2012 WL 8016314 (Me.) (Appellate Brief)
Supreme Judicial Court of Maine.

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

No. BCD-12-110.
September 7, 2012.

On Appeal from Decision of the Business & Consumer Court

Reply Brief of Appellant Bankers Life & Casualty Co.

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***1 INTRODUCTION**

None of the three Bankers Life annuities was economically unsuitable for a consumer in Belanger's position. (See Blue Br. at 5-6, 7-9.) The Superintendent did not so find.[1] Nor did the annuity sales cause harm, as insinuated throughout the Appellee Brief without record support.[2] Just as Belanger reasonably wanted, the annuities protected Belanger's principal; eliminated her risky stock market investments; provided deferred income taxes on earnings; gave her penalty-free withdrawals for greater access to funds than she had ever needed before; and were serviced by a single agent. (*Id.*)

The question presented, therefore, is whether Bankers Life should be penalized for approving the sale of these three suitable and beneficial annuities. The answer is no.

I. The Superintendent's findings of fault on the part of Bankers Life and resulting penalties are unsupported in the record.

A. Because the Superintendent penalized Bankers Life based on findings of fault, the Court cannot impose vicarious liability.

The AG[3] argues that the Superintendent imposed vicarious liability upon Bankers Life and only considered fault for purposes of determining the penalty. ***2** (Red Br. at 26.) The Order, however, speaks for itself. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 155 (1991) ("[A]gency litigating positions' are not entitled to deference...").

When the Superintendent rejected Bankers Life's objection to consolidating the annuity questions with Juliano's snowmobile loan, she "determined that Bankers Life would be responsible... to the extent and to the degree that Staff demonstrates a factual and legal basis for holding Bankers Life responsible." (A. 299.) Citing this ruling,[4] the Superintendent then found that "[b]y 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." (A. 27.) She stated further that Bankers Life was being penalized because it "failed to make any meaningful effort to prevent the improper sales or take timely corrective action." (A. 29.) As such, the Superintendent used only fault-based language in discussing Bankers Life's liability as well as the resulting penalties.

Thus, both the determination of Bankers Life's liability and the penalties imposed on Bankers Life were based upon these factual findings of fault - which are unsupported in the record and cannot be re-written by the AG on appeal. *In re Maine Motor Rate Bureau*, 357 A.2d 518, 527 (Me. 1976).

***3 B. The record is devoid of evidence supporting the Superintendent's findings of fault on the part of Bankers Life.**

The AG lists four bases upon which the Superintendent could have found fault with Bankers Life's conduct: (1) Juliano did not drive three hours south to the Bangor office often enough [5] and was "confused" as to who his manager was; (2) Gagnon did not accompany Juliano on a sales call; (3) Gagnon's review sheet included "a series of leading questions designed to elicit self-serving responses"; and (4) Gagnon did not inquire sufficiently into the terms of the Jackson National annuity. (Red Br. at 28-29.)

With respect to the first cited basis, as previously noted (Blue Br. at 23-25) but not addressed by the AG, there was no confusion and, in any event, no indication why Juliano's inability to name his contemporaneous manager three years later or the lack of more travel to Bangor would constitute a supervisory deficiency. With respect to the AG's new second and third items, no one testified and the Superintendent did not find that supervisors should accompany agents or that there was anything flawed in the review sheet. To the contrary, the only evidence in the record is that Bankers Life's suitability review constituted "best practices." (Blue Br. at 22-23.) Indeed, the Insurance Code does not require any review sheet at all; Gagnon used one in an effort to go beyond what was required. (R. 1789; A. 160.) No one testified otherwise.

