

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

IN RE: BANKERS LIFE AND)
CASUALTY COMPANY AND)
MARY E. MATARAZZO) DECISION AND ORDER
)
Docket No. INS-04-229)

Bureau of Insurance attorney Benjamin Yardley (the "Presiding Officer") issues this Decision and Order in this matter.

I. PROCEDURAL HISTORY

On December 22, 2004, Bureau of Insurance staff (the "BOI Staff Petitioner"), through its counsel, Assistant Attorney General Andrew Black, filed a Petition to Enforce the Provisions of the Maine Insurance Code (the "Petition to Enforce"). By the Petition to Enforce, the BOI Staff Petitioner alleged violations of the Maine Insurance Code by Bankers Life and Casualty Company ("Bankers Life") and its appointed producer, Mary Elizabeth Matarazzo. The BOI Staff Petitioner alleged that Ms. Matarazzo misrepresented the terms and conditions of an annuity and forged signatures of a policyholder on insurance documents, and that Bankers Life is accountable for the actions of Ms. Matarazzo.

The BOI Staff Petitioner specifically requested the following relief:

1. The issuance of an order revoking the producer's license of Ms. Matarazzo. *See* 24-A M.R.S.A. § 1420-K.
2. The issuance of an order taking appropriate action with respect to the certificate of authority of Bankers Life. *See* 24-A M.R.S.A. § 417.
3. The issuance of a cease and desist order prohibiting Bankers Life and Ms. Matarazzo from making, or causing to be made, any statement misrepresenting the terms of an insurance policy issued or to be issued or the benefits or advantages promised thereby. *See* 24-A M.R.S.A. § 12-A.
4. The assessment against Ms. Matarazzo of a civil penalty of \$500 for each violation of the Maine Insurance Code. *See* 24-A M.R.S.A. § 12-A.
5. The assessment against Bankers Life of a civil penalty of \$10,000 for each violation of the Maine Insurance Code. *See* 24-A M.R.S.A. § 12-A.

By Order issued December 29, 2004, Superintendent Alessandro A. Iuppa delegated all legal authority to Bureau of Insurance attorney Benjamin Yardley to act in the Superintendent's name as the Presiding Officer in this proceeding. Assistant Attorney General Thomas Sturtevant is legal counsel to the Presiding Officer.

On January 3, 2005, the Presiding Officer issued a Notice of Pending Proceeding and Hearing, among other matters setting an intervention deadline of January 20, 2005 and a hearing date of March 7, 2005. No applications for intervention were filed in the proceeding.

The Presiding Officer issued a Procedural Order on January 7, 2005 setting deadlines and conditions for discovery. The parties completed discovery under the terms of such order by March 22, 2005.

The Presiding Officer granted the BOI Staff Petitioner's uncontested requests for confidentiality by issuing Protective Orders on February 22, 2005 and April 5, 2005 for certain designated "investigative materials" maintained in Bureau of Insurance files related to the proceeding. At the hearing, the BOI Staff Petitioner waived continued confidentiality as to certain, but not all, of the information accepted by the Presiding Officer as confidential by the terms of the Protective Orders.¹

On March 31, 2005, the BOI Staff Petitioner and Ms. Matarazzo pre-filed their exhibits and witness lists, as amended on April 4, 2005. Bankers Life did not make any pre-filing.

The public hearing was held on April 6, 2005, after one continuance. The BOI Staff Petitioner had filed on March 17, 2005 an uncontested motion for change of hearing location from Gardiner, Maine to Bangor, Maine, which was granted by Order issued March 28, 2005. Present at the hearing were the Presiding Officer and his legal counsel; counsel for the BOI Staff Petitioner and Deputy Superintendent Shaw; Christopher Roach, counsel for Bankers Life; and Marvin Glazier and Seth Harrow, counsel for Ms. Matarazzo, and their client, Ms. Matarazzo. Offered and admitted into evidence were Hearing Officer Exhibits 1 and 2²; BOI Staff Petitioner Exhibits 1, 2, 3-A through 3-S³, 4, 5, 6, 7, 8, 9, 10, 11, and 12⁴; and Matarazzo Exhibits 1 and 7. In addition to the written stipulations (Hearing Officer Exhibits 1 and 2), oral stipulations of the parties were made on the record at the hearing. BOI Staff Petitioner witnesses Marilyn E. Bowden (complainant) and Nancy McCann (expert witness), and Ms. Matarazzo testified under oath. Bankers Life did not offer any exhibits or present any witnesses. Two members of the public attended but did not participate in the hearing. The hearing was in public session except for a brief executive session to consider information accepted as confidential under the Protective Orders.

