

2012 WL 8016312 (Me.) (Appellate Brief)
Supreme Judicial Court of Maine.

BANKERS LIFE & CASUALTY CO., Petitioner-Appellant,
v.
SUPERINTENDENT OF INSURANCE, Respondent-Appellee.

No. BCD-12-110.
August 10, 2012.

On Appeal from the Business and Consumer Court

Brief of Appellee Superintendent of Insurance

[William J. Schneider](#), Attorney General.

[Susan P. Herman](#), Assistant Attorney General, Of Counsel.

[Andrew L. Black](#), Assistant Attorney General, 6 State House Station, Augusta, Maine 04333-0006, 207-626-8800, Attorneys
for Superintendent of Insurance.

***i TABLE OF CONTENTS**

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF FACTS	2
ISSUES ON APPEAL	20
SUMMARY OF THE ARGUMENT	21
ARGUMENT	22
I. There was substantial evidence in the record to support the Superintendent's finding that Juliano was Bankers Life's producer for whose actions Bankers Life could be held accountable and penalized under 24-A M.R.S. § 1445(1)(D)	22
A. Vicarious Liability under 24-A M.R.S. M.R.S.A. § 1445(1)(D)	23
B. Bankers Life Misconstrues the Superintendent's Order Consolidating Proceedings	24
C. Bankers Life Misconstrues the Superintendent's Decision	26
D. There is substantial evidence to support the finding that Bankers Life failed to conduct adequate supervision and failed to follow its own suitability review processes in an effective manner	27
II. There was sufficient evidence in the record to support the Superintendent's findings that Juliano committed 10 violations of law when he sold annuities to Lucianne	29
A. Violation #1. There was sufficient evidence in the record for the Superintendent to find that Juliano recommended to Lucianne that she purchase a third Bankers Life annuity in the amount of \$135,000 without having reasonable grounds for believing that the recommendation was suitable for Lucianne in violation of Bureau of Insurance Rule 9176(A)	29
*ii B. Violation #2. There was sufficient evidence in the record for the Superintendent to find that Juliano made a misleading or incomplete comparison as to the terms of the Jackson National annuity and the IRA Rollover Annuity for the purpose of inducing Lucianne to exchange her Jackson National annuity in violation of 24-A M.R.S. §2155	33
C. Violation #3. There was sufficient evidence in the record for the Superintendent to find that Juliano used dishonest practices by making a misleading comparison between the yields of the IRA Rollover Annuity and the CD Proceeds Annuity and the yields of Lucianne's existing investments in violation of 24-A M.R.S. § 1420-K(1)(H)	35
D. Violation #4. There was sufficient evidence in the record for the Superintendent to find that Juliano engaged in a dishonest practice when he misrepresented that Lucianne "did not feel the need to sing" two Fact Finders in violation of 24-A M.R.S. § 1420-K(1)(H)	37

E. Violations 5-7. There was sufficient evidence in the record for the Superintendent to find that Juliano failed to make reasonable efforts to obtain information necessary to make a suitability determination and failed to have a reasonable grounds for believing each of three annuity transactions were suitable for Lucianne in violation of Bureau of Insurance Rule 917 § 6(A) and (B).	40
F. Violations 8-10. There was sufficient evidence in the record for the Superintendent to find that Juliano demonstrated incompetence or untrustworthiness when he submitted materially inaccurate information about Lucianne’s financial situation in support of each of the three annuity transactions in violation of 24-A M.R.S. § 1420-K(1)(H)	43
III. The Superior Court correctly found no evidence of bias on the part of the Superintendent	45
CONCLUSION	50
CERTIFICATE OF SERVICE	

***iii TABLE OF AUTHORITIES**

CASES

<i>Cobb v. Bd. of Counseling Professionals Licensure</i> , 206 ME 48 ¶ 36, 896 A.2d 271	22
<i>Concerned Citizens to Save Roxbury v. Bd. of Env’tl. Protection.</i> , 2011 ME 39, ¶ 24, 15 A.3d 1263	22
<i>Dodd v. Sec. of State</i> , 526 A.2d 583, 584 (Me. 1987)	21
<i>Forest Ecology Network v. Land Use Regulation Comm’n</i> , 2012 ME 36, 28, 39 A.3d 74, 84	21
<i>Friends of Lincoln Lakes v. Bd. of Env’tl. Protection</i> , 2010 ME 18, ¶ 12, 989 A.2d 1128	21,22
<i>Green v. Comm’r of the Dept. of Mental Health, Mental Retardation and Substance Abuse Servs.</i> , 2001 ME 86, ¶ 12, 776 A.2d 612	22
<i>Handrahan v. Malenko</i> , 2011 ME 15 ¶ 14, 12 A.3d 79	34
<i>Key Equipment Finance, Inc. v. Hawkins</i> , 2011 ME 102 ¶ 4, 28 A.3d 1168	46
<i>In re Maine Clean Fuels, Inc.</i> , 310 A.2d 736 (Me. 1973)	46
<i>Maine Real Estate Comm’n v. Anderson</i> , 512 A.2d 351 (Me. 1986)	22
<i>Sprague Elec. Co. v. Me. Unemployment Ins. Comm’n</i> , 544 A.2d 728 (Me. 1988)	22
<i>Withrow v. Larkin</i> , 421 U.S. 35, 47 (1975)	46
<i>York Hospital v. Department of Health and Human Servs.</i> , 2008 ME 165 ¶ 17, 958 A.2d 67	45

***iv STATUTES**

5 M.R.S. § 11007(4)(C)(4)	46
17-A M.R.S. § 451(1)	46
24-A M.R.S. § 12-A(1)	26
24-A M.R.S. § 216	49
24-A M.R.S. § 216(2)	18
24-A M.R.S. § 1402(5)	24
24-A M.R.S. § 1420-B	24
24-A M.R.S. § 1420-K(1)(H)	35, 36, 38, 43
24-A M.R.S. § 1420-M	24
24-A M.R.S. § 1445(1)	1
24-A M.R.S. § 1445(1)(D)	1, 20, 22, 23, 24, 25, 26, 27, 28,40
24-A M.R.S. § 2155	33
24-A M.R.S. § 2517(3)	30

RULES

Bureau of Insurance Rule 917 § 6(A)	29, 30, 40, 41
Bureau of Insurance Rule 917 § 6(B)	40, 41
M.R. Civ. P. 80C	20, 21
M.R. Civ. P. 80C(e)	46
M.R. Prof. Conduct 3.4(b)	46

*1 INTRODUCTION

This case involves an insurance producer who improperly sold complex annuities to a vulnerable **elderly** consumer. One former insurance regulator has aptly described the improper sale of annuities as a form of “**elder abuse**” and one of the “top insurance scams” perpetrated on older individuals who “aren’t likely to live long enough to reap the benefits.” (R. 1833-36, 1950).¹

In this case, the Superintendent of Insurance (the “Superintendent”) found that Matthew Juliano committed ten violations of law on behalf of his employer Bankers Life and Casualty Company (“Bankers Life”) when he convinced Lucianne Belanger to liquidate a significant portion of her assets in order to purchase three 10-year deferred annuities.² The Superintendent revoked Juliano’s producer license and levied a civil penalty of \$10,000. The Superintendent also levied a civil penalty of \$100,000 against Bankers Life for Juliano’s ten sales practice violations under her authority to hold an insurer accountable for the actions of its producers. [24-A M.R.S. § 1445\(1\)\(D\)](#).³

On appeal, Bankers Life contends that: 1) the Superintendent modified the vicarious liability standard under [section 1445\(1\)\(D\)](#) for this case to a “fault-based standard” and that there is no evidence to support a finding of *2 fault on the part of Bankers Life; 2) there is no competent evidence to support the ten findings that Juliano violated the law; and 3) there was prosecutorial misconduct and Superintendent bias. None of these contentions has merit.

STATEMENT OF FACTS

Matthew Juliano and Bankers Life

After a series of jobs in the trucking, restaurant, and debt collection industries, at the age of 30 Juliano was recruited by Bankers Life to join its South Portland sales office in 1999. (R. 1506). After intensive instruction and three attempts at the licensing exam, Juliano obtained a Maine insurance producer license and began a sales career with Bankers Life. (R. 1509). In 2001 he moved from southern Maine to Aroostook County to pursue his passion for snowmobiling. (R. 1507-08). Bankers Life eventually assigned Juliano to its Bangor sales office, but allowed him to work from his home, which was a three-hour drive from Bangor. (R. 1508, 1556, 1677).

In 2005, following numerous complaints pertaining to its sales practices, Bankers Life agreed to pay a \$400,000 civil penalty in Maine and to take comprehensive actions designed to fundamentally change the manner in which it marketed and sold its insurance products in Maine. (R. 929-53). These requirements included training for all producers in sales suitability, replacement, and disclosure, the adoption of National Association of Insurance Commissioners (“NAIC”) suitability standards, affirmative determination by a branch manager that each sale was suitable, and quarterly suitability audits by an independent auditor for a period of two years. (R. 941-43). Bankers Life *3 also agreed to suspend the sale of deferred annuities in Maine until it had hired replacement managers for its two offices in Maine. (R. 946). Bankers Life then hired Lawrence Gagnon to manage its Bangor sales office and Timothy Farren to be his assistant and “right-hand person.” (A. 99, 131, 141, 145).

Under Gagnon, all producers purportedly received suitability training, which consisted of the Bankers Life Training Module entitled: “Insurance Compliance: Suitability, Replacement and Disclosure.” (R. 1403). Those training materials specified the following four criteria for suitability:

- The prospect needs the insurance.
- The proposed coverage fits that need.

- The prospect can afford the cost.
- In a replacement situation, it also means that proposed new coverage is better for the prospect, considering benefits offered, benefits lost by canceling the inforce insurance policy, and cost.

(R. 1410). With regard to the replacement of insurance products, a series of warnings for producers includes these representative examples:

IT IS GENERALLY UNDERSTOOD THAT REPLACING A POLICY FOR THE SAKE OF GENERATING ADDITIONAL AGENT COMMISSIONS, WITHOUT BENEFITING THE PROSPECT OR IMPROVING HIS/HER SITUATION, WOULD NOT BE IN THE BEST INTEREST OF THE POLICYHOLDER. IT IS AT BEST AN UNETHICAL PRACTICE AND AGAINST THE RULES AND REGULATIONS OF THE STATE'S "DEPARTMENT OF INSURANCE" AND BANKERS LIFE AND CASUALTY COMPANY.

