STATE OF ARIZONA
FILED

DEC 4 2000

DEPT. OF INSURANCE
BY KK

STATE OF ARIZONA

DEPARTMENT OF INSURANCE

In the Matter of: RICHARD IRA SHEAR and ARIZONA ASSET PARTNERS I, INC., Respondents	)))))))	Docket No. 00A-010-INS **ORDER**

On October 27, 2000, the Office of Administrative Hearings, through Administrative Law Judge Lewis D. Kowal, issued a Recommended Decision of the Administrative Law Judge ("Recommended Decision"), a copy of which is attached and incorporated by this reference. The Director of the Department of Insurance has reviewed the Recommended Decision and enters the following Order:

1. The recommended Findings of Fact and Conclusions of Law are adopted.

2. Respondents' insurance licenses are revoked effective immediately.

3. Within 45 days from the effective date of the Order Respondents are each responsible to make restitution payments to certain individuals in the amounts as set forth below:

Cecile Epstein ------$2,035,091.22

Richard Laue -------$160,000.00

Elizabeth Merritt---$72,919.00

NOTIFICATION OF RIGHTS

Pursuant to A.R.S. § 41-1092.09, the aggrieved party may request a rehearing with respect to this order by filing a written motion with the Director of the Department of Insurance within 30 days of the date of this Order, setting forth the basis for relief under A.A.C. R20-6-114(B). Pursuant

to A.R.S. § 41-1092.09, it is not necessary to request a rehearing before filing an appeal to Superior Court.

The final decision of the Director may be appealed to the Superior Court of Maricopa County for judicial review pursuant to A.R.S. § 20-166. A party filing an appeal must notify the Office of Administrative Hearings of the appeal within ten days after filing the complaint commencing the appeal, pursuant to A.R.S. § 12-904(B).

DATED this 4th of December, 2000

Charles R. Cohen
Director of Insurance

A copy of the foregoing mailed
this 4th day of December, 2000

Office of Administrative Hearings
1400 W. Washington, Suite 101
Phoenix, AZ 85007

Michael Denious
Steve Duplissis
Assistant Attorneys General
1275 West Washington Street
Phoenix, Arizona 85007

Sara M. Begley, Deputy Director
Gerrie L. Marks, Executive Assistant for Regulatory Affairs
Mary Butterfield, Assistant Director
Arnold Sniegowski, Investigations Supervisor
Catherine O'Neil, Consumer Legal Affairs Officer
Maureen Catalioto, Supervisor
Department of Insurance
2910 North 44th Street, Suite 210
Phoenix, Arizona 85018

Richard Ira Shear
Arizona Asset Partners 1, Inc.
9188 East San Salvador Drive, Suite 203B
Scottsdale, Arizona 85258
Respondents

Thomas M. Connelly
Camelback Esplanade
2425 E. Camelback Road, Suite 800
Phoenix, AZ 85016

J. Michael Low
LOW & CHILDERS, P.C.
2999 North 44th Street, Suite 250
Phoenix, Arizona 85018

Kathy Knight

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

In The Matter Of:	No. 00A-010-INS
RICHARD IRA SHEAR and ARIZONA ASSET PARTNERS I, INC.,	RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE
Respondents.	

HEARING: April 24, 2000, July 17, 18, 19, 20, and 25, 2000. Record closed on November 9, 2000.

APPEARANCES: On April 24, 2000, Assistant Attorney General Michael De La Cruz appeared on behalf of the Arizona Department of Insurance and Richard Shear appeared on behalf of the Respondents; On July 17, 2000, Assistant Attorneys General Michael Denious and Steve Duplissis appeared on behalf of the Arizona Department of Insurance; Thomas Connelly, Esq. made a limited appearance on behalf of Richard Shear, and Richard Shear appeared on behalf of the Respondents; On July 18, 19, 20, and 25, 2000, Assistant Attorneys General Michael Denious and Steve Duplissis appeared on behalf of the Arizona Department of Insurance; Richard Shear appeared on behalf of the Respondents.

ADMINISTRATIVE LAW JUDGE: Lewis D. Kowal

FINDINGS OF FACT

1. At all times material to this matter, Respondent Richard Ira Shear ("Mr. Shear") was, and currently is, licensed to transact life and disability insurance and variable annuity business in the State of Arizona.

2. At all times material to this matter, Respondent Arizona Asset Partners I, Inc. ("Arizona Asset Partners") was, and currently is, licensed as an agency to transact life and disability insurance and variable annuity insurance business within the State of Arizona.

3. The evidence of record established that, at all times material to this matter, Mr. Shear and Arizona Asset Partners were conducting the business of insurance within the State of Arizona under the assumed business names of Arizona Asset Management ("Arizona Asset Management") and Arizona Asset Administrators (hereinafter collectively referred to as the "Respondents").

4. At all times material to this matter, the evidence of record established that Mr. Shear owned, operated, and controlled the activities of Arizona Asset Partners.

5. At all times material to this matter, Mr. Shear was listed on documents on file with the Arizona Department of Insurance ("Department") as being an officer of Arizona Asset Partners authorized to exercise powers under its insurance licenses.

6. At all times material to this matter, Respondents' business address was 9188 East San Salvador Drive, Suite 203, Scottsdale, Arizona 85258 and 6617 North Scottsdale Road, Suite 210, Scottsdale, Arizona 85250.

Count 1-Annuity for Richard Laue

7. In February 1997, upon referral from Mary Ann Greene ("Ms. Greene"), a financial advisor, Richard Laue ("Mr. Laue") and his wife, Beth Laue ("Mrs. Laue"), residents of California, contacted Mr. Shear to discuss the possibility of removing Mr. Laue's retirement funds from a pension trust fund that was not earning sufficient interest and purchasing an annuity policy to earn more interest.

8. At all times material to this matter, Mr. Laue was a church minister who had his retirement funds previously placed into a pension plan along with other ministers nationwide.

9. After Mr. Laue discussed with Mr. Shear the possibility of purchasing an annuity with the above-mentioned retirement funds, Mr. Shear forwarded an annuity application to Mr. Laue for his completion and signature. Subsequently, Mr. Laue completed the annuity application, dated it February 13, 1997, and mailed the application back to Mr. Shear.

10. In the above-mentioned annuity application, Mr. Laue designated himself as the annuitant. Mrs. Laue testified that Mr. Laue did not complete or sign the Owner

Information section of the application, which was only to be completed if the owner was to be a person other than the annuitant. Thus, it is determined that when Mr. Laue forwarded the annuity application to Mr. Shear, it was with the intent that Mr. Laue be the owner of the annuity.

11. The evidence of record established that the above-mentioned annuity application was forwarded to Equitable Life Insurance Company of Iowa ("Equitable"). The application was received by Equitable showing First National Bank of Springfield ("First National") as the owner of the annuity and signed by a trust officer of First National as trustee.

12. Mr. Shear's signature appears on the application dated February 13, 1997 as agent.

13. It is undisputed that Mr. Shear successfully secured an annuity policy with Equitable on behalf of Mr. Laue, with an effective date of May 28, 1997.

14. Mrs. Laue testified that neither she nor Mr. Laue ever authorized First National to be the owner of the Equitable annuity. Further, Mrs. Laue testified that Mr. Laue confided in her about retirement funds in all respects because other than social security, that was their only source of retirement income. Therefore, Mrs. Laue was familiar with Mr. Laue's transactions involving his retirement funds, including his dealings with Mr. Shear.

