BEFORE THE
BUSINESS TRANSPORTATION AND HOUSING AGENCY
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of the Desist and Refrain Order Against: GLORIA MARGUERITE WALTON 836-B Southampton Rd., Suite 337 Benicia, CA 94510 MICHAEL PAUL MCINTYRE, President and CEO Gentry Group 5950 Berkshire Lane, Suite 400 Dallas, Texas 75225 AMERICAN EQUITY INVESTMENT LIFE INSURANCE COMPANY P.O. Box 71216 Des Moines, Iowa 50325 Respondents.	AGENCY CASE No. 38300 OAH No. N2004080527

DECISION

The attached Proposed Decision of the Administrative Law Judge Ann E. Sarli is hereby adopted by the Department of Corporations as its Decision in the above-entitled matter.

This Decision shall become effective on DEC 14 2004.

IT IS SO ORDERED DEC 14 2004.

William P. Wood

COMMISSIONER OF CORPORATIONS

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PROPOSED DECISION

On September 8, 2004, Ann Elizabeth Sarli, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California.

Karen L. Patterson, Senior Corporations Counsel, represented the complainant, California Corporations Commissioner.

Robert W. Hogeboom and Robert J. Cerny, Attorneys at Law, of Barger & Wolen LLP, represented respondent American Equity Investment Life Insurance Company.

Evidence was received and the record remained open to allow the parties to submit written closing briefs. Complainant's Post Hearing brief was filed on September 22, 2004,

and marked for identification as Exhibit 21. Respondent's Post Hearing brief was filed on October 6, 2004, and marked for identification as Exhibit KK. Complainant's Post Hearing Reply brief was filed on October 13, 2004, and marked for identification as Exhibit 22. The matter was submitted and the record closed on October 13, 2004.

Subsequent to the hearing, and in compliance with an order to meet and confer, the parties stipulated that the following marked exhibits would be moved into evidence; exhibits 9, 17, 18, 19, and T through EE. The record was reopened to allow admission of these exhibits into evidence on November 12, 2004. Thereafter, the matter was submitted and the record was closed.

PROCEDURAL FINDINGS

1. On July 20, 2004, William Wood, California Corporations Commissioner, State of California, Business, Transportation and Housing Agency, Department of Corporations, made and filed the Desist and Refrain Order in his official capacity. In so doing, he acted pursuant to the authority of California Corporations Code section 25532.

2. The Desist and Refrain Order ordered Gloria Marguerite Walton (Walton), Michael Paul McIntyre (McIntyre), Gentry Group (Gentry), and American Equity Life Insurance Company (American Equity) to desist and refrain from advising people to sell securities in order to buy annuities unless and until they have secured certificates authorizing them to conduct business as investment advisers in this state.

The order was based upon the Commissioner's opinion that Walton, McIntyre, Gentry and American Equity are conducting business in California as investment advisers by advising California residents to sell securities without having first applied for and secured a certificate authorizing them to do so, in violation of Corporations Code section 25230.

3. Walton did not appeal the order. The appeals of respondents McIntyre and Gentry were bifurcated from American Equity's appeal. American Equity is the sole respondent in this proceeding. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500, et seq.

FACTUAL FINDINGS

Relationship among parties.

1. American Equity is an insurance company located in Iowa. American Equity is licensed by the California Department of Insurance and specializes in the sale of annuities.

2. Gentry is an insurance marketing firm. McIntyre is the principal of Gentry.

3. American Equity entered into an "Agent's Contract" with McIntyre on January 27, 1997. The contract provided, among other things, that McIntyre had authority to solicit applications for insurance for American Equity. The contract provided that McIntyre had "authority to recruit and recommend to American Equity individuals to be appointed as agents of the company [American Equity]." The contract provided that "no recommendation or application for appointment or contract will be effective until approved by the Company at its Home Office, Des Moines, Iowa." The contract further provided that "If, at any time, you induce agents of the Company to discontinue their contract you shall forfeit any and all commission(s) that you might have otherwise acquired under any and all contract(s) with the Company."