Finally, the argument that Gagnon should have probed further into the terms of the Jackson National annuity is based on language in the Order ***4** stating that Bankers Life had been penalized in the past and suggesting that Gagnon was not following Bankers Life's internal criteria for determining suitability because he purportedly did not know the difference in interest rates between the Jackson National annuity and Bankers Life's replacement. (A. 26-27.) This citation confirms why these penalties cannot be sustained:

1. It is improper to base liability on past misconduct, *Bolduc v. Androscoggin County Comm'rs*, 485 A.2d 655, 659 (Me. 1984);

2. the Code provides the relevant standard, not Bankers Life's internal guidance;

3. Gagnon did in fact review this information and knew that Belanger was comfortable with the small difference to get better, consolidated service, but these facts were simply not recorded in the particular documentation presented by Staff in questioning him at the cited point in the record (*see* R. 1667-68; *see also* R. 1678-79, 1803; A. 143-45, 148, 150);

4. nothing in the Code indicates that it is unsuitable to switch from one annuity to another with a lower rate in order to achieve a goal of better service, which is what Belanger chose to do - and why the Superintendent could not find the replacement annuity unsuitable (Blue Br. at 6, 34-35); and

5. the difference between the Jackson National annuity and the Bankers Life annuity was immaterial, as in some years the value of the Bankers' annuity was slightly greater, while in others the Jackson National annuity was slightly greater (*id.* at 34 n. 14).

Distilled, the AG primarily claims that Juliano's annuity violations were so blatant that deficient supervision is self-evident. (*See* Red Br. at 28-29.) But the opposite is true. To the extent that any annuity violation could be upheld (which none can), it would be marginal and not support a finding of deficiency in Banker Life's best practices supervision. (*See* Blue Br. at 3-7.) For this reason, none of the ten violations can stand as against Bankers Life.

***5 II. No substantial evidence supports the ten violation findings.**

A. Violation #1 - "an unsuitable annuity sales recommendation that failed to reserve sufficient stock proceeds to meet [Belanger's] stated liquidity needs, in violation of Rule 917."

According to the Superintendent, it was improper for Belanger to buy an annuity in the amount of $135,000 using all but $15,000 of the proceeds from her sale of GE stock, because Juliano wrote "20K" in a Fact Finder as Belanger's response to the question "[h]ow much of your savings do you believe needs to be totally liquid and accessible for your use?" (A. 272; *see* A. 37-38.)

But first, the Superintendent did not find and the AG has not argued that the switch from stock to an annuity was economically unsuitable. (Blue Br. at 8-9; *see* A. 160, 169, 172, 235.) Hence, the argument must be that the size of the Annuity as recommended by Juliano was too large, because it was inconsistent with Belanger's "20K" representation in the initial Fact Finder. But the record does not indicate that Juliano recommended an annuity of any particular size. Rather, the record shows that a month after making the "20K" statement and after consulting with her own tax advisor, Belanger received just over $150,000 from the sale of her GE stock, deposited it into her checking account and decided to buy an annuity in the amount of $135,000 and to retain $15,000. (R. 1586-87, R. 1589, R. 1002; *see also* R. 983, ¶ 3 ("I ***6** [Belanger] told Matt [Juliano] I wanted $15,000 to put in my checking account to pay off American Express and replenish my tax account.").) [6]

So the argument must be that, despite Belanger's instructions, Juliano should have refused to sell her the Annuity in the amount of $135,000 because this would be inconsistent with Belanger's earlier Fact Finder statement. The AG does not contest that Belanger retained $16,000 in cash; $5-7,000 in bonds, $5,000 in mutual funds; $20,000 in stock; $19,000 in penalty-free ability to withdraw from her annuities; and $5-7,000 per month pension and social security payments. (Blue Br. at 29-30.) Rather, he argues that these resources were not liquid enough because the Fact Finder uses the term "savings," which he equates to cash. (Red Br. at 31-32.) Despite conceding that hindsight is not the test (*id.* at 32), the AG further claims that Belanger's "failure to withhold more cash from her annuity purchase quickly led to significant financial stress." (*Id.* at 31.)

As a threshold matter, the AG's assertion that buying the Stock Proceeds Annuity in the amount of $135,000 instead of $130,000 caused Belange's financial stress is wholly unsupported in the record. The AG cites A. 212. This is a statement from Juliano that he assisted in a penalty-free withdrawal from the Annuity because Belanger called him to say she needed a new roof. Absent is any suggestion that the Annuity purchase caused any financial stress. To ***7** the contrary, retaining some of her savings in an interest-earning annuity until needed was economically appropriate.

