STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT
Case Type: OTHER-CIVIL

Court File No. 27-CV-08-3025
Judge Cara Lee Neville

State of Minnesota, by its Attorney General, Lori Swanson,

Plaintiff,

vs.

Aviva USA Corporation f/k/a AmerUs Group Co., American Investors Life Insurance Company, and Aviva Life and Annuity Company f/k/a AmerUs Life Insurance Company,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

This case is about protecting elderly Minnesota citizens from abuses in the sale of long-term deferred annuities. Because deferred annuities restrict access to the person's money for years unless costly surrender penalties are paid, they are unsuitable for some elderly people. Exercising her constitutional, statutory, and common law authority, the Minnesota Attorney General sued AmerUs[1] to remedy abuses by the insurance company.

AmerUs argues that the lawsuit should be dismissed under principles of res judicata because it entered into a voluntary Consent Order with the Minnesota Department of Commerce ("DOC") two months *after* it became aware that the Attorney General was investigating its

[1] Unless otherwise indicated, "AmerUs" shall collectively refer to all of the defendants, which include Aviva USA Corporation f/k/a/ AmerUs Group Co. ("Aviva USA"), American Investors Life Insurance Company ("American Investors"), and Aviva Life and Annuity Company f/k/a AmerUs Life Insurance Company ("AmerUs Life"). American Investors and AmerUs Life are subsidiaries of Aviva USA. Complaint at ¶ 8.

practices. Because res judicata does not apply for multiple, distinct reasons, AmerUs' motion should be denied.

STATEMENT OF ISSUES

1. The principles of res judicata do not apply to the Attorney General's lawsuit against AmerUs.

DOCUMENTS COMPRISING THE RECORD

1. Attorney General's Complaint.
2. August 14, 2007 Consent Order attached to the Affidavit of Thomas F. Pursell ("Pursell Aff.").
3. Documents attached to the Affidavit of James W. Canaday ("Canaday Aff.").
4. Affidavits of Muriel Berglund, Joyce Rutzen, Audrey Zachow, Lyle Holm, Bernadette Kellogg and Richard Hofker.

STATEMENT OF FACTS

I. ABUSES IN THE SALE OF LONG-TERM DEFERRED ANNUITIES TO SENIOR CITIZENS HAVE RECEIVED NATIONAL SCRUTINY.

There are a lot of senior citizens in this country and, with the aging of the baby boomers, there are going to be even more in the future. The number of senior citizens in the United States in 2030 is projected to be twice as large as in 2000, growing from 35 million to 72 million and representing nearly 20 percent of the total U.S. population.[2] By some estimates, two-thirds of the individual wealth in the United States is owned by people over the age of 55.[3] Because many senior citizens have been able to save up a nest egg for retirement, they are sometimes targeted with the sale of unsuitable financial products or misleading sales practices.

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[2] Wan He et al., U.S. Census Bureau, Current Population Reports, P23-209, *65+ in the United States: 2005*, U.S. Government Printing Office, Washington, DC (2005), at 1.

[3] *See* Ken Dychtwald, Ph.D., *How the 21st Century Will be Ruled by the New Old* (1999).

One area where this has occurred is the sale of long-term, high surrender fee deferred annuities to senior citizens. Deferred annuities are different than immediate annuities.[4] Immediate annuities typically require the policyholder to make an initial lump sum payment in exchange for guaranteed periodic payments over time, which generally begin immediately or shortly after the purchase date.[5] By contrast, a deferred annuity requires a long-term investment strategy because it restricts access to the person's money until the expiration of what may be lengthy surrender periods.[6] AmerUs sold annuities to senior citizens which imposed surrender penalties for as long as 10 to 15 years.[7] AmerUs' deferred annuities impose penalties for early withdrawal of as much as 18 percent of the annuity's value.[8] A senior citizen who cashed in a $100,000 deferred annuity for which an 18 percent surrender penalty is imposed would lose $18,000.

Many elderly people live on fixed incomes and modest assets and, as they age, they need access to their savings to pay for health care expenses, pharmaceuticals, living expenses, and the like. Some elderly people simply cannot afford to have their money tied up for so many years or, if they need to access the money, to forfeit a substantial portion of their net worth for cashing in a deferred annuity early. As a result, deferred annuities are unsuitable for some senior citizens. Abuses in the sale of long-term annuities to the elderly have garnered significant national scrutiny in recent years.[9] For example, on September 5, 2007, the United States Special Committee on

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[4] Complaint at ¶ 11.
[5] *Id.*
[6] *Id.* at ¶ 1.
[7] *Id.* at ¶ 12. Notably, even AmerUs does not contend that all its annuities sales to the elderly were suitable. For example, in footnote 4 of its memorandum, AmerUs contends no more than that the "vast majority" were suitable and not misrepresented.
[8] *Id.* at ¶ 1.
[9] *See, e.g.*, New York Times, "*Who's Preying On Your Grandparents?*" May 15, 2005, attached as State's Ex. 1 to Canaday Aff.; New York Times, "*For Elderly Investors, Instant Experts Abound,*" July 8, 2007,
(Footnote Continued on Next Page)

Aging held hearings on the abuses in this area.[10] Just a week ago, on April 13, 2008, Dateline NBC aired an hour-long segment called "Tricks of the Trade" that exposed some of the abuses that occur in the sale of deferred annuities to the elderly.[11]

II. THE MINNESOTA ATTORNEY GENERAL HAS FILED MULTIPLE LAWSUITS AGAINST INSURANCE COMPANIES TO REMEDY ABUSES IN THE SALE OF DEFERRED ANNUITIES TO THE ELDERLY.

To hear AmerUs tell it, the company is somehow being treated unfairly because it was sued. In fact, the Office of the Minnesota Attorney General ("OAG") has filed four lawsuits in the last year and one-half against insurance companies for their unlawful practices in connection with the sale of long-term deferred annuities to the elderly. These lawsuits include claims that the annuities were misrepresented and/or were unsuitable. The OAG's investigation of AmerUs was pending at the time the insurance company entered into a Consent Order with the DOC. The OAG has reached settlements with AmerUs' #1 and #3 competitors and has an ongoing lawsuit pending against its #4 competitor. AmerUs is the second biggest seller of these annuities.

1. The OAG's Litigation against AmerUs' Main Competitors.

At the time AmerUs entered into the Consent Order with the DOC on August 14, 2007, AmerUs was well aware of the OAG's pending litigation against its major competitors. For example, on January 9, 2007—eight months before AmerUs signed the Consent Order with the DOC—the OAG filed a lawsuit against Allianz Life Insurance Company of North America

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attached as State's Ex. 2 to Canaday Aff.; Los Angeles Times, "*Retirement at Risk*," April 24, 2006, attached as State's Ex. 3 to Canaday Aff.

[10] *See* United States Senate, Special Committee on Aging, "*Advising Seniors About Their Money: Who is Qualified—and Who Is Not?*" (Sept. 5, 2007) (transcripts and video available at http://aging.senate.gov/hearings.cfm); Washington Post, "*Investment Pitches Prey on Elderly*," September 5, 2007, attached as State's Ex. 4 to Canaday Aff.

[11] *Dateline: Tricks of the Trade* (NBC television broadcast Apr. 13, 2008) (transcripts and video available at http://www.msnbc.msn.com/id/24095230/), transcript attached as State's Ex. 5 to Canaday Aff.

("Allianz"), the country's then-largest seller of deferred annuities to senior citizens.[12] That litigation was settled on October 8, 2007.[13] The OAG settlement provides for full notice and restitution to injured policyholders, meaningful and detailed injunctive relief to alter the company's practices going forward, and a monetary payment to the OAG of $500,000. Even though the OAG and Allianz reached a settlement, DOC continues to conduct a market conduct examination of Allianz's practices in connection with the sale of annuities.[14]

Similarly, on April 26, 2007—four months before AmerUs entered into the Consent Order with the DOC—the OAG filed a lawsuit against American Equity Investment Life Insurance Company ("American Equity"), the then-third largest seller of deferred annuities to senior citizens.[15] That litigation was settled on February 7, 2008.[16] The American Equity settlement provides the same full notice and restitution to injured consumers and meaningful and detailed injunctive relief to change the company's practices going forward as the Allianz settlement, and a monetary payment to the OAG of $250,000. The OAG has also filed a pending suit against Midland National Life Insurance Company, the country's fourth largest seller of deferred annuities to senior citizens.[17]

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[12] *State v. Allianz Life Ins. Co. of North America*, Hennepin County Ct. File No. 27-CV-07-581 (filed Jan. 9, 2007). *See* Allianz Complaint, attached as State's Ex. 6 to Canaday Aff.