15. Mrs. Laue testified that neither she nor her husband, Mr. Laue, ever entered into a trust agreement with Mr. Shear.

16. In 1998, Mr. Laue retired from the church ministry and was diagnosed with Parkinson's disease.

17. On April 13, 1999, Mr. Shear submitted to Equitable a request to change the owner of the above-mentioned annuity from Mercantile Trust, formerly First National, to Arizona Asset Partners.

18. Mr. Shear represented to Equitable that the change of ownership request was being done at the request of Mr. Laue and Mercantile Trust.

19. On April 16, 1999, Mr. Shear submitted a request to Equitable for a full surrender of the above-mentioned annuity. Mrs. Laue testified that neither she nor Mr. Laue ever authorized or consented to such action.

20. On April 29, 1999, Equitable issued a check made payable to Arizona Assett (sic) Partners in the amount of $143,887.90, representing the surrender value of the Equitable annuity policy minus surrender charges in the amount of $15,987.54.

21. The above-mentioned check in the amount of $143,887.90 was deposited into Arizona Asset Management's business checking account, Bank of America account number 252532689, on May 3, 1999.

22. Mr. Shear is an authorized signatory on the above-mentioned bank account.

23. To date, despite requests from Mr. Laue, Respondents have not forwarded any of the $160,000.00 that Mr. Laue initially provided or any of the $143,887.90 Equitable provided to Arizona Asset Partners upon surrender of the annuity policy.

24. Ms. Greene, the Laues' financial adviser who referred the Laues to Mr. Shear, testified that for several months prior to August 1998 she had been requesting that Mr. Shear provide her with a statement regarding the Equitable annuity as well as a copy of the annuity application. The documents were eventually provided to Ms. Greene in August 1998.

25. The purpose for such requests was that, according to the terms of the annuity, the Laues had been informed that they would be entitled to receive 10% annuity payments after the annuity's second year in existence to supplement Mr. Laues' retirement.

26. Ms. Greene contacted Equitable and, upon providing Mr. Laue's social security number, requested the value of the annuity. She was informed by an Equitable representative that Mr. Laue's annuity policy had been surrendered in April 1999. As recently as one week prior to that conversation, Mr. Shear had represented to Ms. Greene that the Laues' money was at Equitable.

27. On July 15, 1999, Mr. Shear called Ms. Greene from Hawaii and never clearly addressed the issue as to the whereabouts of Mr. Laue's money other than to state that he would "straighten the situation out when he returned from vacation."

28. On approximately August 2, 1999, Mr. Shear represented to Ms. Greene that he had sent Mr. Laue's money to AmerUs and American Life for two separate annuities and that the money would be there the next day.

29. On approximately August 3, 1999, Mr. Shear called Ms. Greene while he was in Europe and informed her that he had "screwed up", he informed her that he had taken Mr. Laue's money and would replace it when he returned to Arizona. For approximately 90 days thereafter, Ms. Greene called Mr. Shear on a daily basis to inquire as to the status of Mr. Laue's money but never received a response from Mr. Shear.

30. After August 3, 1999, Mr. Shear sent a check dated September 29, 1999, in the amount of $81,000.00, to Morgan Stanley Dean Witter ("Morgan Stanley"), Mr. Laue's brokerage firm, representing one half of the money that Mr. Laue previously provided to Mr. Shear. Morgan Stanley learned from the Bank of America that the account on which the check had been written had insufficient funds. Morgan Stanley sent a wire to Ms. Greene requesting that she contact the Laues to inform them that the check was not good and was being sent back to them.

31. Donna Futrell ("Ms. Futrell"), an investigator with the Department during the Department's investigation of this matter, conducted a search of Respondents' records with respect to the Laues and obtained Respondents' bank account records for the relevant time period. Upon review of those documents, Ms. Futrell concluded that the account from which the above-mentioned $81,000.00 check was issued was a new account created by Mr. Shear. Ms. Futrell discovered that the account never contained $81,000.00. Thus, a reasonable inference can be drawn from such evidence that when Mr. Shear issued the check to Morgan Stanley he knew or should have known that the account on which the check was drawn had insufficient funds. Thus it is determined

that Mr. Shear never intended by the issuance of the check that the Laues would receive the $81,000.00.

32. The evidence of record established that after submission of the above-mentioned check, Mr. Shear made several overtures to the Laues with respect to returning their money but that the Laues, at that point in time, did not trust Mr. Shear and did not take such overtures as sincere efforts of repayment. In particular, Mr. Shear offered a promissory note and deed of trust to certain property. The documents submitted into evidence do not show that the note or deed of trust were fully executed or legally binding. Thus, such evidence does not establish that Respondents made sincere attempts to repay the Laues.

33. The testimony of Mrs. Laue, Ms. Greene, and Ms. Futrell, as set forth above, is determined to be credible.

34. It is undisputed that despite making requests for the return of their $160,000.00, the Laues did not receive any return of funds from Respondents and are still owed the sum of $160,000.00.

Count 2-Rebating Insurance Premiums

Richard Laue

35. Respondents obtained an AmerUs whole life insurance policy in the amount of $1,000,000.00, insurance policy number 1630805, effective December 28, 1997, for Mr. Laue with an annual premium payment of $50,408.80, commission and bonus payments of $76,973.66, and let such policy lapse on December 28, 1998.

36. While the application for AmerUs policy number 1630805 lists the Calvary Bible Charitable Trust, Richard Laue, trustee, as the owner of the policy, Richard Shear's signature as trustee appears on the owner's signature line of the application.

37. Mrs. Laue credibly testified that the Laues never authorized, never consented to, and had no knowledge of, the premium payments owed on the above-mentioned policy or of the policy lapsing for nonpayment of premium.

38. Respondents obtained an AmerUs whole life insurance policy in the amount of $250,000.00, policy number 1630795, for Mrs. Laue with an annual premium

payment of $9,405.00, commission and bonus payments of $11,812.50, and let the policy lapse on February 12, 1999.

Helen Katz

39. Respondents obtained an AmerUs insurance whole life insurance policy in the amount of $250,000.00 with an accelerated benefit rider, policy number 1629812, for Helen Katz ("Ms. Katz") with a total annual premium payment of $40,867.50, commission and bonus payments of $51,455.25, and let the policy lapse on January 15, 1999.

40. On January 1, 1998, Arizona Asset Management issued a check made payable to AmerUs in the amount of $40,867.50 regarding Helen Katz's policy number 1629812 and Ms. Katz endorsed that check.

Charles Thomas

41. Respondents obtained an AmerUs whole life insurance policy, number 1634607, for Charles Thomas ("Mr. Thomas") and let the policy lapse in August 1999.

42. On October 29, 1998, Arizona Asset Management issued a check payable to AmerUs in the amount of $23,030.00 regarding Mr. Thomas' policy number 1634607.

Marlene Thomas

43. Respondents obtained an AmerUs whole life insurance policy in the amount of $500,000.00, policy number 1634608, for Marlene Thomas ("Mrs. Thomas") with an annual premium payment of $14,905.00.

44. On September 11, 1998 and September 22, 1998, monies were wired to Mr. and Mrs. Thomas from Arizona Asset Management's Bank of America account number 988027032.

Bonnie Gonzalez

45. Respondents obtained an AmerUs whole life insurance policy, number 1634609, for Bonnie Gonzalez ("Ms. Gonzalez") in the amount of $500,000.00 with an annual premium payment of $21,660.00, commission and bonus payments of $27,253.80, and let the policy lapse on August 7, 1999.

