ORDER NO.: E15-126

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BKI-10377-13
AGENCY DOCKET NO.: OTSC #E13-51 & E14-48

RICHARD J. BADOLATO, ACTING COMMISIONER, DEPARTMENT OF BANKING AND INSURANCE,	)	
Petitioner,	)	FINAL DECISION AND ORDER
v.	)	
KARL V. BROWN AND GUARANTEED BAIL BONDS,	)	
Respondents.	)	

This matter comes before the Commissioner of Banking and Insurance ("Commissioner")[1] pursuant to the authority of N.J.S.A. 52:14B-1 et seq., N.J.S.A. 17:1-15, N.J.S.A. 17:22A-26 et seq., the New Jersey Producer Licensing Act of 2001, (the "Producer Act"), and all powers expressed or implied therein, for the purposes of reviewing the Initial Decision of Administrative Law Judge Barry E. Moscowitz ("ALJ"), which was decided on September 15, 2015 ("Initial Decision"). In that decision, the ALJ granted summary decision to the Department of Banking and Insurance ("the Department") against Respondents Karl V. Brown ("Brown") and Guaranteed Bail Bonds ("Guaranteed"), (collectively, "Respondents") on all six of the counts alleged in the Department's Amended Order to Show Cause No. E14-48 ("AOTSC") and recommended revocation of both Respondents' producer licenses and the

[1] Pursuant to R. 4:34-7, Acting Commissioner Richard J. Badolato has been substituted as the current Commissioner in the caption.

imposition of civil penalties in the amount of $50,000, costs of investigation in the amount of $3,625, and restitution in the amount of $84,841.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter originally arose out of Order to Show Cause No. E13-51[2] ("OTSC) issued by the Department on May 29, 2013, against the Respondents seeking to revoke both of their producer licenses and impose civil penalties, costs of investigation, and restitution for alleged violations of the Producer Act and related insurance regulations. In the OTSC, the Department alleges that the Respondents engaged in the following activities in violation of the insurance laws of this State:

> Count One - Brown and Guaranteed issued a check in the amount of $30,000 for the partial refund of cash collateral on a bond that was returned for insufficient funds, in violation of N.J.S.A. 17:22A-40a(2), (4), (8) and (16), N.J.A.C. 11:17C-2.2 and N.J.A.C. 11:17C-2.3i;
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> Count Two - Brown and Guaranteed used dishonest practices to misappropriate $100,000 of cash collateral, in violation of N.J.S.A. 17:22A-40a(2), (4), (8) and (16), N.J.S.A. 11:17C-2.1(a)[3], and N.J.A.C. 11:17C-2.2;
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> Count Three - Brown and Guaranteed used dishonest practices by cashing a check made out to another party for partial return of cash collateral on a bond and misappropriated $15,000, in violation of N.J.S.A. 17:22A-40a(2), (4), (8) and (16), and N.J.A.C. 11:17C-2.2; and
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> Count Four - Brown and Guaranteed failed to provide business records to the Department, in violation of N.J.S.A. 17:22A-

[2] The Initial Decision states that the Agency Docket Number is OTSC E13-15. Upon review, however, the Agency Docket Number is actually OTSC E13-51. Initial Decision at 1.

[3] The OTSC was amended to include N.J.S.A. 11:17C-2.1(a) in Count 2; however, the correct citation should be N.J.A.C. 11:17C-2.1(a).

40a(2) and (8), N.J.A.C. 11:17C-2.5(h)[4], and N.J.A.C. 11:17C-2.6(b).

On June 20, 2013, Respondents filed an Answer to the OTSC, wherein the Respondents admitted to and denied some of the allegations as set forth in the OTSC and requested a hearing. The Department transmitted the matter as a contested case to the Office of Administrative Law ("the OAL") on July 20, 2013, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

On August 6, 2013, the contested case was assigned to Administrative Law Judge Tahesha L. Way. Thereafter, the Department, by letter dated January 10, 2014, requested leave to file an Amended Order to Show Cause including new allegations and charges. The letter also set forth the basis for the amendments. The Respondents were to submit a response to the request by January 24, 2014; however, no response was received. On February 24, 2014, Administrative Law Judge Tahesha L. Way issued a Letter Order granting the Department's leave to file an Amended Order to Show Cause. On April 16, 2014, the Department issued the six-count AOTSC, which, in addition to the four counts originally contained in the OTSC, alleges that the Respondents engaged in the following activities in violation of the insurance laws of this State:

> Count Five - Brown was indicted and a Judgment of Conviction was entered against him for Theft by Unlawful Taking and he failed to notify the Department of both the Indictment and the Conviction within 30 days, in violation of N.J.S.A. 17:22A-40a(2), (8) and (18), N.J.S.A. 17:22A-47b, and N.J.S.C. 11:17A-4.10[5]; and
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> Count Six - Brown and Guaranteed misappropriated bail bond premiums, which constitutes fraud and demonstrates

[4] The OTSC was amended to include N.J.A.C. 11: 17C-2.5(h) in Count 4.