[13] *See* Allianz Consent Judgment, attached as State's Ex. 7 to Canaday Aff.

[14] Star Tribune, "*Allianz to pay $10 million to settle lawsuit,*" February 15, 2008, attached as State's Ex. 8 to Canaday Aff. Indeed, in accordance with applicable law, the AGO settlement did not preclude such regulatory action by the DOC. (providing that AGO settlement with Allianz did not release claims of DOC).

[15] *State v. American Equity Inv. Life Ins. Co.*, Hennepin County Ct. File No. 27-CV-07-8236 (filed Apr. 26, 2007). *See* American Equity Complaint, attached as State's Ex. 9 to Canaday Aff.

[16] *See* American Equity Amended and Restated Consent Judgment, attached as State's Ex. 10 to Canaday Aff.

[17] *State v. Midland Nat'l Life Ins. Co.*, Hennepin County Ct. File No. 27-CV-07-24362 (filed Nov. 29, 2007).

2. The OAG's Investigation of AmerUs Pre-Dated the Company's Consent Order with the DOC.

AmerUs knew that it was being actively investigated by the OAG at the time it signed the Consent Order with the DOC. Indeed, AmerUs appears to have tried to "run the clock" on the OAG's investigation so that it could first reach a deal with the DOC.

On June 26, 2007 the OAG served a Civil Investigative Demand ("CID") (which is akin to a civil investigative subpoena) on AmerUs.[18] The CID asked for detailed information about the insurer's annuities sales practices in Minnesota. AmerUs was required by statute to respond to the CID in 20 days, or by July 16, 2007.[19] Instead of doing so, on July 12, 2007 AmerUs' counsel asked the OAG for an extension until July 30, 2007, which the OAG granted.[20] On July 31, 2007 AmerUs made an extraordinarily lackluster production.[21] On August 9, 2007, the OAG pointed out the gross deficiencies and asked for full production by August 16, 2007.[22] On August 14, 2007, AmerUs signed a Consent Order with the DOC.

AmerUs is no stranger to litigation over its annuities sales practices. The insurer currently has 14 lawsuits pending against it which are consolidated as multidistrict litigation ("MDL") in the Eastern District of Pennsylvania.[23] The MDL consolidation order states that: "[t]hese actions share allegations that the defendants are and were involved in improper marketing of estate or financial planning services to senior citizens solely to obtain financial information in order to

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[18] *See* CID, served June 26, 2007, attached as State's Ex. 11 to Canaday Aff.
[19] Minn. Stat. § 8.31, subd. 2(a) (2007).
[20] *See* letter from AmerUs' counsel, Thomas Pursell, to Assistant Attorney General Ian Dobson dated July 16, 2007, attached as State's Ex. 12 to Canaday Aff.
[21] *See* letter from AmerUs' counsel, Thomas Pursell, to Assistant Attorney General Ian Dobson dated July 31, 2007, attached as State's Ex. 13 to Canaday Aff.
[22] *See* letter from Assistant Attorney General Ian Dobson to AmerUs' counsel, Thomas Pursell, dated August 9, 2007, attached as State's Ex. 14 to Canaday Aff.
[23] *In re: American Investors Life Ins. Co. Annuity Mktg. and Sales Practices Litig.*, MDL Docket No. 1712 (E.D. Pa.).

target prospective purchasers of deferred annuities, and then sell them deferred annuities, regardless of whether deferred annuities were suitable for those persons."[24] AmerUs has also been sued in the recent past by the Attorneys General of Illinois and California.[25]

III. AMERUS' CONDUCT HARMED THE ELDERLY.

1. The AFLP/Heritage Living Trust Mill.

One particularly deplorable yet effective way that unsuitable deferred annuities are sometimes sold to senior citizens is through "living trust mills." The use of "living trust mills" to sell annuities to the elderly has garnered significant national attention.[26] The use of living trusts as a guise to sell annuities was not mentioned in or addressed by the Consent Order. One of the reasons the living trust scheme is so effective is that the insurance agent already has access to the senior's financial information as a result of the sale of the trust and can use the information to pitch the annuity.

On March 7, 2007 the OAG sued one such living trust mill: American Family Prepaid Legal Corporation ("AFLP") and Heritage Marketing and Insurance Services, Inc. ("Heritage").[27] AFLP/Heritage have also been sued by the Attorneys General of North Carolina and Pennsylvania.[28] AFLP sells the living trust, and Heritage is an insurance agency that delivers the

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[24] Transfer Order, MDL Docket No. 1712 (E.D. Pa) (filed Oct. 25, 2005), at 2, attached as State's Ex. 15 to Canaday Aff.

[25] *State of Illinois v. American Investors Life Ins. Co. et al.*, Sangamon County Cir. Ct. (IL); *State of California v. American Investors Life Ins. Co. et al.*, Los Angeles County Super. Ct. Case No. BC328584.

[26] *See, e.g.*, Wall Street Journal, "*Marketers Use Trickery to Evade No-Call Lists*," October 26, 2007, attached as State's Ex. 16 to Canaday Aff.; *see also* State's Ex. 3; United States Senate, Special Committee on Aging, "*Advising Seniors About Their Money: Who is Qualified—and Who Is Not?*" (Sept. 5, 2007) (transcripts and video available at http://aging.senate.gov/hearings.cfm).

[27] *State v. American Family Prepaid Legal Corp. et al.*, Hennepin County Ct. File No. 27-CV-07-4102 (filed March 7, 2007).

[28] *See* State's Ex. 16 to Canaday Aff.

trust and then sells the annuities.[29] AFLP and Heritage are a father and son team.[30] Stanley Norman and his son Jeffrey Norman (the "Normans"), both of California, are the owners, directors, and executives of AFLP and Heritage.[31] The OAG filed its lawsuit against AFLP/Heritage five months before AmerUs entered into the Consent Order with DOC.[32]

The OAG's AFLP/Heritage lawsuit alleges that the companies targeted seniors with in-home presentations in which they exaggerated the costs and pitfalls of probate.[33] Upon scaring the senior that they would lose their money to probate, they sold the senior citizens boilerplate living trusts for $2,000. Under the false pretense of delivering the living trust to the senior, they then aggressively attempted to sell the senior unsuitable annuities.[34] The agents who delivered the living trusts were expected to sell an average of $25,000 in annuities for each trust delivered.[35] In June, 2007, AFLP/Heritage agreed to a preliminary injunction to cease all living trust and annuities sales in Minnesota.[36] AFLP has now filed for bankruptcy in California.[37] As a result, most of its victims are out thousands of dollars and have not yet been made whole.

Heritage, the insurance agency arm of the AFLP/Heritage scheme, distributed to its sales agents a training manual on how to sell annuities. The training manual teaches similar "tricks of the trade" as were featured in the recent Dateline NBC exposé. For example, among other things, the Heritage training manual advised its sales agents to:

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[29] *See American Family Prepaid Legal Plan* Complaint, attached as State's Ex. 17 to Canaday Aff., at ¶¶ 1-2.
[30] *Id.* at ¶ 7.
[31] *Id.*
[32] The OAG's Civil Investigative Demand to AmerUs, served two months before AmerUs entered into the DOC Consent Order, inquired into the AFLP living trust mill. *See* Canaday Aff. Ex. 11 at Doc. Req. # 19.
[33] *Id.* at ¶ 1.
[34] *Id.* at ¶ 11.
[35] *Id.* at ¶ 34.
[36] *See* AFLP Consent Preliminary Injunction, attached as State's Ex. 18 to Canaday Aff.
[37] *In re American Family Prepaid Legal Plan Inc.*, Case No. 8:07-6K-13777-RK (Bankr. C.D. Cal.) (filed Nov. 12, 2007).