46. On August 11, 1998, Ms. Gonzalez issued a check payable to American Mutual in the amount of $21,660.00

47. On August 11, 1998, Arizona Asset Management issued a check from Bank of America account number 988027032 made payable to Ms. Gonzalez in the amount of $21,660.00. The check was endorsed by Ms. Gonzalez.

Walter Frklich

48. Respondents obtained an AmerUs whole life insurance policy in the amount of $1,500,000.00, policy number 1636382, for Walter Frklich ("Mr. Frklich") with an annual premium payment of $38,580.00, commission and bonus payments of $42,145.57, and let the policy lapse on May 12, 1999.

49. On October 28, 1998, Mrs. Frklich, Mr. Frklich's wife, issued a check payable to AmerUs in the sum of $6,430.00 as premium payment on policy number 01636382.

50. On October 29, 1998, Arizona Asset Management issued to Mr. Frklich a check from its Bank of America account number 988027032 in the sum of $6,430.00. The check was endorsed by Mr. Frklich.

51. On April 13, 1999, Arizona Asset Management issued a check payable to AmerUs in the sum of $3,750.00 from Bank of America account number 988027032 as premium payment on Mr. Frklich's policy number 01620567.

52. On May 26, 1999, Arizona Asset Management issued a check payable to AmerUs in the sum of $6,100.00 from Bank of America account number 988027032 as premium payment on Mr. Frklich's policy number 01620567. AmerUs attempted to deposit the check but it was returned because of insufficient funds.

Lee Weinstein

53. Respondents obtained an AmerUs whole life insurance policy in the amount of $1,500,000.00, policy number 1637195, for Lee Weinstein ("Mr. Weinstein") with an annual premium payment of $55,860.00, commission payments of $38,744.50, and let the policy lapse on January 15, 1999.

54. On November 24, 1998, Mr. Weinstein, through the business account of C.C. Carriage, Inc., issued a check payable to AmerUs in the amount of $4,800.00.

55. On December 13, 1998, Arizona Asset Management issued a check from Bank of America account number 988027032 made payable to Continental Carriage in the amount of $25,500.00.

56. Although evidence was presented that Mr. Shear purchased a limousine from Mr. Weinstein, which possibly could account for the above-mentioned check, Mr. Shear did not explain why such payment would come from Arizona Asset Management's operations account.

57. It is reasonable to infer from the evidence that the above-mentioned payment Arizona Asset Management made to Continental Carriage related to insurance products that it purchased from Respondents, thus constituting a rebate.

Ronald Askew

58. Respondents obtained an AmerUs whole life insurance policy for Ronald Askew ("Mr. Askew"), a California resident.

59. Mr. Askew issued a check in the amount of $168,280.00 made payable to AmerUs as a premium payment for an insurance policy.

60. James Halstead ("Mr. Halstead"), a California licensed insurance agent , was the agent of record concerning Mr. Askew as reflected by the records of AmerUs.

61. On May 19, 1998, $160,000.00 was wired from Arizona Asset Management's account number 988027032 to Mr. Askew.

62. During the hearing, Mr. Shear objected to the jurisdiction of the Department and this tribunal to address the Askew insurance transaction described above because the agent of record, the insured, and the transaction occurred in California. The Administrative Law Judge took Mr. Shear's objection under advisement. Upon reviewing the totality of the evidence presented, it is determined that there is jurisdiction for this matter to be included in the instant hearing. Arizona law prohibits rebates.

63. The evidence of record establishes that in the Askew insurance transaction, payment was made from Arizona Asset Management's account in Arizona to Mr. Askew

in an amount approaching the total amount Mr. Askew paid for insurance. Consequently, there is a sufficient nexus between the insurance transaction and California and Arizona by the transfer of funds from a licensed insurance agency to provide Arizona with jurisdiction over this matter, solely as it relates to the issue of illegal rebating.

64. Mr. Shear did not present any credible evidence to explain why funds from Arizona Asset Management's account in Arizona were used to transfer funds to Mr. Askew or why such funds were being provided to Mr. Askew, or why documents relating to Mr. Askew's insurance transaction in California were being maintained in the Arizona office of Arizona Asset Management's files.

65. Evidence was presented alluding to the fact that Mr. Halstead had previously worked for Mr. Shear or his agency and Mr. Shear was, at some point in time, licensed as an insurance agent in California.

66. Although Mr. Shear contended that the return of the monies to Mr. Askew was permitted under California law, he failed to explain how Arizona Asset Management in Arizona was involved.

67. Mr. Shear asserted that the payment was allowed under California law but did not present any foundation as to the California law nor did he present any evidence in support of the assertion. Further, Mr. Shear did not address the issue of whether the payment is a violation of Arizona law even if permitted in California.

68. Based on the evidence presented, it is reasonable for the Administrative Law Judge to infer that the $160,000.00 wire transferred from Arizona Asset Management bank account in Arizona to Mr. Askew was related to the above-mentioned AmerUs insurance transaction in California and constituted some form of rebating.

Karen Goff

69. Respondents obtained an AmerUs policy number 1634668 for Karen Goff ("Ms. Goff") for the face value of $250,000.00, an annual premium payment of

$11,440.00, commission and bonus payment of $14,376.60, and let the policy lapse on October 1, 1999.

70. On November 11, 1198, Ms. Goff issued a check in the amount of $11,440.00 made payable to AmerUs as a premium payment.

71. From July 17, 1998 through January 13, 1999, checks were issued in various amounts to Ms. Goff and/or her business, Creative Framing, from Arizona Asset Management bank account number 988027032.

72. The Department contends that the above-mentioned payments made by Arizona Asset Management constitute rebating of premiums on the AmerUs insurance policy purchased by Ms. Goff. Both Mr. Shear and Ms. Goff testified that the payments made by Arizona Asset Management to Ms. Goff were for framing work.

73. The total amount that Ms. Goff received from Arizona Asset Management during the relevant time period totaled $13,000.00.

74. There are inconsistencies in the evidence presented by Mr. Shear concerning Ms. Goff. Further the evidence presented by the Department concerning Ms. Goff sharply conflicts with the evidence presented by Mr. Shear. Ms. Goff's testimony concerning her dealing with Mr. Shear allude to possible improprieties . However, the evidence of record was insufficient to support a finding that those dealings constituted rebating of insurance premiums. Therefore, it is determined that credible evidence is presented establishing that the payments made to Ms. Goff by Arizona Asset Management were for framing work performed by Ms. Goff.

Isaac Berneman

75. Respondents obtained an AmerUs whole life insurance policy in the amount of $250,000.00, policy number 1637233, for Isaac Berneman ("Mr. Berneman"), a resident of California, with an annual premium payment of $80,265.00, commission payments of $61,127.78, and let the policy lapse on July 10, 1999.

76. On December 10, 1998, Arizona Asset Management issued a check from its account number 988027032 in the amount of $6,800.00 made payable to AmerUs regarding policy number 1637233.

77. From January 12, 1999, through June 30, 1999, automatic withdrawals each in the amount of $6,822.52 were made to AmerUs regarding policy number 1637233.

78. The evidence of record established that Mr. Shear received a commission on the above-mentioned policy as the agent of record.

79. Mr. Berneman testified that he was the agent of record entitled to commissions and that Mr. Shear, acting as the general agent, was entitled to a percentage of the commission.

80. The evidence of record establishes that Respondents made premium payments for Mr. Berneman on AmerUs policy number 1637233.

81. Mr. Berneman testified that he requested his commission on the policy, which was forwarded to Respondents by the insurer, be used towards payment of the policy premium.

82. The record reflects that no premium payments were made on AmerUs policy number 1637233 after the commissions had been applied towards the policy premium and were exhausted.