[5] While the AOTSC cites N.J.S.C. 11:17A-4.10, this appears to be a typographical error as a statute or regulation with this citation does not exist and references to N.J.A.C. 11:17A-4.10 exist in the Department's Motion for Summary Decision.

incompetence, unworthiness, and financial irresponsibility; that the Respondents failed to abide by the terms and duties of their Sub-Producer Agreement; and that the Respondents failed to maintain books and records, in violation of N.J.S.A. 17:22A-40a(2), (4), (8), and (16), N.J.S.A. 17:22A-42a, N.J.S.A. 11:17C-2.1(a)[6], N.J.A.C. 11:17A-4.10, N.J.A.C. 11:17C-2.2(b), and N.J.A.C. 11:17C-2.5(a).

On November 28, 2014, the case was reassigned to Administrative Law Judge Barry E. Moscowitz. Thereafter, on December 30, 2014, Respondents filed an Answer wherein the Respondents admitted to and denied some of the allegations set forth in the AOTSC.

On June 17, 2015, Brown entered into Consent Order No. E15-62 with the Department wherein he admitted to violations of the Producer Licensing Act, which were unrelated to the charges alleged in the present matter through the OTSC and AOTSC.

On July 29, 2015, the Department moved for a Summary Decision against the Respondents. The Respondents did not file a response to the Department's Motion. On September 15, 2015, the ALJ granted Summary Decision on all six Counts alleged in the AOTSC and recommended revocation of both Respondents' producer licenses and the imposition of civil penalties in the amount of $50,000, costs of investigation in the amount of $3,625, and restitution in the amount of $84,841.

ALJ'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The ALJ noted that motions for summary decisions are governed by N.J.A.C. 1:1-12.5, which states that summary decision may be rendered if the papers and discovery, which have been filed, together with affidavits, show no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. Initial Decision at 17. The ALJ further noted that

[6] While the AOTSC cites N.J.S.A. 11:17C-2.1(a), this appears to be a typographical error as a statute with this citation does not exist and references to N.J.A.C. 11:17C-2.1(a) exist in the Department's Motion for Summary Decision.

when a motion for summary decision is made and supported, the burden shifts to the adverse party, who must respond by affidavit, setting forth specific facts showing that genuine issues of material fact exist and which are resolvable only by an evidentiary proceeding. Ibid. The judge, when deciding on a motion for summary decision, must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Ibid. (citing Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995)).

The ALJ found that Respondents failed to respond by affidavit setting forth specific facts showing that genuine issues of material fact, which can only be determined in an evidentiary hearing, exist. Ibid. Accordingly, the ALJ concluded that no genuine issue of material fact exists in this matter, and the Department should prevail on all six Counts of the AOTSC. Ibid.

The ALJ found the following relevant facts in his grant of summary decision. Respondent Brown is the owner of Respondent Guaranteed. Initial Decision at 5. Both Respondents are licensed as resident insurance producers in this State, and Respondent Brown is the Designated Responsible Licensed Producer for Guaranteed. Ibid.

Count One

As to Count One of the AOTSC, the ALJ found that on November 10, 2010, the Middlesex County Superior Court set bail in the amount of $300,000 for Thomas K. Ibid. Thereafter, Thomas K. and his wife completed an application and signed an agreement with the Respondents for the posting of a bail bond in the same amount. Ibid. The two agreements signed by Thomas K. and his wife provided that Thomas K. would provide Respondents with cash in the amount of $110,000 as collateral to secure the bail bond and to prevent the

Respondents from placing a lien on Thomas K. and his wife's marital home. Ibid. Thomas K. and his wife provided the Respondents with checks and cash in the amount of $131,700 to secure the bail bond. Ibid.