In any event, there is no inconsistency between a stated desire of keeping "20K" in liquid savings and what Belanger did here. Nowhere is there any indication that Belanger wanted to net $20,000 in cash from the stock sale, as opposed to retain $20,000 of liquidity in her total financial portfolio. Nor is there anything economically irrational in her choice or the size of the Annuity. Thus, there is no evidence that Juliano made any recommendation unsuitable for Belanger, whether one defines suitability to mean an economically rational choice or consistency with a specifically articulated goal. The Doughty Report confirms that the annuity in form and substance was and is suitable and recommended no change. (A. 236-37.) [7]

At one point, the AG concedes that the legal test is whether there were "reasonable grounds for believing that the [Stock Proceeds Annuity] was suitable for" Belanger. (Red Br. at 32.) Bankers Life agrees. Its duty was to recommend a suitable annuity, which it did. To read into Rule 917 a duty to ensure that Belanger retained $20,000 in cash from the stock sale not only reads into the "20K" Fact Finder statement more than can reasonably be ***8** construed in assessing civil penalties, but imposes a binding obligation on Juliano incapable of modification even by Belanger herself. This reading also imposes a fiduciary duty on Bankers Life found nowhere in Rule 917 and requires it to give tax advice, which it affirmatively should refrain from doing. (See A. 157.) And it is indisputable that the Stock Proceeds Annuity increased Belange's liquidity, as the stock proceeds - even net of capital gains tax increased Belanger's cash holdings from pre-transaction by $6,000.

The AG argues that annuity withdrawals can take a week or two (and could theoretically be postponed for up to six months). This is a red herring. These provisions are required to prevent a run on the bank (A. 165) and have never been exercised. (*See id.;* R. 1557.) The fact that Belanger readily obtained the withdrawal for her roof expenditure (1) undermines the AG's argument that the $19,000 penalty-free withdrawal was illiquid in any common understanding of the term; and (2) further shows that Belanger's increased penalty-free accessibility to funds post-transaction did not harm, but rather benefited her.

There was no basis to find recommendation of the Stock Proceeds Annuity a violation of Rule 917.

B. Violation #2 - a "misleading comparison of [the] ... Jackson National annuity with the IRA Rollover Annuity, in violation of 24-A M.R.S.A. § 2155."

The AG concedes sub silentio that the record lacks evidence that Belanger was misled regarding the differences between the interest and charges for the Jackson National Annuity and the IRA Rollover Annuity, and that there ***9** was nothing misleading about the written information that Bankers Life provided before she bought the annuities. Instead, the AG argues that the Superintendent could find a violation of § 2155 because she "was not required to believe that such written disclaimers somehow cured Juliano's [alleged preceding oral] misrepresentations." (Red Br. at 34.)

There is no evidence of any misrepresentation. The AG cites R. 672 and R. 1097. These are simply citations to the written disclosures. The Order cites volume IV of the transcripts. (A. 25.) The AG does not, perhaps because there Juliano states that he in fact apprised Belanger in their introductory meeting that the guaranteed rate for the IRA Proceeds Annuity was lower than that in Jackson National Annuity, and, further, that Belanger responded by saying she did not care because she wanted better service. (A. 179.)

This leaves the AG with citing two sets of calculations prepared by the Bureau's actuary "comparing the future growth histories" of the annuities, and arguing that an agent misleads in violation of § 2155 if he fails to give such a comparison. (Red Br. at 34.) But the comparison the AG argues was required was inaccurate. (*See* A. 93-95 (actuary conceding, *inter alia*, that, he failed to consider customer service and rider impacts.) Nor does § 2155 impose such a burden. Even the Order does not so suggest.

C. Violation #3 - "dishonest practices in using the first-year bonus to make a misleading comparison of the yields of the IRA Rollover Annuity and the CD Proceeds Annuity with yields of [Belanger's] existing investments, in violation of 24-A M.R.S.A. § 1420-K(1)(H)."