¹ Thus, BOI Staff Petitioner Exhibits 1, 2, 3-A through 3-J, 3-O through 3-S, 4, 5, 6, and 7 are no longer confidential and, therefore, are public records. The BOI Staff Petitioner never claimed confidentiality as to its Exhibits 8, 9, 10, 11, and 12 which documents, therefore, are public records.

² Hearing Officer Exhibit 1 is a set of stipulations between the BOI Staff Petitioner and Bankers Life, and Hearing Officer Exhibit 2 is a set of stipulations between the BOI Staff Petitioner and Ms. Matarazzo.

³ BOI Staff Petitioner Exhibits 3K, 3L, 3M, and 3N were accepted as confidential pursuant to the terms of Protective Orders issued in the proceeding and shall remain confidential as non-public records until determined otherwise pursuant to the Protective Orders.

⁴ BOI Staff Petitioner Exhibits 8, 9, 10, 11, and 12 were admitted over the objection of Ms. Matarazzo's counsel.

The Presiding Officer held the record open after the hearing for the parties to file written position papers by April 15, 2005 and responses by April 27, 2005. Bankers Life was the only party who did not file a position paper or response.

On April 14, 2005, Bankers Life, the Maine Attorney General, and the Superintendent of Insurance entered into a Consent Agreement resolving, among other issues, the charges against Bankers Life in the Petition to Enforce. On that date, the Superintendent issued an Order terminating the authority delegated to the Presiding Officer with respect to Bankers Life and dismissing the Petition to Enforce against Bankers Life.

On May 26, 2005, the Presiding Officer issued his Decision and Order in this proceeding. Subsequently, he discovered that he had referred to the Maine Unfair Trade Practices Act as the Maine Uniform Trade Secrets Act. May 26th Decision and Order at 7. The statutory references and UTPA acronym were correct. This May 31, 2005 Decision and Order corrects minor mistakes and does not change the substance of the May 26, 2005 Decision and Order.

II. PURPOSE OF THE PROCEEDING

The purpose of the proceeding was to consider the alleged violations of the Maine Insurance Code by Bankers Life and Ms. Matarazzo and the request for relief in the Petition to Enforce. The Presiding Officer conducted the proceeding in accordance with the provisions of the Maine Administrative Procedure Act, 5 M.R.S.A. chapter 375, subchapter IV; 24-A M.R.S.A. §§ 229 to 236; Bureau of Insurance Rule Chapter 350; and the January 7, 2005 Procedural Order. All parties had the right to present evidence, to examine or cross-examine witnesses, and to be represented by counsel and, in fact, exercised those rights.

III. POSITIONS OF THE PARTIES

The Petition to Enforce includes five counts against Mary E. Matarazzo, as follows:

- Count I alleges that she violated the Maine Insurance Code, 24-A M.R.S.A. § 2153, because she made, issued, or circulated a statement misrepresenting the terms of a policy to be issued and the benefits promised by such policy when she used as a sales tool a document that provided an incomplete and misleading comparison between an annuity and a certificate of deposit.
- Counts II and III allege that she violated the Maine Insurance Code, 24-A M.R.S.A. § 1420-K(1)(J), because she forged Mrs. Bowden's name to Change of Beneficiary forms dated October 11, 2001 and October 31, 2001, which forms were documents related to an insurance transaction.
- Counts IV and V allege that she violated the Maine Insurance Code, 24-A M.R.S.A. § 1420-K(1)(H), because she committed a fraudulent or dishonest practice when she signed as a witness to Mrs. Bowden's signature on the Change of Beneficiary forms dated October 11, 2001 and October 31, 2001, which Mrs. Bowden never signed.