(R. 1414) (all capitals in original).

As we said, State insurance laws, licensing procedures and the courts all make a clear point of an **agent's fiduciary duty**. This responsibility is put to the test when replacing an existing insurance program. Always make a clear and complete comparison of the existing and proposed plans. If you are replacing a policy, it should clearly stand up to the scrutiny of any individual, regulatory agency or court on its own merits.

(R. 1415) (bold in original).

In the summer of 2007 Juliano was struggling professionally and *4 financially. Despite eight years of experience, he was having difficulty making the Bankers Life's minimum production quota, which was \$24,000 in commissions for calendar year 2007.⁴ (R. 752-55). On July 17, 2007, Gagnon formally counseled Juliano about this deficiency and emphasized his "need to *write* more business." (R. 755 (emphasis in original)). Compounding this pressure from his boss were Juliano's \$1,200 per month child support obligations and a longstanding \$12,000 debt to MaineCare. (R. 1547, 1560). These financial problems had destroyed his personal credit and caused him to rely on his parents for financial support. (R. 1546-47, 1549). To make matters worse, his only snowmobile was no longer legally operable so he faced the prospect of a winter without snowmobiling. (R. 1545, 1546-47, 1908, 1912).

Lucianne Belanger

In the fall of 2007, Lucianne Belanger was 75 years of age and living alone in Caribou. (R. 1209-10). She was a former nun and retired school teacher with no spouse or children. (A. 207; R. 1008). Lucianne had serious health problems: she was diabetic, hearing-impaired, had only recently quit smoking, had undergone [treatment for breast cancer](#) earlier that year, and, despite "a severe allergy to cats," had over a half-dozen cats living in her home. (A. 207-08; R. 1302). Lucianne had a variety of investments, with a total value exceeding \$200,000, but had little knowledge of financial matters and was anxious and confused about her finances. (A. 207; R. 1516, 1909).

*5 Juliano's October 31 Meeting with Lucianne

In mid-October 2007, Juliano learned from a relative of a fellow Bankers Life producer that there was "an older woman that had a situation going on where she didn't understand her finances." (A. 207; R. 1516). Juliano understood that she "was looking for complete help all together, unsure of where she stood, what she had, how everything worked and what was best for her." (R.

1909). He quickly called Lucianne and discovered “that she was concerned with her stocks” and that “[s]he didn't understand her whole situation at all.” (A. 207; R. 1903). He arranged to meet with her at her home on October 31, 2007. (A. 207).

At this meeting, Juliano performed the standard Bankers Life information gathering process by filling out a sales tool referred to as a “Fact Finder.” (A. 207). The Bankers Life home office relies on this document when it analyzes the suitability of a sale. (R. 1521). It is a three-page form with a series of questions pertaining to: 1) medical expenses; 2) long-term care; 3) final expenses/survivors' income; and 4) retirement income/savings. (A. 186-88). These four topics correspond to the four major insurance products that Bankers Life sells: 1) Medicare supplement; 2) long-term care; 3) life insurance; and 4) annuities. (R. 1513). The Fact Finder helps Bankers Life producers determine which of these products may interest the customer. (R. 1518). The producer reads the questions to the prospective customer and writes in the answers. (R. 1522, 1558). The form contains a line at the bottom for the customer to sign confirming that the information written by the *6 producer is accurate. (A. 188). Gagnon and Farren instructed their producers to fill out the Fact Finder “as complete as possible.” (R. 1522). There were also two shorter suitability questionnaires that Bankers Life required its producers to complete upon submission of an application. (R. 1661).

By use of the Fact Finder, Juliano quickly identified Lucianne's assets and sources of income. (A. 188). He determined only the amounts of the assets, however, and not the material terms and conditions of the investments. (A. 188; R. 1523). Furthermore, he made no attempt to ascertain the extent of her debts and liabilities. (A. 188; R. 1914-15). He learned that she was receiving Social Security benefits as well as teacher retirement pensions from both New York and Maine and was covered by Medicare Parts A and B as well as a group retirement plan. (A. 186, 207). For each type of investment she held, Juliano entered a corresponding value on the Fact Finder as follows:

Savings Account	\$10,000
Annuities	\$18,000
CDs	\$37,000
IRAs	\$50,000
Money Markets	\$500
Mutual Funds	\$10,000
Stocks/Bonds	\$5,000 to \$7,000

(A.188). The total amount of Lucianne's assets as reflected on this Fact Finder was \$130,500 to \$132,500. (A. 188). It did not accurately reflect the value of Lucianne's stock, which was actually around \$150,000. (A. 234).

Juliano explicitly recorded in the Fact Finder that Belanger believed that she needed \$20,000 “to be totally liquid and accessible for [her] use.” (A. 188). Juliano also wrote that Lucianne “[did]n't like money in the stock market” *7 because she “can't get my hands on it,” and that she “definitely” considered it more important to lower her taxes than increase her income. (A. 188). He further wrote: “Client wants IRA rollover for higher interest. Wants NQ annuity to defer taxes.” (A. 188). In place of Lucianne's signature, certifying the accuracy of the information in the Fact Finder, Juliano wrote: “Client did not feel the need to sign file.” (A. 188).

Despite listing her supposed assets, Juliano never asked to see any documentation in order to verify the amounts or learn the terms and conditions of the investments. (A. 208; R. 1523). Furthermore, he did not inquire about or record any information about Lucianne's debts and liabilities, except for noting that her monthly expenses included an American Express credit card payment. (A. 188; R. 1914-15). Nevertheless, without any knowledge of the terms and conditions of her current investments,

he proposed that Lucianne purchase Bankers Life annuities using funds from her existing annuities, CDs, and IRAs. (A. 208; R. 1534). Through this exercise, Juliano also learned of Lucianne's serious health problems. (A. 207-08).

Juliano told Lucianne that he could not help her with the stock, but Farren could because Farren held a securities license. (A. 207; R. 1527). On November 2, 2007, Juliano faxed the Fact Finder to Farren and asked him to come help Lucianne. (A. 100-01, 131, 183, 208; R. 1910). Farren called Lucianne that same day and confirmed that she “really knew very little about” her stock. (A. 100, 131-32). Farren learned that she held General Electric stock with an approximate value of \$52,000, which if sold in its entirety *8 would yield a taxable capital gain of approximately \$62,300. (A. 100-01, 184). Farren then set up an appointment to meet with Lucianne at her home. (A. 100, 131-32). Because Farren would have to make a 400-mile round trip to attend the meeting, Juliano agreed to split with Farren the commissions on any annuities sold to Lucianne. (A. 92, 99; R. 1526-27, 1544).

The Meeting of November 8, 2007

On November 8, 2007, Farren and Juliano met with Lucianne at her home in Caribou. (A. 132). Farren spoke with Lucianne about her income and assets but “didn't ask the details about them” and “didn't fill out a factfinder form.” (A. 100-02, 132, 185; R. 1723). Farren admitted, “The only paperwork I physically looked at was the statement from GE.” (A. 140). Farren called the custodian of Lucianne's GE stock to determine the exact amount that Lucianne owned and find out what she had to do to sell the stock and then told Lucianne how to liquidate the stock on her own. (A. 102, 132; R. 1729).

Although Juliano and Farren took no applications at this meeting, and neither inquired with any detail about Lucianne's existing liabilities or the terms or conditions of her existing investments, they made a plan to use assets from Lucianne's GE Stock, CDs, and IRAs to purchase three separate Bankers Life annuities. (A. 209; R. 1535). Based on the recommendations of Juliano and Farren, Lucianne agreed to purchase the annuities. (A. 209; R. 1535). In total, the meeting lasted approximately one hour. (R. 1721).

Farren recalled that Juliano reacted quickly, calling within a day or two to inform him that Lucianne would be selling the stock in order to buy another *9 annuity. (A. 133; R. 1721). Juliano also scheduled an appointment with Lucianne for November 13, to execute applications for the two Bankers Life annuities that did not depend on the stock sale. (A. 209).

Juliano's November 13, 2007, meeting with Lucianne

November 13, 2007, turned into a busy day of financial transactions for Lucianne. On that one day Lucianne surrendered two CDs at TD Banknorth and one CD at The County Federal Credit Union (“TCFCU”), deposited all the proceeds into her checking account, filled out two applications for separate annuities, wrote a check to Bankers Life in the amount of \$37,530, and signed two authorizations to transfer funds to Bankers Life - one that would roll over an annuity she had with Jackson National Life Insurance Company (“Jackson National”) and the other that would roll over an IRA CD she had at TD Banknorth. (R. 704-05, 707, 713, 1215, 1224, 1276-77). Juliano was busy that day too following Bankers Life procedures that required him to fill out and have Lucianne sign numerous forms including the two product suitability forms for each of the two annuities. (A. 268, 273, 281; R. 1281).

The CD Annuity

The first application was for a single premium 10-year deferred non-qualified annuity in the amount of \$37,500. (R. 1209, 1224). This annuity was funded by the three CDs that Lucianne cashed in. Because she cashed each of them in before their respective maturity dates, she had to pay early withdrawal penalties that totaled \$574.92. (A. 190-92; R. 708). The table below reflects the terms, balances, and penalties of each of these CDs.

Financial Institution	Interest Rate	Term	Maturity Date	Date Cashed	Balance	Penalty	Amount Received
-----------------------	---------------	------	---------------	-------------	---------	---------	-----------------

TCFCU	4.75%	6 mo	2/26/08	11/13/07	19,369.46	226.51	19,142.95
TD Bank	2.72%	12mo	3/17/08	11/13/07	7,737.38	148.81	7,588.57
TD Bank	2.47%	24mo	8/5/09	11/13/07	10,998.29	199.60	10,798.69
Total	—	—	—	—	38,105.13	574.92	37,530.21

***10** (R. 704-13). In addition to the withdrawal penalties, Lucianne was required to pay two percent premium taxes totaling \$750, which reduced the initial value of her annuity to \$36,779. (A. 244-45).

Juliano, however, misrepresented to Lucianne the extent of the penalties she would incur when she cashed in these CDs. On the shorter suitability questionnaire, which Juliano filled out on November 13--the same day Lucianne actually closed out and incurred early withdrawal penalties totaling \$574.92-- Juliano indicated the penalties would be only \$250±. (A. 273). With slightly more accuracy, on the longer suitability form that he filled out that same day, he indicated that the penalties would total only \$400±. (A. 268). The actual penalties were 130% greater than he stated in one form and 44% greater than he stated in the other. (A. 268, 273).