> Never ask a closing question like "What do you think?" or "Would you like to sign up for the plan?" These are yes/no questions that never work. Remember the prospective client does not want to buy anything. Questions like these rarely lead to sales. Instead, always assume the close.[38]

The Heritage training manual also instructs the annuities sales agents how to mislead the elderly about the nature of an annuity:

> It is actually a product that is very similar to the concept of having a savings account at the bank. You basically place your money into this product and begin earning interest. There are no fees or charges to open up the account. Now the only main difference is that instead of having this account with the bank or a credit union, this money is actually with an insurance company.[39]

Heritage also trained its agents how to overcome objections the elderly may have about buying an annuity, such as: "I want to talk to my kids." Heritage suggests that the agent respond to that question as follows:

> I don't understand. This is simple. Remember all we're talking about here is basically like opening up a savings account. Taking your money and moving it from one safe place to another better safe place. It doesn't cost you a dime to move it. I mean we're not talking about investing your whole life savings in some oil rig in Texas. In that case you better talk to your kids about it. You have already stated that Option #2 [buying an annuity] was the best choice, and you already know that Option #1 is your current situation. Mr. and Mrs. Smith, in my professional opinion, and I meet with folks just like yourselves every day, day in and day out, this is the absolute best decision you could ever make for yourself. So let's get this going. It will only take a few minutes to get this done here. [Agent is then instructed to: "Immediately begin completing the application paperwork."][40]

2. AmerUs Funded the AFLP/Heritage Trust Mill and Benefited From Its Sale of Annuities to the Elderly.

Insurance companies often like to claim that agents who make the unsuitable sales from which they handsomely profit are simply "rogue agents." AmerUs can't do that here. AmerUs,

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[38] Heritage Marketing, "*Agent Training Materials,*" attached as State's Ex. 19 to Canaday Aff., at 3.
[39] *Id.* at 11.
[40] *Id.* at 14-15.

acting through its CEO, General Counsel, and other top executives, funded the operation of the AFLP/Heritage trust mill and was fully informed about its dubious methods of operations.

AmerUs' close relationship with the Normans and their companies dates back to at least 1999. In October, 1999, for example, Heritage bragged to Mark Heitz, AmerUs' CEO, that: "We are pleased to announce that we set a new record nationally last week for In-Home sales. Our gross volume for the last two weeks has been $6.2 million."[41] Heritage advised AmerUs at that time it would produce annuity business for the insurer in Minnesota by May, 2000.[42]

By the year 2000, the Normans and Mr. Heitz, AmerUs' CEO, were negotiating what became a series of operating loans by AmerUs to the trust mill and insurance agency.[43] AmerUs knew about and/or controlled detailed aspects of the Normans' businesses, such as the legal and ownership structure, hirings and firings, employee salaries, overhead, expansion plans, areas of operation, and the like.[44] At one point in August, 2000, AmerUs' General Counsel agreed to lend the Normans an additional $350,000, so long as: "American Investors Life Insurance Company, Inc. will be the exclusive insurance company used by Heritage Marketing for all annuity and/or insurance sales."[45] By 2001, AmerUs had loaned AFLP/Heritage over $1,000,000.[46] The

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[41] Letter from Brad Chrustawka, Managing Director for Heritage Marketing and Insurance Services, to Mark V. Heitz, President and Chief Executive Officer for American Investors Life Insurance Company, dated October 5, 1999, with related notes, attached as State's Ex. 20 to Canaday Aff.

[42] *Id.*

[43] *See* letter from Mark Heitz and Tom Fogt to Stan Norman and Jeff Norman, dated April 19, 2000, attached as State's Ex. 21 to Canaday Aff.; American Investors Life Insurance Company, Inc./Heritage Marketing Credit Agreement Term Sheet, attached as State's Ex. 22 to Canaday Aff.; Memorandum from Mike Miller to Jeff Norman and Stan Norman, dated May 8, 2000, attached as State's Ex. 23 to Canaday Aff.; Memorandum from Mark Heitz to Jeff Norman and Stan Norman, dated May 9, 2000, attached as State's Ex. 24 to Canaday Aff.; Letter from Michael H. Miller, Executive Vice President and General Counsel for American Investors Life Insurance Company, to Stan Norman, Jeff Norman, and Roger Kruse, Heritage Marketing and Insurance, dated August 10, 2000, attached as State's Ex. 25 to Canaday Aff.

[44] *See id.*

[45] *See* State's Ex. 25 to Canaday Aff.

financing continued in later years. For example, in 2004, AmerUs' CEO agreed to pay $60,000 toward the cost of a consultant to advise the Normans' companies.[47] Indeed, by 2004, AmerUs even contemplated buying AFLP/Heritage for up to $25 million.[48]

AmerUs' financing of the Normans' companies had impact. In November, 2005, for example, Jeff Norman wrote to Mr. Heitz, AmerUs' CEO, that: "...I wanted to stop and take a moment to personally thank you for your decision to loan the money in the first place. My company would no longer be in existence if not for that 'emergency' loan....I will be forever in your gratitude."[49]

AmerUs was so busy financing AFLP/Heritage to sell annuities on the insurer's behalf that it disregarded the insidiousness of the marketing scheme. On July 13, 2000, a former employee of AFLP/Heritage sent to Mr. Heitz, AmerUs' CEO, a letter marked, "Please read it, for what it's worth, and destroy the letter."[50] The letter acknowledged how "you personally, supported [the company] with new location funding and currently with the $700,000 loan," which have "allowed the company to currently survive in the marketplace."[51] The letter describes the Normans' "business formula" as "fairly simple": it starts by "Hav[ing] the right number of

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[46] Letter from Michael H. Miller, Executive Vice President and General Counsel for American Investors Life Insurance Company, to Stan Norman and Jeff Norman, Heritage Marketing and Insurance, dated March 16, 2001, attached as State's Ex. 26 to Canaday Aff.

[47] Letter from Jeffrey L. Norman, Chief Executive Officer for American Family Prepaid Legal Corporation, to Mark Heitz, President and Chief Executive Officer for American Investors Life Insurance Company, dated April 15, 2004, attached as State's Ex. 27 to Canaday Aff.

[48] *See* draft letter from Mark Heitz, President and Chief Executive Officer for American Investors Life Insurance Company, to Stanley and Jeffrey Norman, Heritage Marketing and Insurance, attached as State's Ex. 28 to Canaday Aff.

[49] Letter from Jeffrey L. Norman, President for Heritage Marketing and Insurance, to Mark Heitz, AmerUs Annuity Group, dated November 16, 2005, attached as State's Ex. 29 to Canaday Aff.

[50] Letter from Paul Chaklos to Mark Heitz, AmVestors Financial Corporation, dated July 13, 2000, at 3, attached as State's Ex. 30 to Canaday Aff.

[51] *Id.* at 1.

Paralegals hired and trained per lead drop" and by "Giv[ing] each Paralegal 10-12 appointments per week and expect[ing] 1.5 to 2 trust [sic] sold weekly."[52] The company would then "Have delivery agents hired and trained to deliver Trust and sell annuities."[53] The letter explained that, to break even, "The trusts sold must generate an average annuity premium of $25,000 each."[54]

In June, 2004 AFLP/Heritage gave AmerUs a draft of its Strategic Business Plan.[55] The plan describes how AFLP will first sell the senior citizen a living trust, followed by an AmerUs annuity sale by Heritage. The plan notes that, "Heritage sells annuities and other financial products, as offered by third party insurance companies such as AmerUs. Heritage has a strong relationship with AmerUs and is a strong distributor of their products."[56] The plan states that, "The primary target market is senior citizens aged 65 and up,"[57] a market which "continues to grow with the aging of the baby boomers."[58] The plan describes how the annuities are marketed:

> Our primary sales approach utilizes sales representatives of the company, by having a direct meeting between the [AFLP] representative and the prospective client. Through this initial consultation, we propose a low cost comprehensive legal plan. This is our lead product offer, which creates the opportunity for us to present a wide range of financial products.
>
> To help create the distinction for the client, [AFLP] sells the legal plan and a Heritage representative will deliver the client's completed estate plan and propose alternative financial products.
>
> There is a direct correlation in sales and income between the growth in legal plan sales and the growth in premiums funded.[59]

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[52] *Id.*
[53] *Id.*
[54] *Id.* at 2.
[55] *See* selected pages of American Family Prepaid Legal Corporation and Heritage Marketing & Insurance Services Inc., "*Strategic Business Plan 2004-2008*," dated June 2004, at 1, attached as State's Ex. 31 to Canaday Aff.
[56] *Id.* at 4.
[57] *Id.* at 7.
[58] *Id.* at 8.
[59] *Id.* at 29.