On March 7, 2011, Thomas K.'s bail was reduced to $100,000 by the Middlesex County Superior Court. Ibid. On March 31, 2011, Respondent Guaranteed issued a check to Thomas K. in the amount of $30,000 as a partial refund of the $110,000 that Thomas K. paid as collateral to secure the bail bond. The ALJ found that this check was subsequently returned for insufficient funds in violation of N.J.S.A. 17:22A-40a(2), (4), (8), and (16), N.J.A.C. 11:17C-2.2, and N.J.A.C. 11:17-2.3(i). Initial Decision at 10.

Count Two

As to Count Two of the AOTSC, the ALJ found that on August 30, 2011, the Middlesex County Superior Court released Thomas K. on his own recognizance, and on September 8, 2011, dismissed all of the charges against him. Initial Decision at 6. Between September 2011 and March 2012, Thomas K. requested that Respondents return the $110,000 collateral paid for securing his bond; however, Respondents failed to return the collateral to Thomas K.[7] Ibid. Thus, the ALJ found that the Respondents misappropriated cash collateral in the amount of $100,000 in violation of N.J.S.A. 17:22A-40a(2), (4), (8), and (16), and N.J.A.C. 11:17C-2.2. Initial Decision at 11.

[7] While the ALJ found that no portion of the cash collateral had been returned to Thomas K., Thomas K. admitted that approximately $22,726 was received from Respondent Brown, through the Probation Department of the Union County Superior Court, as a result of the Judgment of Conviction entered against Respondent Brown on or about December 13, 2013, over two years after the charges against Thomas K. were dismissed. Thomas K. Cert., ¶ 28. However, Respondent Brown, in his answers to the Department's Request for Admissions, indicates that the amount Respondents paid in restitution pursuant to the criminal matter was $24,313. Bornmann Cert., Exh. 7, at 4.

Count Three

As to Count Three of the AOTSC, the ALJ found that on March 11, 2011, Guaranteed's surety, First Indemnity of America ("FIA"), issued check number 112 in the amount of $15,000, which was made payable to Thomas K. Initial Decision at 5. Thereafter, the Respondents endorsed and deposited this check into a bank account owned and operated by Guaranteed. Ibid. Then, on March 31, 2011, the Respondents issued a check in the amount of $30,000 to Thomas K. as a partial refund of the $110,000 paid to Respondents as collateral for securing the bail bond. Ibid. The ALJ found that this check was thereafter returned for insufficient funds (Initial Decision at 6) and that FIA's $15,000 check issued to Thomas K. was never provided to Thomas K. in violation of N.J.S.A. 17:22A-40a(2), (4), (8), and (16), and N.J.A.C. 11:17C-2.2. Initial Decision at 11.

Count Four

As to Count Four of the AOTSC, the ALJ found that on March 29, 2012, the Department requested that the Respondents provide the complete file relating to Thomas K., including checks between or among FIA, Respondents, and Thomas K.; however, on April 5, 2012, the Department received only an incomplete response. Initial Decision at 6. After the Department made a specific request for copies of checks issued to Thomas K., including the Respondents' check in the amount of $30,000 and FIA's check in the amount of $15,000, Respondents, upon the advice of counsel, failed to provide the Department with copies of the checks. Initial Decision at 6-7.

Based on those facts, the ALJ concluded that the Respondents failed to produce business records to the Department in violation of N.J.S.A. 17:22A-40a(2) and (8), N.J.A.C. 11:17C-2.5(h), and N.J.A.C. 11:17C-2.6(b). Initial Decision at 13.

Count Five

As to the Count Five of the AOTSC, the ALJ found that in April 2013, Brown was indicted under Indictment No. 13-04-004101 in the Union County Superior Court for: "(1) Theft by Failure to Make Required Disposition of Property Received in the Second Degree in violation of N.J.S.A. 2C:20-9, (2) Issuing a Bad Check in the Third Degree in violation of N.J.S.A. 2C:21-5, and (3) Theft by Deception in the Third Degree in violation of N.J.S.A. 2C:20-4." Initial Decision at 7. A Judgment of Conviction for Theft by Unlawful Taking was entered against Brown on December 12, 2013. Ibid. Brown failed to notify the Department of either his indictment or conviction. Ibid.

The ALJ found that Respondent Brown's failure to notify the Department constitutes a violation of N.J.S.A. 17:22A-40a(2), (8), and (18), N.J.S.A. 17:22A-47b, and N.J.A.C. 11:17A-4.10. Initial Decision at 15.