On the shorter suitability form as the reason why the proposed annuity was “in the best interest of the client,” Juliano wrote: “Client wants probate protection--better interest. Says does not need the money but would like some accessibility--the CDs don't give her that.” (A. 273). Juliano then convinced Lucianne that the yield on a 10-year deferred annuity would be better than that of her existing CDs simply by comparing the interest rate of the CDs with the “bonus rate” of the Bankers Life annuity, which applied only to the first year of the annuity, but not to any of the remaining years. (A. 177; R. 1920). ***11** In his comparison of the yields, he failed to factor in the effects of the two percent premium tax and the early withdrawal fees of the CDs. (A. 177; R. 1920). Moreover, Juliano recommended immediate liquidation of the CDs instead of waiting until they matured. (R. 1534-35). Juliano also emphasized the accessibility of the funds in the annuity by telling Lucianne that each year she could access up to ten percent of her annuity at any time without paying an early withdrawal penalty. (R. 1530). He failed, however, to tell Lucianne that Bankers Life contractually reserved the right to postpone the payment of withdrawals for up to six months. (A. 258; R. 1532).

The following day, November 14, 2007, Bankers Life issued annuity #7878395 to Lucianne based on a net premium of \$36,779. (A. 244). Thus, in a single day, as a result of early withdrawal fees and premium tax, Lucianne's three CDs with a total value of \$38,105.13 were converted into a Bankers Life annuity with a value of only \$36,779. (A. 244; R. 704-13). At the same time, Juliano received a commission of \$609.87, Farren received commissions totaling \$670.85, and Gagnon received a commission of \$231.65. (R. 770).

Exchange of Jackson National Annuity

The second application Juliano completed for Lucianne on November 13 was for another single premium 10-year deferred IRA (qualified) annuity for an estimated \$48,000. (R. 1264). This annuity was to be funded by Lucianne transferring the entire balances of her 10-year deferred IRA annuity with Jackson National, and her IRA CD at TDBanknorth--which at hearing was often referred to as the “inherited IRA.” (R. 1276-77, 1563). Juliano completed ***12** the rollover of the Jackson National annuity, but was unable to roll-over the inherited IRA. (R. 1564).

Under Bankers Life procedures this replacement called for special suitability treatment and required Juliano to “make a clear and complete comparison of the existing and proposed plans.” (R. 1414-15). Instead, Juliano avoided making any meaningful comparison between the replaced Jackson National annuity and the proposed Bankers Life annuity. (R. 1537-40). In the two suitability questionnaires for this transaction, the only remarks are that Lucianne “wants better interest rate” and does not like Jackson National's service. (A. 281, 285). Juliano reviewed only a periodic statement pertaining to the Jackson National annuity and not a copy of the actual annuity contract. (R. 1537). When he compared the two annuities, he used only the first-year

guaranteed rate of 6.20% of the Bankers Life annuity and compared that to the current Jackson National rate of 3.45%, ignoring the fact that, after the first year, Bankers Life guaranteed a rate of only 2.50% while the Jackson National guaranteed a rate of 3.00%. (R. 672, 690, 1537-40). Furthermore, he performed no analysis of the benefits of retaining the Jackson National annuity which had been in force for over six years and was only one year away from being totally accessible with no withdrawal restrictions or penalties. (R. 658, 672, 1537-40). Even so, he had Lucianne complete the application and documents authorizing Bankers Life to roll over her Jackson National annuity into a Bankers Life annuity, a process that would take until December 3, 2007, to complete. (R. 1112, 1264-8).

***13** Juliano's November 15, 2007, Meeting with Lucianne

Once Farren had ascertained the value of Lucianne's GE stock as being around \$50,000 and instructed her how she could cash it in, all that remained was for Juliano to see it through to completion. (R. 1588-89). But before making this sale, Juliano had a special request for Farren. He still had a ways to go to reach his sales production quota so he asked Farren to agree to an after-sales commission split. (R. 1544, 1588). Under this deal, the entire commission for the sale of this annuity would count towards Juliano's 2007 sales production quota, even though half of it was actually earned by Farren, who would be repaid in 2008. (R. 1544). The catch was that the annuity had to be issued before the end of the year. (A. 194).

On November 15, 2007, Juliano met with Lucianne to have her complete an application to purchase yet another ten-year deferred annuity in the amount of \$30,000. (R. 1241). Juliano filled out two more suitability questionnaires. (A. 275, 279). One was silent on the reasons for the purchase and the other indicated that the reasons were "Tax Savings," "Retirement," "Future Expenditures," and "Accessibility." (A. 275, 279). Juliano also changed the Fact Finder so that it now indicated that she had stocks and bonds with a value of "175K" instead of "5-7K." (A. 272, 278). He did not, however, update the Fact Finder to reflect that Lucianne had liquidated her CDs totaling \$37,000 two days earlier and had purchased a Bankers Life annuity. (A. 278). Nor did the suitability questionnaire reflect this change in her economic circumstances. (A. 275).

***14** By the beginning of December 2007 the Jackson National roll-over transaction had not been completed so Juliano had still not earned his commission on that sale. That transaction was not completed until December 3, 2007, when Bankers Life issued annuity #7879517 to Lucianne in the amount of \$17,352.06 and paid Juliano a commission of \$195.21. (A. 253). Despite having filled out the application for the \$130,000 annuity, however, Lucianne did not request a sale of her GE stock until the end of November and had still not received payment for the sale of her GE stock or completed that annuity transaction. (R. 699). Thus in early December Juliano had still not earned the \$4,000 commission pursuant to the deal he had made with Farren. On December 5, 2007, Gagnon placed further pressure on Juliano when he again formally counseled him for low production. (R. 757). That same day, Juliano met with Lucianne to deliver the roll-over annuity. (A. 210).

Following the December 5 meeting, Lucianne received her GE stock check totaling approximately \$50,000. (A. 210). Farren and Juliano had advised Lucianne to hold out enough money to pay capital gains taxes and agreed that \$15,000 would be sufficient for her needs. (R. 1715). She then wrote a check to Bankers Life for \$35,000, which Juliano picked up on December 12, 2007, to complete the deal before year-end. (A. 211; R. 1239). The annuity was issued with an effective date of December 13, 2007. (A. 260).

Timing of the annuity sales

The timing of the annuity sales benefited Juliano, but not Lucianne. The early liquidation of her CDs caused Lucianne to pay penalties totaling \$574.92 ***15** when delaying just a couple months could have preserved much of that amount. (R. 704-13). Similarly, the roll-over of the Jackson National annuity caused her to pay a surrender charge of \$264.24. (R. 658). The sale of the GE stock in December also had negative consequences. The sale generated a capital gain of approximately \$39,000, allocated entirely to 2007, which led to additional federal tax liability of \$6,000 and state tax liability of \$3,000 for 2007. (A. 234). In particular, this capital gain caused her modified adjusted gross income (MAGI) to skyrocket to \$108,063, roughly doubling her Medicare B premiums. They rose from \$96.40 to \$192.70 per month for 2009 - a total of \$1,155.60 in additional premium for

the year. (R. 827-28). Had Lucianne reduced her MAGI by \$1,064 so that it would be below \$107,000, she would have paid \$57.80 less per month or \$693.60 less for the year. (R. 828). She could have easily accomplished this if she had delayed selling a portion of the stock until after December 31, 2007. With minimal planning she could have avoided any increase to her Part B premiums if the sale were structured to keep her MAGI below \$85,000 for 2007. (R. 828). Juliano knew she paid Medicare Part B premiums because he noted this on the Fact Finder. (A. 282).

In addition, Juliano recommended to Lucianne that she purchase only 10-year deferred annuities, which paid commissions that were 63% greater than commissions on five-year deferred annuities.⁵ (R. 747-48). As a 75-year old woman with serious health problems, Lucianne would have difficulty *16 surviving to when the annuity actually annuitized. (R. 927).

Management's Review of the Annuity Transactions

As branch sales manager and unit sales manager, Gagnon and Farren received management override commissions on all sales made by any producer in the Bangor Office and thus had incentives to complete sales. (R. 1583, 1676-77, 1712). In addition to reviewing the Fact Finder and suitability questionnaires, Gagnon also interviewed the producer about each customer when performing his sales suitability review. (R. 1661). To guide him in this interview, Gagnon developed what he calls a "Cheat Sheet," a list of 22 questions including 19 leading questions such as: "Did you make any statements of guarantee or did you use any scare tactics about other products?" and: "Did you do a fair comparison?" (R. 577, 1661). Gagnon then records the responses of the producer, typically as "yes," "no," and "N/A" along with brief notes if other information is provided. (R. 577). Like the other forms, Gagnon's "Cheat Sheet" contains no questions pertaining to the customer's liabilities and debts or the terms of the customer's investments (e.g., interest rate, maturity date, dividend payments). Nevertheless, the Cheat Sheet, the Fact Finder, and suitability questionnaires formed the basis on which Gagnon determined whether the annuity sale was suitable. (R. 1661).

The Snowmobile Transaction and Lucianne's Financial Stress

On December 19, 2007, Juliano met with Lucianne to deliver the stock proceeds annuity. (A. 211). Juliano used this meeting to convince Lucianne to purchase him a snowmobile, and the following day he accompanied her to a *17 dealership where she applied for and obtained a loan of \$7,186.50 and purchased a 2007 800cc Arctic Cat. (A. 211, 219; R. 835, 844). Juliano informally agreed to repay Lucianne in monthly installments of \$200. (A. 212).

As the winter progressed, it became clear that Lucianne had failed to retain sufficient liquid funds. Lucianne needed a new roof, but lacked sufficient cash to pay for it. (A. 212). She tried to secure a loan, but the bank would not approve a loan unless she paid off her American Express card. (A. 212). On April 8, 2008, with the help of Juliano, Lucianne obtained a penalty-free withdrawal of \$11,500.00 from the GE proceeds Bankers Life annuity to pay off her AMEX balance and obtain a roof loan. (A. 212-13; R. 768).

Not surprisingly, the producer-client relationship eventually deteriorated, at which point Lucianne mustered the courage to demand payment in full for the snowmobile. (A. 215-16). After some posturing by Juliano, Juliano's father intervened (A. 216-17; R. 1549), took out some money that he was holding for Juliano in a basement safe, and paid the remaining balance of \$5,801.50 to Lucianne on September 15, 2008. (A. 212, 216-17; R. 851, 1549).