4. In March of 2001, Gentry recruited Gloria Walton, an insurance agent licensed by the State of California. Gentry recommended Walton to American Equity, pursuant to the terms of its Agent's Contract with American Equity. Walton completed an Agent Appointment Application on the letterhead of American Equity and submitted the application to American Equity. The application contained, among other things, the following language under a section entitled Agent's Declaration and Authorization: "I understand that this application will form a part of my Agent's License Agreement with American Equity Investment Life Insurance Company (the Company) ... I further understand that if any material information given in this application is found to be incorrect or incomplete, it will be grounds for termination for cause at the sole discretion of the Company." Ms. Walton was paid by Gentry from a commission schedule established by American Equity. Any monies she collected from annuity purchasers were placed in the name of American Equity.

5. Effective March 15, 2001, Walton's California insurance license listed American Equity as a company appointment. This appointment authorized Walton to transact business on behalf of American Equity as a life and disability agent. Although Walton had appointments as an agent of other insurance companies, Walton sold only American Equity annuities.

6. American Equities and Gentry provided periodic training to Walton and other Gentry employees in the features of American Equity annuities, and in completing the paperwork necessary to sell and fund an annuity. Included in this paperwork are dozens of forms designed to transfer various types of assets to American Equity in order to fund annuity purchases. American Equity and Gentry had extensively trained Ms. Walton in the use of these forms.

7. Of American Equity's national sales force of 44,000 agents, Gentry's agents rank third or fourth in volume of annuity sales.

8. Neither American Equity, McIntyre, Gentry nor Walton applied for or secured from the corporations commissioner a certificate authorizing them to provide financial advice regarding securities transactions.

Rickaby Annuity Transaction

9. Gentry's annuity sales force targeted senior citizens who had lump sum assets sufficient to purchase annuities. Gentry gained initial access to these senior citizens through the sale of living trusts. Gentry did business with trust preparers who advertised living trusts in the senior's market. Once a trust was prepared for a client, Gentry's sales force contacted the client in an attempt to sell annuities to the client. Gentry cold-called trust clients regularly and mailed them form letters announcing that it was time to have their estate plans reviewed by a Gentry Retirement Specialist.

10. Gentry's agents periodically called Charles Rickaby to set up an appointment for an estate plan review. Mr. Rickaby was a 77-year-old retired electrician, living in Oroville. His wife, Geraldine, was also 77 years old. In 1996, the Rickabys went to a retirement planning seminar and purchased a trust. An attorney purportedly prepared the trust. However, the Rickabys never met or spoke to this attorney. Instead of working with the attorney, the Rickabys shared their financial and estate information with the trust salesperson and the notary who notarized their trust documents.

Thereafter, Gentry agents regularly attempted to get an appointment with the Rickabys in their home to "review" their trust. Eventually, Mr. Rickaby agreed to an appointment to take place at his home on February 24, 2003. As the Gentry agent was pulling into the driveway, paramedics were removing Mr. Rickaby's body from the home. Mrs. Rickaby canceled the appointment.

11. On March 13, 2004, the Gentry sales force mailed a letter to the now deceased Charles Rickaby. The Gentry letter stated in its entirety:

> **RE: Estate Planning Review**
>
> Dear Charles Rickaby,
>
> It's time again for an estate planning review, which is provided to you as a continuing service, free of charge or obligation. Here at Gentry Group, we are proud to be of service to you. Additionally, as part of your financial review, you are entitled to our new Estate Planning Organizer (EPO). It is a handy and easy-to -use guide for important estate and retirement planning matters, which may benefit you now and your loved ones in the future. Our representative will deliver your EPO to your home.
>
> If you are like most seniors, you would really love to take advantage of the market rise, but would be afraid of the downside risk. Gentry Group has your interest in mind. In fact, with some of American Equity's indexed products you will get the very best of both worlds. You will be able to participate in an up market with ZERO risk to the principal if the market goes down. Be sure to ask our representative about

these exciting opportunities.