The BOI Staff Petitioner argues that “this is not a complicated case” because the charged violations are very specific and only a few facts are in dispute. BOI Staff Petitioner Closing Argument at 1. From the BOI Staff Petitioner’s perspective, whether the violation charged in Count I occurred is a matter of law because there is no dispute that Ms. Matarazzo distributed the document that is alleged to constitute a misrepresentation.⁵ *Id.* The BOI Staff Petitioner further argues that whether the violations concerning forgery and fraudulent and dishonest practices charged in Counts II through V occurred is a matter of witness credibility. *Id.* The testimonies of Mrs. Bowden and Ms. Matarazzo on these charges were diametrically opposed. *Id.* The BOI Staff Petitioner argues that the “[s]ubstantial and unrebutted expert testimony, however, corroborates the testimony of Ms. Bowden and undermines that of Respondent Matarazzo.” *Id.* at 2.

Ms. Matarazzo argues that “[w]hen all of what Ms. Matarazzo did is viewed in its entirety, she did not present incomplete or misleading information to Mrs. Bowden.” Matarazzo Closing Argument at 4. Thus, she argues, BOI Exhibit 4 must be viewed in conjunction with the other insurance transaction documents and the testimony about the lengthy and complete discussions between Ms. Matarazzo and Mrs. Bowden concerning the sale of the annuity policy. *Id.* Ms. Matarazzo further argues that the evidence does not sustain findings that she forged Mrs. Bowden’s signature on two Change of Beneficiary forms or that she committed fraudulent or dishonest practices for signing as a witness on those forms.⁶ *Id.*; Matarazzo Closing Response at 2-4. Thus, because of Mrs. Bowden’s lack of memory at the hearing as to many of the documents that she acknowledged bore her signature and her inability to remember signing any documents, Ms. Matarazzo concludes that Mrs. Bowden’s testimony “does not warrant significant weight.” Matarazzo Closing Response at 2. Moreover, Ms. Matarazzo characterizes Ms. McCann’s expert testimony as “speculative evidence” which does not prove that Ms. Matarazzo forged Mrs. Bowden’s signature. Matarazzo Closing Argument at 4.

IV. FINDINGS OF FACT

Based on the filings on record at the Bureau of Insurance in this proceeding and the testimony and exhibits presented at the hearing, and after considering the parties’ respective arguments, the Presiding Officer finds that:

1. Ms. Matarazzo is licensed by the Superintendent of Insurance as a resident insurance producer under License No. PRR45977.
2. Ms. Matarazzo is and was at all times relevant to this matter an appointed insurance producer for Bankers Life and Casualty Company, Maine License No. LHF127, based at its branch sales office at 27 Bangor Mall Boulevard, Bangor, Maine.
3. Mrs. Bowden currently is a retiree residing with her husband in Maine. They have three grown children.

⁵ This document is BOI Exhibit 4.

⁶ These documents are BOI Exhibits 1 and 2.