Count Six

As to Count Six of the AOTSC, the ALJ found that on July 5, 2011, Respondents entered into a Sub-Producer Agreement with Bankers Insurance Company ("Bankers"), wherein, Respondents agreed to pay Bankers a two-percent premium and a one-percent build-up contribution on each bail bond issued by Respondents in New Jersey. Initial Decision at 7. Respondents were informed by the Department on August 14, 2013, of Banker's claim that the Respondents failed to pay the premiums for fifty bonds. Ibid. Respondents replied by stating that Respondents had bounced a couple of checks, but had paid for some transactions in cash. Ibid. Respondents admitted that no records or receipts were kept relating to those transactions. Ibid. Respondents admitted that $3,390 was owed to Bankers as a check in this amount was never presented to Bankers. Ibid. Respondents only paid premiums to Bankers in the amount of

$2,756, representing seventeen of the fifty bonds issued by Respondents. Initial Decision at 8. The remaining premiums still owed to Bankers for the remaining bonds is in the amount of $4,841, which Respondents acknowledge that they owe and have stated that they will take responsibility for this amount. Ibid. Based upon the above, the ALJ found that the Respondents misappropriated bond premiums in violation of N.J.S.A. 17:22A-40a(2), (4), (8), and (16), N.J.A.C. 11:17A-4.10, N.J.A.C. 11:17C-2.1(a), and N.J.A.C. 11:17C-2.2(b). The ALJ also found that the Respondents failed to abide by the terms and duties of their sub-producer agreement with Bankers in violation of N.J.S.A. 17:22A-40a(2), (4), (8), and (16), and N.J.S.A. 17:22A-42a. Finally, the ALJ found that the Respondents failed to maintain books and records in violation of N.J.A.C. 11:17C-2.5(a).

ALJ'S FINDINGS AS TO THE PENALTY AGAINST RESPONDENTS

The ALJ noted that pursuant to N.J.S.A. 17:22A-40a(2), the Department may revoke an insurance producer's license for violating any insurance law or regulation. The ALJ further stated that, in particular, the Department may revoke an insurance producer's license for "improperly withholding, misappropriating or converting any monies or properties received in the course of doing insurance business," N.J.S.A. 17:22A-40a(4), for "using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of insurance business in this State or elsewhere," N.J.S.A. 17:22A-40a(8), or for "committing any fraudulent act," N.J.S.A. 17:22A-40a(16). Furthermore, the ALJ noted that the Department, pursuant to N.J.S.A. 17:22A-45a, has the power to conduct investigations, administer oaths, interrogate licensees, and issue subpoenas. The ALJ further noted that any person found to violate any provision of the Producer Act shall be liable for a

penalty not exceeding $5,000 for the first offense and not exceeding $10,000 for each subsequent offense. N.J.S.A. 17:22A-45c. In addition, the Department may order restitution be paid to any person owed and the reimbursement of the Department's costs for investigation and prosecution insurance law violations. Ibid.

Based upon these standards, the factual findings, and the conclusions of law summarized above, the ALJ recommended that the insurance producer licenses of both Respondents be revoked, that civil monetary penalties in the amount of $50,000 be imposed, that restitution in the amount of $84,841 be awarded, and that Respondents reimburse $3,625 in costs to the Department.

EXCEPTIONS

By letter dated September 29, 2015, and received on October 6, 2015, the Office of the Attorney General, on behalf of the Department, submitted Exceptions to the Initial Decision. Respondents did not submit any Exceptions.

In its Exceptions, the Department concurs with the findings of fact, conclusions of law and recommended penalty in the Initial Decision. However, the Department requests that the civil monetary penalty in the amount of $50,000 be allocated among the violations committed by the Respondents and charged in the six counts of the AOTSC. Specifically, the Department requests that the civil monetary penalty against Respondents be $5,000 as to Count One, $10,000 as to Count Two, $10,000 as to Count Three, $5,000 as to Count Four, $5,000 for each notification failure as to Count Five, and $10,000 as to Count Six. The Department further requests that Respondent Brown and Guaranteed be held jointly and severally responsible for the civil monetary penalties arising from Counts One, Two, Three, Four, and Six, totaling $40,000,

and that Respondent Brown be held individually responsible for the civil monetary penalty arising from Count Five, totaling $10,000.

LEGAL DISCUSSION

The Department bears the burden of proving the allegations in an Order to Show Cause by a preponderance of the competent, relevant, and credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as would lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance may be described as: "the greater weight of credible evidence in the case not necessarily dependent on the number of witnesses, but having the greater convincing power." State v. Lewis, 678 N.J. 47 (1975).

