about November 3, 2004.

13. On or about November 5, 2004, IRL sent a letter to Skiftun instructing Skiftun not to process any transfer requests, not to liquidate any assets and not to take any instructions without IRL's express oral and written permission. LL assisted IRL in the preparation of this letter to Skiftun.

14. The Department's investigation of Bower indicates that Bower acted as an unregistered investment advisor or investment advisor representative when he advised HZ and IRL to sell their securities to buy an annuity from Banker's and that annuity purchase would result in compensation to Bower.

ALLEGATIONS RELEVANT TO VIOLATION OF § 30-10-301, MCA

15. The Department realleges by incorporation the facts contained in paragraphs 1-14, herein.

16. The Department's investigation of Bower has determined that Bower, while acting as an investment advisor, acted fraudulently when he failed to inform HZ and IRL that he lacked sufficient relevant facts, such as tax consequences for HZ and IRL in the event of liquidation of their securities, to determine whether the securities transactions he recommended to HZ and IRL were suitable for them. Clearly Bower ignored relevant information about his potential client when he acted in spite of IRL's obvious Alzheimer's induced short-term memory losses. Clearly Bower ignored relevant information about his potential client when he ignored HZ's inability to understand the impact of storing original stock certificates in her closet.

17. The Department's investigation of Bower has determined that Bower, while acting as an investment advisor, acted fraudulently when he failed to inform HZ and IRL that he was required to be registered before conducting investment advisor business.

18. The Department's investigation of Bower has determined that Bower, while acting as an investment advisor, engaged in an act, practice and course of business that operated as a fraud on HZ and IRL when he recommended the sale of their securities without first ascertaining whether the securities sales were suitable for HZ and IRL. Additionally, Bower acted fraudulently when he informed HZ he could liquidate HZ's Glacier Bancorp stock certificates that were valued in excess of \$500,000. Bower engaged in an act, practice and course of business that operated as a fraud on IRL when he convinced IRL to sign fund transfer forms in spite of IRL's obvious short-term memory loss and in spite of the fact that IRL had indicated in writing that this was not what IRL wanted.

ALLEGATIONS RELEVANT TO VIOLATION OF § 33-1-1302, MCA

19. The Department realleges by incorporation the facts contained in paragraphs 1-18.

20. The insurance industry's continuing education materials approved by the Department indicate annuity products are suitable for persons in their late 50's and early 60's or for persons still working.

21. Through its investigation of the HZ and IRL complaints, the Department determined that Bower fraudulently attempted to sell an unsuitable insurance product to HZ and IRL, acting with reckless disregard as to whether his assertions regarding the product were true, making the assertions for his benefit and to the detriment of HZ and IRL when they relied upon those assertions.

ALLEGATIONS SPECIFIC TO VIOLATIONS OF § 33-17-1001, MCA

22. The Department realleges by incorporation the facts contained in paragraphs 1-21, herein.

23. The Department's investigation of Bower has determined that in the conduct of his affairs under his insurance producer's license Bower used coercive and dishonest practices by using undue pressure in his sales tactics to convince HZ and IRL to buy the annuity product he sells by appointment with Banker's.

24. The Department received a complaint against Bower from Montana citizen identified herein as JC. Based on the information provided by JC, the Department alleges that Bower used coercive and dishonest practices while conducting business pursuant to his insurance producer's license by coming to JC's home on the pretense of selling JC and JC's spouse hospitalization and health insurance. While at JC's residence. Bower did not have any such insurance available, rather Bower sold JC's spouse an annuity through Banker's. JC's spouse requested that Bower not process the application for three (3) or four (4) days allowing opportunity to transfer funds from one account to another to cover the cost of the annuity product. Bower processed the application and check immediately, causing JC's account to suffer an overdraft charge. JC made numerous attempts to contact Bower to no avail. After a full month of attempting contact with Bower, JC contacted Banker's. Banker's reimbursed JC the initial investment of \$5,000, without any interest and without repayment for the overdraft charge. Bower later told JC he was not allowed to hold applications, but that Bower must immediately process the applications. Bower did not relay that information to JC or to JC's spouse at the time the application was made.