Complaint against Juliano and Bankers Life

After finally obtaining the payoff for the snowmobile, Lucianne reported her problems with Bankers Life to Legal Services for the **Elderly**, and on October 28, 2008, Suzanne Russell, a staff attorney for Legal Services for the **Elderly** notified the Bureau of Insurance of Juliano's alleged exploitation of Lucianne. (R. 981). On December 10, 2008, Bureau investigator Mike McGonigle and Office of Securities investigator Willis Smedberg interviewed *18 Lucianne in Caribou with Attorney Russell

and Lucianne's friend Dorothy Holcombe present. (A. 230). Assistant Attorney General Andrew Black attended the interview by telephone. (A. 230). This interview was recorded and transcribed. (R. 1001-1032).

In the course of its investigation, the Bureau obtained, among other things, a written statement from Lucianne (R. 983-91), and on February 5, 2009, a 12-page statement by Juliano. (A. 207-18). On March 9, 2009, Lucianne provided a written response to Juliano's statement. (R. 992-1000). On September 28, 2009, Bureau Staff filed petitions for enforcement against Juliano, Farren, and Bankers Life. (A. 49-69). Later, on April 16, 2010, Bureau Staff filed a petition for enforcement against Gagnon. (A. 70-75). Following the filing of these petitions, Bankers Life requested information from Bureau Staff, which could not be disclosed, pursuant to [24-A M.R.S. § 216\(2\)](#), without the approval of the Superintendent. On September 13, 2010, after lengthy debate about what documents Bureau Staff was authorized to disclose, the Superintendent ordered disclosure and issued a Protective Order defining the terms under which Bureau Staff could disclose documents to Bankers Life, and Bureau Staff complied with those conditions. (R. 119-22).

On September 28, 2010, the Superintendent scheduled a hearing for these consolidated matters for November 3, 2010. (R. 129). On October 4, 2010, Bankers Life moved for a continuance, seeking to have the hearing postponed until sometime in January. (R. 152-56). Bureau Staff opposed continuance to January, citing Lucianne's health problems and recent *19 hospitalization as reasons for not delaying the hearing further. (R. 158-59). On October 27, 2010, the Superintendent continued the hearing, but also ordered a special hearing to take place on November 30, 2010, for the limited purpose of obtaining Lucianne's testimony. (R. 182). Lucianne, however, died on November 11, 2010. (R. 1687, 1689). On November 19, 2010, the Superintendent set the hearing to commence on January 27, 2010. (R. 183).

The 4-day hearing commenced on January 27, 2011, and ended on January 31, 2011. (R. 1498-1929). Bankers Life and Juliano objected to Bureau Staff's proposed admission into evidence of Russell's letter, the transcript of the interview with Lucianne, and two written statements by Lucianne. (R. 1687-88). The Superintendent admitted them for limited purposes only. (R. 1691). At the close of the hearing and again in their written closing arguments, the licensees requested that the Superintendent dismiss the petitions against them because of alleged investigative and prosecutorial misconduct. (R. 261-62, 1926-28).

On May 12, 2011, the Superintendent issued a Decision and Order in which she found that Juliano had committed thirteen violations of insurance law, revoked his Maine producer license, and imposed a civil penalty in the amount of \$10,000. (A. 29). Ten of these violations pertained to the sales of the annuities and included lacking a reasonable basis for recommending a sale as suitable, making a series of misleading comparisons, making misrepresentations on forms, failing to make reasonable efforts to obtain information necessary for a suitability determination, and submitting *20 materially inaccurate information about Lucianne. (A. 28). The Superintendent found that Bankers Life should be held accountable and penalized for the actions of Juliano pursuant to [section 1445\(1\)\(D\)](#) for these ten violations and imposed a civil penalty of \$10,000 against Bankers Life for each of those violations for a total of \$100,000, and restitution to the estate of Lucianne in the amount of \$2801.60 for annuity surrender penalties. (A. 29). The Superintendent referred the allegations against Farren to the Maine Office of Securities and the Financial Industry Regulatory Authority for further consideration and dismissed the petition against him without prejudice. (A. 29-30). The Superintendent concluded that "Gagnon should have paid particular attention to the shortcomings and internal inconsistencies in the documentation that Mr. Juliano submitted," and that "Gagnon could not have been able to reach an informed conclusion on the suitability of the replacement," but declined to impose any penalties against him. (A. 27, 30).

Both Bankers Life and Juliano filed petitions for review of the Superintendent's decision pursuant to [M.R. Civ. P. 80C](#). On February 27, 2012, the Business and Consumer Court (Horton, J.) issued a decision that denied their appeals and affirmed the decision of the Superintendent in its entirety. (A. 31). Both Bankers Life and Juliano appealed, but Juliano withdrew his appeal on June 28, 2012.

ISSUES ON APPEAL

I. Whether there is any competent evidence in the record to support the Superintendent's finding that Juliano was a producer of Bankers Life for whose actions Bankers Life could be held accountable and penalized under 24-A M.R.S. § 1445(1)(D)?

*21 II. Whether there is any competent evidence in the record to support the Superintendent's findings that Juliano committed 10 violations of law when he sold annuities to Lucianne?

III. Whether the Superior Court correctly found no evidence of bias on the part of the Superintendent and that any alleged bias or impropriety on the part of Bureau staff could not be imputed to the Superintendent?

SUMMARY OF ARGUMENT AND STANDARD OF REVIEW

First, Bankers Life was appropriately penalized for the ten violations Juliano committed while performing his duties as a producer for Bankers Life, selling Bankers Life products. Second, there is competent evidence to support each of Juliano's ten violations found by the Superintendent. Finally, the Superior Court correctly found no evidence of bias on the part of the Superintendent.

Because this is an appeal from a judgment issued pursuant to M.R. Civ. P. 80C, the Law Court reviews the Superintendent's decision directly for "legal errors, abuse of discretion, or unsupported factual findings." *Forest Ecology Network v. Land Use Regulation Comm'n*, 2012 ME 36, ¶28, 39 A.3d 74, 84 (quotations omitted). Judicial review of agency decision-making is "deferential and limited." *Friends of Lincoln Lakes v. Bd. of Envtl. Protection*, 2010 ME 18, ¶2, 989 A.2d 1128, 1133. "The court may not substitute its judgment for that of the agency merely because the evidence could give rise to more than one result." *Dodd v. Sec. of State*, 526 A.2d 583, 584 (Me. 1987). Rather, the Law Court must affirm the Superintendent's factual findings if "they are supported by substantial evidence in the record, even if the record contains inconsistent evidence or evidence contrary to the result reached by the agency." *Concerned Citizens to Save Roxbury v. Bd. of Envtl. Protection*, 2011 ME 39, 24, 15 A.3d 1263, 1271 (quotations omitted). This substantial evidence standard "does not involve any weighing of the merits of evidence" by the reviewing court." *Friends of Lincoln Lakes*, 2010 ME 18, ¶ 14, 989 A.2d at 1134.

As the Law Court has emphasized, to disturb an agency's findings on appeal the unsuccessful party at an agency level has the "burden to show more than that there was competent evidence to support [its] position; [it] has to demonstrate that there was no competent evidence to support those findings." *Green v. Comm'r of the Dept. of Mental Health, Mental Retardation and Substance Abuse Servs.*, 2001 ME 86, ¶ 12, 776 A.2d 612, 616 (emphasis in original). Furthermore, credibility determinations of witnesses are within the exclusive province of the Superintendent as fact finder. See *Sprague Elec. Co. v. Me. Unemployment Ins. Comm'n*, 544 A.2d 728, 732 (Me. 1988). Finally, contrary to Bankers Life's assertion, the statutes pursuant to which the Superintendent imposes sanctions are regulatory not penal and therefore do not have to be strictly construed. See *Maine Real Estate Comm'n v. Anderson*, 512 A.2d 351, 353 (Me. 1986). See also *Cobb v. Bd. of Counseling Professionals Licensure*, 2006 ME 48 ¶ 36, 896 A.2d 271, 280 (Clifford, J. concurring).

ARGUMENT

I. There was substantial evidence in the record to support the Superintendent's finding that Juliano was Bankers Life's producer for whose actions Bankers Life could be held accountable and penalized under 24-A M.R.S. § 1445(1)(D).

This issue is not a close call. Juliano was Bankers Life's producer with *23 respect to the sales of annuities to Belanger. Bankers Life has never disputed that Juliano was acting on its behalf and within the scope of his duties when he sold Belanger the annuities. Consequently, the Superintendent properly held Bankers Life accountable for Juliano's misconduct with regard to these sales and penalized Bankers Life as permitted under 24-A M.R.S. § 1445(1)(D).

Bankers Life argues that the Superintendent held it accountable based solely upon her finding that Bankers Life failed to supervise adequately and follow its own suitability review process and because these findings were erroneous, the Superintendent's decision must be reversed. (Blue Br. 2, 19). This conclusion is incorrect and based on a flawed construction of the record.

A. Vicarious Liability under 24-A M.R.S. § 1445(1)(D)

Section 1445(1) of the Maine Insurance Code makes an insurer responsible for the actions of its insurance producers for purposes of the Superintendent imposing disciplinary sanctions on the insurer. The statute seeks to protect the public by providing a strong incentive for insurers to select their producers carefully and to supervise and oversee their activities. Subsection 1(D) authorizes the imposition of penalties without a finding of insurer culpability: “the insurer... is accountable and may be penalized by the superintendent, as provided in this Title, for the actions of its producers.” The relevant inquiry for determining whether this vicarious liability attaches is simply whether the actor is a “producer” of the insurer.

The Maine Insurance Code defines an insurance producer as “a person required to be licensed under subchapter II-A to sell, solicit or negotiate *24 insurance.” 24-A M.R.S. § 1402(5). Under subchapter II-A, “A person may not sell, solicit or negotiate insurance in this State for any class or classes of insurance unless the person is licensed for that line of authority in accordance with this subchapter.” 24-A M.R.S. § 1420-B. Furthermore, before a producer may legally act as an “agent” of an insurer and thereby sell coverage on behalf of and bind the insurer, the producer must become “an appointed agent of the insurer.” 24-A M.R.S. § 1420-M. Thus, whether a person is a producer of an insurer depends on whether the person sells, solicits, or negotiates the insurer's products. Appointment by the insurer is conclusive evidence that the insurer recognizes the person as its producer.

When producers commit violations of law while acting outside the scope of their duties, vicarious liability requires a closer analysis. In such cases, the insurer may have an argument that the violations are not “the actions of its producers” for purposes of section 1445(1)(D). The Superintendent properly applied the law when she held Bankers Life liable for Juliano's actions in connection with his misconduct selling annuities, but not liable in connection with the snowmobile transaction, which was personal to Juliano.