83. Neither Mr. Shear nor Mr. Berneman explained why Respondents did not receive any commission with respect to AmerUs policy number 1637233, or why Mr. Shear is listed as the agent of record with AmerUs if Mr. Berneman was the agent of record, as contended by Mr. Shear. Further, they both failed to explain how commissions were used to pay the premium payments when Mr. Berneman testified that when he submitted the application for the AmerUs insurance policy he had paid the annual premium.

84. The Administrative Law Judge concludes as a result of the weight of the credible evidence that the only logical inference that can be drawn from the above-mentioned insurance transaction involving Respondents and Mr. Berneman is that Respondents paid the insurance premiums for Mr. Berneman with respect to policy number 1637233.

85. As a result of the above, Respondents obtained from AmerUs the total sum of $476,916.91 in commissions and bonuses from the above-mentioned conduct.

86. On September 23, 1999, AmerUs terminated its general agent contract with Mr. Shear for cause and demanded payment of unearned commissions and bonuses received by Mr. Shear totaling $401,366.58 as of August 31, 1999.

Determination of Respondents' Activities Concerning Rebating Allegations

87. The evidence of record establishes as set forth above, with the exception of Ms. Goff, Respondents conducted the transaction of insurance business with certain clients whereby Respondents obtained premium payments from the clients, secured insurance policies for them thereby entitling Respondents to a high rate of commission and bonus payment from AmerUs. Respondents either paid the insurance premiums directly or issued a check to the clients for an identical sum or similar sum as the amount of premium payment with respect to such insurance transactions.

88. Subsequent to obtaining the above-mentioned insurance policies, Respondents allowed the insurance policies to lapse after the first year by failing to provide any further premium payments on such policies. By such course of conduct, Respondents engaged in rebating insurance premiums, in violation of Arizona insurance law, resulting in the clients obtaining insurance coverage free or at a discount for one year and Respondents benefiting by receiving high commissions and bonus payments.

Count III-Regarding the Epsteins' Annuities from New England Life Insurance Company, All American Life Insurance Company, and AmerUs Insurance Company

89. Cecile Epstein ("Mrs. Epstein") testified that she and her husband Murray Epstein ("Mr. Epstein"), now deceased, purchased a $400,000.00 annuity policy from Mr. Shear and believed, based upon representations made by Mr. Shear, that the policy was being issued through All American Life Insurance Company.

90. The information the Epsteins obtained from Mr. Shear led the Epsteins to believe that the above-mentioned annuity policy would have a monthly return of $3,000.00 at a rate of 9% being paid to the Epsteins' stock brokerage firm of Simmons & Bishop and that the term of the policy was 22 years.

91. The Epsteins also purchased a second annuity policy from Mr. Shear and based upon representations made by Mr. Shear, they believed that the policy was to be issued by AmerUs in the amount of $300,000.00, and would provide a monthly payment in the amount of $2,000.00 to the Epsteins. Mrs. Epstein provided Respondents the sum of $200,000.00 for the purchase of the annuity.

92. On September 15, 1995, Mrs. Epstein purchased from Mr. Shear a third annuity policy in the amount of $300,000.00 to be issued through New England Life Insurance Company. Mrs. Epstein provided Respondents the sum of $300,000.00 for the purchase of the annuity. Mrs. Epstein testified that she expected monthly payments in the amount of $2,000.00 to be paid from that annuity.

93. The documents obtained by Ms. Futrell during the course of her investigation show that from December 1997 through October 1998, wire transfers totaling $97,800.00 were generally sent on a monthly basis in the amounts of $2,000.00, $2,000.00, and $3,000.00 from the Arizona Asset Management Bank of America bank account number 988027032 to Simmons & Bishop.

94. Receipt of the above-mentioned monthly payments by Simmons & Bishop led Mrs. Epstein to believe that the above-mentioned insurance investments had been made on her behalf by Respondents.

95. Mrs. Epstein also testified that she never received any annuity policies from New England Life Insurance Company, AmerUs, or All American Life Insurance Company.

96. Eric Westman ("Mr. Westman"), a compliance analyst with AmerUs testified that AmerUs never issued an annuity policy to the Epsteins or Mrs. Epstein.

97. Ms. Futrell testified that, during the course of her investigation of this matter, she contacted New England Life Insurance Company, All American Life Insurance Company, and AmerUs and learned that none of those insurers issued any annuity policies to the Epsteins or Ms. Epstein.

Count IV-American Mutual Life Insurance Company Annuity

98. On March 10, 1995, the Epsteins provided Mr. Shear with a check in the amount of $429,495.81 made payable to American Mutual Life FBO Murray Epstein as the premium payment for an annuity policy issued through American Mutual Life Insurance Company. That insurer issued annuity policy number 2089506 in March 1995.

99. The above-mentioned $429,495.81 check was deposited into a Bank of America bank account titled U.S. Life Insurance Marketing, Inc. dba the New England, American Mutual Life, account number 988008229 on March 13, 1995. The evidence of record established that, at that time, the only signatories on the account were Mr. Shear and his wife Melanie.

100. During the relevant time period, American Mutual Life Insurance Company changed its name to AmerUs and currently conducts the business of insurance under that name.

101. A policy data sheet that Mr. Shear provided to the Epsteins regarding the above-mentioned annuity lists Mr. Epstein as the annuitant and owner of the policy. The policy data sheet shows that Mr. Epstein was to receive monthly payments in the amount of $4,000.00 for a ten year period commencing on April 22, 1995.

102. On April 7, 1995, American Mutual Life Insurance Company received a single premium payment for the above-mentioned annuity in the amount of $215,284.94 from Mr. Shear for a policy numbered 2089506. That annuity policy provided Mr. Epstein with monthly payments of $4,000.00 for a five year period.

103. In August 1995, Mr. Epstein passed away.

104. Mr. Westman testified that American Mutual never issued policy number 2089506 with a ten year term and monthly payment of $4,000.00. Further, Mr. Westman testified that the above-mentioned policy data sheet showing a ten year term with monthly payment of $4,000.00 was not an American Mutual Life Insurance policy data sheet.

105. The weight of the credible evidence of record establishes that the Epsteins did not receive the annuity that Mr. Shear represented they were purchasing.

106. The evidence of record also establishes that Mr. Shear failed to forward to American Mutual Life Insurance Company the sum of $214,210.87, the balance of the $429,495.81 Mr. Shear received from the Epsteins nor did Mr. Shear return such funds to the Epsteins.

Count V-Five Checks Totaling $660,000.00

107. From September 12, 1996, through July 21, 1998, Mrs. Epstein provided five checks to Mr. Shear made payable to American Mutual, in the total amount of $660,000.00.

108. Notations in the memo section of some of the above-mentioned checks reference policy numbers. All five of the checks were deposited into the above-mentioned U.S. Life Insurance Marketing bank account. The Department contends that Mr. Shear did not forward the monies to any insurer and that Mr. Shear converted and/or misappropriated the funds for his own use.

109. Mrs. Epstein testified that she had no independent recollection as to why the checks were provided to Mr. Shear and, other than the policy reference numbers on the memo portion of three of the checks, could not recall if the checks were provided as premium payments.

110. Mrs. Epstein also testified that pursuant to Mr. Shear's advice she wrote insurance policy numbers on checks that she wrote to Respondents or to insurance companies.

111. The evidence of record establishes that Mr. Shear acted as a financial adviser to the Epsteins and also acted as a trustee for two trusts of the Epsteins, the Cecile Epstein Irrevocable Life Insurance Trust created March 24, 1998, and the Murray and Cecile Epstein Children's Trust created on January 16, 1995.