Again, we look forward to seeing you soon. A representative from our scheduling center will be calling to schedule your appointment with the Gentry Retirement Specialist

We Are at Your Service.
Kelli Terrell
Vice President, Agency Services

12. Shortly after receiving the letter from Gentry, Mrs. Rickaby received a telephone call from the Gentry sales force asking her to set up an appointment to update her financial planning. Believing that her living trust may need revision due to her husband's death, Mrs. Rickaby scheduled an appointment with Gentry for May 28, 2004. On that day, Walton arrived at Mrs. Rickaby's home. Walton gave Mrs. Rickaby a business card which only identified Gentry Group and Gloria Walton, with no titles or other information identifying her as an insurance sales agent or identifying Gentry as an insurance marketing firm.

13. Ms. Walton had no credentials, training or experience which would enable her to evaluate a trust document or " update" a trust, evaluate a portfolio, or provide financial planning advice. She had no ability or intent to update Rickaby's trust or to provide financial planning advice. Rather, she arrived at Mrs. Rickaby's with the intent to sell her annuities. Ms. Walton arrived at Mrs. Rickaby's home carrying all of the forms necessary to sell American Equity annuities. Her car contained dozens of forms designed to transfer various types of assets to American Equity in order to fund annuity purchases.

14. Walton did not tell Mrs. Rickaby that she was an insurance agent or that she was there to sell Mrs. Rickaby American Equity annuities. Ms. Walton did not tell Mrs. Rickaby that she was not qualified to evaluate a trust document or to provide financial planning advice. Ms. Walton spent over an hour "reviewing" Mrs. Rickaby's living trust documents and her financial statements and copying down information by hand. Mrs. Rickaby was under the impression that Walton was a retirement specialist sent by Gentry Group to provide a free update of her living trust. In reality, Walton was reviewing Mrs. Rickaby's financial documents in order to determine if she held assets to fund an annuity purchase.

15. While reviewing Mrs. Rickaby's financial documents, Walton discovered that Mrs. Rickaby held approximately $30,203 in a Putnam Growth & Income stock mutual fund. She also held approximately $68,267 in IRA funds in another Putnam Growth & Income stock fund. Walton determined that Mrs. Rickaby could fund the purchase of two American Equity annuities with the proceeds from these funds.

16. Ms. Walton prepared approximately thirty documents, including annuity applications, Direct Custodial Transfer Requests, a Statement of Understanding, disclosure

statements, client information and financial worksheet forms, letters of instruction and a "disclosure to seniors" form. Walton copied information onto these forms and gave Mrs. Rickaby the stack of documents. She told Mrs. Rickaby to sign and initial the forms where Walton indicated. Ms. Walton merely lifted the pages above the page to be signed and pointed to the spot Mrs. Rickaby was to sign. Mrs. Rickaby signed the documents.

17. The documents Mrs. Rickaby signed included documents (the Mondschein documents) authorizing the transfer of her Putnam mutual funds to a new account that Williams Financial Group (Williams) would open in her name. The Mondschein documents reflect that the mutual funds were then going to be sold by a Williams employee, Sidney Mondschein, who was a registered representative (i.e., stockbroker). The Mondschein documents authorize Williams to forward the proceeds to American Equity. The Mondschein documents include, among other things, a Request for Taxpayer Identification Number with an attached arbitration agreement, a Brokerage Account Application and a Letter of Instruction directed to Sidney Mondschein Williams Financial Group under the heading American Equity Investment Life Insurance Company.

18. Ms. Walton used her powers as a notary to notarize many of the Mondschein documents. These documents include Walton's signature as notary and an imprint of her notary seal.

19. Mrs. Rickaby told Walton that she felt she should read the documents she was signing. Walton told her she would explain all the documents. However, when Mrs. Rickaby had signed the last in the stack of documents, Walton gathered them together and left. Ms. Walton took several of Mrs. Rickaby's financial documents, including her stock fund statements, a death certificate for her husband, a copy of her trust document, a copy of her driver's license and all of the forms Mrs. Rickaby had signed.

20. Although Mrs. Rickaby believed that Walton was "working on my trust fund," she began having nagging doubts about the way in which Walton had acted. She started to "wonder" why Walton had left with her personal identifying and financial documents. She became concerned that she had been a victim of identity theft. She testified at the hearing that she felt she "had been stupid for signing the papers." She testified, "I kind of woke up, and I called her the next day and asked her to return my papers." Walton replied that she could have her papers back in about a month. Mrs. Rickaby called Gentry, and "Kelli" told her that everything was all right and she would be getting her papers back shortly.