B. Bankers Life Misconstrues the Superintendent's Order Consolidating Proceedings

At the root of Bankers Life's argument is its misconstruction of the Superintendent's Order Consolidating Proceedings issued on June 25, 2010. (A. 299). Bureau Staff had moved to consolidate into a single adjudicatory hearing the enforcement proceedings against Juliano, Farren, Gagnon, and Bankers Life. (A. 290). Juliano did not object to the consolidation. Bankers *25 Life, Farren, and Gagnon, consented to the consolidation, but only to the extent that it was limited to the sale of annuities to Lucianne because these “occurred as part of Bankers Life's business operations.” (A. 293). Gagnon, Farren, and Bankers Life wanted a separate hearing on the snowmobile transaction because that transaction “involved a personal loan that was unrelated to any product offered by Bankers Life....” (A. 293).

In ordering the consolidation of the proceedings, the Superintendent explicitly addressed the licensees' concerns about the impact of the evidence relating to the snowmobile transaction:

Staff has made clear that it is not implicating Mr. Gagnon or Mr. Farren in the snowmobile allegation. Accordingly, any evidence relating to that allegation will only be considered in regard to Mr. Juliano and Bankers Life. Further, if Staff proves misconduct by Mr. Juliano, *it will only be held against Bankers Life to the extent and to the degree that Staff demonstrates a factual and legal basis for holding Bankers Life responsible for Mr. Juliano's actions.*

(A. 299 (emphasis added)).

Bankers Life now argues that in so ordering, the Superintendent “interpreted the statute” as imposing “a fault-based standard of liability ... (Blue Br. 19). No such statutory interpretation of [section 1445\(1\)\(D\)](#) occurred. The Superintendent merely explained that wrongdoing by Juliano in regards to the snowmobile allegation did not automatically equate to the imposition of penalties against Bankers Life. Furthermore, with respect to the annuities transactions, the factual and legal basis cannot be reasonably disputed. The factual basis was that Juliano committed the violations while acting as an appointed producer within the scope of his duties. The legal basis was ***26** [section 1445\(1\)\(D\)](#), which makes an insurer accountable and subject to penalties for the actions of its producers. No further inquiry is required.

C. Bankers Life Misconstrues the Superintendent's Decision

Bankers Life compounds its misreading of the Superintendent's order of consolidation with a further misreading of her Decision and Order by arguing that the Superintendent imposed liability only because she found Bankers Life at fault and that the record lacks sufficient evidence to support that finding. (Blue Br. 21-26).

At the end of her decision and order, the Superintendent carefully articulated the bases upon which she was imposing sanctions against both Juliano and Bankers Life. The relevant section reads as follows:

Mr. Juliano engaged in the improper replacements of L.B.'s CDs and L.B.'s Jackson Life annuity in his capacity as an agent of Bankers Life, which is therefore accountable for his misconduct and may be penalized for that misconduct pursuant to [24-A M.R.S.A. § 1445\(1\)\(D\)](#). Bankers Life failed to make any meaningful effort to prevent the improper sales or take timely corrective action. Therefore, pursuant to [24-A M.R.S.A. § 12-A\(1\)](#), I am imposing a civil penalty of \$100,000 for each of Mr. Juliano's ten suitability and sales practices violations, for a total of \$100,000.

(A. 29). Thus, the Superintendent imposed vicarious *liability* against Bankers Life under [section 1445\(1\)\(D\)](#) for the violations committed by Juliano because Juliano engaged in these actions “in his capacity as an agent of Bankers Life.” In determining the appropriate *penalties*, the Superintendent then factored in Bankers Life's “fail[ure] to make any meaningful effort to prevent the improper sales or take timely corrective action.”

The factual finding that Bankers Life quotes appears in the section of the Decision and Order entitled “Mr. Gagnon's Suitability Review.” (A. 26). The ***27** Superintendent first explains the ways in which Gagnon's suitability review was deficient, including the shortcomings and inconsistencies in the documentation he reviewed. (A. 27). She then concludes this section of her decision as follows:

In the order issued June 25, 2010, I determined that Bankers Life is responsible for Mr. Juliano's actions, pursuant to [24-A M.R.S.A. § 1445\(1\)\(D\)](#), “to the extent and to the degree that Staff demonstrates a factual and legal basis for holding Bankers Life responsible.” By failing to conduct adequate supervision and failing to follow its own suitability review processes in an effective manner, Bankers Life is responsible for Mr. Juliano's suitability violations and deceptive sales practices. This appears to be a systemic problem with the company that warrants further examination, and in the circumstances of this case, should not be treated as a violation of the Insurance Code by Mr. Gagnon in his individual capacity as a licensed producer.

(A. 27-28). This passage is an explanation as to why Bankers Life, as opposed to Juliano's manager, Gagnon, should be held responsible for Juliano's violations. The Superintendent did not interpret [section 1445\(1\)\(D\)](#) to impose liability on Bankers Life *only* as a result of Bankers Life “failing to conduct adequate supervision and failing to follow its own suitability review processes in an effective manner.” As explained above, the Superintendent imposed [section 1445\(1\)\(D\)](#) vicarious liability on Bankers Life because Juliano was its producer acting “in his capacity as an agent of Bankers Life.” (A. 29). In the quoted

passage, the Superintendent explains that she is declining to impose sanctions against Gagnon because she views his deficient actions primarily as a reflection of Bankers Life's systemic failures.

D. There is substantial evidence to support the finding that Bankers Life failed to conduct adequate supervision and failed to follow its own suitability review processes in an effective manner.

*28 Even if this Court were to determine that no sanctions could be imposed against Bankers Life without evidence of a failure to supervise Juliano or review the annuity sales in this instance, that burden is easily met by the record in this case. As the Superior Court concluded, “Given her findings regarding lack of supervision and Bankers Life's prior history, the Superintendent was certainly within her discretion under the statute in imposing penalties on Bankers Life and, based upon previous violations, imposing the maximum penalty.”⁶ (A. 46).

The Superintendent found that “Bankers Life repeatedly failed to identify multiple warning signs,” which demonstrated that its procedures were inadequate. (A. 26). The record indicates that Bankers Life's supervision of Juliano was superficial at best. He worked remotely, rarely presented himself to the Bangor Sales Office, and was confused about who was his immediate manager. (R. 1508-10,1677). Despite being hired to help correct Bankers Life's persistent legal problems with the sales practices of its producers, Gagnon admitted that in the two years he managed Juliano prior to the Belanger transactions and in the three years thereafter, he never once accompanied Juliano on a sales call. (R. 1798). Gagnon's primary tool for monitoring his sales agents was what he called his “Cheat Sheet,” which posed a series of leading questions designed to elicit self-serving responses. (R. 577, 1661). Absent from the entire suitability review process was any meaningful *29 inquiry into the customer's financial liabilities or the terms and conditions of the financial products that were being replaced. Gagnon never even inquired into the terms of the Jackson National annuity that was being replaced, (R. 1667-68), despite Bankers Life's suitability criteria that explicitly required an analysis of whether the proposed new coverage was better for the customer than the existing coverage. (R. 1410). The Superintendent properly concluded that Gagnon did not undertake an informed suitability review. (A. 27).

II. There was sufficient evidence in the record to support the Superintendent's findings that Juliano committed 10 violations of law when he sold annuities to Lucianne.

Bankers Life argues that the Superintendent's findings are not supported by the record and relies almost entirely on variations on the theme that the Superintendent should have credited the testimony of Juliano over other conflicting evidence. As will be demonstrated below, the record contains an ample evidentiary basis for each of the Superintendent's challenged findings.

A. Violation #1. There was sufficient evidence in the record for the Superintendent to find that Juliano recommended to Lucianne that she purchase a third Bankers Life annuity in the amount of \$135,000 without having reasonable grounds for believing that the recommendation was suitable for Lucianne in violation of Bureau of Insurance Rule 917 § 6(A).

The Superintendent found that although Juliano knew that Lucianne desired to have \$20,000 in savings that would be totally liquid and accessible for her use, he still recommended that she purchase the \$135,000 annuity, which left her with less than her stated liquidity need. (A. 22-23). The Superintendent therefore concluded that Juliano did not have reasonable grounds for believing that the purchase of the \$135,000 annuity would be *30 suitable for Lucianne. Bankers Life: 1) questions the Superintendent's mathematical calculations and argues for a more liberal construction of the phrase “totally liquid;” 2) argues that Lucianne, not Juliano, was “the master” of this decision; and 3) contends that in reaching her conclusion, the Superintendent made “an improper hindsight inquiry.” (Blue Br. 29-33). The applicable rule reads as follows:

In recommending to a consumer the purchase of an annuity or the exchange of an annuity that results in another insurance transaction or series of insurance transactions, the insurance producer, or the insurer where no producer is involved, must have reasonable grounds for believing that the recommendation is

suitable for the consumer on the basis of the facts disclosed by the consumer as to his or her investments and other insurance products and as to his or her financial situation and needs.

02-031 C.M.R. ch. 917, § 6(A).⁷ To find a violation of this rule in this instance, the Superintendent needed to find that Juliano should have known: 1) that Lucianne needed to have \$20,000 in savings that would be totally liquid and accessible; and 2) that her purchase of the \$35,000 annuity left her with less than \$20,000 in totally liquid savings.

In the Fact Finder that Juliano filled out at the October 31, 2007, meeting, which he later submitted with the application for the \$135,000 annuity on November 15, 2011, Juliano explicitly noted that Lucianne believed that she needed \$20,000 of her savings “to be totally liquid and accessible for *31 [her] use.” (A. 272, 278). On the same Fact Finder Juliano also indicated that she had \$10,000 in savings. (A. 272, 278). The Superintendent, however, doubted the accuracy of that figure because of the conflicting evidence that Lucianne had “ongoing credit card debts at the same time.” (A. 23). Although she had other investments, none of these other investments were “totally liquid and accessible.” (A. 272, 278). When Lucianne liquidated her GE stock she received \$150,253 in proceeds. (A. 234). Juliano understood that she would be holding out \$15,000 to be used to pay taxes resulting from the capital gains from the stock sale. (R. 1715). On December 12, 2007, Juliano collected from her a check for \$135,000. (A. 211). Therefore, at this point, Juliano would have thought that the \$15,000 being withheld would be used to pay taxes and that none of \$15,000 would go towards the \$10,000 deficit in her savings needs. Even assuming that the \$10,000 savings account figure was accurate, Juliano could not have reasonably thought that she would have had \$20,000 in liquid savings after she purchased the \$35,000 annuity. Indeed, Lucianne's failure to withhold more cash from her annuity purchase quickly led to significant financial stress. When she needed a new roof in April, she did not have the cash to pay for it, she had run up a significant balance on her AMEX card, and her credit card debt prevented her from obtaining a loan.