AOTSC—Allegations Against Respondents

For all of the reasons set forth in the Initial Decision, I concur that summary decision is appropriate as to all six Counts of the AOTSC issued against Respondents. As found by the ALJ, Respondents failed to adduce evidence that creates a genuine issue as to any material fact and their defenses as pled fail as a matter of law.

Count One: Issuing a Check that was Returned for Insufficient Funds

Count One of the AOTSC alleges that the Respondents issued a check in the amount of $30,000 that was returned for insufficient funds, in violation of N.J.S.A. 17:22A-40a(2) (violating any insurance law), (4) (improperly withholding, misappropriating, or converting any monies received in course of doing insurance business), (8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility), and (16) (commit a fraudulent act), N.J.A.C. 11:17C-2.2 (all premiums shall be remitted to the insurer or returned to the insured

within 5 business days after receipt of the funds), and N.J.A.C. 11:17-2.3(i) (insurance producers shall establish and maintain a trust account, which shall at all times be at least equal to the amount deposited less withdrawals).

I concur with the ALJ's findings that the Department proved the allegations in Count One and that the Respondents issued a check in the amount of $30,000 that was subsequently returned for insufficient funds, in violation of N.J.S.A. 17:22A-40a(2), (4), (8) and (16), and N.J.A.C. 11:17C-2.3i and N.J.A.C. 11:17C-2.2.

I hereby note that N.J.A.C. 11:17C-2.2 provides that all premium funds shall be remitted to the insurer or returned to the insured within five (5) business days after receipt of the funds. Although the check that the Respondents issued to Thomas K. was a partial refund of the $110,000 cash collateral that Thomas K. had given to Respondents on November 10, 2010, to secure his bail bond issued by the Middlesex County Superior Court (Initial Decision at 5), it is important to make clear that I hereby hold that the term "premium funds" in this provision and all other provisions in N.J.A.C. 11:17C, which establishes the requirements for the management of funds by licensed insurance producers, regulates how insurance producers handle all monies received by them in the course of conducting insurance business, including collateral collected by limited lines bail bond producers. Although not strictly premium, those funds are remitted to the bail bond producer along with traditional insurance premium and are required by the producer as a condition of posting the bond. Thus, without remission of such collateral, the bond could not be procured, and thus those funds are a part of the premium funds regulated by N.J.A.C. 11:17C. It would be illogical to interpret our rules as requiring bail bond producers to segregate and hold only traditional premium in a fiduciary capacity, especially when collateral are monies paid to the producer in order to secure the bond and those funds are always subject to

being returned to the individual posting the security upon discharge of the bail bond. See, N.J.A.C. 11:17C-2.1. Therefore, I concur with the ALJ that the Respondents' failure to return the collateral within 5 days of their receiving a demand by the defendant/indemnitor for a reduction of the collateral also violated N.J.A.C. 11:17C-2.2, and with the ALJ's determination that all other violations of N.J.A.C. 11:17C discussed below are an appropriate interpretation and application of the Department's rules on producer management of funds received in the course of business when applied to limited lines bail bond producers.

Count Two: Failure to Return Cash Collateral

Count Two of the AOTSC alleges that the Respondents used dishonest practices to misappropriate $100,000 of cash collateral, in violation of N.J.S.A. 17:22A-40a(2) (violating any insurance law), (4) (improperly withholding, misappropriating, or converting any monies received in course of doing insurance business), (8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility), and (16) (commit a fraudulent act), N.J.S.A. 11:17C-2.1(a) (all premium funds shall be held by an insurance producer in a fiduciary capacity and shall not be misappropriated, improperly converted to the insurance producer's own use, or illegally withheld by the licensee), and N.J.A.C. 11:17C-2.2 (all premiums shall be remitted to the insurer or returned to the insured within 5 business days after receipt of the funds).