21. Mrs. Rickaby began to worry whether anything she signed had to do with the deed to her property, and called a title company. She was referred to the Seniors Against Investment Fraud program. Ultimately, the Department of Corporations became involved, and was able to cancel the annuity purchases with American Equity before Williams sold Mrs. Rickaby's mutual funds.

22. Mrs. Rickaby testified that she never had any intention of selling her mutual funds, transferring the funds out of her Putnam Accounts, or purchasing annuities. She did

not know she was signing documents authorizing these transactions. She believed she and Walton were going through the process of updating her trust following her husband's death. She did not read or date the documents or otherwise fill them out - she simply signed them where Walton indicated she should. Mrs. Rickaby believed that Walton would explain the documents after they were signed. Walton did not explain the documents.

Mrs. Rickaby was a credible witness. Her naivety, compliant nature, and vulnerability were apparent at the hearing. [1] She believed that Walton was updating her trust due to her husbands' death. She believed that the documents she signed were necessary to update the trust. Walton did everything to encourage this belief and nothing to disabuse Mrs. Rickaby of this understanding.

23. Indeed, Gentry's written solicitation was a pretext designed to make Mrs. Rickaby believe that Walton was meeting with her as an estate-planning representative to update her trust. Nowhere in the solicitation letter, the follow-up phone solicitation, or on Walton's business card does it state that Walton is an insurance agent, that Gentry is an Insurance Marketing firm, or that both Walton and Gentry are in the business of selling American Equity annuities.

24. Ms. Walton's pretext is to present herself as an "estate planning representative" as long as possible during her client meetings. She reviews the client's trust and financial documents. She talks with the client about the drawbacks of their assets, like the low interest rate of an asset. She talks about avoiding probate. She does not use the word "annuity" until the end of the interview. At that point she has reviewed all of the client's assets to determine where to draw money to purchase an annuity. And, the client is primed to accept her recommendation to liquidate assets and purchase annuities.

Ms. Walton's pretext is evident from her testimony:

> That [the annuities] comes up towards the last because you have to see what they have and how they feel, and the rates have been very, very low, so sometimes if we can help them, that's what they try to do is to try to avoid probate and transfer to something that is better, and once we bring the policy back, they can see it, and once they see it, most of them are very happy.

25. Ms. Walton further testified that a "client's greatest asset is their home," and she wanted to "make sure the client's home is, you know, taken care of, and upon passing, that's done, and then after...." She testified that she goes over and "kind of review[s]" each of the client's financial documents, "and sees what is happening and talks about it." She tries to determine what interest rate the client is getting on an asset. She asks the client "how they

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[1] As an example of Mrs. Rickaby's naivety and vulnerability, Mrs. Rickaby was so pleased that the Department of Corporations had interceded on her behalf, that she sent a $500 check to Corporations counsel with a thank-you note.

feel about a certain statement." She testified that it is necessary to go through the client's assets "because you don't know what they have before you make that recommendation [to purchase an annuity] to the clients."

26. Ms. Walton testified that her appointment with Mrs. Rickaby was made "just to review her financial records like I do with each client," and that she did so "to make sure that whatever she has is current." She admitted that she was looking at the financial records to make a determination that she might be suitable for an annuity purchase. She testified that she "mentioned" to Mrs. Rickaby "about transferring the funds, you know, from Putnam to the annuity." She testified that Mrs. Rickaby was "very excited" about transferring the funds, after she had told Mrs. Rickaby the annuity would avoid probate and provide her with a lifetime income. Ms. Walton testified:

> She saw the past that with Putnam she did have some losses.... We said we stopped the bleeding, and the good part of it, after the funds are transferred, she has a chance to look it over. We had the policy in front of me. I explained that to her. I would have explained it to her like I explained it to the clients. Then she had a chance to say I like it or I don't. If she doesn't want it she gets her money back. She had a thirty-day free look. She was excited about the options of what was going to happen.