Bankers Life's arguments are easily dismissed. First, Bankers Life counts as “savings” income as well as assets that are not in “savings” to reach what it claims is \$65,000 in liquidity in her overall portfolio ...” (Blue Br. 31). For instance, Bankers Life counts Lucianne's pension and social security *32 payments. (Blue Br. 30). These represent income, not assets, and certainly not savings. It also counts the approximately 19,000 that could be withdrawn from her Bankers Life annuity on a penalty free basis. (Blue Br. 30). As Juliano testified, however, completing these withdrawals takes 7-14 business days and Bankers Life reserves the right to postpone these withdrawals for up to six months. (A. 262; R. 1530-32). It also counts amounts in mutual funds and stocks. (Blue Br. 30). Even if the amounts in these asset categories are correct, these assets are not “avings” and are not as liquid and accessible as funds in a savings account, especially for a 75-year old who has difficulty understanding and handling her finances. Unlike savings accounts, withdrawing funds from stocks and mutual funds requires a “sale” of assets that becomes a taxable event. With such assets, there are always timing and financial impact issues that need to be considered and that may significantly reduce the practical accessibility of these funds.

Second, its attempt to assign the responsibility for the decision to Lucianne misses the point. The purpose of the law is to protect consumers by prohibiting a producer from recommending the purchase of an annuity unless the producer reasonably believes it is suitable for the consumer. The only relevant inquiry is whether Juliano had reasonable grounds for believing that the sale was suitable for Lucianne.

Finally, Bankers Life's “hindsight inquiry” argument mischaracterizes the Superintendent's findings. Bankers Life argues that the Superintendent found this sale unsuitable only because Lucianne did, in fact, experience a lack of *33 sufficient liquidity shortly after the sale. (Blue Br. 32-33). The Superintendent cites Lucianne's subsequent financial distress as an effect of her lack of liquidity, not as the reason the sale was unsuitable. Her financial stress shows that Lucianne suffered harm from this improper sale, and consumer harm is relevant factor in imposing sanctions.

B. Violation #2. There was sufficient evidence in the record for the Superintendent to find that Juliano made a misleading or incomplete comparison as to the terms of the Jackson National annuity and the IRA Rollover Annuity for the purpose of inducing Lucianne to exchange her Jackson National annuity in violation of 24-A M.R.S. § 2155.

The Superintendent found that when Juliano persuaded Lucianne to exchange her Jackson National annuity for a Bankers Life annuity, he used as a basis of comparison only the first-year bonus rate of the Bankers Life annuity without making any direct comparisons between the Bankers Life and Jackson National base rates that would be guaranteed after the first year. (A. 25). She concluded that using only this bonus rate amounted to a misleading and incomplete comparison as to the terms, conditions, or benefits contained in the annuity and a violation of 24-A M.R.S. § 2155.⁸

There is competent evidence to support these findings. Juliano testified that when he compared the two annuities during his sales presentation, he used only the first-year guaranteed rate of 6.20% of the Bankers Life annuity *34 and compared that to the current rate of 3.45% under the Jackson National annuity without disclosing that after the first year, the Bankers Life guaranteed rate would be only 2.50% while the Jackson National annuity guaranteed a higher rate of 3.00%. (R. 672, 1097). Bankers Life does not contest what Juliano stated to Lucianne. Rather, it contends that Juliano's statements were not misleading because in the packet of documents that Juliano delivered to Lucianne were written statements that disclosed both the limitation on the bonus rate and the substantial reduction in the guaranteed rate after the first year. (Blue Br. 35). The Superintendent was not required to believe that such written disclaimers somehow cured Juliano's misrepresentations.

Bankers Life also claims that Lucianne “knew of and accepted Banker Life's marginally lower rate” as a trade off for better customer service. (Blue Br. 34-35). The only evidence Bankers Life cites of such knowledge and acceptance, however, was Juliano's self-serving testimony, and the Superintendent was not required to believe that. (A. 86, 179). *Handrahan v. Malenko*, 2011 ME 15 ¶ 14, 12 A.3d 79, 82.

Juliano presented the issue to Lucianne as a simple comparison between two numbers that showed a clear advantage with the Bankers Life annuity. A fair comparison, however, involves a more complicated calculation, which when performed properly indicates that the exchange would not be favorable for Lucianne. Bureau actuary Richard Diamond performed two sets of calculations to compare the future growth histories of the two annuities. (A. 222; R. 1567-69). Both comparisons show that the exchange resulted in *35 Lucianne receiving a Bankers Life annuity with a lower current rate, a lower guaranteed rate, and substantially increased limits on withdrawal rights. (A. 222).⁹

C. Violation #3. There was sufficient evidence in the record for the Superintendent to find that Juliano used dishonest practices by making a misleading comparison between the yields of the IRA Rollover Annuity and the CD Proceeds Annuity and the yields of Lucianne's existing investments in violation of 24-A M.R.S. § 1420-K(1)(H).

At hearing Juliano admitted that he failed to document his supposed calculations comparing Lucianne's existing CDs to the annuity that he was proposing. (R. 1920). He also explained the “common sense” comparison he performed:

I didn't look at the CD. She read from her bank statements what the interest rate was, what the maturity date was, and gave me that information. I would have done that on a scrap piece of paper just to figure out and done a comparison to see which way was best. And some of it's--some of it is common sense. I mean, if someone's getting three percent, and you're offering them nine percent,¹⁰ it doesn't take a rocket scientist to figure out that nine percent is better than two percent. I'm very fast with math and numbers.

*36 (R. 1920). As with the Jackson National annuity, the Superintendent found that Juliano improperly used the first-year bonus rate as a point of comparison to the CDs, finding as follows:

If he performed those calculations at all, he should have shown them to [Lucianne], retained them in his files, and made them available for Gagnon's suitability reviews, and his statement implying that the financial comparison for these investments was obvious to anyone who is good with numbers demonstrates that he was once again improperly relying on the first-year bonus rate as the basis for comparison.

(A. 26). Consequently, the Superintendent concluded that “Juliano engaged in dishonest practices and demonstrated incompetence, untrustworthiness, and financial irresponsibility in the conduct of his business in violation of [24-A M.R.S.A. § 1420-K\(1\)\(H\)](#).” (A. 26)¹¹

Bankers Life contends that it “indisputably provided complete and honest information in the sale of a suitable annuity,” but that the Superintendent applied “an incorrect test” by finding that a dishonest practice occurred based merely on speculation that there was a better way to structure the annuity sale rather than an analysis of the annuity actually sold. (Blue Br. 36-37). Juliano's comparison, however, was woefully inadequate because he failed to properly factor in the effects of the early withdrawal penalties and used only the first-year bonus as a basis for comparison.

Juliano's overly simplistic comparison portrayed the Bankers Life annuity as the superior investment option. Bureau actuary Diamond's *37 mathematical analysis,¹² however, revealed how misleading Juliano's interest-rate-only comparison was. Diamond compiled a series of spreadsheets that examined whether Lucianne would have been better off financially by cashing in her CDs on November 13, 2007, and purchasing a Bankers Life annuity at that point, or waiting until each CD matured and then purchasing a separate annuity on each of the maturity dates. (A. 223-28; R. 1569). In other words, this examination determined whether the higher initial interest rate of the Banker's Life annuity was sufficient enough to yield returns between November 13, 2007, and the CD maturity dates that would be greater than the sum of the CD's interest over that same time and the corresponding withdrawal penalty. It did so by comparing the actual annuity to hypothetical annuities purchased on the CD maturity dates using both the guaranteed rates and projected rates of the Bankers Life annuity. With regard to both the TCFCD CD and the TD Banknorth CD, Diamond's analysis shows that Lucianne was financially disadvantaged by not waiting until the maturity date to purchase the Bankers Life annuity.¹³

D. Violation #4. There was sufficient evidence in the record for the Superintendent to find that Juliano engaged in a *38 dishonest practice when he misrepresented that Lucianne “did not feel the need to sign” two Fact Finders in violation of [24-A M.R.S. § 1420-K\(1\)\(H\)](#).

The Superintendent found that Juliano committed a dishonest practice when he submitted Fact Finders with the first two annuity sales on which he untruthfully wrote that Lucianne “did not feel the need to sign.” (A. 272, 284). Bankers Life argues that there is no evidence to support the finding and that there is no rational basis to “speculate that Juliano would want to lie about Belanger's willingness to sign the first Fact Finder.” (Blue Br. 40). On the contrary, as the Superior Court correctly concluded, “The evidence in the record is that Mr. Juliano gave an explanation for the lack of signature so at odds with other evidence that the Superintendent decided he was not telling the truth.” (A. 42).

The importance of the Fact Finder in the suitability review performed by both Gagnon and the Bankers Life home office was not in dispute. Bankers Life stipulated that the Fact Finder completed by Juliano (A. 186-88) was “the document that was relied upon by people at Bankers when they analyzed the suitability of this sale, the substantive information of which has not changed.” (R. 1521). Both Bankers Life and Gagnon required Juliano to fill out this form for their suitability reviews. (R. 1520). Juliano knew this tool would be relied upon by Gagnon and Bankers Life in making their suitability analyses, and a sale could be “kicked back for suitability” if it did not pass home office review. (R. 1523, 1730-31).

Because the producer, rather than the customer, fills out the Fact Finder, the Fact Finder contains a signature line for the customer to certify that the information written by the producer is accurate. This certification acts as a check against producers who might otherwise be tempted to modify the customer's information so that it would pass through suitability review. It also becomes an important piece of evidence for both the producer and insurer if the propriety of the sale is challenged. If a producer or insurer did not want the customer to have an opportunity to review the information that would be used to justify the sale, the producer might invent, and the insurer might readily accept, an excuse for why the Fact Finder was not signed.

The Fact Finder that Juliano submitted in November 2007 did not contain a certifying signature by Lucianne. Instead, Juliano dated the signature line November 13, 2007, and wrote on the signature line: "Client did not feel the need to sign file." (A. 188). Unlike the other forms submitted with the applications, the Fact Finder contained health information and characterizations about Lucianne's feelings towards her investments and financial goals. (A. 188). On the Fact Finder, Juliano described a customer who might benefit from purchasing an annuity and might live long enough to enjoy the benefits of a 10-year deferred annuity. (A. 188).