4. Some time before September 2001, Ms. Matarazzo received a long-term care lead from Bankers Life concerning the Bowdens and met Mr. Bowden, who suggested that she meet Mrs. Bowden after she retired from her job. April 6, 2005 *Hearing Transcript* (“Tr.”) at 151, line 17, through 153, line 14.
5. In September 2001, Ms. Matarazzo met with Mrs. Bowden at her residence regarding various insurance matters, including the sale of a Bankers Life annuity policy.
6. In September 2001, Mrs. Bowden owned an annuity policy with Nationwide Life Insurance Company. BOI Exhibit 3-M.
7. At one of their meetings, Ms. Matarazzo gave Mrs. Bowden a one-page document entitled “Insurance Corner, What is an Annuity?”, admitted as BOI Exhibit 4. Tr. at 32, lines 6-11.
8. At one of their meetings, Ms. Matarazzo gave Mrs. Bowden a four-page Bankers Life publication entitled “The Key to Golden Retirement, What You Should Know About Annuities,” admitted as Matarazzo Exhibit 1. Tr. at 155, lines 5-8.
9. Between September and October 2001, Ms. Matarazzo sold and Mrs. Bowden purchased a Bankers Life and Casualty Company, Flexible Premium Deferred Annuity (the “Bankers Life Annuity”), admitted as BOI Exhibit 5.
10. Mrs. Bowden withdrew a certificate of deposit from a local credit union to purchase the Bankers Life Annuity. Tr. at 33, line 21, through 34, line 8; Tr. at 70, lines 115 through 117; BOI Exhibit 3-L.
11. The Bankers Life Annuity had a 10-day “right to return” following delivery if Mrs. Bowden was unsatisfied with the policy, providing for the refund of any premium paid. BOI Exhibit 5.
12. Ms. Matarazzo delivered the Bankers Life Annuity to, and discussed it with, Mrs. Bowden at her residence on October 11, 2001. Tr. at 160, lines 3-18.
13. The Bankers Life Annuity contains handwritten notations by Ms. Matarazzo, made at their October 11, 2001 meeting, of her responses to Mrs. Bowden’s questions about provisions of the policy. BOI Exhibit 5; Tr. at 160, line 3, through 161, line 11.
14. Mrs. Bowden did not exercise her 10-day right of rescission of the Bankers Life Annuity, which expired on or about October 21, 2001.
15. In October 2002, Mrs. Bowden exercised her right to make a 10% partial withdrawal of the cash surrender value of the Bankers Life Annuity penalty free. BOI Exhibit 3-L; Tr. at 168, line 15, through 169, line 5.
16. In January or February 2003, Mrs. Bowden filed a consumer complaint with the Maine Bureau of Insurance regarding the Bankers Life Annuity. BOI Exhibits 3-K and 3-L.

17. In October 2003, Mrs. Bowden exercised her right to make a 10% partial withdrawal of the cash surrender value of the Bankers Life Annuity penalty free. BOI Exhibit 3-Q.⁷
18. In October 2004, Mrs. Bowden had the right to make a 10% partial withdrawal of the cash surrender value of the Bankers Life Annuity penalty free.
19. Nancy McCann of McCann Associates, Inc. of Boston, Massachusetts is an expert in the field of handwriting and document examination. BOI Exhibit 7.
20. The BOI Staff Petitioner retained Ms. McCann “[t]o determine, if possible, the authenticity and/or authorship of ‘Marilyn Bowden’ and ‘Mary Matarazzo’ signatures on two (2) Change of Beneficiary forms.”⁸ BOI Exhibit 6.
21. Ms. McCann prepared a Questioned Document Report, dated March 15, 2005 (the “Expert Report”), admitted as BOI Exhibit 6.
22. The Expert Report states that: “It is highly probable the two (2) ‘Marilyn Bowden / Marilyn E. Bowden’ signatures appearing on [BOI Exhibits 1 and 2] are **NOT genuine**” (Emphasis in original.) BOI Exhibit 6.
23. The Expert Report states that: “Both of the non-genuine signatures appear to have been simulated / copied, perhaps from a model signature(s) of Marilyn Bowden.” BOI Exhibit 6.
24. The Expert Report states that: “As a result of the simulated nature of the two (2) non-genuine ‘Marilyn Bowden’ signatures appearing on [BOI Exhibits 1 and 2], a conclusive determination of authorship cannot be rendered.” BOI Exhibit 6.
25. The Expert Report states that: “the known writer, Mary Matarazzo[,] cannot be eliminated as the possible author of the two (2) non-genuine Bowden signatures on [BOI Exhibits 1 and 2].” BOI Exhibit 6.
26. The two Change of Beneficiary forms, admitted as BOI Exhibits 1 and 2, identify Mr. Bowden as the First Beneficiary and the three Bowden children as Alternate Beneficiaries.
27. The Bankers Life Annuity contains provisions permitting changes of beneficiary at any time during Mrs. Bowden’s lifetime. BOI Exhibit 5.
28. At no time after receiving copies of the Change of Beneficiary form(s) sometime in early January 2002 did Mrs. Bowden notify Bankers Life, Ms. Matarazzo, the Attorney

⁷ It is evident that the phrase in BOI Exhibit 3-Q which reads “with now withdrawal charges” should be read and was understood by Bankers Life to mean “with no withdrawal charges.”