Although the OTSC and AOTSC alleges that the Respondents misappropriated $100,000 in cash collateral, the ALJ found that Thomas K. provided cash collateral to the Respondents in the amount of $110,000 to secure Thomas K.'s bail bond and to ensure that the Respondents would not place a lien on Thomas K.'s marital home. Initial Decision at 11. The record supports the ALJ's finding that $110,000 is the amount of the cash collateral. This amount matches that

which is listed on the "Collateral Agreement and Affidavit of Ownership," which was entered into between the Respondents and Thomas K. See Thomas K. Cert., Exh. 4. Moreover, this amount matches the hand-written agreement signed by Respondent Brown and Thomas K. wherein Respondents agreed to remove the lien from Thomas K.'s house in exchange for the payment of $110,000 cash collateral. Ibid. In addition, Thomas K. and his wife gave Respondents $131,700 in checks and cash for collateral and bail premium which Respondent Brown acknowledged receiving in writing and provided receipts. Shannon Cert. ¶10 and 11, Exhs. 5 and 6; Thomas K. Cert. ¶5, Exh. 3.

N.J.A.C. 1:1-6.2(a) provides that "[u]nless precluded by law or constitutional principle, pleadings may be freely amended when, in the judge's discretion, an amendment would be in the interest of efficiency, expediency and the avoidance of over-technical pleading requirements and would not create undue prejudice." Prior Commissioners have permitted such amendments. For example, in Commissioner v. Furman, OAL Dkt. No. BKI 3891-06, Initial Decision (06/21/07), Final Decision and Order (09/17/07), the Order to Show Cause did not allege that the respondent supplied false information to an insurer; however, the respondent admitted to supplying said false information during cross examination. Accordingly, the Commissioner cited to N.J.A.C. 1:1-6.2 and concluded that "the pleadings in this case should be modified to conform with the evidence on the record. . . ." Ibid. I agree with the ALJ that the amount of the cash collateral that was misappropriated by the Respondents was $110,000 and not the $100,000 listed in the OTSC and AOTSC. As such, I AMEND the AOTSC accordingly.

I concur with the ALJ's findings that that the Department proved the allegations in Count Two and that the Respondents used dishonest practices to misappropriate $110,000 of cash

collateral, in violation of N.J.S.A. 17:22A-40a(2), (4), (8) and (16), N.J.A.C. 11:17C-2.1(a) and N.J.A.C. 11:17C-2.2.

Count Three: Misappropriation of a Check Payable to Another Party

Count Three of the AOTSC alleges that the Respondents used dishonest practices by cashing a check made out to another party and misappropriated $15,000, in violation of N.J.S.A. 17:22A-40a(2) (violating any insurance law), (4) (improperly withholding, misappropriating, or converting any monies received in course of doing insurance business), (8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility), and (16) (commit a fraudulent act), and N.J.A.C. 11:17C-2.2 (all premiums shall be remitted to the insurer or returned to the insured within 5 business days after receipt of the funds).

In the Answer to the AOTSC, Respondents assert that there is no violation because the check was deposited by staff as a clerical error. This argument is not persuasive and the Respondent submitted no legally competent proofs to support this allegation. Respondent Brown knew that Thomas K.'s bail was reduced and informed Thomas K. that FIA was issuing a $15,000 refund. Thomas K. Cert., ¶13. The FIA refund check was forwarded to Brown and a signature purporting to be Thomas K. endorsed the check, and according to Thomas K. he did not sign the check. Thomas K. Cert., ¶19 and ¶20, Ex. 9. Moreover, Respondents did not return the refund to Thomas K.

I concur with the ALJ's findings that the Department proved the allegations in Count Three and that the Respondents cashed a check made out to another party and misappropriated $15,000, in violation of N.J.S.A. 17:22A-40a(2), (4), (8) and (16) and N.J.A.C. 11:17C-2.2.

Count Four: Failure to Produce Documents to the Department

Count Four of the AOTSC alleges that the Respondents failed to provide business records to the Department, in violation of N.J.S.A. 17:22A-40a(2) (violating any insurance law), and (8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility), N.J.A.C. 11:17C-2.5(h) (insurance producers shall maintain a file for each client containing records for at least five years from the date of termination of coverage), and N.J.A.C. 11:17C-2.6(b) (insurance producers shall produce for inspection by the Department any and all books and records required to be kept in the conduct of the business of insurance).

In the Answer to the AOTSC, Respondents argue that documents were not provided upon the advice of counsel. However, it is Respondents' responsibility to understand and abide by Producer Act and regulatory requirements. See Suter v. Fiegoli, OAL Dkt. No. BKI-8509-00, Initial Decision (04/08/02), Final Decision and Order (05/28/02) (finding that a licensee's reliance on counsel, even if misplaced, does not absolve him of guilt for failure to comply with statutory requirements); Commissioner v. Secure Title, Inc. and Hilderbrandt, OAL Dkt. No. BKI-16461-15, Initial Decision (10/20/14), Final Decision and Order (06/04/15) (finding that is it a licensee's responsibility to understand and abide by the statutory requirements of the Producer Act, not his counsel).