The Superintendent, for good reason, found Juliano's story to be "not plausible." (A. 24). On that same day Lucianne signed no less than 22 other documents, including four suitability questionnaires. (R. 1215-16, 1218-23, 1228, 1270-71, 1273-78, 1280-82, 1287). It simply makes no sense that she would suddenly refuse to sign this particular document. In addition, there *40 were numerous errors in the information contained in the Fact Finder especially with regard to her health, which Juliano described as "great" while omitting her diabetes and misrepresenting the recentness of her cancer treatment. (A. 270). Although Juliano's motive for making this misrepresentation may be unclear, what is clear is that Juliano was desperate to make sales in the fall of 2007 and would not have wanted these annuity applications to get kicked back due to suitability questions.

Bankers Life further argues that even if there was a "basis to conclude that Juliano felt like lying and in fact lied," Bankers Life should not be sanctioned for his dishonest acts because there was no "reason for Bankers Life to suspect Juliano was lying," and "the alleged lie was to it, Bankers Life." (Blue Br. 40). Again, under section 1445(1)(D), Bankers Life's liability attached by virtue of Juliano being its producer. Furthermore, this excuse for not signing was so at odds with the other facts that it should have caused Bankers Life to at least question its validity - unless Bankers Life wanted to avoid confronting an issue that might require it to decline a sale. Bankers Life was not the real victim. When a producer makes an unsuitable sale by short-circuiting the review process, the consumer is harmed and the insurer profits.

E. Violations 5-7. There was sufficient evidence in the record for the Superintendent to find that Juliano failed to make reasonable efforts to obtain information necessary to make a suitability determination and failed to have a reasonable grounds for believing each of three annuity transactions were suitable for Lucianne in violation of Bureau of Insurance Rule 917 § 6(A) and (B).¹⁴

*41 Under Bureau Rule 917 an insurance producer may not sell an annuity without first making reasonable efforts to obtain information concerning the consumer's financial status, tax status, and investment objectives, and other information the producer uses or considers reasonable to obtain. 02-031 C.M.R. ch. 917, § 6(B). The Superintendent found that Juliano failed to make reasonable efforts to obtain sufficient information about Lucianne's debts and expenses and accurate information about penalties that would be imposed for early withdrawal from Lucianne's CDs. (A. 23). Furthermore, even though Lucianne made the documentation of her finances readily available to Juliano, he did not review these documents but relied solely on the representations of Lucianne, who Juliano knew did not understand her finances.

Bankers Life contends that the Superintendent improperly "impos[ed] a hindsight and fiduciary standard." (Blue Br. 42). Nothing in the Superintendent's decision, however, refers to or imposes any fiduciary obligation. The only reference in the record to a fiduciary obligation, as noted above, is in Bankers Life's own training materials. (R. 1415).

Juliano records (although sometimes inaccurately) the amounts of her various investments. (A. 187-88). He notes only generically the types of *42 expenditures she has: "living/car/charity/AMEX." (A. 188). Without making any effort, let alone

a reasonable effort, to ascertain the extent of these expenses and liabilities, Juliano would have been unable to obtain an accurate picture of Lucianne's net worth. He was able to see what assets Lucianne could convert into Bankers Life annuities, but he was unable to see whether converting these assets would benefit her. The fact that Lucianne noted that she was carrying a balance on her AMEX card should have, at a minimum, led Juliano to make the simple inquiry, "How much?" He certainly had no reservations about asking that same question about her assets. Similarly, he is aware of Lucianne's robust allegiance to various animal welfare entities and her desire to continue funding them, and he notes "charity" as one of her recurring expenses. As the Superintendent observed:

[Caribou Pet Rescue] was an activity that [Lucianne] "considered a priority and was trying desperately to keep it alive.... I needed money to pay off Amex which was in large part due to my contributions to CPR." [R. 995] It cannot be known whether she would have told this to Mr. Juliano if he had asked, but his failure to inquire made certain that he would be left with an inaccurate picture of L.B.'s finances.

(A.23). In the end, Juliano recommends that Lucianne convert a substantial majority of her assets into 10-year deferred annuities, without having a reasonable understanding of her expenses and liabilities. Had Juliano simply inquired about her debts in 2007, he would have been in a better position to make an appropriate recommendation.

Juliano failed to obtain an accurate picture of the penalties Lucianne was to experience when she made early withdrawals from her CDs. The amounts may be small in comparison to the stock sale, but not in comparison to the *43 purported benefits of the annuity that replaced them. The correct amounts could have been easily ascertained from her financial institutions. As actuary Diamond demonstrated, that inquiry and analysis would have weighed heavily against making the conversion for monetary reasons. (A. 222-28). Furthermore, Juliano did not even look at the bank statements for the CDs or Lucianne's Jackson National annuity before recommending that Lucianne replace these investments with Bankers Life annuities. (R. 1920).

F. Violations 8-10. There was sufficient evidence in the record for the Superintendent to find that Juliano demonstrated incompetence or untrustworthiness when he submitted materially inaccurate information about Lucianne's financial situation in support of each of the three annuity transactions in violation of 24-A M.R.S. § 1420-K(1)(H).

The Superintendent found that there was a significant amount of conflicting and inaccurate information in the various forms that Juliano submitted as supporting documentation for each of the three annuity sales and that Juliano's failure to submit accurate information demonstrated his incompetence or untrustworthiness and constituted three separate violations of 24-A M.R.S. § 1420-K(1)(H). Bankers Life contests these findings and further contends that the inaccuracies did not "ha[ve] any material consequence" (Blue Br. 44). The record contains ample evidence of Juliano's documentary errors, and the cursory nature of both Juliano's suitability analysis and Bankers Life's management review.

On November 13, 2007, Juliano submitted with Lucianne's application for the CD Proceeds Annuity a Fact Finder and a Suitability Questionnaire. (A. 268, 272). In the former he stated that Lucianne held stock and bonds valued *44 at \$5,000 to \$7,000 and in the latter he stated that her bond holdings totaled \$5,000 to \$7,000 and that she had additional stock holdings totaling approximately \$200,000. The Fact Finder omitted the largest asset entirely. For that same transaction, in the longer suitability questionnaire he stated that she would incur early withdrawal penalties totaling approximately \$400, while in the shorter suitability questionnaire he stated that these same penalties would be approximately \$250. (A. 268, 273). The actual amount of the penalties was \$574.92. (R. 704-13). Bankers Life rationalizes this discrepancy by adding the two figures, yielding a total that errs in the opposite direction, but each questionnaire is meant to be read without reference to the other. (Blue Br. 41, n.18)

Two days later, on November 15, 2007, when Juliano submitted the application for the GE Stock Proceeds annuity, he submitted yet another erroneous Fact Finder and Suitability Questionnaire. (A. 275, 278). This time Juliano modified both forms to reflect Lucianne's stock holdings of approximately \$175,000. He stated on both forms, however, that she still had approximately

\$37,000 in CDs even though he knew that she had already liquidated over \$18,000 worth of these CDs to fund the annuities she had purchased earlier.

Juliano also repeatedly submitted the same Fact Finder, which contained materially inaccurate information about Lucianne's health. (A. 270, 276, 282; R. 1317). On the form, Juliano describes her health as "great," omitting her diabetes and states that she "beat cancer many years ago," notwithstanding *45 her cancer surgery within the past eight months. Juliano's rosy description of Lucianne's health would have helped validate his recommendation to purchase a 10-year deferred annuity rather than one of lesser duration. It also created the impression that she was a good candidate for long term care insurance, a coverage that Juliano did, in fact, later sell to her. (R. 881).

III. The Superior Court correctly found no evidence of bias on the part of the Superintendent.

Bankers Life argues that this Court should remand the case to the Superintendent for a new hearing because of alleged bias on the part of Bureau Staff and the Superintendent. (Blue Br. 49). The lower court correctly rejected the claim of bias finding that the alleged bias did not relate to the Superintendent, did not factor in her decision, and could not be imputed to her. (A. 46). A similar claim was rejected by this Court in *York Hospital v. Department of Health and Human Servs.*, 2008 ME 165 ¶ 17, 959 A.2d 67, 71-72. In *York Hospital*, the petitioner challenged the decision of the Commissioner relating to a certificate of need application based, in part, upon allegations of bias and improprieties on the part of an individual staff member. This Court affirmed the superior court's decision which upheld the administrative decision because there was no evidence that the alleged bias and improprieties of the individual staff member played a role in the Commissioner's decision. *Id.* The same rationale should be applied here. Moreover, contrary to the contentions of Bankers Life, the record does not compel a conclusion that Bureau Staff engaged in "active misconduct," "repeatedly ma[d]e material misstatements under oath," and "made statements *46 under oath that they knew not to be true, with the support of counsel."¹⁵ (Blue Br. 2, 46). Nor does the record compel a conclusion that the Superintendent was biased and pursued this matter with a "witch-hunt mentality," imposing penalties against Bankers Life "not based upon a dispassionate assessment of the record evidence, but due to prejudgment that tainted every phase of the investigation, the hearing and the Superintendent's resultant findings." (Blue Br. 41 n.18, 44).

This Court may reverse or modify the Superintendent's decision if the administrative findings, inferences, conclusions, or decisions are affected by bias. 5 M.R.S. § 11007(4)(C)(4). In evaluating claims of fact finder bias, this Court must presume impartiality. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). See *In Re Maine Clean Fuels, Inc.*, 310 A.2d 736, 750-51 (Me. 1973). "In the absence of any direct, demonstrable evidence of prejudice," the reviewing court is compelled to conclude that an appellant's allegations of prejudice are without foundation. *In re Maine Clean Fuels, Inc.*, 310 A.2d at 751. The record contains no such evidence.¹⁶

Bankers Life alleges three specific acts of misconduct - "prejudicial name calling, prejudgment, and withholding evidence." (Blue Br. 46). Bankers Life *47 claims that the Superior Court made a "finding of bias" and that "[Bureau Staff's] active misconduct was acknowledged by the Superior Court, as inexorably reflected in the record." (Blue Br. 45, 46). What the Superior Court actually said speaks for itself:

Bankers Life argues that the Bureau's investigation was biased due to unprofessional behavior of the lead investigator and the failure to consider exculpatory information - the "Doughty report." Although Bankers Life's assertion of bias is supported, it does not relate to the Superintendent herself. Moreover, the *allegedly biased behavior* did not factor into her decision and cannot be imputed to her. She, not the investigator, was the decision maker, and the court can divine no evidence of bias or prejudice on her part from the record.