The allegedly improper comparison was made when, in a meeting with Juliano, Belanger read him the interest rates from her existing CDs and he ***10** compared them to rates for the CD Proceeds Annuity. (R. 1920.) The Superintendent found that this constituted "dishonest practices" because "if [Juliano] performed those calculations at all," "he should have shown them to [Belanger], retained them in his files, and made them available for Mr. 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.)

The undisputed evidence reflects that Belanger knew her CD interest rates and was told the annuity interest rates, including the first year bonus rate and guarantee rate thereafter. (A. 86.) This should end the inquiry.

The Superintendent did not find either annuity unsuitable. That too should end the inquiry.

Nothing in § 1420-K(1)(H) provides that an agent must retain written copies of CD-to-annuity comparisons in writing or that such writings must be available for internal review. It is certainly not "dishonest" not to create and retain such writings under § 1420-K(1)(H). The AG argues that, to avoid penalty, Juliano had to provide Belanger "a series of spreadsheets" as prepared by the Bureau's actuary to show how Belanger could have better optimized her financial planning by timing the transfer to the CD Proceeds Annuity in a different way. (Red Br. at 37.) That brand-new fiduciary standard is unsupportable, its absence does not reflect "dishonest practices," and crystallizes how the Superintendent was scouring the record (in vain) for ***11** anything upon which to sanction the Respondents because she was convinced by atmospherics, but not evidence, that **elder** fraud had occurred and Bankers Life had to pay.

Ironically, if Bankers Life had provided these spreadsheets to Belanger, *that* would have been misleading, as Staff's expert conceded. (A. 96-98 (Staff's analysis assumed convoluted sequential purchases, failed to account for taxes and overall had "significant flaws" and did not "reflect reality").) The spreadsheets also - inaccurately - assumed the same annuity interest rate would be available no matter when purchased. (A. 96-98.) [8]

D. Violation #4 - "dishonest practices in submitting unsigned Fact Finders with the first two annuity purchases and misrepresenting that the client refused to sign, in violation of 24-A M.R.S.A. § 1420-K(1)(H)."

Even the AG's fertile imagination cannot conjure up a reason why Juliano would lie about Belanger's decision not to sign one form. (Red Br. at 40: "Juliano's motive for making this misrepresentation may be unclear..."). Even if Juliano was desperate to make a quick sale in order to obtain a commission, as the AG asserts, there is no reason why Juliano would lie about the unsigned form to do so - the AG does not contest that there is no requirement that Fact Finders be signed, and that Belanger signed additional forms containing the same information. (*See* A. 278.)

***12** To call the Superintendent's finding of a lie here speculative gives it too much credit. The reasoning is apparently that because Belanger signed other forms, there was no logical reason why she would not sign this one. The chain of reasoning is painful: if it is illogical not to sign, but it is equally illogical for Juliano to lie about it, then Juliano must be lying and maximum penalties should be imposed for doing so. But the burden of proof was on Staff, not Juliano or Bankers Life. And because civil penalties are imposed, the Code must be narrowly construed. (Blue Br. at 20.) The Superintendent is not supposed to presume dishonesty and misconstrue the record to conform to her presumption - which is precisely what occurred.

The AG distorts the finding by suggesting that Juliano's "lie" "short-circuit [ed] the review process." (Red Br. at 40.) There was no such "short-circuit." (*See* Blue Br. at 3-7.) Nor *could* lying about a declination to sign this Fact Finder have short-circuited Bankers Life's review process. The AG hypothesizes that having signatures on Fact Finders is useful. (Red Br. at 38-39.) Bankers Life agrees. [9] But it does not follow that a statement by Juliano that Belanger chose not to sign the form somehow precluded review. An unsigned statement would only invite more scrutiny, not less, thus undermining, not supporting, the AG's theory.

***13** The finding that Juliano lied is speculative and illogical, and confirms that the Superintendent improperly imposed the burden of proof on the Respondents to prove their innocence in the face of presumed guilt.