112. The Department's investigation was unable to determine what happened to those funds after they were deposited into the above-mentioned bank account. However, credible evidence was presented that the sum of $660,000.00 was never returned to the Epsteins.

113. During the hearing, Mr. Shear did not present any evidence to explain why those funds were deposited into the above-mentioned account or what happened to them.

114. Mr. Shear alluded to the fact that the documents presented by the Department were incomplete and that investments other than the insurance products addressed at the hearing were made on behalf of Mrs. Epstein. However, Mr. Shear failed to produce credible evidence in support of that assertion.

115. Based on the totality of the circumstances involving how Respondents conducted their insurance business with the Epsteins, that the sum of $660,000.00 was deposited into an account that listed names sufficiently similar to the names of actual insurance companies so that checks made payable to an insurer were able to be deposited by Respondents into the above-mentioned bank account, that Respondents failed to provide to the Department documents that were subpoenaed, and Respondents failed to account for the use of the $660,000.00, causes this Judge to draw a reasonable inference that the funds were provided as payments either towards (1) insurance products that were represented by Respondents to be in existence but did not exist, or (2) products that did exist but for which funds were never forwarded to the insurance carriers.

Count VI-American Mutual Life Insurance Policy and Count VII-American Mutual Life Insurance Policy Owned by the Murray and Cecile Epstein Grandchildren Trust

116. An application for life insurance to be issued through American Mutual Life Insurance Company with Mrs. Epstein as the insured was completed listing the Epstein Irrevocable Trust as the owner of the policy. Mrs. Epstein signed the application listing herself as the applicant and owner as of April 26, 1995 and Mr. Shear as the agent. However, on page 5 of the application, Mr. Shear signed representing himself to be a trustee and owner of the policy as of April 24, 1995. The medical history portion of the application was not completed.

117. Another application for life insurance to be issued through American Mutual Life Insurance Company with Mrs. Epstein as the insured was completed listing the

Epstein Irrevocable Trust as the owner of the policy. Mrs. Epstein signed the application as the insured and Mr. Shear signed the application representing himself to be the trustee and owner of the policy. The medical history portion of the application was completed. The application was dated June 6, 1995.

118. Mr. Westman testified that the only life insurance application that AmerUs has on file at its home office is the above-mentioned June 6, 1995 application.

119. The evidence of record reflects the existence of The Cecile Epstein Irrevocable Life Insurance Trust II created March 24, 1998. However, the record is devoid of credible evidence that establishes the existence of the Epstein Irrevocable Life Insurance Trust. With such evidence lacking in the record, the Administrative Law Judge concludes that such trust does not exist, even though there is an irrevocable trust number II, it is reasonable to infer that such a trust may have existed at one time. However, this Tribunal will not engage in speculation and assume such trust currently exists without supporting credible evidence. Consequently, it is determined that the Epstein Irrevocable Trust was not the owner of the above-mentioned policy.

120. On June 6, 1995, AmerUs issued a $600,000.00 life insurance policy on the life of Mrs. Epstein, policy number 1607414, with the trustee of the Epstein Irrevocable Trust listed as the owner of the policy.

121. Mr. Westman testified that despite making requests to Mr. Shear, AmerUs never received documents from Respondents establishing the existence of the Epstein Irrevocable Trust that is listed on the above-mentioned June 6, 1995 application to be the owner of the above-mentioned policy. The June 6, 1995 application is the only application AmerUs received concerning a $600,000.00 insurance policy on the life of Mrs. Epstein.

122. On July 28, 1995, Mr. Shear signed a policy receipt acknowledging receipt of AmerUs policy number 1607414.

123. It is undisputed that Mrs. Epstein never received a copy of the above-mentioned policy.

124. From June 27, 1995, through December 15, 1998, Mrs. Epstein paid Respondents a total sum of $259,824.00 as premium payments on policy number 1607414.

125. The above-mentioned payments were deposited into Arizona Asset Partner's checking account of titled Arizona Asset Management (Bank of America account number 988027032), in which Mr. Shear is an authorized signatory.

126. AmerUs only received total premium payments of $48,204.65 from Respondents with respect to policy number 1607414.

127. The weight of the evidence of record establishes that Respondents failed to forward a total of $211,619.35 in premiums they received from Mrs. Epstein with respect to policy number 1607414.

128. From February 5, 1997, through June 16, 1999, Mr. Shear requested and obtained several loans from AmerUs against the cash value of policy number 1607414 totaling $141,422.61. With the exception of two loans in the amount of $10,000.00 and $21,322.27, the loan proceeds were applied as premium payments on policy number 1607414. The two checks representing the loans of $10,000.00 and $21,322.27 were issued by AmerUs and deposited into Arizona Asset Management's account. None of those monies were paid or forwarded to Mrs. Epstein.

129. In accordance with their business practice, for all loans taken on policy number 1607414, AmerUs sent correspondence to the owner of policy number 1607414, the trustee of the Epstein Irrevocable Trust, at Respondents' current or former address as noted above.

130. At the time when Mr. Shear had requested the above-mentioned loans, Mrs. Epstein had no knowledge as to such action.

131. On September 16, 1999, at Mr. Shear's request, AmerUs applied policy dividends from policy number 1607414 to pay a quarterly premium on the policy.

132. To date, Respondents have not returned any premium monies to Mrs. Epstein regarding policy number 1607414.

133. On June 6, 1996, Mr. Shear prepared an application for life insurance on behalf of Mrs. Epstein to be issued through American Mutual Life Insurance Company listing the Murray and Cecile Epstein Grandchildren Trust ("Grandchildren Trust") as the owner of the policy.

134. Mrs. Epstein signed the above-mentioned application as the insured and Mr. Shear signed the application representing himself to be the trustee and owner of the policy. The application lists Arizona Asset Management's business address as being the address of the Grandchildren Trust. However, the record lacks credible evidence as to the existence of the Grandchildren Trust.

135. On August 6, 1996, AmerUs issued a $500,000.00 insurance policy on the life of Mrs. Epstein, policy number 161223, with the Grandchildren Trust being the owner of the policy.

136. Over the course of the above-mentioned policy's existence, Mr. Shear obtained loans totaling $76,471.61 against the cash value of policy number 1616223.

137. All of the loans that Mr. Shear obtained on policy number 1616223 were applied as premium payments on the policy.

138. On September 16, 1999, at Mr. Shear's request, AmerUs applied policy dividends from policy number 1616223 to pay a quarterly premium on the policy. The total policy dividends on policies numbered 1616223 and 1607414, that were used as premium payments on the policies, totaled $18,655.00

139. Mrs. Epstein had no knowledge as to the above-mentioned loans or the application of such loans and dividend payments to be applied as premium payments on the policies.

140. On November 6, 1999, policy number 1616223 lapsed for non-payment of premium.

141. The evidence of record establishes that any notices from AmerUs regarding the lapsing of the above-mentioned policy were sent to the "owner of the policy", the trustee of the Epstein Grandchildren's Trust.

Count VIII-Security Life of Denver Policy-the Epsteins

142. On August 17, 1994, upon receipt of an application for a joint survivor life insurance policy on the lives of the Epsteins, Security Life of Denver Insurance Company ("Security Life") issued a $800,000.00 joint survivor policy numbered 106780. On the application, the Epstein Irrevocable Life Insurance Trust was designated as the owner of the policy, with Mr. Shear as trustee.