What was the greatest risk posed by the scheme, according to the Strategic Business Plan: "Investigations initiated by local and state authorities."[60]

The relationship between AmerUs and AFLP/Heritage grew in 2005. In January, 2005, for example, Stan Norman thanked AmerUs' CFO for the joint launching of a new program in Minnesota and other states to retain "orphan business" (i.e. policyholders who no longer had an agent assigned to them).[61] By August, 2005, Stan Norman was bragging to AmerUs' CEO that the company "is on track to write 300 million in 2005" and that its "relentless drive to improve our operations, have and will likely continue to pay dividends for us and AmerUs Group."[62]

The aggressive sales tactics had consequences for Minnesota seniors like Muriel Berglund, 83, a retired farmer from Litchfield, Minnesota.[63] Ms. Berglund's husband died six years ago.[64] In 2005, when she was 81, AFLP/Heritage convinced Ms. Berglund to pay $2,000 for a living trust.[65] At the time, Muriel had about $30,000 in liquid assets.[66] After gaining access to Ms. Berglund's finances through the sale of a living trust, the AFLP/Heritage agent advised her to put all of her money into an AmerUs annuity.[67] She agreed to place $20,000—about two-thirds of her liquid net worth—into the annuity.[68] She did not learn about the surrender charges until after viewing the recent Dateline NBC exposé on the improper sales of deferred annuities.[69]

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[60] *Id.* at 8.
[61] Letter from Stanley Norman to Mark Hammond, Vice President and Chief Financial Officer for AmerUs Annuity Group Company, dated January 20, 2005, attached as State's Ex. 32 to Canaday Aff.
[62] Letter from Stanley Norman and Richard Boemer to Mark Heitz, dated August 1, 2005, attached as State's Ex. 33 to Canaday Aff.
[63] Affidavit of Muriel Berglund at ¶ 1.
[64] *Id.*
[65] *Id.* at ¶ 3.
[66] *Id.* at ¶ 4.
[67] *Id.* at ¶¶ 4, 5.
[68] *Id.* at ¶ 5.
[69] *Id.* at ¶ 6.

Besides the money in the annuity, Ms. Berglund now has $5,000 in liquid assets.[70] Ms. Berglund wants access to her money but cannot afford to incur the hefty surrender charges.[71]

3. AmerUs Also Works With Other Living Trust Companies.

AmerUs works with other "living trust" companies.[72] For example, AmerUs received more than $11 million in premium from Minnesota seniors who purchased annuities through CLA Estate Services, Inc. ("CLA").[73] The OAG's Complaint against AmerUs alleges that, "Living trust mills like AFLP/Heritage and CLA ... use the pretext of selling prepaid legal plan memberships and standardized living trusts for as much as $2,000 or more to collect personal financial information from seniors, which then may be used to identify and exploit prospective purchasers of deferred annuities."[74]

Joyce and Louis Rutzen (the "Rutzens") of Burnsville, Minnesota were one such couple. When they were 76 years old, AmerUs placed over 60 percent of their liquid assets—$45,000—into an annuity with a 12 year surrender period.[75] This means they cannot fully access their money penalty-free until they are 89. The Rutzens were sold the annuity by a CLA agent who first sold them a living trust.[76] The agent presented the annuity as a "good savings plan."[77] Mr. Rutzen now has Alzheimer's Disease and is in a memory care center, and the couple's

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[70] *Id.* at ¶ 7.
[71] *Id.* at ¶¶ 7, 8.
[72] AmerUs has reported that it works with numerous other companies, which the OAG intends to investigate in discovery. The companies include Estate Planning Advisors, Funding and Financial Services, BEN Consulting, Family First Advanced Estate Planning, Secure Marketing Company, National Family Trusts, National Senior Benefit Services, Financial Services of America, WAU, Addison Insurance Marketing, and EPICO. *See* E-mail from Chris Conroy to Janet Sipes, dated July 18, 2007, attached as State's Ex. 34 to Canaday Aff.
[73] Complaint at ¶¶ 3, 15.
[74] *Id.* at ¶ 3.
[75] Affidavit of Joyce Rutzen at ¶¶ 3, 5, 6.
[76] *Id.* at ¶ 3.
[77] *Id.* at ¶ 6.

monthly pension goes for their care.[78] They cannot afford to cancel the annuity, however, because of the huge surrender penalties.[79]

4. Unsuitable Sales Impact Seniors' Lives.

Deferred annuities are complicated financial instruments. In some cases, seniors complain that the terms of the annuity were misrepresented to them or were unsuitable for their needs. Some of these stories are cited in the OAG's Complaint and others are contained in affidavits and consumer complaints on file with the OAG. Here are just a couple of illustrative examples:

Audrey Zachow, 79, lives in Hutchinson, Minnesota. In 2004, AmerUs sold her an annuity for $122,000.[80] Ms. Zachow did not understand that there was a ten-year surrender penalty for cashing in the annuity early.[81] Three years later, the same sales agent convinced Ms. Zachow to cash in the annuity to invest in the motion picture industry.[82] She lost $13,000 in surrender penalties.[83] Lyle Holm, an 80 year old retired telephone lineman, lives in Shakopee.[84] AmerUs sold Mr. Holm an annuity with a ten-year surrender charge period.[85] Three years later, Mr. Holm wanted to cancel the policy, and learned of the surrender charges for the first time.[86] To prevent Mr. Holm from cancelling his policy, the agent said he would waive any surrender penalties for early withdrawal if he transferred the money, approximately $47,000, to a different

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[78] *Id.* at ¶¶ 4, 7.
[79] *Id.* at ¶ 7.
[80] Affidavit of Audrey Zachow at ¶ 3.
[81] *Id.* at ¶ 6.
[82] *Id.* at ¶ 4.
[83] *Id.* at ¶ 6.
[84] Affidavit of Lyle Holm at ¶ 1.
[85] *Id.* at ¶ 4.
[86] *Id.*

AmerUs annuity.[87] Mr. Holm's new annuity, which comprises about one-half of his liquid net worth, has a 13-year surrender period which runs until Mr. Holm is 90 years old.[88]

In other cases, consumers complain that the annuity was not a suitable investment for their needs. Bernadette Kellogg is a 73 year old retired secretary from Bloomington.[89] She was invited to a free lunch to learn more about estate planning.[90] AmerUs put her entire retirement savings—$10,000—into a deferred annuity.[91] Ms. Kellogg cannot get access to this money without incurring a hefty surrender penalty.[92] She thought the product was like a bank CD.[93] She was wrong. Frances Hofker, a retired appliance store owner from North St. Paul, was sold a $27,000 AmerUs annuity with a 14-year surrender charge when she was 78 years old.[94] She had no other savings.[95] She did, however, have $25,000 in credit card and home equity debt that she incurred to pay her living expenses.[96]

IV. THE OAG SEEKS MEANINGFUL RELIEF FOR SENIORS.

AmerUs' Consent Order with the DOC provides that, "The Department agrees that this Consent Order constitutes a full and complete settlement and release of any and all claims against AIL and SBS and their successors with respect to all matters addressed and resolved in this Consent Order."[97] The DOC did not purport to, nor could it, release any claims of the OAG.

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[87] *Id.* at ¶ 5.
[88] *Id.* at ¶ 6.
[89] Affidavit of Bernadette Kellogg at ¶ 1.
[90] *Id.* at ¶ 2.
[91] *Id.* at ¶ 3.
[92] *Id.* at ¶ 4.
[93] *Id.* at ¶ 5.
[94] Affidavit of Richard Hofker at ¶¶ 1, 6.
[95] *Id.* at ¶ 6.
[96] *Id.*
[97] In the Matter of the Certificates of Authority of American Investors Life Insurance Company, et. al., Consent Order, dated August 14, 2007, at 4, attached as AmerUs' Ex. 1 to Pursell Aff.