E. Violations 5-7 - "failure to make reasonable inquiries to gather suitability information in connection with each of the three annuity applications, constituting three separate violations of Rule 917, § 6(A)."

Two arguments are offered to support these findings. First, based on information provided by Belanger, Juliano recorded that the withdrawal penalties for Belanger's CDs would be $250± and $400±, and the total turned out to be S574.92. [10] Second, Belanger later told the Bureau that she considered pet rescue "a priority and was trying desperately to keep it alive... [and she] needed money to pay off Amex which was in large part due to [her] contributions." (A. 23.) [11] Citing this Belanger statement, the Superintendent rules that Juliano "fail[ed] to inquire." (*Id.*)

Juliano did inquire about Belanger's expenses. She owned her home mortgage-free and listed her monthly expenses as "living/car/charity/AMEX" (A. 278), said that they were "very limited" (A. 151) and "*minimal*" (A. 132), and described her debts as "very little." (A. 132.) She confirmed all of this in her subsequent meeting with Farren. (*Id.*) This information was also substantiated ***14** by her historical ability to live well within her monthly income, without needing to withdraw from her investments. (*See* A. 149, 151, 155, 160-62, 178.) There is no evidence that Belanger told Juliano that she had, would have, or could have any large looming debts or expenses that she could not cover from her reported $5500/month income. [12]

Thus, the Superintendent is penalizing Juliano and Bankers Life because they relied on information provided by the consumer, and did not verify her representations by personally reviewing "the documentation of her finances" (Red Br. at 41), scrutinizing her AMEX bills and probing further as to her charitable desires - even though she had historically lived comfortably within her means and there was no reason to doubt her veracity. [13]

Rule 917(A) provides that an insurer must have "reasonable grounds" for believing that the recommendation is suitable for the consumer "on the basis of the facts disclosed by the consumer." Nothing in the law provides that more is required than reliance on the consumer's representations, particularly when the consumer's past history is consistent with these representations and there would be no way for Juliano to know of the consumer's future roofing needs ***15** and unarticulated desires to contribute beyond her means to pet rescue. (*See* Red Br. at 40 n. 14.) [14]

The only way one can reach the conclusion that Bankers Life should be held to account for relying on Belanger's representations and history is if one applies a fiduciary, if not omniscient, standard. The AG's response to this point? The Order does not include the word "fiduciary." (Red Br. at 41.)

Littered through the AG's Brief, starting at page 1, are assertions that Belanger was **elderly**, "vulnerable," alone, sick, unknowledgeable, confused and anxious about her finances. (*E.g.*, Red Br. at 1, 4, 32, 41.) The implication the AG not-so-subtly wants the Court to draw is that Juliano and Bankers Life preyed upon an incompetent, when they should have been protecting her and optimizing her financial portfolio. Setting aside the fact that the annuity purchases were sound economic decisions, there is no evidence that Belanger was incompetent to provide accurate information and make her own decisions. She was a retired teacher who had handled her finances competently all her ***16** life. (A. 132-33.) She consulted her own tax advisor before making her purchase. (A. 134.) She felt it was too risky to have so much of her money tied up in the stock market. (A. 132-33.) Ultimately Belanger's very reasonable concerns led her to sell some of her stock holdings, saving her from the devastating effects of the market's sharp decline.15 Bankers Life's duty was to listen to its customer and offer sound, suitable products, which is exactly what it did, to that client's benefit. [15]

F. Violations 8-10 - "demonstrating incompetence or untrustworthiness in the submission of materially inaccurate information about [Belanger's] financial situation in each of the three annuity applications, constituting three separate violations of 24-A M.R.S.A. § 1420-K(1)(H)."