143. As noted above, the evidence of record reflects the existence of Cecile Epstein Irrevocable Life Insurance Trust II created March 24, 1998, but lacks credible evidence establishing the existence of the Epstein Irrevocable Life Insurance Trust. Consequently, it is determined that the Epstein Irrevocable Trust was not the owner of the above-mentioned policy.

144. During the course of the above-mentioned policy's existence, until mid-August,1996, Mr. Shear forwarded premiums to Security Life on behalf of the Epsteins.

145. From September 3, 1996, through June 21, 1998, Mrs. Epstein provided checks to Mr. Shear totaling $107,146.89 as premium payments for policy number 1067980.

146. The above-mentioned checks were deposited into the above-mentioned Arizona Asset Management account and/or a Bank of America account titled U.S. Life Insurance Marketing, Inc. dba the New England, American Mutual Life, account number 988046145, in which Mr. Shear was an authorized signatory.

147. Around September 1996, Security Life sent a change of address verification letter to the trustee of the Epstein Irrevocable Trust confirming that the address for the Trust had been changed from the Epsteins' residential address to the then business address of Arizona Asset Management.

148. On September 5, 1996, Security Life sent an automatic deduction request form to the Epstein Irrevocable Trust.

149. The evidence of record establishes that only $41,713.31 of the $107,146.89 that Mrs. Epstein provided to Respondents was forwarded to Security Life as premium payments on policy number 1067980. Such money was received from

Respondents by checks or through an automatic deduction from Arizona Asset Management's account. Thus, it is determined that Respondents failed to forward to Security Life a total of $65,433.58 in premiums they received from Mrs. Epstein.

150. The documents Respondents provided to the Department and the Respondents' bank account records do not reflect what happened to the $65,433.58, and Mr. Shear did not present evidence into the record accounting for the money. Therefore, the Administrative Law Judge concludes that the weight of the evidence of record establishes that Respondents illegally withheld such funds and/or misappropriated or converted such funds for their own use.

151. From March 28, 1997, to December 29, 1997, while representing to act under the title of trustee, Mr. Shear obtained several loans against the cash value of policy number 1067980, some of which were applied as premium payments on the policy in the total amount of $33,951.69.

152. Mr. Shear retained the funds from one of the loans taken out against the cash value of policy number 106780, in the amount of $13,658.09, which was deposited into the Arizona Asset Management account with Bank of America. Respondents failed to forward any of that sum to Mrs. Epstein and failed to account to Mrs. Epstein or the Department, and failed to present evidence during the hearing as to what happened to the funds.

153. By such failure to account for the above-mentioned funds, a reasonable inference can be made by the Administrative Law Judge that Respondents illegally withheld, or misappropriated, or converted the funds to their own use.

154. Mrs. Epstein was not informed by Respondents that the above-mentioned loans were being obtained nor did she consent to or authorize such loans.

155. On April 17, 1998, policy number 1067980 lapsed for non-payment of premium.

156. To date, Respondents have not returned any premium monies to Mrs. Epstein.

Count IX-Mrs. Epstein's Long Term Care Policy

157. On November 6, 1997, Mrs. Epstein dealt with William Gardner ("Mr. Gardner"), a life insurance agent who, at that time, was employed by Arizona Asset Management, in obtaining a long term care life insurance policy.

158. Mr. Gardner prepared a proposal for a long term care life insurance policy to be issued by First Penn Pacific Insurance Company ("First Penn"). Mr. Gardner obtained a quote from First Penn for such a policy with a one time premium payment of $100,000.00.

159. On January 21, 1998, Mrs. Epstein presented Mr. Shear with two checks, each in the amount of $50,000.00, made payable to Richard Shear, trustee, as premium payment for the First Penn long term care life insurance policy. Those checks were deposited into Respondents' Arizona Asset Management account.

160. In addition to the above-mentioned proposal, other proposals were obtained for Mrs. Epstein by Respondents for a long term care policy to be issued through First Penn with different premium payments and death benefits. A final proposal was obtained on June 10, 1998, with an annual premium payment of $9,950.00.

161. On February 12, 1998, Mr. Gardner prepared an application for a long term care policy to be issued by First Penn for Mrs. Epstein listing the Epstein Grandchildren Trust as the owner of the policy. Mrs. Epstein signed the application as the insured and Mr. Shear signed the application as the trustee and owner of the policy. Mr. Gardner signed the application as the witness-agent for the policy.

162. On March 16, 1998, First Penn issued a long term care policy on the life of Mrs. Epstein, policy number 193300, having a premium of $52,751.12, with the Epstein Grandchildren Trust designated as the owner of the policy.

163. On June 2, 1998, Mr. Shear forwarded to First Penn a $9,881.61 premium payment via a check from Arizona Asset's Management account for policy number 193300.

164. On June 25, 1998, Respondents sent First Penn an "Amendment to Application" changing the policy's premium to the annual premium of $9,950.00. The amendment was signed by Mr. Shear in the capacity of trustee and owner of policy number 193300. Mrs. Epstein also signed the policy amendment but was informed by Mr. Shear that since she had paid the $100,000.00 premium, she would not have to make any additional premium payments on the policy.

165. The evidence of record established that according to First Penn's records, Mrs. Epstein had paid premiums on policy number 193300 totaling $13,578.40.

166. Respondents failed to forward to First Penn a total of $86,421.60 in premiums they received from Mrs. Epstein on policy number 193300 but instead illegally withheld, or misappropriated, or converted such funds to their own use.

167. To date, Respondents have not returned any of the premium monies to Mrs. Epstein.

Count X-Mary Elizabeth Merritt

168. At all times material to this matter, Mary Elizabeth Merritt ("Ms. Merritt") was also known as Mary Elizabeth McCormick and as Liz Storie.

169. On March 11, 1994, Ms. Merritt, a resident of the state of Oklahoma, met with Mr. Shear to discuss financial planning and investment, including the purchasing of certain investments offered by insurance companies.

170. At the time when Ms. Merritt met with Mr. Shear, she was 23 years old and had inherited $250,000.00 due to the loss of her husband. She was concerned about her financial welfare and that of her children. Ms. Merritt had no financial planning knowledge or experience and relied upon Mr. Shear's advice.

171. After the above-mentioned meeting, Ms. Merritt was informed by Mr. Shear and Paul Sanger ("Mr. Sanger"), an attorney who was an employee of Arizona Asset Partners that, for the suggested investment strategy agreed to by the parties, Ms. Merritt had to provide Respondents with three separate checks made payable to certain insurance companies.

172. Ms. Merritt testified that she tendered three checks to Respondents as follows: a) a check made payable to USG in the amount of $75,000.00; b) a check made payable to the New England in the amount of $75,000.00; and c) a check made payable to US Life in the amount of $100,000.00.

173. In tendering the above-mentioned checks, Ms. Merritt testified that based upon representations made to her by Mr. Shear and Mr. Sanger, she believed that the three payments were being made for the following investments: a) the purchase of a $75,000.00 annuity from USG Annuity & Life Company with a certain rate of return; b) $75,000.00 was to be invested in the New England Mutual Life Insurance Company Zenith Fund; and c) $100,000.00 was to be invested in a cash management account with US Life.

174. In furtherance of the above-mentioned investments, Ms. Merritt completed a New England Variable Life Insurance Company application and received a proposal from Respondents regarding New England Life Insurance Company. Ms. Merritt also completed a USG Annuity & Life Company annuity application.

175. Mr. Shear represented to Ms. Merritt that the $75,000.00 check she provided to Respondents made payable to the New England would be invested in the Zenith Fund of the New England Life Insurance Company. Those funds were not invested in that manner.