The OAG brings this litigation to vindicate the OAG's interests, on behalf of the people of Minnesota.[98]

First, the OAG seeks full notice to and restitution for all injured senior citizens. As noted above, the OAG has already entered into settlements with AmerUs' #1 and #3 competitors. Those settlements require the insurers to make a rescission offer to all policyholders 65 years of age or older who purchased an annuity on or after specified months in 2001.[99] All such policyholders will receive a letter from the OAG offering them the opportunity to claim a full refund with interest and without a surrender penalty if they believe the annuity was either unsuitable for their needs or was misrepresented to them.[100] By contrast, the DOC settlement with AmerUs does not provide any mechanism for restitution for individuals who have not affirmatively complained.[101] This litigation involves senior citizens and complex financial instruments. Only a fraction of aggrieved consumers will affirmatively complain to the government. That is why the OAG believes it is important for all affected policyholders to

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[98] AmerUs states in footnote 3 of its brief that it paid the DOC $1.4 million, while the OAG's settlement with Allianz required a $500,000 payment for civil penalties. AmerUs' holding company had revenue of £ 31.072 billion last year, which is over $61 billion at current exchange rates. *See Aviva plc Annual Report and Accounts 2007.* This case, however, is not about the size of the civil penalties. The OAG chose to have money in Allianz go back to the injured citizens rather than to be collected in fines. Under the OAG's settlement with Allianz, the insurer was required to make a rescission offer to its policyholders (with a potential value of up to approximately $300 million in premium), giving them notice and the opportunity to get their money back with interest and without penalty.

[99] *See* State's Ex. 7 at ¶¶ 21-22; State's Ex. 10 at ¶¶ 19-20.

[100] *See* State's Ex. 7 at ¶¶ 19-25; State's Ex. 10 at ¶¶ 17-23.

[101] In addition, the DOC Consent Order allows AmerUs to exclude from restitution those individuals to whom it has provided "satisfactory remediation," which it fails to define. *See* Consent Order at 10. In order to have their complaints reviewed, the Consent Order requires that former complainants affirmatively inform AmerUs that they would like their previous complaints reviewed. *See* Consent Order at 11 (emphasis added). When evaluating a complaint, the Consent Order does not require AmerUs to determine whether additional facts should have been gathered from the applicant to determine suitability, but simply requires AmerUs to evaluate the decision on the "facts *known* at the time." *See id.* The Consent Order does not specify what remedies must be given to complainants who were sold unsuitable policies, but simply requires that AmerUs provide "appropriate remediation as warranted by the circumstances of each Complaint." *See id.*

receive affirmative notice of their rights, as was done in the OAG's settlements with AmerUs' main competitors.[102]

Second, the OAG seeks meaningful injunctive relief.[103] The OAG's settlements with AmerUs' #1 and #3 competitors require the companies' agents to complete a detailed financial inventory in a prescribed form for each senior annuity applicant so that a reasonable determination can be made as to whether an annuity is suitable in that case.[104] The insurance companies also must inquire into the applicant's financial circumstances, such as their monthly income and living expenses, disposable income, liquid assets, and anticipated future decrease in income, increase in living expenses, or increased need for liquidity.[105] The OAG Consent Judgments also prohibit the companies from selling an annuity to a senior citizen altogether if certain "red flag" thresholds are met, unless they document in their files specific, objective evidence that clearly establishes that the sale is suitable in light of that applicant's stated financial condition, needs and objectives.[106]

Third, the OAG seeks full, meaningful relief for AmerUs' participation in the living trust mill schemes that it helped orchestrate, fund, and/or from which it reaped substantial economic

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[102] In the case of Allianz, for example, while about 250 consumers complained to the OAG, an additional 1,500 or more requested restitution when apprised of their legal rights and given the opportunity to do so.

[103] The DOC Consent Order fails to specify the suitability procedures that AmerUs must establish to "comply" with Minnesota suitability requirements. *See* Consent Order at 6. Instead, AmerUs' suitability procedures must "specifically cover certain factors, such as current interest rates, withdrawal charges, liquidity needs of the applicant, etc. *See id.* The Consent Order does not provide guidance for AmerUs to ensure that its producers have reasonable grounds to believe that a recommended insurance product is suitable for the applicant. *See id.*

[104] *See* State's Ex. 7 at ¶ 16, Ex. B; State's Ex. 10 at ¶ 14, Ex. B.

[105] *See* State's Ex. 7 at ¶ 16, Ex. A; State's Ex. 10 at ¶ 14, Ex. A.

[106] *See* State's Ex. 7 at ¶ 15; State's Ex. 10 at ¶ 13. Some of the "red flags" include situations where the senior anticipates a significant increase in living expenses or reduction in net income or liquid assets during the surrender period; the senior has liquid assets, after purchase of the annuity, of $75,000 or less; or the premium paid for the annuity exceeds 25 percent of the applicant's net worth. *See* State's Ex. 7 at ¶ 14; State's Ex. 10 at ¶ 13.

benefit. This includes restitution for the cost of the living trusts themselves, as well as meaningful injunctive relief. This relief is not addressed in the Consent Order.

LEGAL STANDARD

While AmerUs styled its motion as a Minn. R. Civ. P. 12.02(e) motion, AmerUs provided to the Court, and relied upon, extrinsic evidence to support its motion. *See Def. Mem. in Supp. of Mot.*, Pursell Aff. Ex. 1. Minn. R. Civ. P. 12.02(e) provides, in relevant part, that "[i]f, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties should be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Minn. R. Civ. P. 12.02(e) (2007); *see, e.g., Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). Where a court considers more than just the pleadings, the motion is treated as a summary judgment motion and not a motion for judgment on the pleadings. *Id.; see also Hofstad v. Hargest*, 412 N.W.2d 5, 7 (Minn. Ct. App. 1987).

Although the Minnesota Court of Appeals has held that a trial court may "take judicial notice of its own prior decisions and the appellate courts' review of those decisions" in considering a motion for judgment on the pleadings, AmerUs has not properly cited to any Minnesota case for its assertion that a court may take judicial notice of *any* public document without converting a Rule 12 motion in to a Rule 56 motion. *In re Trusts by Hormel*, 543 N.W.2d 668, 671 (Minn. Ct. App. 1996) (*citing Lowe v. Patterson*, 135 N.W.2d 38, 42 (Minn. 1965)).[107] Rather, AmerUs relies on an unpublished Carver County District Court order stating that "a court

[107] The *Lowe* case actually involved a summary judgment motion where the court determined it was appropriate to take judicial notice of a judgment rather than require evidence to establish its existence in the same court in which it had been entered. *Lowe*, 135 N.W.2d at 42.

may take judicial notice of opinions in an underlying action, or consider documents central to the claim alleged" when evaluating a Rule 12 motion. *Defs.' Mem. in Supp. of Mot.* at 3-4 (citing *Meyer v. Chapel Hill Acad.*, 2003 WL 23864633 (Minn. Dist. Ct. June 10, 2003)). The *Meyer* district court case relied upon *In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995), a Minnesota Supreme Court case, as its support for such authority. *In re Hennepin County*, however, the Court simply recognized that when portions of a document are cited in the pleadings, a court may review the entire document when considering a Rule 12 motion:

> In deciding a motion to dismiss, however, the court may consider the entire written contract when the complaint refers to the contract and the contract is central to the claims alleged.

In re Hennepin County 1986 Recycling Bond Litig. 540 N.W.2d at 497 (citations omitted).

The exception urged by AmerUs—to allow this Court on a Rule 12 motion to consider a document entirely beyond of the purview of the State's Complaint—is inconsistent with the common-sense exception allowed in *In re Hennepin County*. The extrinsic evidence relied upon by AmerUs is neither a prior decision of this court nor a document referenced in the Attorney General's Complaint; thus the motion must be converted to a Rule 56 motion for summary judgment. Accordingly, the Attorney General is submitting additional facts to further assist the Court in considering the important policy and legal issues before this Court.[108]

LEGAL ARGUMENT

[108] Because the only issue in AmerUs' motion, res judicata, is a question of law, the Court also has discretion to consider information outside the pleadings without converting the motion to a Rule 56 matter. *See e.g. Dahl v. R.J. Reynolds Tobacco Co.*, 742 N.W.2d 186, 197 (Minn. Ct. App. 2007) rev. granted (Feb. 27, 2008) (citations omitted) (holding that, on consideration of Rule 12 motion, affidavits that were submitted did not convert the motion to dismiss to a motion for summary judgment because they dealt solely with a question of law); *see also Drewitz v. Motorwerks, Inc.*, 728 N.W.2d 231, 239 (Minn. 2007) (res judicata is a question of law).