The basis for this finding as asserted by the AG, aside from the $250± and $400± versus $574.92 difference in penalties discussed above, is: (1) the first Fact Finder listed Belanger's stock assets as $5-7000, when she still held $150,000 of GE Stock; and (2) a second Fact Finder and suitability questionnaire listed Belanger's assets as including $37,000 in CDs and $18,000 in annuities, although those assets had been liquidated to purchase two of the Bankers Life annuities. (*See* A. 23-24; Red Br. at 43-44.) [16]

***17** Looking at the latter assertion first, at the time that the annuity suitability questionnaires were signed, no assets had yet been put into Bankers Life annuities. (A. 91.) Bankers Life pointed this out in its opening brief. (Blue Br. at 43-44.) The AG did not respond.

With respect to the omission of Belanger's GE Stock in the first Fact Finder, Juliano reported what he was told by Belanger. When, as a part of the suitability review process, Belanger worked with Farren to identify correct information regarding her stock, Juliano recorded the proper number. (A. 132, 275.)

In any event, the Superintendent imposed liability because she found submission of "materially" inaccurate information. The record is devoid of any indication that these purported inaccuracies were material. [17] Gagnon - the manager who reviewed the transactions - reviewed all three annuities at once, interviewed Juliano and Farren separately about the proposed transactions, and understood Belanger's complete, accurate financial picture. (A. 143-45; 136.) Gagnon could not have approved the Stock Proceeds Annuity if he had been misled by the earlier, lower figures: $135,000 would not have been available to purchase

the Annuity. Nowhere does the AG explain how ***18** understating the stock value on one Fact Finder not used for the Stock Proceeds Annuity was material to these transactions.

III. The proceedings did not comport with due process and fairness requirements.

The AG argues that the record "does not compel a conclusion" that Staff engaged in active misconduct. (Red Br. at 46.) This is not the correct test.[18] Beyond that, the AG's lack of a scintilla of remorse, or even recognition of bad behavior, is breath taking. For example, as to the repeated misstatements of McGonigle under oath and his counsel's attempts to support them, the AG responds: "the Superintendent is not aware of any formal or informal criminal or bar complaint pertaining to these accusations." (Red Br. at 46 n. 15.) But criminality is not the measure. He then resurrects the claim that the "garbage" comment was a mere reference to chores - the very explanation McGonigle had to disavow, ultimately, under oath. (A. 114.)

The AG then argues that Staff bias cannot be imputed to the Superintendent. But first, the Court looks not just at actual prejudice, but whether the circumstances presented a "risk" of a decision not based on the ***19** merits, or the "appearance" of prejudice. (Blue Br. at 45.) On this point, the AG is silent. With respect to Bankers Life's argument that this risk was particularly high here given the incendiary atmospherics (*id.* at 46), the AG proves the point by doing his best to fan those flames, as he charges exploitation, victimization and **elderly** fraud. (*E.g.*, Red Br. at 1 alluding to "**elder abuse**" and "top insurance scams" perpetrated on older individuals; id. at 48: "A common tactic of those who exploit the **elderly**."). The AG fails to advise the Court that the expert cited in its opening for these principles - Mary Jo Hudson - clearly and repeatedly testified that there was *no such evidence in this case.* (R. 1834-36.)

With respect to the actual prejudice noted by Bankers Life from the misconduct, the AG argues that there was no harm from Staff's ignoring the Doughty Report because it was unimportant (Red Br. at 49) - even though: Staff admitted on the stand that the Report showed that the Stock Proceeds Annuity was suitable (A. 123) and its petitions against the four individuals and Bankers Life alleged to the contrary; Staff, as well as the former Deputy Superintendent of Insurance and current head of the Office of Securities, testified that it would have been important to any investigator interested in conducting a fair, independent and objective investigation (A. 121-124, 128); it formed the basis for Belanger's **elder** services attorney to conclude Belanger had benefited from the subject transactions and, accordingly, had no claim against Bankers Life (A. 124, 238); and even McGonigle admitted that he would have wanted the Doughty Report disclosed, and its contents considered if he ***20** were the subject of the investigation. (A. 123.)[19] The Report can only be considered unimportant to individuals predisposed to a particular outcome.