⁸ The examined Change of Beneficiary forms are BOI Exhibits 1 and 2.

General, or the Bureau of Insurance that it was not her signature on either document. Tr. at 62, line 10, through 63, line 22; Tr. at 168, lines 5-12.

29. When Ms. Matarazzo met with Mrs. Bowden at her residence in October 2002 there were no discussions about forgery or other problems with the Change of Beneficiary forms. Tr. at 168, line 15, through 169, line 11.
30. The complaint filed by Mrs. Bowden with the Maine Bureau of Insurance in early February 2003 did not allege forgery against Ms. Matarazzo. BOI Exhibit 3-K.
31. There was no allegation of forgery against Ms. Matarazzo in follow-up correspondence provided by Mrs. Bowden to Maine Bureau of Insurance staff in June 2003. BOI Exhibit 3-M.
32. The first time the allegation of forgery by Ms. Matarazzo was raised is in the Petition to Enforce filed by Bureau staff with the Superintendent on December 22, 2004.

V. ANALYSIS AND CONCLUSIONS OF LAW

The BOI Staff Petitioner has the burden of proving the various allegations it has asserted against Ms. Matarazzo. At least one of the counts in the Petition to Enforce alleges actions by Ms. Matarazzo that verge on criminal conduct. As this action is not a criminal proceeding, however, the BOI Staff Petitioner's burden of proof is equivalent to that in a civil action: it need only prove its case by a preponderance of the evidence. *Hinds v. John Hancock Mut. Life Ins. Co.*, 155 A.2d 721, 726 (Me. 1959). The Law Court has stated that, in deciding whether the moving party has met this reduced burden, the factfinder must "scrutinize [the evidence] in the light of common sense and common experience including the relative unlikelihood of criminal conduct." *Id.*, citing *Colby v. Richards*, 107 A. 867 (Me. 1919).

A. The Misrepresentation Allegation (Count I)

As noted above, the BOI Staff Petitioner alleges that Ms. Matarazzo violated 24-A M.R.S.A. § 2153 because she made, issued, or circulated a statement misrepresenting the terms of the Bankers Life Annuity and the benefits promised by such policy when she used as a sales tool the one-page document entitled "Insurance Corner, What is an Annuity?" Section 2153 prohibits misrepresentation and the false advertising of insurance policies. 24-A M.R.S.A. § 2153. The Maine Insurance Code also prohibits unfair or deceptive acts or practices in the business of insurance. 24-A M.R.S.A. § 2152. These statutory provisions are part of Maine Insurance Code chapter 23, Trade Practices and Fraud, whose purpose "is to regulate trade practices in the business of insurance . . . by defining or providing for the determination of all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices . . . and by prohibiting the trade practices so defined or determined." 24-A M.R.S.A. § 2151.

In addition to these insurance-specific unfair trade practice laws, similar consumer protections appear in the Maine Unfair Trade Practices Act (the "UTPA"), 5 M.R.S.A. §§ 205-A - 214. The UTPA is considered a state version of the Federal Trade Commission Act, 15 U.S.C.

§ 45(a)(1). Practices found by the Federal Trade Commission (FTC) to be unfair or deceptive are likely to be violations of the UTPA. *See* 5 M.R.S.A. §§ 207(1), (2). Recent Maine Supreme Judicial Court decisions concerning UTPA unfair trade practices have followed FTC and federal court interpretations of what constitutes an unfair or deceptive act. *Maine v. Weinschenk*, 2005 ME 28, ¶ 15; *Suminski v. Maine Appliance Warehouse, Inc.*, 602 A.2d 1173, 1174-75 n. 1 (Me. 1992). The Presiding Officer will follow Maine Supreme Judicial Court decisions concerning unfair trade practices and likewise will apply interpretations given by the FTC and the federal courts in determining what constitutes an unfair or deceptive act for purposes of the Maine Insurance Code, chapter 23.