(A. 46 (emphasis added)).

The prejudicial name-calling allegation refers to Bankers Life's contention that investigator McGonigle "called Juliano 'garbage' - then later denied, under oath having done so." (Blue Br. 10). Again, Bankers Life mischaracterizes the evidence. At the outset of the investigation, McGonigle traveled to Aroostook County to interview Lucianne. Toward the end of this long interview, during which Lucianne at one point broke down in frustration with herself for having fallen victim to Juliano's scheme to befriend her and convert her assets to Bankers Life annuities (R. 1008-09), McGonigle asked Lucianne about an entry she had made on her wall calendar. (A. 232). Lucianne had just described how Juliano had attempted to help her with chores like shoveling her roof. (A. 125; R. 1029). In the calendar block for November 15, 2007, Lucianne had written two notes: "Matt 9:00" and "garbage." (A. 232). McGonigle referenced the notes and asked Lucianne the following question: "Are they related in any way?" (A. 232). Lucianne *48 responded "No." The transcript of the interview then reads: "[ALL LAUGHING]." (A. 232).

Bankers Life apparently contends that McGonigle's question and the laughter following Lucianne's response were improper because they occurred "in front of two potential witnesses." (Blue Br. 10). The notion that this question may have prejudiced these particular witnesses is absurd. One need only read the interview in which these potential witnesses catalogue the many ways in which Juliano manipulated Lucianne and conned her out of her money to see that little or nothing McGonigle said or asked could further prejudice them against Juliano. (R. 1001-32). Indeed, having been personally victimized by Juliano, Lucianne was already biased against him. Furthermore, Bankers Life was not harmed because Lucianne's untimely death assured that she would not testify against them.

This was not an instance of an investigator conjuring up a name to call Juliano. Lucianne had written "garbage" next to "Matt" a year before the interview, before anything had happened to strain their relationship. The laughter that followed, after everyone realized the double meaning, does not make it improper for McGonigle to have asked about the appointment. Indeed, seeing these two entries for the same date on Lucianne's calendar, he would have been remiss not to ask whether they were related. A common tactic of those who exploit the **elderly** is to ingratiate themselves by performing small tasks or errands, a pattern Lucianne seemed to have been describing.

Bankers Life's claim that Bureau Staff improperly withheld evidence and *49 "ignored exculpatory evidence" appears to be referring to the so-called "Doughty Report," authored by "The Tax Guy®" Dale W. Doughty, Sr. (R. 233-37).¹⁷ Bureau Staff did not improperly withhold any evidence. The Superintendent accurately explained what occurred:

The Staff objected to Bankers Life's discovery request, citing its confidentiality obligations under [24-A M.R.S.A. § 216](#) and raising significant legal questions of first impression. When I granted Banker's Life's motion to compel and ordered production subject to a protective order, the Staff complied.

(A. 14). The Doughty Report was treated like and turned over to Bankers Life subject to a protective order with all the other evidence. (R. 119-22).

As for the Bureau Staff improperly "ignoring" the Doughty Report, the report speaks for itself. Its relevance was minimal because Doughty explicitly noted: "My comments here will not address any issues of ethical or professional conduct which have been manifested in these dealings." (A. 233). Bankers Life argued the meaning of its contents, but did not even call Doughty as a witness to validate its interpretation of his report.

Finally, Bankers Life contends that the fact it was fined the maximum civil penalty \$100,000 proves its claim of bias. (Blue Br. 48). As found by the Superior Court, given the Superintendent's findings regarding lack of *50 supervision and Bankers' Life prior history,¹⁸ the Superintendent was well within her discretion in imposing the maximum civil penalty. In addition, although the Superintendent did impose the maximum *civil penalties*, she did not come close to imposing maximum penalties; she did not modify, suspend, or revoke Bankers Life's certificate of authority, despite Bureau Staff arguing that she should. (R. 408). The magnitude of the civil penalty was also justified by Bankers Life's failure to make any meaningful effort to prevent the improper sales or take timely corrective action. (A. 29).

CONCLUSION

For the reasons stated above, the Superintendent respectfully requests that this Court affirm the Business and Consumer Court's decision affirming the Superintendent's Decision and Order.

Footnotes

- 1 Mary Jo Hudson, former Director of the Ohio Department of Insurance, was a paid witness for Bankers Life. She acknowledged that six months before her testimony she issued a press release captioned "Take Action: Protect Yourself from Fraud - **Elderly** Easy Targets for Top Insurance Scams." (R. 1950-54, *see* Order Correcting Record dated November 8, 2011).
- 2 The Superintendent also found Juliano solely responsible for three violations (not subjects of this appeal) when he persuaded Lucianne to purchase him a snowmobile.
- 3 24-A M.R.S. § 1445(1) reads in pertinent part: "In addition to any other applicable provisions of law, the insurer... [i]s accountable and may be penalized by the superintendent, as provided for in this Title, for the actions of its producers."
- 4 The Bankers Life production quota is measured not on the basis of premiums or contracts sold, but on the total amount of commissions earned. (R. 752-53).
- 5 For a 75-year-old consumer, Bankers Life paid a commission of 3.25% of premium for non-qualified plans and 2.25% for qualified plans. (R. 747). On the other hand, Bankers Life paid only 2.00% commission for its five-year deferred annuities. (R. 748).
- 6 The Superior Court also concluded that § 1445(1)(D) imposes vicarious liability on insurers for the actions of its producers. (A. 45).
- 7 Bankers Life asserts, "the Superintendent's ability even to promulgate and apply Rule 917 **at all** to require 'suitability' is at best dubious." (Blue Br. 28 n.9 (bolding in original)). On the contrary, the law mandates that the Superintendent "adopt rules regarding the suitability of sales of annuities for the purpose of protecting the consumer and furthering uniformity of laws with other states." 24-A M.R.S. § 2517(3).
- 8 24-A M.R.S. § 2155 reads as follows: "No person shall make or issue, or cause to be made or issued, any written or oral statement misrepresenting or making incomplete comparisons as to the terms, conditions, or benefits contained in any policy for the purpose of inducing or attempting or tending to induce the policyholder to lapse, forfeit, borrow against, surrender, retain, exchange, modify, convert, or otherwise affect or dispose of any insurance policy."
- 9 In one comparison he used the guaranteed interest rates, including the first-year bonus rate (6.20% and 2.50%), of Bankers Life, and in the other he used the higher projected rates of Bankers Life (6.20% and 3.20%). (A. 222). In both comparisons he used only the guaranteed interest rate of Jackson National (3.00), even though the current rate was 3.45%. (R. 690). The comparison using the two guaranteed rates showed that, although in the early years the Bankers Life annuity had a higher "cash value," the Jackson National annuity would *always* have a higher "Surrender Value" (the amount actually available to a living policy holder). (A. 222). In the comparison between Bankers Life projected rates (6.20% and 3.20%) and Jackson National guaranteed rates (an unfair comparison that favored Bankers Life), the surrender value of the Jackson National annuity would still be higher for the next six years. (A. 222; R. 1569).
- 10 This figure overstates the one-time first year rate by approximately 3%. Juliano appears either to be adding the 3% bonus to a first-year rate that already includes the bonus, or to be treating the base rate as part of the bonus and adding it a second time.
- 11 24-A M.R.S. § 1420-K(1)(H) authorizes the Superintendent to impose sanctions on producers for "[u]sing fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this State or elsewhere."
- 12 Bankers Life stipulated to the mathematical accuracy of Diamond's analysis. (R. 918-24, 1844-45).
- 13 Diamond's analysis shows that with regard to the TCFCU CD that was due to mature on February 27, 2008, and for which she incurred an early withdrawal penalty of \$226.51, Lucianne was financially disadvantaged (at all times both under the guaranteed and projected rates) by not waiting until the maturity date to purchase the annuity. (A. 223-24; R. 1569-71). Similarly, Diamond's analysis shows that with regard to the TDBanknorth CD that was due to mature on March 17, 2008, and for which Lucianne incurred an early withdrawal penalty of \$148.81, Lucianne was financially disadvantaged (at all times both under the guaranteed and projected rates) by not waiting until the maturity date to purchase the annuity. (A. 225-26; 1571).
- 14 On page 24 of the Decision and Order the Superintendent explicitly states that Juliano "fail[ed] to make reasonable inquiries to gather suitability information in connection with each of the three annuities," but cites to only "Rule 917, § 6(A)." (A. 28). It is clear from her statement in the middle of page 20, however, that she concluded that Juliano violated both subsections 6(A) and 6(B): "I conclude that Mr. Juliano violated Rule 917, both by failing to make reasonable efforts to obtain the information necessary to evaluate the

suitability of his recommendations, and also by failing to make a reasonable suitability evaluation based on the information he had obtained.” (A. 24). At oral argument in the Business and Consumer Court the parties agreed that the Superintendent concluded that Juliano violated both [section 6\(A\) and 6\(A\)](#). (A. 42 n.3).

15 These accusations, if true, would appear to constitute criminal misconduct under [17-A M.R.S. § 451\(1\)](#) and bar misconduct under M.R. Prof. Conduct 3.4(b). As of the date of this filing, the Superintendent is not aware of any formal or informal criminal or bar complaint pertaining to these accusations.

16 The Court need review only the record because Bankers Life has never argued, and does not now argue, that there are facts extrinsic to the record that would support the allegations of bias made in its appellate brief. See [Key Equipment Finance, Inc. v. Hawkins, 2011 ME 102 ¶ 4, 28 A.3d 1168, 1169](#). Furthermore, Bankers Life never requested to take additional evidence and consequently waived the right to do so. [M.R. Civ. P. 80C\(e\)](#).

17 The report was generated after Bankers Life agreed to pay for an evaluation of whether Lucianne may have been entitled to some form of restitution as a result of converting her GE stock to a Bankers Life annuity. (R. 1708). Doughty reached the obvious conclusion that she was not financially harmed because “the liquidation of [Lucianne’s] shares at the time of this 2007 transaction was indeed a fortuitous event.” (A. 235).

18 In 2005 Bankers Life paid a civil penalty of \$400,000 for the sales practices of its producers, and in 2009 it paid a civil penalty of \$500,000 for the illegal sale of an annuity by two producers and its failure to supervise its producers. (R. 929-53).

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.