27. Ms. Walton was not credible in her claim that she explained annuities to Mrs. Rickaby. She was not credible in her claim that Mrs. Rickaby became very excited about the purchase and enthusiastically wished to transfer her Putnam funds because they were losing money. Mrs. Rickaby's testimony to the contrary was more persuasive. Mrs. Rickaby's description of what transpired between her and Walton is supported by Mrs. Rickaby's discovery that two disclosure forms contained her forged signature. Mrs. Rickaby found the disclosure forms in the annuity application documents returned to her by American Equity and Williams. Further, Walton was not credible because everything about the nature of her transactions with living trust clients was pretextual and designed to reveal as little as possible of her true purpose until the client had been persuaded to "stop the bleeding" with an annuity.

Other Annuity Transactions [2]

28. Richard Goveia, an elderly man, testified that he had a trust prepared in 1997. American Equity or Gentry agents contacted him several times after the trust was set up, attempting to meet with him at his home. He declined to meet with the agents. In January of 2003, Mr. Goveia allowed a Gentry agent, Edmond Brown, to come to his home. Mr. Goveia held about $393,000 in mutual funds. He was not thinking of selling the funds. However, the agent talked to him about selling the mutual funds in order to purchase an annuity. The

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[2] The Desist and Refrain Order did not specifically allege these transactions. Therefore, the evidence of additional annuity transactions was admitted to show pattern and practice: that the Rickaby transaction was not an isolated or atypical transaction.

agent "wanted [him] to put anything [he] had into the annuity" because "stocks were going down."

Mr. Goveia testified that he had his money in three accounts: one in a Franklin Mutual fund and two in Washington Mutual funds. He testified that the agent "got the money out [of the mutual funds] for us," in order to "sell us the equity." He testified that the agent "just put the money... into the insurance equity thing." The Gentry agent had arranged for Mondschein to transfer Goveia's mutual funds to a Williams brokerage account and then to American Equity to fund the annuity purchase. Mr. Goveia suffered a tax loss resulting from the sale.

29. Vera Rietzel, an elderly woman, testified that she and her husband had a will made out years ago. After about a year, "equity group" sent "somebody" to their home to "check" the will. She testified "and that's how we got into equity group." Gloria Walton was the first agent who came to their house, in 2001, and she "checked the will and the investment things." The Rietzels had several stocks and mutual funds. When she was asked in the hearing whether they discussed these investments with Walton, Ms. Rietzel responded, "Well, we did, but we really didn't know really too much about it as far as investing money goes." Walton "took some of the money out of the smaller stuff and put it all together and wrote up a policy."

Over time, the Reitzels purchased five annuities from three Gentry agents. They purchased three annuities from Walton. They purchased one annuity from Edmond Brown. Walton's annuities cost the Reitzels $25,000, $10,000 and $118,000 respectively. Mondschein handled some of these stock transfers. Williams transferred the proceeds of the mutual funds sales to American Equity to fund the annuity purchases.

30. Violet Goegen, an elderly woman, testified that she had a trust prepared. She testified that after her trust was prepared:

> "Well, Gentry Group was "calling me and calling me telling me - asking me to make an appointment to have my revocable living trust reviewed, and they called me so many times, and I told them many times that nothing has changed. I don't need to have it reviewed. Well in August, 2002, my son passed away suddenly, and they kept still calling me, so after my son passed away, I decided I would have them come and review my revocable living trust, so the agent [Edmond Brown] came and he looked, and he wanted to know what assets I had and I said my savings and securities and stock with National Securities, so he said, well, you know, Miss Goegen, the stock market is going down, down, down, and your passbook savings in the bank is very little interest on them. You would be better off liquidating your assets and turning it into an annuity. You will get a higher percentage."

Ms. Goegen testified that "I was not really in my right frame of mind" and "I should never have gotten into" the annuity purchase. She testified that "they" liquidated her stock, worth approximately $38,000. She testified that she had asked Brown whether she had to tell

her broker to sell her stocks. He responded that he would take care of it for her. Her funds were transferred to Williams Financial Group and sold by Mondschein. Williams forwarded the funds to American Equity to fund an annuity.