The factfinder must determine whether an act or practice is “unfair or deceptive,” or otherwise a misrepresentation, in violation of the UTPA on a case-by-case basis. *Weinschenk* at ¶ 15, *citing Binette v. Dyer Library Ass’n.*, 688 A.2d 898, 906 (Me. 1996). Maine follows the well recognized three-part test to justify a finding of unfairness, deception, or misrepresentation. Thus, to be a misrepresentation, the act or practice:

- (1) must cause, or be likely to cause, substantial injury to consumers;
- (2) is not reasonably avoidable by consumers; and
- (3) is not outweighed by any countervailing benefits to consumers.

Weinschenk at ¶ 16, *citing Tungate v. MacLean-Stevens Studios, Inc.*, 1998 ME 162, ¶ 9, *FTC v. Crescent Publ’g. Group, Inc.*, 129 F.Supp. 2d 311, 322 (S.D.N.Y. 2001), 15 U.S.C.A. § 45(n) (West 1997). The FTC itself has concluded that “[t]he Commission will find an act or practice deceptive if there is a misrepresentation, omission, or other practice, that misleads the consumer acting reasonably in the circumstances, to the consumer’s detriment.” *FTC Policy Statement on Deception* (October 14, 1983) at 7. As earlier stated in the *FTC Policy Statement on Unfairness* (December 17, 1980), “[u]njustified consumer injury is the primary focus of the FTC Act, and the most important of the three [] criteria.” *FTC 1980 Policy Statement* at 3.

The BOI Staff Petitioner has failed to meet its burden of proof on the allegation of misrepresentation by Ms. Matarazzo against Mrs. Bowden on two grounds. First, the Presiding Officer must consider “[t]he entire . . . transaction or course of dealing,” *FTC 1983 Policy Statement* at 7, “in its entirety and not [] engage in disputatious dissection. The entire mosaic should be viewed rather than each tile separately.” *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. N.Y. 1963). In this case, the totality of the transaction or course of dealing between Ms. Matarazzo and Mrs. Bowden in the sale of the Bankers Life Annuity does not support a finding of misrepresentation. While the record shows that Ms. Matarazzo did give Mrs. Bowden the one-page document entitled “Insurance Corner, What is an Annuity?”, the record also shows that the annuity transaction involved other documents and in-person meetings between Ms. Matarazzo and Mrs. Bowden.⁹ BOI Exhibit 4; BOI Exhibit 5; Matarazzo Exhibit 1; Tr. at 160, line 3, through 161, line 11. Further, there is no credible evidence that Ms. Matarazzo coerced Mrs. Bowden into the transaction. To the contrary, Mrs. Bowden went to the bank herself to withdraw funds in order to complete the transaction. Tr. at 70, lines 15-17. If the one-page document is one tile in this mosaic, the other documents and the meetings are also tiles in this

⁹ The record is silent as to who prepared the document entitled “Insurance Corner, What is an Annuity?” (BOI Exhibit 4).

transaction. Considering the transaction in its entirety, the Presiding Officer cannot conclude that it presents a picture of misrepresentation.

Second, insufficient evidence exists to support a finding of substantial injury resulting from Ms. Matarazzo's providing BOI Exhibit 4 to Mrs. Bowden. The Law Court has observed that this requirement is "designed to weed out 'trivial or merely speculative harms.'" *Tungate* at ¶ 10 (*cites omitted*). The Presiding Officer accepts that Mrs. Bowden sincerely believes that she suffered harm, but the record does not show what financial injury or other harm she did in fact incur. Further, the record does not show that such harm was likely to have occurred. As to the first point, for example, the BOI Staff Petitioner has not compared the financial terms of the Bankers Life Annuity to other investment options available to Mrs. Bowden in late 2001.¹⁰ As to the second point, the BOI Staff Petitioner has not addressed the curative value of Ms. Matarazzo's having reviewed the actual annuity document with Mrs. Bowden and providing her with other sales documents, such as the item admitted as Matarazzo Exhibit 1, in addition to BOI Exhibit 4. Nor did the BOI Staff Petitioner address the facts that Mrs. Bowden did not exercise her 10-day rescission right under the annuity, but did exercise her withdrawal rights under the annuity a year later. The Presiding Officer infers from these events that Mrs. Bowden understood the terms of the annuity transaction that she entered.