I. THE PRESENT ACTION IS NOT BARRED BY THE DOCTRINE OF RES JUDICATA.

In its rush to apply res judicata to this action, AmerUs fails to establish any element of the doctrine.

First, AmerUs completely ignores the threshold requirement that res judicata only applies to an agency decision where an agency acts in a judicial or quasi-judicial capacity. The DOC did not act in a judicial or quasi-judicial capacity here, rendering the doctrine inapplicable.

Second, AmerUs fails to establish any of the four required elements of res judicata. To the contrary, none of the elements exist: (1) the Consent Order is *not* a final judgment on the merits; (2) the Attorney General and DOC are *not* in privity; (3) the Attorney General did *not* have a full and fair opportunity to litigate the matter; and (4) the Consent Order does *not* involve the same set of factual circumstances as are involved in this action. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004) (res judicata standard).

Finally, even where a defendant can establish all four elements, res judicata is a discretionary doctrine that is not rigidly applied and should not be applied here.

Because there is utterly no merit to AmerUs' claim of res judicata, the State respectfully requests that AmerUs' motion to dismiss be denied.

1. Res Judicata Does Not Apply Because DOC Was Not Acting in a Judicial or Quasi-Judicial Capacity.

Res judicata does not apply to all agency decisions. There is "no authority anywhere to the effect that res judicata is applicable to all administrative proceedings regardless of their nature." *State ex rel. Turnbladh v. Dist. Court*, 107 N.W.2d 307, 310 (Minn. 1960). Rather, res judicata applies only to administrative decisions "where the agency acts in a judicial or quasi-judicial capacity." *McKee v. County of Ramsey*, 245 N.W.2d 460, 462 n.1 (Minn. 1976) (citations omitted); *see Turnbladh*, 107 N.W.2d at 310-11 ("The only authority for the application of [res

judicata] in such proceedings goes no further than to assert that the doctrine should be applied to administrative proceedings which are essentially quasijudicial in nature.").[109] And res judicata applies only to judicial or quasi-judicial decisions that are subject to further judicial review. *McKee*, 245 N.W.2d at 462 n.1 ("One factor which apparently influences the decision to accord administrative decisions res judicata effect is the availability of judicial review.")

Here, DOC was not acting in a judicial or quasi-judicial capacity. Nothing in the Consent Order suggests that DOC held a hearing or a contested case proceeding in which DOC heard testimony, received evidence, or evaluated witnesses. To the contrary, the Consent Order specifically states that DOC was engaging in "an informal disposition...without a hearing." Consent Order at 1. The Consent Order arose not as a result of a judicial or quasi-judicial proceeding, but "as a result of" DOC's "examination" of AmerUs' business practices under Minn. Stat. § 60A.031 (2006). *Id.* Nothing in the Consent Order indicates that DOC undertook an investigation into a disputed claim, weighed evidentiary facts, and applied those facts to a prescribed standard. *See Handicraft Block Ltd. P'ship v. City of Minneapolis*, 611 N.W.2d 16, 20 (Minn. 2000) (identifying the three indications of quasi-judicial actions). In fact, the Consent Order contains no findings of fact or conclusions of law at all; rather, it merely contains DOC's *allegations, see* Consent Order at 1 ("Based on the examination the Department alleges that....", and AmerUs' denials, *see id.* at 4. Furthermore, the Consent Order is not subject to judicial review. *McKee*, 245 N.W.2d at 462 n.1. Because DOC did not act in a judicial or quasi-judicial capacity and the Consent Order is not subject to judicial review, res judicata simply does not apply.

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[109] *See also Council 96 v. Arrowhead Reg'l Corr. Bd.*, 356 N.W.2d 295, 299 (Minn. 1984) (stating that res judicata applies only when agency acts in judicial or quasi-judicial capacity); *State v. Minneapolis Park and Rec. Bd.*, 673 N.W.2d 169, 177 (Minn. Ct. App. 2003) (same); *Erickson v. Comm'r of the Dep't. of Human Servs.*, 494 N.W.2d 58, 61 (Minn. Ct. App. 1992) (same).

2. Res Judicata Does Not Apply Because None of the Four Required Elements are Met.

Even if the principles of res judicata could apply to the Consent Order, AmerUs has completely failed to establish any of the four required elements of the doctrine. As noted above, res judicata only acts to bar a subsequent claim where *all* of the following elements are met: (1) the earlier claim resulted in a final judgment on the merits; (2) the earlier claim involved the same parties or their privies; (3) the earlier claim provided the estopped party a full and fair opportunity to litigate the matter; and (4) the earlier claim involved the same set of factual circumstances. *Hauschildt,* 686 N.W.2d at 840. None of those elements are met.

A. The Consent Order is not a final judgment on the merits.

Generally, only a *judgment on the merits* may act as res judicata. *Mattsen v. Packman,* 358 N.W.2d 48, 49 (Minn. 1984); *see also Hauschildt,* 686 N.W.2d at 840. Here, the Consent Order was nothing more than an informal resolution between AmerUs and DOC. The "informal disposition" simply cannot be construed as a final judgment on the merits. None of the three cases cited by AmerUs[110] supports its contention that "the Consent Order constitutes a final judgment on the merits for purposes of res judicata." *See Defs.' Mem. in Supp. of Mot.* at 5. These cases actually state that a *judgment* entered by a court is required for res judicata to apply to subsequent actions. They do not hold that a mere informal settlement—which is not reduced to or entered as a judgment, not reviewed by a court, not part of any court proceeding, and not subject to a hearing before an administrative law judge—is a final judgment on the merits for purposes of res judicata. Because the Consent Order is not a final judgment on the merits, res judicata does not apply.

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[110] *State Bank of New London v. W. Cas & Sur. Co.*, 178 N.W.2d 614 (Minn. 1970); *Kolb v. Schrerer Bros. Fin. Servs. Co.*, 6 F.3d 542 (8th Cir. 1993); *In re Falk*, 88 B.R. 957 (Bankr. D. Minn. 1988).

B. The Attorney General's role as the State's Chief Legal Officer is not in privity with the Commissioner's regulatory role in a market conduct examination.

(i) None of the indications of privity are present.

Res judicata applies only when the earlier claim involved the same parties or their privies. *Hauschildt,* 686 N.W.2d at 840. AmerUs makes no claim that the Attorney General and DOC are the same parties.[111] Thus, the only issue is whether the Attorney General and DOC are somehow in privity. To determine privity, courts examine the circumstances of each case. *State v. Lemmer*, 736 N.W.2d 650, 660 (Minn. 2007). Importantly, "[c]ommonality of interests alone is insufficient to establish privity." *Id.* Instead, the focus is on whether "the legal rights of the party to be estopped were adequately represented by the party to the first litigation." *Id.* (citation omitted). When determining privity, courts consider whether the party to be estopped "(1) had a controlling participation in the first action, (2) had an active self-interest in the previous litigation,... or (3) had a right to appeal from a prior judgment." *Id.* at 661 (citations omitted).

AmerUs' mere contention that Attorney General and DOC have some common interests is insufficient to establish res judicata. None of the three indications of privity outlined in *Lemmer* applies. Nothing in the Consent Order demonstrates that the AGO: (1) had a controlling participation in DOC's action; (2) had an active self-interest in participating in DOC's administrative examination undertaken pursuant to Minn. Stat. § 60A.031; or (3) had any right to appeal DOC's decision. As *Lemmer* makes clear, it is common for two entities that execute duties for the State of Minnesota to have similar interests. This, however, does not mean that such entities are in privity for purposes of res judicata. In fact, the Attorney General was not involved in the DOC's market conduct examination.

[111] The Consent Order is only signed by the DOC, and only the DOC releases AmerUs from future claims. The DOC did not, and could not, release the claims of the Attorney General.

(ii) The Attorney General's functions and responsibilities are distinct from DOC's.

Citing *Lemmer*, AmerUs asserts that "litigation by one state agency is binding on other agencies of the same state government." *See Defs.' Mem. in Supp.* at 9. But this is only part of what *Lemmer* states on the subject. *Lemmer* also states that prior litigation may not be binding if the agencies have differing authorities, functions, or responsibilities:

> Although the general rule is that litigation by one state agency is binding on other agencies of the same government, exceptions may be warranted if there are important differences in the authority of the respective agencies.... Collateral estoppel will not apply between the two government agencies [i]f the second action involves an agency or official whose functions and responsibilities are so distinct from those of the agency or official in the first action that applying preclusion would interfere with the proper allocation of authority between them.