LEGAL CONCLUSIONS

Jurisdiction

1. The Commissioner of the Department of Corporations has jurisdiction and authority to issue the Desist & Refrain Order at issue herein. California Corporations Code section 25532, subdivision (b), provides in pertinent part:

> If, in the opinion of the commissioner, a person has been or is acting as a broker-dealer or investment adviser, or has been or is engaging in broker-dealer or investment adviser activities, in violation of Section 25210, 25230 or 25230.1, the commissioner may order that person to desist and refrain from the activity until the person has been appropriately licensed or the required filing has been made under this law.

2. American Equity maintains that the Commissioner of the Department of Corporations is precluded from regulating insurance sales activity in California. It argues that the California Department of Insurance exclusively regulates the activities of insurers and insurance agents in sales of annuities. This argument is without merit. The Commissioner may regulate the conduct of an insurer or its agents when that conduct violates the California Corporations Code. The fact that parties violating the Corporations Code are licensed by the Department of Insurance does not exempt them from compliance with the Corporations Code.

3. American Equity also argues that under the National Securities Markets Improvement Act of 1996, the Securities and Exchange Commission exercises exclusive jurisdiction over investment advisers with assets under management of $25 million or more. Therefore, it reasons, if American Equity is acting as an investment adviser, and American Equity has assets in management of $25 million, the California Corporations Commission is preempted from regulating its investment activity. This argument is without merit. American Equity may be providing investment advice to its annuity purchasers without qualifying as a large institutional investor. There is no evidence American Equity does so qualify. It does not "manage" its client's assets, it merely collects them and purchases an insurance product with the client funds. Further, there was no evidence the $25 million in assets American Equity holds are the managed assets of clients.

Agency

4. American Equity asserts that it is not subject to the Desist and Refrain Order

because it was not responsible for the actions of Walton or Gentry Group. American Equity's position is not persuasive.

The evidence is persuasive that both Gentry and Walton were agents of American Equity. Walton and Gentry acted on behalf of American Equity and for the purpose of furthering American Equity's business by selling its annuities. Walton and Gentry were parties to written agent agreements with American Equity. Indeed, Gentry could not employ an agent to sell American Equity's policies without American Equity's approval, and without that agent entering into a separate agency agreement with American Equity.

American Equity appointed Walton as an agent with the California Department of Insurance. Walton sold exclusively American Equity annuities and Gentry Group was responsible for a significant percentage of American Equity's sales. The fact that American Equity paid commissions directly to Gentry Group, who in turn paid Walton her commissions did not convert Walton to an independent actor. Walton's pay was based solely upon American Equity commission schedules. Her compensation was based upon, among other things, the number, dollar amount and types of annuities she sold, as well as the ages of the annuitants.

Gentry and Walton were subject to numerous contractual provisions controlling the sale of policies. American Equity provided Walton and Gentry formal training and required that its agents complete its forms and secure certain information in order to sell its annuities. In sum, Walton, Gentry and American Equity had contractual responsibilities to each other in furthering their common goal, the sale of American Equity annuities. The group presented the classic structure of agency - the agents agreed to act on behalf of the principal and subject to its control. (*Edwards v. Freeman* (1949) 34 Cal. 2d 589, 590)

5. American Equity argues that if Walton was its agent, she operated outside of her actual or ostensible authority if she brought about the liquidation of Mrs. Rickaby's securities without her consent. American Equity's argument is not persuasive.

An agent represents her principal for all purposes within the scope of her actual or ostensible authority. All the rights and liabilities which would accrue to the agent from transactions within such limit accrue to the principal. (California Civil Code section 2330) "Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess." (California Civil Code section 2316) "[O]ne cannot hold out another before the public as his agent having authority of a general character and take the benefits of his acts when he considers them favorable to him and repudiate his agent's acts when he considers them unfavorable." (*Hovley v Meline (Frank) Co.* (1927) 83 CA 441,443)

"The most important question always is whether the agent was engaged strictly in an endeavor to bring about a result for which his services were engaged. If he was, the principal should not be permitted to escape responsibility upon the plea that his agent acted in some

condition that arose which was out of the ordinary and unexpected." (*Garber v. Prudential Ins. Co.,* (1962) 203 Cal. App. 2d 693, 703)

Here Walton and other Gentry agents were engaged to sell annuities. In their endeavors to bring about these results, they encouraged and facilitated the sale of securities to fund the annuities. Identifying securities and transferring securities to Mondschein at Williams Financial Group was the standard operating procedure. American Equity had worked with Mondschein for many years and used his services regularly to liquidate securities to fund annuity purchases. American Equity provided its agents with a plethora of forms to enable them to facilitate the transfer of stock funds, mutual funds, stock certificates, IRA accounts and equities held in other forms. Agents were schooled in which forms were necessary to facilitate the sale of each type of equities account. The agents themselves often conversed with Mondschein.