25. The Department further alleges that Bower failed to provide the required disclosure documentation to JC and JC's spouse at the time of application for the annuity product. Bower's conduct violated specific administrative rules when he failed to provide the required disclosure documents.

26. The Department's investigation of JC's complaint has determined that Bower used undue pressure to sell the annuity to JC's spouse. The Department also determined that Bower is a source of injury and loss to JC and JC's spouse and Bower is untrustworthy.

27. The Department's investigation of Bower has determined that in the conduct of his affairs under his insurance producer's license, Bower is untrustworthy because he provides investment advice without registration as an investment advisor as required by § 30-10-201, MCA.

28. The Department's investigation of Bower has determined that in the conduct of his affairs under his insurance producer's license, Bower is a source of injury and loss to the public because he provides investment advice without meeting the requirements of Montana law to do so and by his using undue pressure in his sales tactics Bower has convinced persons to purchase insurance products they did not want or that were unsuitable.

ALLEGATIONS SPECIFIC TO VIOLATIONS OF § 33-1-1302, MCA

29. The Department realleges by incorporation the facts contained in paragraphs 1-28.

30. The Department's investigation of Bower has determined that in the course of offering or selling the Banker's annuity product to HZ, IRL, JC and JC's spouse, Bower misrepresented material facts and that Bower made these misrepresentations with reckless

indifference as to whether the material facts were true, and with the intent of causing HZ, IRL, JC and JC's spouse to rely on those misrepresentations to their detriment when he offered or sold an annuity product that was not suitable to any of the victims identified in this case.

CONCLUSIONS OF LAW

Conclusions of Law Relating to the Securities Act of Montana

1. The Montana State Auditor is the Securities Commissioner. MCA § 30-10-107.
2. The administration of the Securities Act of Montana, MCA § 30-10-101 et seq., is under the supervision and control of the Securities Commissioner. MCA § 30-10-107.
3. The Securities Act of Montana shall be construed to protect investors, persons engaged in securities transactions, and the public interest. MCA § 30-10-102
4. Pursuant to MCA § 30-10-103(11), an investment advisor counsels others for compensation, direct or indirect, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities.
5. Pursuant to MCA § 30-10-201(3), it is unlawful for a person to act as an investment advisor without first being registered as such with the Department.
6. By rendering advice regarding the value and sale of securities to persons in Montana for compensation, Bower acted as an unregistered investment advisor in violation of MCA § 30-10-201(3).
7. Additionally, by recommending that persons sell securities without grounds to believe that the recommendation is suitable for that person based upon reasonable inquiry concerning that person's investment objectives, financial situation and needs, and any other relevant known information, Bower acted fraudulently, in violation of § 30-10-301, MCA.

8. Pursuant to § 30-10-305 (3), MCA, the Commissioner may impose an administrative fine not to exceed \$5,000.00 per violation upon a person found to have engaged in any act or practice constituting a violation of parts 1 through 3 of the Securities Act of Montana or any of its regulation.

Conclusions of Law Relating to the Montana Insurance Code

9. The State Auditor is the Commissioner of Insurance pursuant to § 2-15-1903, MCA.

10. The Montana Insurance Department is under the control and supervision of the Commissioner pursuant to §§ 2-15-1902 and 33-1-301, MCA.

11. The Commissioner shall administer the Department to protect consumers pursuant § 33-1-311, MCA.

12. Pursuant to §§ 33-2-109(4), 33-20-101 et. seq., and 33-17-236, MCA, as a licensed insurance producer appointed with Banker's, Bower may sell fixed annuity contracts issued by Banker's.

13. Pursuant to § 33-1-102, MCA a person may not transact a business of insurance in Montana or a business relative to a subject, resident, located, or to be performed in Montana without complying with the applicable provisions of this code.

14. Bower is in violation of § 33-17-1001(1)(f), MCA in that, while in the conduct of the affairs under the insurance producer license, Bower used fraudulent, coercive, or dishonest practices or was otherwise incompetent, untrustworthy, financially irresponsible, or a source of injury and loss to the public.