Lemmer, 736 N.W.2d at 661 (citations and quotations omitted).[112]

Because the Attorney General is a distinct constitutional officer with different authority, functions, and responsibilities than the DOC, the Consent Order cannot bind the Attorney General. To start, the Attorney General is not a "state agency" like DOC. The Attorney General is a duly elected constitutional officer who is separate from the other executive officers, such as the Governor. Minn. Const., Art. V, Section 1. DOC is specifically identified as a state agency, Minn. Stat. § 15.01, and its commissioner is appointed by the Governor, Minn. Stat. § 15.06, subd. 2 and Minn. Stat. § 45.012(a). Because the Attorney General is a separately elected constitutional office, AmerUs' assertion that litigation by one "state agency" can bind another "state agency" does not hold water here.

Furthermore, the Attorney General's authority, functions, and responsibilities differ significantly from DOC's. The Attorney General is the chief law officer of the state. *State ex rel.*

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[112] *Lemmer* dealt with collateral estoppel, but both collateral estoppel and res judicata require an analysis of privity. *See Hauschildt*, 686 N.W.2d at 837, 840.

Young v. Robinson, 112 N.W. 269, 272 (Minn. 1907). The Attorney General has "extensive common-law powers which are inherent in [her] office." *Dunn v. Schmid,* 60 N.W.2d 14, 17 n.8 (Minn. 1953). These powers include the authority to "institute, conduct, and maintain all such suits and proceedings as [she] deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights." *Robinson*, 112 N.W. at 272; *see Head v. Special Sch. Dist. No. 1*, 182 N.W.2d 887, 892 (Minn. 1970). Indeed, the Attorney General's "discretion...is plenary" and her discretion "as to what litigation shall or shall not be instituted by [her] is beyond the control of any other officer or department of the state." *State ex rel. Peterson v. City of Fraser*, 254 N.W. 776, 778-79 (Minn. 1934).[113] Moreover, the Attorney General has extensive statutory powers to investigate violations of the laws respecting unfair, discriminatory, and other unlawful practices in business, commerce, or trade. *See* Minn. Stat. §§ 8.31, subd. 1; 8.32, subd. 2(a). The Attorney General may sue for injunctive relief and recover damages, costs and disbursements, costs of investigation, attorneys fees, civil penalties, and equitable relief, including restitution. *See id.* § 8.31, subds., 3, 3a; *State by Humphrey v. Alpine Air Prods., Inc.*, 490 N.W.2d 888, 896-97 (Minn. Ct. App. 1992), *aff'd*, 500 N.W.2d 788 (Minn. 1993); *State by Humphrey v. Ri-Mel, Inc.*, 417 N.W.2d 102, 112 (Minn. Ct. App. 1987).

Here, the Attorney General has brought suit in part under three consumer protection laws that the DOC cannot enforce: (1) the Uniform Deceptive Trade Practices Act, Minn. Stat. § 325D.43-.48; (2) the Prevention of Consumer Fraud Act, Minn. Stat. § 325F.68-.70; and (3) the False Statement in Advertisement Act, Minn. Stat. § 325F.67. These consumer protection laws have consistently been interpreted broadly by Minnesota courts in favor of consumers because of

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[113] *See also Humphrey on Behalf of State v. McLaren*, 402 N.W.2d 535, 539 (Minn. 1987) (describing authority of Attorney General); *State by Spannaus v. Northwestern Bell Tel. Co.*, 304 N.W.2d 872, 877 (Minn. 1981) (same); *State by Hatch v. Cross Country Bank*, 703 N.W.2d 562, 570 (Minn. Ct. App. 2005) (same).

their remedial purpose. *See, e.g., State by Humphrey v. Phillip Morris, Inc.*, 551 N.W.2d 490, 496 (Minn. 1996) ("These statutes are generally very broadly construed to enhance consumer protection.") This broad construction in favor of consumers "reflect[s] a clear legislative policy encouraging aggressive prosecution of statutory violations." *Id.* at 495. Further, the Attorney General has requested in this litigation enhanced civil penalties for fraud against senior citizens, which only she—and not the DOC—can claim. *See* Minn. Stat. § 325F.71.

Through her statutory and common law powers pursuant to the *parens patriae* doctrine, the Attorney General also seeks full restitution on behalf of all Minnesota consumers in the present action. *See Alpine,* 490 N.W.2d at 896 (recognizing authority for restitution claims by the Attorney General); Minn. Stat. § 8.31, subd. 3a. By contrast, the DOC cannot order restitution for Minnesota consumers who were sold unsuitable annuity products. *See* Minn. Stat. § 45.027, subd. 6 (allowing Commerce to impose civil penalties only). This is an important distinction, because the Consent Order does not require AmerUs to provide full notice and restitution to all potential victims. *See United States v. Alky Enter., Inc.*, 969 F.2d 1309, 1314-15 (1st Cir. 1992) (finding no privity because commission did not have the authority to obtain the remedies that the United States could obtain).

Further, while the Consent Order and this action both contain claims relating to AmerUs' violation of Minnesota's insurance suitability statutes, this is permissible because DOC and the Attorney General both have authority to enforce Minnesota's insurance laws. *See State by Hatch v. Am. Family Mut. Ins. Co.,* 609 N.W.2d 1, 4 (Minn. Ct. App. 2000). In *American Family,* the Attorney General initiated litigation against American Family Insurance for violations of Minnesota insurance and consumer protection laws. *Id.* at 2. The Court held that DOC's authority does not eclipse the Attorney General's authority:

> If the legislature had intended that the commerce commissioner have exclusive authority, it could have stated this explicitly. Thus, we conclude that these provisions regarding the authority of the commerce commissioner do not prohibit the attorney general's action.... That the commissioner of commerce has the authority to investigate and prosecute claims against insurance companies does not mean that the attorney general is precluded from doing so.... [T]he statutes dealing with the authority of the commerce department and its commissioner to regulate insurance do not explicitly provide that the commissioner's authority is exclusive.

Id. at 4. *American Family* reaffirmed the law that the Attorney General's discretion to initiate a lawsuit cannot be controlled by "any other state department or officer." *Id.* at 3; *see also City of Fraser*, 254 N.W. at 778-79.

The cases cited by AmerUs do not support its position that the Consent Order blocks the Attorney General's action. *See Defs.' Mem. in Supp. of Mot.* at 9-11, 11 n. 6. There are multiple ways to distinguish the cases cited by AmerUs:

- Each case involved prior litigation in which there was a judicial or quasi-judicial action by a court, agency, commission, or board.[114] But in this case, DOC did not engage in a judicial or quasi-judicial action. *See supra.*

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[114] *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 390-91 (1940) (National Bituminous Coal Commission, administered by Department of the Interior, held a public hearing and issued opinion with findings of fact and conclusions of law); *Harms v. United States*, 1992 WL 203942, at *1 (4th Cir. Aug. 24, 1992) (district court issued a memorandum opinion and order granting summary judgment on some claims and found no liability after a trial on others); *Grand Traverse Band of Ottawa and Chippewa Indians v. Michigan Dep't of Natural Res.*, 141 F.3d 635, 637-38 (6th Cir. 1998) (district court signed a consent order after a hearing); *United States v. Rogers*, 960 F.2d 1501, 1504, 1509 (10th Cir. 1992) (district court held a bench trial and issued a memorandum opinion and order with detailed findings of fact and conclusions of law); *Nash County Bd. of Educ. v. Biltmore, Co.*, 640 F.2d 484, 486-87 (4th Cir. 1981) (district court entered a consent judgment); *Bowen v. United States*, 570 F.2d 1311, 1314-15 (7th Cir. 1978) (administrative law judge of the National Transportation Safety Board conducted a hearing and issued an order making factual determinations; the order was appealed to and affirmed by the NTSB); *Mervin v. F.T.C.*, 591 F.2d 821, 829-31 (D.C. Cir. 1978) (district court dismissed the suit for failure to state a claim); *Safir v. Gibson*, 432 F.2d 137, 141-44 (2d Cir. 1970) (claims were "fully litigated" before the Federal Maritime Commission, which made factual findings and conclusions of law); *Exxon Corp. v. United States Dep't of Labor*, 2002 WL 356517, at *2 (N.D. Tex. Mar. 5, 2002) (district court made findings of fact and conclusions of law); *Polsby v. Thompson*, 201 F. Supp. 2d 45, 47-48 (D.D.C. 2002) (district court twice dismissed plaintiff's claims, once after a trial and once on a motion to dismiss); *Berwind Corp. v. Apfel*, 94 F. Supp. 2d 597, 605 (E.D. Pa. 2000) (district court granted summary judgment, which was affirmed on appeal); *Peters v. State*, 948 P.2d 250, 251-52 (Mont. 1997) (district court entered summary judgment on liability and, after the parties settled on damages, entered a consent (Footnote Continued on Next Page)