Most importantly, American Equity agents understood that their commissions and their continued employment were dependent upon "closing" the sale at the client's home. [3] Gentry agents were advised that they are expected to close and that the client is "pre-qualified" for a sale. Gentry agents were advised that the client had assets sufficient to purchase an annuity. Gentry agents understood that permitting a client to seek independent advice on stock transfers or to effectuate the stock transfer directly with their own brokerages was risky. There was a risk that the client could be dissuaded from the annuity purchase by her stockbroker, or could cool off to the sale in the time it took for the client to effectuate a stock transfer herself. Ms. Walton was prepared to cut off the client's escape in this manner. She attended the Mrs. Rickaby meeting with her notary seal, ready to notarize the only documents which require notarization: the Mondschein documents involving security transfers. The evidence was that Walton was not a renegade American Equity agent, but a prototypical one.

The evidence is conclusive that Walton acted within the scope of the actual authority conferred by American Equity when she met with elderly clients to discuss American Equity annuities. She acted within the scope of her actual authority when she talked with clients about the means they had to pay for annuities. She also acted with the scope of her actual authority when she brought about the liquidation of Mrs. Rickaby's securities without consent.

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[3] Gentry placed the following advertisement for agents; "We are simply looking for licensed agents to run 3 daily pre-set, prequalified appointments. Agents who have experience selling and are proven closers are now joining The Gentry Group Crusade. Our agents do not prospect. Why? Simply, they do not have time. They are too busy sitting in front of clients. There is absolutely no other insurance marketing firm on earth that "Tee's" up an agent for success like Gentry Group. Step up to the Big Leagues and start selling Annuities to the growing market NOW! Closers need only apply …."

Investment Adviser Activity

6. American Equity argues that complainant has failed to prove by clear and convincing evidence that American Equity violated California Corporations Code section 25230, subdivision (a). American Equity maintains that neither Walton, Gentry, nor American Equity engaged in the "business" for "compensation" of "advising others as to the value or advisability of selling securities."

California Corporations Code section 25230, subdivision (a) provides in pertinent part:

> It is unlawful for any investment adviser to conduct business as an investment adviser in this state unless the investment adviser has first applied for and secured from the commissioner a certificate, then in effect, authorizing the investment adviser to do so ....

California Corporations Code section 25009, subdivision (a), provides in pertinent part:

> "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities ....

This section exempts persons acting in certain capacities from its definition. [4] Those exemptions are not applicable here, except to the extent that insurance agents are not exempted and "retirement specialists" are not exempted.

California Corporations Code section 25009, subdivision (b), provides in pertinent part:

> "Investment adviser" also includes any person who uses the title "financial planner" and who, for compensation, engages in the business, whether principally or as part of another business, of advising others, either directly or through publications

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[4] Enumerated exemptions are set forth as follows; "Investment adviser" does not include (1) a bank, trust company or savings and loan association; (2) an attorney at law, accountant, engineer or teacher whose performance of these services is solely incidental to the practice of his or her profession; (3) an associated person of an investment adviser; (4) a broker-dealer or agent of a broker-dealer whose performance of these services is solely incidental to the conduct of the business of a broker-dealer and who receives no special compensation for them; or (5) a publisher of any bona fide newspaper, news magazine or business or financial publication of general, regular and paid circulation and the agents and servants thereof, but this paragraph (5) does not exclude any such person who engages in any other activity which would constitute that person an investment adviser within the meaning of this section.

or writings, as to the value of securities or as to the advisability of investing in … purchasing or selling securities....

This section exempts certain persons acting in certain capacities from its definition. [5] Those exemptions are not applicable here, except to the extent that insurance agents are not exempted and "retirement specialists" are not exempted.