15. Bower is in violation of § 33-1-1302, MCA by fraudulently selling unsuitable insurance products to Montana citizens, acting with reckless disregard as to whether his assertions regarding the product were true.

16. Pursuant to § 33-17-1001(1), MCA, the Commissioner may suspend, revoke, refuse to renew, refuse to issue a license or may levy a civil penalty in accordance with MCA § 33-1-317 or choose any combination of actions when an insurance producer is found to be in violation of MCA § 33-17-1001.

17. Pursuant to MCA § 33-1-317, the Commissioner may impose an administrative fine not to exceed \$5,000.00 per violation of the Montana Insurance Code or regulations.

PUBLIC INTEREST

For any and all of the reasons set forth above, it is in the public interest and will protect Montana investors and insurance consumers to:

1. Immediately issue a cease and desist order barring Bower from further violations of Montana's Insurance Code and the Securities Act.
2. Revoke Bower's insurance producer's license until this matter is resolved.
3. Order Bower to pay an administrative fine in an amount and upon such terms and conditions as supported by the evidence and determined at hearing of this matter.
4. Take such other actions which may be in the public interest and necessary and appropriate for the protection of Montana investors.

RECOMMENDED RELIEF

1. Pursuant to § 30-10-305, MCA, the Department seeks a fine of \$5,000 for each of Bower's recommendations of an unsuitable security transaction in violation of the Securities Act;

2. Pursuant to § 30-10-305, MCA, the Department seeks a fine of \$5,000 for Bower's failure to register as an investment advisor as required by § 30-10-201 (3), MCA;

3. Pursuant to § 33-17-1001, MCA, the Department seeks revocation of Bower's insurance producer's license;

4. Pursuant to §§ 33-17-1001 and 33-1-317, MCA, the Department seeks a fine of \$5,000 for each violation of the Insurance Code;

5. Any other such relief allowed by law or required by justice.

STATEMENT OF RIGHTS

You are entitled to a hearing to respond to this notice, present evidence and arguments on all issues involved in this case. You have a right to be represented by an attorney at any and all stages of this proceeding. You may demand a formal hearing before a hearing examiner appointed by the Commissioner pursuant to the Montana Administrative Procedure Act, sections 2-4-601, MCA, and following, including Section 2-4-631, MCA. If you demand a hearing, you will be given notice of the time, place and the nature of the hearing.

If you want to contest the proposed action under the jurisdiction of the Commissioner, you must advise the Commissioner within fifteen (15) days of the date you receive this notice. You must advise the Commissioner of your intent to contest the proposed action by writing to Roberta Cross Guns, Special Assistant Attorneys General, State Auditor's Office, 840 Helena Avenue, Helena, Montana 59601. Your letter must clearly indicate whether you demand a hearing, or whether you waive formal proceedings and, if so, what informal proceedings you prefer for disposition of this case. Pursuant to Section 2-4-603(2), Mont. Code Ann., you may not request to proceed informally if the action could result in suspension, revocation or any other adverse action against a professional license.

Should you request a hearing, you have the right to be accompanied, represented, and advised by counsel. If the counsel you choose has not been admitted to practice law in the state of Montana, he or she must comply with the requirements of Application of American Smelting and Refining Co., (1973), 164 Mont. 139, 520 P.2d 103.

CONTACT WITH SECURITIES COMMISSIONER'S OFFICE

If you have questions or wish to discuss this matter, please contact Roberta Cross Guns, legal counsel for the State Auditor, at 840 Helena Avenue, Helena, MT, 59601, (406)-444-2040 or, within Montana, (800)-332-6148. If you are represented by an attorney, please make any contacts with this office through your attorney.

POSSIBILITY OF DEFAULT

Failure to give notice or to advise of your demand for a hearing or form of informal procedure within fifteen (15) days, will result in the entry of a default order imposing the disciplinary sanctions against you and your license, without further notice to you, pursuant to 6.2.101, Administrative Rules of Montana and the Attorney General's Model Rule 10, 1.3.214.

DATED this 7th day of ~~November~~ December 2004.

JOHN MORRISON
State Auditor and Commissioner of
Insurance and Securities

By: Roberta Cross Guns
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Special Assistant Attorney General