Finally, the most cogent evidence of prejudice remains the outcome of the proceedings. The Superintendent found ten violations where none exist, found multiple statutory violations based on the same conduct and imposed maximum penalties for each and every one.

CONCLUSION

Because the record evidence does not support the Superintendent's findings, the violation findings against Bankers Life should be reversed. Alternately, the matter should be remanded for new, untainted proceedings.

Footnotes

1 The Superintendent found neither the CD Proceeds Annuity nor the IRA Rollover Annuity unsuitable. The Superintendent did not find the Stock Proceeds Annuity economically unsuitable, either, but concluded (incorrectly) that it was inconsistent with Belanger's initial intent to retain $20,000 in savings. (*See infra* Part II.A.)

2 Belanger saved S76,000 through her purchase of the Stock Proceeds Annuity alone. (A. 235.) *See also* A. 238 (Legal Services for the **Elderly** noting that Belanger was "in a much better financial position" due to the Stock Proceeds Annuity).

3 Because arguments made in the Appellee Brief differ from reasoning in the Order, the Briefs author will be referred to as the Attorney General or "AG," and the author of the Decision and Order (Order), the Superintendent.

4 The Superintendent's discussion of the consolidation order refutes the AG's construction of it. While the AG suggests that the consolidation order was limited to addressing liability for the snowmobile transaction, the Superintendent stated without qualification that the order "determined" how liability would be imposed. In other words, the Superintendent herself framed the consolidation order as her interpretation of 24-A M.R.S.A. § 1445(1)(D). It must therefore be given deference. *Allied Res., Inc. v. Dep't of Public Safety*, 2010 ME 64, ¶ 21, 999 A.2d 940, 945.

5 Juliano traveled to the office once a month when weather permitted. (R. 1677.)

6 Citing paragraph 3 of Belanger's written statement is appropriate because the facts in paragraph 3 were corroborated by other witnesses. (A.112: Superintendent ruling that "[w]ithout corroboration, any hearsay statements in the exhibits will not be relied on as the sole basis for making findings of fact.")

7 The AG chides Bankers Life for questioning whether the Superintendent can penalize an insurer based on Rule 917 for unsuitability, citing as the statutory authority for doing so 24-A M.R.S. § 2517(3), which requires the Superintendent to "adopt rules regarding the suitability of sales of annuities..." The problem is that nowhere in the Code or Rule 917 is suitability defined, apparently leading the Superintendent to conclude that she can penalize an insurer for selling an objectively suitable annuity. (See Blue Br. at 20 (discussing vagueness limitations in interpreting statutory and regulatory language).)

8 Belanger signed a statement stating she understood that "[d]ue to the volatility of the financial markets and other factors that are used by [Bankers Life] to set the [annuity interest] rates, it is possible that the rates could increase or decrease substantially from the date You sign the application. You should read Your policy carefully and check rates on the policy Schedule when it is issued." (A. 269.)

9 For example, running throughout the AG's Brief are accusations that Juliano misrepresented the state of Belanger's health. (*E.g.*, Red Br. at 40.) But Belanger signed the factfinder in which Juliano made the statement challenged by the AG. (A. 278.) Thus, her signature provides evidence that this information was provided by the consumer - which is what the insurer is supposed to rely on under Rule 917.

10 It is undisputed that it was Belanger who called the banks and relayed this information to Juliano. (A. 91.) The surrender charge at The County Federal Credit Union for one CD was $226.51, while the charge at TD Banknorth for two CDs was $348.41. (A. 190-92, 268.)

11 By her own ruling, the Superintendent could not rely on this statement from Belanger (A. 23) unless independently corroborated. (A. 112.) Neither the AG nor the Superintendent cites to any such corroboration.

12 Contrary to the innuendo running rampant through the AG's Brief, the record is devoid of any evidence that purchasing the Bankers Life annuities caused Belanger any harm whatsoever but rather only helped her financial position.