176. The evidence of record establishes that New England Life Insurance Company never received an application regarding Ms. Merritt, and never had her funds invested in the Zenith or any other of its funds.

177. Mr. Shear represented to Ms. Merritt that New England Life Insurance Company issued an insurance policy on her behalf, when in fact it had not.

178. The evidence of record established that in March 1994 USG issued a $75,000.00 annuity policy for the benefit of Ms. Merritt.

179. In March 1996, Mr. Shear contacted Ms. Merritt, informed her that USG was in the process of merging with another company, and recommended that she surrender the annuity and transfer the money to another investment.

180. On March 12, 1996, Mr. Shear sent a letter to Ms. Merritt advising her to surrender the above-mentioned USG policy and, having her add $100,000.00 to be derived from another investment known as the Vegas Project, invest that money in an office building. The letter also indicates that an investment would be made into the Fidelity Growth Fund of Travelers Marketlife and a trust account would be set up at Simmons & Bishop for her to receive 5% interest.

181. Mr. Shear sent Ms. Merritt an uncompleted USG withdrawal form for her to sign and return with respect to surrendering the USG annuity. The form was later completed by Mr. Shear and submitted to USG with a request that the surrender check be sent to "Mary E. Merritt c/o Arizona Asset Management" with Arizona Asset Management's then business address.

182. On April 17, 1996, USG sent a check to Mr. Shear, made payable to Ms. Merritt in the amount of $75,505.21 as the surrender value of the annuity policy. Mr. Shear deposited that check into the Arizona Asset Management Account.

183. Mr. Shear advised Ms. Merritt that the surrender monies from the above-mentioned polices and other monies she had invested with Mr. Shear would be used to purchase a 40% interest in an Arizona Asset Management office building.

184. Mr. Shear represented that with the 40% interest in the office building, Ms. Merritt would receive a monthly income interest return of $1,500.00 over the course of 7-10 years beginning in May 1996, and that the building would be sold sometime during that time.

185. On February 21, 1997, Ms. Merritt and Richard Shear, on behalf of Arizona Asset Partners, entered into an investment agreement whereby Ms. Merritt agreed to invest the sum of $150,000.00 with Arizona Asset Partners to be used in the Arizona Asset Partners' office building, and that Ms. Merritt would receive interest of 12% that would be paid at a rate of $1,500.00 per month over a three year period.

186. Mr. Shear had represented to Ms. Merritt that the US Life investment would generate monthly income payments to her in the amount of $1,200.00 per month over a six year period, at the end of that time, the balance would be paid to Ms. Merritt.

187. The evidence of record reflects that monthly payments were being made from checks and/or wire transfers from Respondents' Arizona Asset Management Account and US Life Marketing Account #1 instead of from insurance companies. At that time, Ms. Merritt was unaware that her payments were being made by Respondents.

188. US Life never received an application from Ms. Merritt or in her name and never issued any insurance policy on her behalf nor did it ever receive any monies to be invested in a mutual fund.

189. From time to time between April 1, 1994, and February 21, 1997, Mr. Shear prepared and provided investment portfolio reports to Ms. Merritt containing the status of her accounts with the above-mentioned investments. The reports led Ms. Merritt to believe that her monies were being invested through various insurers, as had been previously represented to her by Mr. Shear.

190. Respondents' records involving Ms. Merritt do not reflect the investments were made in accordance with Mr. Shear's representations that they would be through certain insurers. Further, the accounting of the monies invested and the transferring of funds from one investment to another was not clearly reflected in the documents the Department found in Respondents' file on Ms. Merritt.

191. The evidence of record established that Ms. Merritt has received the sum of $177,081.00 from Respondents. The record also established that Respondents have failed to return to Ms. Merritt the sum of $72,919.00, representing the balance of the initial amount Ms. Merritt provided to Respondents for investment. It is noted that such sum does not take into consideration any loss of investment return that may be due Ms. Merritt.

Count XI-Subpoenas Issued by the Department

192. On November 4, 1999, the Department issued a subpoena duces tecum to Respondents for the production of:

> any and all contracts, agreements, policies, binders, certificates, applications, correspondence, documents, memos, notes, accounting and bank records, receipts, checks, ledgers, and records of premiums and

commissions received pertaining to any insurance or insurance type policies or risks placed with, sold by and or secured in behalf of or solicited by and or from the above-named persons and entities.

193. On November 9, 1999, the Department investigators hand-delivered the above-mentioned subpoena to Mr. Shear for the immediate production of the documents set forth in the subpoena.

194. During the above-mentioned on-site inspection of Respondents' records, Mr. Shear did not produce all of the files requested by the Department. With respect to the Laues' file, Mr. Shear referred the investigators to Mr. Sanger.

195. The evidence of record established that upon contacting Mr. Sanger, the Department's investigators were provided with the Laues' file.

196. The Department requested certain client files of Respondents and, despite representations made by Mr. Shear that they would be produced by November 10, 1999, those files were not produced.

197. Ms. Futrell testified that during the on-site inspection, Mr. Shear went to the file room to obtain the requested documents. Ms. Futrell observed Mr. Shear attempting to remove certain documents from the requested files claiming that they were unrelated to insurance matters. When confronted by the Department's investigators, Mr. Shear produced documents representing them to be the documents he had removed from the files. However, files that were reviewed by the Department's investigators contained incomplete documents and documents were missing that would be kept by insurance agents in their normal course of business.

198. On November 15, 1999, the Department issued a subpoena duces tecum to Respondents, Arizona Asset Management, Inc. and Arizona Asset Administrators. The subpoena was hand-delivered to them on November 15, 1999, with a return date of November 18, 1998, for the production of specified documents.

199. The November 15, 1999, subpoena addressed the following: a) Pasquale and Carol Nunzio, b) Evelyn Simmons; c) Richard Laue; d) Charles Thomas; d) Bank of

America account numbers 252533892, 988027032, and 252532689; and e) Bank One account number 07595465.

200. The documents requested in the subpoena were:

> any and all contracts, agreements, policies, binders, certificates, applications, correspondence, documents, memos, notes, receipts of payment and records of premiums and commissions received pertaining to any insurance or insurance type policies or risks placed with, sold by, or secured in behalf of or solicited by and or from the individuals or entities named above and copies of all monthly account statements, checks (front and back) written on and deposit slips for, each of the above-listed bank accounts from January 1,1998, through October 31, 1999.

201. Mr. Shear is listed as the signatory on the four bank accounts listed in the above-mentioned subpoena.

202. To date, Respondents have not presented to the Department all of the documents requested in the above-mentioned subpoenas and have failed to fully comply with the subpoenas.

CONCLUSIONS OF LAW

1. Throughout the hearing, Mr. Shear raised as a defense to the allegations set forth in the Notice of Hearing that he created trusts for certain clients as an estate planning tool whereby he was the trustee and owner of the life insurance policies that funded the trusts.

2. An insurance agent is accountable to clients for the insurance products that they attempt to procure through the agent. Further, an insurance agent is accountable to clients for the premiums, if any, that are provided to the agent by the clients.