I concur with the ALJ's findings that the Department proved the allegations in Count Four and that the Respondents failed to provide business records to the Department, in violation of N.J.S.A. 17:22A-40a(2) and (8), N.J.A.C. 11:17C-2.5(h), and N.J.A.C. 11:17C-2.6(b).

Count Five: Respondent Brown's Indictment and Conviction

Count Five of the AOTSC alleges that Respondent Brown failed to notify the Department within 30 days of his indictment and subsequent conviction of Theft by Unlawful Taking, in violation of N.J.S.A. 17:22A-40a(2) (violating any insurance law), (8) (fraudulent or dishonest

practices, or demonstrate untrustworthiness or financial irresponsibility), and (18) (an insurance producer shall notify the Commissioner of his indictment and/or conviction of any crime), N.J.S.A. 17:22A-47b (an insurance producer shall report a criminal prosecution of the producer to the Commissioner within thirty days of the pre-trial hearing date), and N.J.A.C. 11:17A-4.10 (an insurance producer shall act in a fiduciary capacity in the conduct of his or her insurance business).

I concur with the ALJ's findings that the Department proved the allegations in Count Five and that the Respondent Brown failed to notify the Department of his indictment and conviction of Theft by Unlawful Taking, in violation of N.J.S.A. 17:22A-40a(2), (8), and (18), and N.J.S.A. 17:22A-47b. I hereby clarify the Initial Decision in that it is Respondent's engagement in criminal activities involving theft of monies received in the conduct of insurance business which constitutes breaches of his duty to act in a fiduciary capacity in the conduct of his insurance business, in violation of N.J.A.C. 11:17A-4.10.

Count Six: Misappropriation of Bail Bond Premiums and Failure to Maintain Records

Count Six of the AOTSC alleges that the Respondents misappropriated bail bond premiums, in violation of N.J.S.A. 17:22A-40a(2) (violating any insurance law), (4) (improperly withholding, misappropriating, or converting any monies received in course of doing insurance business), (8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility), and (16) (commit a fraudulent act), N.J.S.A. 11:17C-2.1(a), N.J.A.C. 11:17A-4.10 (an insurance producer shall act in a fiduciary capacity in the conduct of his or her insurance business), and N.J.A.C. 11:17C-2.2(b) (all premiums due the insured shall be paid to the insured or credited to the insured's account within five business days after receipt by the insurance producer). Count Six further alleges that the Respondents failed to abide by the terms and duties

of their Sub-Producer Agreement with Bankers, in violation of in violation of N.J.S.A. 17:22A-40a(2) (violating any insurance law), (4) (improperly withholding, misappropriating, or converting any monies received in course of doing insurance business), (8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility), and (16) (commit a fraudulent act) and N.J.S.A. 17:22A-42a (an agent shall also abide by the terms of its written agency contract with an insurer). Further, Count Six alleges that the Respondents failed to maintain books and records, in violation of N.J.A.C. 11:17C-2.5(a) (insurance producers shall maintain accurate books and records reflecting all insurance related transactions).

I concur with the ALJ's findings that the Department proved the allegations in Count Six and that the Respondents misappropriated bail bond premiums, in violation of N.J.S.A. 17:22A-40a(2), (4), (8), and (16), N.J.A.C. 11:17A-4.10, and N.J.A.C. 11:17C-2.1(a). However, it should be noted that the AOTSC alleges that Respondents' actions, as alleged in Count Six, are a violation of N.J.S.A. 11:17C-2.1(a). As no statute by this citation exists, this appears to be a typographical error when citing to N.J.A.C. 11:17C-2.1(a), and this correct citation was set forth in the Department's Motion for Summary Decision and in the Initial Decision. N.J.A.C. 11:17C-2.1(a) provides that all "premium funds shall be held by an insurance producer in a fiduciary capacity and shall not be misappropriated." I agree with the ALJ's determination that the Respondents' actions, as alleged in Count Six of the AOTSC, constitute a violation of N.J.A.C. 11:17C-2.1(a) and pursuant to N.J.A.C. 1:1-6.2(a), as discussed above, I AMEND the AOTSC to correct the citation of N.J.A.C. 11:17C-2.1(a).