13 The AG states that all Juliano would have had to do after Belanger said she had AMEX charges was to ask "How much?," and the reference to charity mandated inquiry. (Red Br. at 42.) But nothing in the record indicates that there was in fact a large charge to find at that time. Staff never introduced any evidence showing that Belanger carried significant credit card debt at any time. Having never tapped into her investments before, there was no reason to believe that increasing her liquidity would cause harm. In fact, it did not. (*E.g. supra*, p. 8.)

14 Nor does either the Superintendent in her Order or the AG in his Brief explain why Juliano should have suspected that Belanger was misrepresenting her CD penalties (assuming for argument's sake that listing $250± and $400± was somehow inaccurate). Instead, the AG argues only that the amounts were off (from $574) and these "amounts may be small in comparison to the stock sale, but not in comparison to the purported benefits of the annuity that replaced them." (Red Br. at 43-44.) This argument ignores the fact that Belanger's motivation to switch to the CD Proceeds Annuity was not to make more money, but rather obtain better service, deferral of taxes and penalty-free access to her money. (Blue Br. at 5-6.) Further, the AG's argument that $574 v. $250±/$400± information "would have weighed heavily against making the conversion for monetary reasons," as allegedly shown by the actuary's analysis, (1) assumes $250± /$400± is a material discrepancy from $574; (2) ignores Belanger's consolidation goals; (3) ignores Staff's expert admissions that the tax-deferral benefits of the annuities were significant, according to Doughty, totaling $12,000 in just the first two years; and (4) ignores Staff expert's admission that there would be rate risk in delaying the purchase of the annuities. (A. 95-98.)

15 Based on the consistent and undisputed expert testimony in this case, convincing Belanger to remain so exposed to a single issue stock would be a far more compelling unsuitability/violations case than the one Staff presented.

16 The AG also makes various accusations regarding a purported misstatement by Juliano regarding Belange health. It is unclear why. While the Superintendent criticizes Juliano for not updating the Fact Finder when he learned that Belanger's cancer surgery had been more recent than Belanger had initially reported to him (A. 24), the Superintendent makes this comment in her discussion of Rule 917. The Superintendent did not base her findings of incompetence or untrustworthiness under § 1420-K(1)(H) on this lack of update. (A. 26.)

17 The same is true regarding health representations. The AG asserts that "Juliano's rosy description of [Belanger]s] health would have helped validate his recommendation to purchase a ten-year deferred annuity rather than one of lesser duration." (Red Br. at 45.) The

AG provides no record support for his claim. The AG further asserts that the health description was relevant to a sale of long term care insurance by Juliano. (Red Br. at 45.) There was no finding of a violation based on a long term care insurance sale. Like the bulk of the AG's Brief, perhaps the goal is to provide color and incite emotion in the reader, instead of a focus on the relevant record facts and applicable law.

18 The AG cites *York Hospital v. Dep't of Health & Human Services*, 2008 ME 165, 959 A.2d 67, to support his position that no relief is available unless the record compels a finding of active misconduct. In *York*, the Law Court ordered an administrative record expanded and, based on that expanded record, the Superior Court made findings regarding bias and prejudice. *Id.*, ¶ 2, 959 A.2d at 69. Hence, this Court deferred to the Superior Court's findings. Here, the Superior Court engaged in no independent factfinding. The court also reviews the legal question of due process without deference to the Superintendent. (Blue Br. at 18.) Thus, the applicable test is not what the record compels, but rather whether this Court agrees with the Superior Court based on this Court's review of the record that the record shows Staff bias (A. 46), and if so, whether it concludes based on its de novo review of the law that relief is appropriate for Staffs misconduct.

19 The AG cites Doughty's statement that Doughty focused on the issue of suitability, not unprofessional or unethical conduct, apparently to insinuate that Doughty was suggesting there was such misconduct. (Red Br. at 49.) Setting aside that Doughty stated he was not looking at these issues, Bankers Life has no quarrel that Juliano's conduct with respect to the snowmobile loan was wholly unprofessional - which only underscores the prejudice caused by linking the Juliano snowmobile claims to the annuity claims against Bankers Life, over Bankers Life's objection. (Blue Br. at 46-47.)

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