3. When an insured initially procures an insurance policy and appoints the insurance agent as a trustee of an irrevocable trust that owns the policy, in order to obtain the tax benefits of such trust, which is the reason that such a trust would be created, the client must not retain any control over the trust. If the appointment of the agent as trustee of such a trust is made, then the insurance agent bears the responsibility of paying the premiums on the insurance policies, and under the general powers of a trustee unless specifically excluded in the trust document, the trustee has

the authority to take out loans against the insurance policies, is responsible for paying the premiums on the policy, and has the right to surrender the policy. In that capacity, the trustee has no duty to inform the client who initially purchased the policy, who is in most cases the insured, as to the status of the policy or account regarding the premiums. The trustee's duty would be to the beneficiaries of such policies, which, in order to maintain the tax advantages would be an individual other than the client. However, the duties of the insurance agent would require an accounting and disclosure to the client who had procured the policy.

4. The Administrative Law Judge concludes that in a situation such as the one described above, i.e., having an insurance agent who sells insurance policies that fund irrevocable trusts also serve as trustee of those trusts, creates an inherent conflict of interest as to duties of the trustee to beneficiaries versus the duties of an insurance agent to the client.

5. In the situations set forth above, where trusts appear to be involved, the evidence of record established that Mr. Shear represented and created the appearance that trusts were created. Thus, Mr. Shear put the force in motion to have complete control over his clients' funds and placed himself in a conflict situation.

6. The evidence of record fails to establish appropriate disclosures and consents with respect to such conflict. The actions taken by Mr. Shear with respect to the Laues, Mrs. Epstein, and Ms. Merritt were violative of an insurance agent's fiduciary duties to his clients and contrary to law. While questions have been raised concerning whether Mr. Shear violated his duties as a trustee, such issues are not appropriately before this Tribunal and no determinations are made with respect to such matters.

7. Mr. Shear placed himself in a position of trust with his clients and took advantage of his fiduciary capacity of acting as an insurance agent to benefit himself and the Respondents to the detriment of Respondents' clients.

8. The evidence of record fails to establish that the Laues, the Epsteins, or Ms. Merritt ever understood why the applications for the purchase of whole life insurance policies and/or annuities contained references to certain trusts, whether the trusts ever

existed, or why Richard Shear signed the applications as trustee and owner of the policies.

9. Mr. Shear advised the above-mentioned clients that it was in their best interests to submit the applications for life insurance in the above-described manner without explaining to them that, if the trust owns the property, and he or another person or entity acts as trustee, the clients would not have any control over the life insurance or annuity policies and there would be no accounting to them by the trustee. It is unclear to this Administrative Law Judge whether Mr. Shear's failure to properly advise his clients was intentional or negligent. However, what is evident is that Mr. Shear did not properly advise his clients and provided misinformation to them concerning the existence of trusts, insurance policies, other investments in certain insurance products, the status of those investments, and the location of clients' funds and premium payments as detailed in the above Findings of Fact.

10. The situations detailed in the above Findings of Fact as to Mr. Shear's abuse of his position as an insurance agent are disturbing because Respondents have improperly withheld retirement funds from elderly individuals like the Laues who needed that money to live comfortably in their retirement years and preyed on the inexperience of a young widow like Ms. Merritt who had no knowledge as to what to do with her money that she wanted preserved and invested for her family's future. Further, Respondents betrayed the trust placed in Mr. Shear by an elderly couple, Mr. and Mrs. Epstein, with respect to their life savings that they wished to invest and preserve.

11. The evidence of record also establishes a pattern of conduct whereby Respondents, through Mr. Shear, purportedly created trusts, though none of the trust documents reflected in the applications for life insurance of the individual clients that are involved in this matter were ever produced or shown to exist.

12. The evidence of record also establishes that Respondents engaged in a pattern of conduct of rebating insurance premiums whereby Respondents could obtain large commissions and bonuses at the expense of insurance carriers and allow certain

individuals to have insurance coverage free for one year before letting the insurance policies lapse for non-payment of premium.[1]

13. During the hearing, Respondents failed to display any remorse over the actions set forth above, and failed to present credible evidence in defense or in mitigation of the allegations set forth in the Notice of Hearing that were proven by the Department.

14. Respondents' conduct, as set forth in the above Findings of Fact, constitute the wilful violation of, or the wilful noncompliance with, any provision of A.R.S. Title 20, or any lawful rule, regulation or order of the Director, in violation of A.R.S. §20-316(A)(2).

15. Respondents' conduct, as set forth in the above Findings of Fact, constitutes the misappropriation or conversion to their own use, or illegal withholding of monies belonging to policyholders, insurers, beneficiaries or others received in or during the conduct of business under Respondents' licenses or through their use, in violation of A.R.S. §20-316(A)(4).

16. Respondents' conduct, as set forth in the above Findings of Fact, constitutes the making or issuing, or causing to be made or issued, any estimate, illustration or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised within the meaning of A.R.S. §20-443(1).

17. Respondents' conduct, as set forth in the above Findings of Fact, constitutes the making or issuing, or causing to be made or issued, any estimate, illustration or statement using any name or title of any policy misrepresenting the true nature of such policy within the meaning of A.R.S. §20-443(4).

18. Respondents' conduct, as set forth in the above Findings of Fact, constitutes the making or issuing, or causing to be made or issued, any estimate, illustration or statement making any misrepresentation to any policyholder for the purpose of inducing

---

[1] Although Mr. Westman testified that it is not appropriate for an insurance agent to make premium payments on behalf of clients, Mr. Westman did not explain how or why AmerUs accepted such payments from Respondents in the various situations set forth in the above Findings of Fact. However, the activities of AmerUs are not at issue herein.

or tending to induce such policyholder to lapse, forfeit, surrender, retain or convert any insurance policy, in violation of A.R.S. §20-443(5).

19. Respondents' conduct, as set forth in the above Findings of Fact, constitutes the making, or causing, directly or indirectly, to be made any statements containing any assertions, representations, or statements with respect to the business of insurance, which are untrue, deceptive or misleading, within the meaning of A.R.S. §20-444(A).

20. Respondents' conduct, as set forth in the above Findings of Fact, constitutes knowingly paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as an inducement to any contract of life insurance, life annuity or disability insurance, any rebate of premiums payable on the contract, within the meaning of A.R.S. §20-449.

21. Respondents' conduct, as set forth in the above Findings of Fact, constitutes fraud within the meaning of A.R.S. §20-463(1) and (4).

22. Respondents' conduct, as set forth in the above Findings of Fact, constitutes a conduct of affairs under their insurance license showing them to be incompetent or a source of injury and loss to, or repeated complaints by, the public or any insurer, within the meaning of A.R.S. §20-316(A)(7).

23. The licenses of Arizona Asset Partners I, Inc. may be suspended, revoked or refused for any cause related to Mr. Shear, an individual designated in its insurance licenses to exercise its powers, pursuant to A.R.S. §20-316(B).

24. Grounds exist for the Director of the Department to suspend, revoke or refuse to renew the Respondents' insurance licenses, impose a civil penalty upon Respondents and/or order restitution, pursuant to A.R.S. §§20-316(A), 20-316(B), 20-316(C), and 20-456(B).

RECOMMENDED ORDER

Based on the above, it is recommended that all insurance licenses issued by the Arizona Department of Insurance to Respondents be revoked and that, within 45 days from the effective date of the Order entered in this matter by the Director of the

Department, Respondents are each responsible to make restitution payments to certain individuals in the amounts as set forth below:

Cecile Epstein-----$2,035,091.22

Richard Laue-------$160,000.00

Elizabeth Merritt---$72,919.00

Done this day, November 9, 2000.

Lewis D. Kowal
Administrative Law Judge

Original transmitted by mail this 9 day of November, 2000, to:

Department of Insurance
Charles R. Cohen
2910 North 44th Street, Ste. 210
Phoenix, AZ 85018

ATTN: Curvey Burton

By Chris Crawford Thomison