After reviewing the record of this proceeding, and viewing the sale transaction in its entirety, the Presiding Officer concludes that the BOI Staff Petitioner has failed to prove misrepresentation under section 2153.

B. The Forgery Allegation (Counts II and III)

The BOI Staff Petitioner alleges that Ms. Matarazzo violated 24-A M.R.S.A. § 1420-K(1)(J) by forging Mrs. Bowden's name to the Change of Beneficiary forms dated October 11, 2001 and October 31, 2001. Section 1420-K(1)(J) provides that "[t]he superintendent may place on probation, suspend, revoke or refuse to issue or renew an insurance producer's license or may levy a civil penalty in accordance with section 12-A or take any combination of such actions" for "forging another's name to an application for insurance or to any document related to an insurance transaction." 24-A M.R.S.A. § 1420-K(1)(J). The Maine Insurance Code does not define the term "forging" or "forgery." Maine's Criminal Code, chapter 29, Forgery and Related Offenses, offers some guidance. It states that "[a] person is guilty of forgery if, with the intent to defraud or deceive another person . . ., [the person] falsely makes, completes, endorses or alters a

¹⁰ Without making findings of fact in this regard or taking official notice of the following, the Presiding Officer notes that 1-year Treasuries produced an average investment return of 2.33% beginning October 2001, 1.65% in October 2002, 1.25% in October 2003, and 2.23% in October 2004; 10-year Treasuries beginning October 2001 had an average return of 4.57%; six-month certificates of deposit from October 2001 through April 2005 averaged 2.26%, 2.11%, 1.69%, 1.23%, 1.14%, 1.21%, 2.18%, and 3.34%. The record demonstrates that the Bankers Life Annuity includes a guaranteed minimum rate of accumulation of 4% per year; penalty free annual partial withdrawals of up to 10% of the cash surrender value for the first 12 policy years; no limits on annual withdrawals thereafter; monthly income benefits beginning in policy year 15; and a \$24.00 annual service charge. BOI Exhibit 5; BOI Exhibit 3-M. The Bankers Life Annuity also has a Convalescent Care Benefit rider and a Terminal Illness Benefit rider. *Id.* This Decision and Order does not address the question whether the Bankers Life Annuity was a suitable insurance product given Mrs. Bowden's age, as no participant in this proceeding has raised this issue.

written instrument.” 17-A M.R.S.A. §§ 702(1), 703(1).¹¹ Intent to defraud or deceive is an essential element of this offense. *Maine v. Pinkham*, 432 A.2d 1297, 1299 (Me. 1981). The Law Court has stated that “[t] here can be no forgery if the instrument that has allegedly been falsely made or signed is incapable of defrauding.” *Id.*, citing *People v. Reichert*, 191 N.E.2d 220, 221 (Ill. 1934) (no intent to defraud when change of note to be a corporate obligation alone is not shown by evidence to depart from parties’ contractual intent). In civil and criminal actions based on forgery, Maine has long followed the rule that “intent to defraud or deceive” is an element of proof. *Sawyer v. Hopkins*, 22 Me. 268, 280-282 (1843). See also *Black’s Law Dictionary*, Eighth Edition (West 2004) (defining “forgery” to mean, among other definitions, a “false or altered document made to look genuine by someone with the intent to deceive”); *State v. Flye*, 26 Me. 312, 316 (1846) (the definition of forgery at common law is “the fraudulent making or alteration of a writing to the prejudice of another man’s rights” (*cites omitted*)).