- Many cases dealt with situations where an agency, commission, or board was a party in both cases (i.e., the prior case and the one in which preclusion was raised).[115] But again, the Attorney General's Office is not an agency, board, or commission and was not a party to the Consent Order. *See supra.*

- While a few cases found that a federal agency, commission, or board was in privity with the United States,[116] these cases are inapposite because of how Minnesota's structure of government differs from that of the federal government. In Minnesota, the Attorney General and Governor are independently elected executive officers, and the Governor appoints the Commissioner of Commerce. *See supra.* In the federal government, however, the President appoints both Attorney General of the United States and the members of federal commission and services that were at issue in these cases. *See* 28 U.S.C. § 503 (Attorney General); 15 U.S.C. § 78d(a) (SEC); 39 U.S.C. § 202 (USPS)[117]; Title 5 of United States Code, Appendix, Reorganization Plan No. 1 of 1953, Section 1 (HHS).[118]

- While AmerUs cites a few cases where a state and a state agency was involved, none stand for the proposition, as AmerUs would have it, that a voluntary settlement with a state agency, after an informal proceeding, would bind a state attorney general.[119]

AmerUs' argument for res judicata must fail for all the reasons set forth above, as the Attorney General is not in privity with DOC as respects the Consent Order.

(Footnote Continued From Previous Page)
judgment); *State v. Parson*, 808 P.2d 444, 446 (Kan. Ct. App. 1991) (district court made a "judicial determination" that a Harp rig was a vehicle under Kansas vehicle registration law).

[115] *See Sunshine*, 310 U.S. at 390-91 (Department of the Interior and IRS); *Mervin*, 591 F.2d at 829-31 (Civil Service Commission and FTC); *Safir*, 432 F.2d 137, 141-44 (Federal Maritime Commission and Federal Maritime Administration); *Exxon*, 2002 WL 356517, at *2 (DOL and EEOC); *Polsby*, 201 F. Supp. 2d at 47-48 (HHS and HHS); *Berwind*, 94 F. Supp. 2d at 605 (HHS and Commissioner of Social Security).

[116] *See Harms*, 1992 WL 203942, at *1 (USPS/Postmaster General and United States); *Rogers*, 960 F.2d at 1504 (SEC and United States); *Bowen*, 570 F.2d at 1314-15 (NTSB and United States); *Polsby*, 201 F. Supp. 2d at 47-48 (HHS and United States); *Berwind*, 94 F. Supp. 2d at 605 (HHS/Commissioner of Social Security and United States).

[117] The United States Postal Service is an independent establishment of the executive branch of the United States. 39 U.S.C. § 201. The USPS is directed by a Board of Governors composed of eleven members. *Id.* § 202(a). Nine of the members, known as Governors, are appointed by the President. *Id.* The other two members, the Postmaster General and the Deputy Postmaster General, are appointed by the Governors. *Id.* § 202(c), (d).

[118] The Reorganization Plan No. 1 of 1953 established the Department of Health, Education, and Welfare ("HEW"). HEW was redesignated as HHS by 20 U.S.C. § 3508.

[119] *See Grand Traverse*, 141 F.3d at 637-38; *Nash County*, 640 F.2d at 486-87; *Peters*, 948 P.2d at 251-52; *Parson*, 808 P.2d at 446.

C. The Attorney General, in her role as the State's Chief Law Officer, did not have a full and fair opportunity to litigate these claims in DOC's process.

AmerUs has failed to show that the Attorney General had a full and fair opportunity to litigate the current claims as part of DOC's process. *Hauschildt,* 686 N.W.2d at 840. The DOC entered into an informal resolution in its role as a regulator. The Attorney General was not provided any opportunity—full, fair, or otherwise—by which to litigate even the insurance suitability issues, to say nothing of the consumer protection, deceptive trade practices, and false advertising claims in the present action.[120] To the contrary, knowing that the CID was outstanding, AmerUs went ahead and entered into a voluntary Consent Order with the DOC. In the utter absence of any opportunity for the Attorney General to have litigated the present claims in the subsequent proceedings, res judicata cannot apply.

D. The Attorney General's consumer protection action does not involve the same set of factual circumstances as DOC's administrative process.

There are important distinctions in the factual circumstances giving rise to the DOC market conduct examination versus the Attorney General's current action, rendering res judicata inapplicable. The focus of res judicata is whether the second claim "arise[s] out of the same set of factual circumstances" as the first claim. *Hauser v. Mealey*, 263 N.W.2d 803, 807 (Minn. 1978). The "common test for determining whether a former judgment is a bar to a subsequent action is to inquire whether the same evidence will sustain both actions." *McMenomy v. Ryden*, 148 N.W.2d 804, 807 (Minn. 1967).

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[120] Indeed, the OAG by law could not have litigated these claims before the DOC. Minn. Stat. § 8.31 provides that the OAG's complaints involving unfair, discriminatory, and other unlawful practices in business are to be brought in the district courts, and not as part of an administrative proceeding. AmerUs' argument assumes that there is something unusual about parallel judicial and administrative proceedings. This assumption is wrong. Under our system of laws, the same conduct can generate liability under multiple statutes and multiple remedies may be brought simultaneously to protect the public.

As noted above, there are significant factual differences between the conduct allegedly addressed by the DOC Consent Order and this lawsuit, which alleges that AmerUs financed and controlled bogus living trust mills that were designed to build trust with the elderly to sell annuities. The DOC Consent Order does not mention or address these facts, nor does it remedy them. The DOC Consent Order also does not provide for full restitution or injunctive relief.

II. RES JUDICATA IS A DISCRETIONARY DOCTRINE THAT IS NOT RIGIDLY APPLIED.

Despite AmerUs' suggestion to the contrary, a court is not required to apply res judicata, even if all of the elements were otherwise met, which they are not here. "If the doctrine applies, the decision whether to actually apply it is left to the discretion of the trial court." *Erickson v. Comm'r of Dep't of Human Servs.*, 494 N.W.2d 58, 61 (Minn. Ct. App. 1992) (citation omitted). Res judicata is not rigidly applied, rather it is "qualified or rejected when [its] application would contravene an overriding public policy." *Council 96 v. Arrowhead Regional Corrections Bd.*, 356 N.W.2d 295, 299 (Minn. 1984); *see also Wilson v. Comm'r of Revenue*, 619 N.W.2d 194, 198 (Minn. 2000). Furthermore, "[a]bsent a special consideration, a determination arising solely under one statute should not automatically be binding when a similar question arises under another statute." *Council 96*, 356 N.W.2d at 299 (citation omitted).

In this case, it would not be appropriate to apply res judicata even if all of the other elements were met. AmerUs knew that the Attorney General was investigating its conduct when it settled with DOC. AmerUs' #1 and #3 competitors have already entered into Consent Judgments with the OAG that provide for full notice and rescission offers to Minnesota seniors and injunctive relief that is substantially broader than that obtained by the DOC. Further, many elderly people have not been made whole by the DOC settlement. Application of res judicata here would result in bad public policy. Companies that violate the law would know that they

could cut off an action by a state attorney general simply by racing to its weakest state or federal agency-regulator and cutting a deal. Application of res judicata here would also contravene public policy by undermining the authority of the Attorney General, Minnesota's chief legal officer and a statewide elected constitutional officer, to represent the interests of the citizens of this State through her common law, statutory, constitutional and *parens patriae* powers. Accordingly, even if the elements of res judicata otherwise applied, it would be bad public policy for the Court to invoke the doctrine here, and it should not do so.

CONCLUSION

For the reasons stated above, the Court should deny AmerUs' Motion to Dismiss.

Dated: 4/21/2008

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