7. American Equity first argues that Walton did not give Mrs. Rickaby "advice" to sell her securities. American Equity points to Mrs. Rickaby's testimony that Walton had her sign documents without explanation and did not mention annuities to her. However, the evidence is persuasive that Walton and Gentry were engaged in the business of advising others, including Mrs. Rickaby, directly and through writings, as to the advisability of continued investing in or selling of their securities. As an integral and necessary part of Walton's and Gentry's business, they advised seniors that their stock funds were of questionable value: they were going down in value, were taxable and incurred inheritance taxes, and the principal was at risk. Walton and Gentry agents advised seniors that stock funds should be sold to fund annuities; which they advised were tax free, safe, did not incur inheritance taxes and yielded higher interest.

Walton visited Mrs. Rickaby at her home prepared to and with the intention of inducing her to sell securities in order to purchase annuities. Gentry's letter to Mr. Rickaby paved the way for Walton to furnish this investment advice to Mrs. Rickaby. Walton was described in the letter as a "Gentry Retirement Specialist". The letter explained Gentry's services as "an estate planning review", "a continuing service" and "your financial review". The letter, itself, was designed to prime the client to consider selling stock. It stated: "If you are like most seniors, you would really love to take advantage of the market rise, but would be afraid of the downside risk. Gentry Group has your interest in mind. In fact, with some of American Equity's indexed products you will get the very best of both worlds. You will be able to participate in an up market with ZERO risk to the principal if the market goes down."

Thus, Gentry and Walton approached both Mr. and Mrs. Rickaby with the recommendation that they sell stocks to purchase annuities. Walton, while representing herself as a retirement planner there to provide retirement and trust planning financial advice, did induce Mrs. Rickaby to sign the documents needed to transfer her $100,000 worth of stock to Mondschein and Williams and ultimately to American Equity. Walton made the judgment and decision that Mrs. Rickaby should sell her stock and purchase annuities. The fact that Mrs. Rickaby was not aware that Walton was arranging the transfer of her stock does not negate the fact that Walton, Gentry and American Equity were engaged in the business of advising her to sell her securities in order to purchase annuities.

8. American Equity maintains that it was not "engaged in the business" of providing investment advise to others, as set forth in the statutory definition of "investment adviser." However, as set forth above, its agents Walton and Gentry were actively engaged

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[5] See Footnote #4.

in the business of holding themselves out as financial specialists. They were actively engaged in the business of recommending that senior citizens sell their stocks. Their recommendations came in the form of often misinformed and misleading statements about the drawbacks of the stock market, inheritance procedures and the tax benefits of selling stocks to buy annuities. Financial "advice" was the backbone of Walton and Gentry's business.

9. American Equity argues that it did not provide financial advice "for compensation" as set forth in the statutory definition of "investment adviser." This argument is without merit. The evidence is persuasive that American Equity, Gentry, and Walton profited handsomely when they sold annuities to seniors. Mondschein profited when he sold the senior's stock accounts, charging them a brokerage fee for his services. To argue that the advice given did not result in compensation is disingenuous. The statute does not require that the client pay directly for investment advice, but only that the adviser be compensated for his or her advice.

10. As set forth in the Factual Findings and in the Legal Conclusions, it was established by clear and convincing evidence that respondent American Equity, through its agents, Walton, Gentry and McIntyre conducted business in the State of California as investment advisers. American Equity, through its agents, Walton, Gentry and McIntyre, acted as investment advisers by engaging in the business of advising others, directly and through writings, as to the value of securities and as to the advisability of investing in and selling securities. They engaged in this business for compensation.

11. Under California Corporations Code section 25230, it is unlawful for any investment adviser to conduct business as an investment adviser in this state unless the investment adviser has first applied for and secured from the commissioner a certificate, then in effect, authorizing the investment adviser to do so. As set forth in the Factual Findings and in the Legal Conclusions, neither American Equity, Walton, Gentry nor McIntyre were so certified at all relevant times herein.

ORDER

The Desist and Refrain Order issued on July 20, 2004, against American Equity Investment Life Insurance Company, by California Corporations Commissioner, William P. Wood is UPHELD.

Dated: November 12, 2004

ANN ELIZABETH SARLI
Administrative Law Judge
Office of Administrative Hearings