The BOI Staff Petitioner has failed to meet its burden of proving that Ms. Matarazzo defrauded Mrs. Bowden for two reasons. First, the record lacks any evidence to show that Ms. Matarazzo intended to defraud or deceive Mrs. Bowden. The facts show that, whether or not Ms. Matarazzo authored Marilyn Bowden’s name to the two Change of Beneficiary forms, the identity of the First Beneficiary and Alternate Beneficiaries in each of the forms specifically fulfilled Mrs. Bowden’s stated intentions. If Mrs. Bowden has concerns as to the legal effectiveness of the forms because they might be forgeries, she has always had the remedy of sending a newly signed and witnessed Change of Beneficiary form to Bankers Life.

Second, contrary to the BOI Staff Petitioner’s argument, Ms. McCann’s expert opinion on this issue does not compel a finding against Ms. Matarazzo.¹² Although an expert’s opinion need not be stated with any special degree of certainty, lack of certainty by the expert witness affects the weight accorded the testimony. *State v. Tibbets*, 604 A.2d 20, 22 (Me. 1992), citing *State v. Longley*, 483 A.2d 725, 731 (Me. 1984), *State v. Hebert*, 480 A.2d 742, 749 (Me. 1984), Field & Murray, *Maine Evidence* (1987) at 264. When asked at hearing if there was a degree of probability to which she could testify that Ms. Matarazzo had authored the ‘Marilyn Bowden’ signatures on the Change of Beneficiary forms, Ms. McCann testified that she could not “opine to a reasonable degree of certainty” on this question. Tr. at 138 lines 23-25; Tr. at 139, lines 5-6. Thus, Ms. McCann’s expert opinion was only that “a conclusive determination of authorship [could not] be rendered” on the Change of Beneficiary forms, and that “the known writer, Mary Matarazzo[,] cannot be eliminated as the possible author of the two (2) non-genuine Bowden signatures” on those forms. BOI Exhibit 6. Failure to eliminate Ms. Matarazzo as the possible author, however, does not prove that she did in fact commit the alleged act.

After reviewing the record of this proceeding, the Presiding Officer concludes that the BOI Staff Petitioner has failed to prove that Ms. Matarazzo forged the questioned signatures. Therefore, the subsidiary allegations of “fraudulent or dishonest practices” in signing as a

¹¹ Section 702 defines the crime of “aggravated forgery” with section 703 defining what is commonly referred to as “simple forgery.” The term “written instrument” is broadly defined at section 701(4).

¹² Ms. McCann limited her expert opinion to the “authenticity” or “non-authenticity” of the examined documents.

witness to Mrs. Bowden's allegedly forged signature on the Change of Beneficiary forms cannot be sustained.

VI. BANKERS LIFE'S OBLIGATIONS UNDER THE CONSENT AGREEMENT

Mrs. Bowden's complaint against Bankers Life was specifically included in the Consent Agreement entered into among Bankers Life, the Superintendent of Insurance, and the Maine Attorney General. *Consent Agreement*, ¶ 10. The Presiding Officer therefore makes no findings or conclusions concerning Bankers Life. No person should interpret this Decision and Order as affecting any remedies that might be available to Mrs. Bowden under the Consent Agreement.

VII. ORDER

The Presiding Officer ORDERS that the Petition to Enforce is DENIED as filed against Mary Elizabeth Matarazzo.


VIII. NOTICE OF APPEAL RIGHTS

This Decision and Order is final agency action of the Superintendent of Insurance within the meaning of the Maine Administrative Procedure Act. Any party may appeal this Decision and Order to the Superior Court as provided by 24-A M.R.S.A. § 236, 5 M.R.S.A. § 11001, et seq. and M.R. Civ. P. 80C. Any such party must initiate an appeal within thirty days after receiving this notice. Any aggrieved non-party whose interests are substantially and directly affected by this Decision and Order may initiate an appeal within forty days of the issuance of this decision. There is no automatic stay pending appeal; application for stay may be made as provided in 5 M.R.S.A. § 11004.

PER ORDER OF THE SUPERINTENDENT OF INSURANCE

DATED: May 31, 2005

By: _____


BENJAMIN YARDLEY
Presiding Officer