Further, N.J.A.C. 11:17C-2.2(b) provides that "[a]ll premiums due the insured shall be paid to the insured or credited to the insured's account within five business days after receipt by the insurance producer from the insurer or other insurance producer or premium finance

company." In the present matter, the Respondents owed premium funds to their surety, Bankers, under the terms of their Sub-Producer agreement. The Respondents, under the circumstances alleged in Count Six, did not owe premium funds to any insureds. However, N.J.A.C. 11:17C-2.2(a), provides that "[a]ll premium funds shall be remitted to the insurer or other insurance producer, as applicable, within five business days after receipt of the funds except as otherwise required or provided by any of the following." This section of the rule clearly applies to the factual allegations set forth in Count Six. As the Respondents admitted that they owed premium funds to Bankers, an insurer, the AOTSC in this matter should be conformed to reflect the proofs and correct regulatory citation. Pursuant to N.J.A.C. 1:1-6.2(a), I AMEND the AOTSC to reflect N.J.A.C. 11:17C-2.2(a) as the correct regulatory violation in Count Six. As such, I FIND that Respondents' actions, as alleged in Count Six of the AOTSC, do not constitute a violation of N.J.A.C. 11:17C-2.2(b). However, I FIND that the Respondents' actions, as alleged in Count Six of the AOTSC, do constitute a violation of N.J.A.C. 11:17C-2.2(a).

Further, I concur with the ALJ's findings that the Respondents failed to abide by the terms and duties of their Sub-Producer Agreement with Bankers, in violation of N.J.S.A. 17:22A-40a(2), (4), (8), and (16), and N.J.S.A. 17:22A-42a. Lastly, I concur with the ALJ's findings that the Respondents failed to maintain books and records, in violation of N.J.A.C. 11:17C-2.5(a).

Penalty against Respondents

With respect to the appropriate action to take against Respondents' insurance producer licenses, I find that the record is more than sufficient to support license revocation and, in fact, compels the revocation of their licenses. I concur with the ALJ's recommendation that the Respondents' licenses be revoked.

Our strong policy is to instill public confidence in both insurance professionals and the industry as a whole. In re Parkwood Co., 98 N.J. Super. 263 (App. Div. 1963). Courts have long recognized that the insurance industry is strongly affected with the public interest and the Commissioner is charged with the duty to protect the public welfare. See Sheeran v. Nationwide Mutual Insurance Company, 80 N.J. 548, 559 (1979). Insurance agents and brokers act as fiduciaries. Strawbridge v. NY Life Insurance Company, 504 F.Supp. 824 (D.N.J. 1981). An insurance producer collects and holds money from insureds; thus, the qualities of trustworthiness, integrity, and compliance are of paramount importance to the insurance industry. The nature and duty of an insurance producer also "calls for precision, accuracy and forthrightness." Fortunato v. Thomas, 95 N.J.A.R. (INS) 73 (1993).

In decisions by prior Commissioners in similar cases, revocation has consistently been imposed upon licensees who have engaged in misconduct involving fraud, misappropriation of premium monies, bad faith, and dishonesty. Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11); Commissioner v. Strandskov, OAL Dkt. Nos. BKI 03451-07 and BKI 03452-07, Initial Decision (09/25/08), Final Decision and Order (02/04/09); see also Commissioner v. Feliz, OAL Dkt. No. BKI 85-05, Initial Decision (12/16/05), Final Decision on Remand (03/13/06) (license revocation, restitution and fines for failure to remit payment to the insurer or return premiums to insureds); Commissioner v. Erwin, OAL Dkt. No. BKI 4573-06, Initial Decision (07/09/07), Final Decision and Order (09/17/07) (license revocation and administrative fines for, among other things, failure to remit premiums and failure to maintain a trust account). Only in very rare cases involving extraordinary mitigating factors would it be appropriate to refrain from revoking the license of an insurance producer who has committed fraud. Bakke v. Goncalves, OAL Dkt. Nos. BKI 3188-

03 and BKI 3301-05, Initial Decision (12/03/03), Final Decision and Order (05/24/04), On remand (02/15/06).

I agree with the ALJ's findings that Respondents' activities were clear and egregious violations of the insurance laws of this State and therefore demand the revocation of the Respondents' producer licenses. As the aforementioned decisions show, revocation is appropriate in almost all cases wherein a licensed insurance producer has engaged in misappropriation of premium monies, bad faith, and dishonesty. Here, the Respondents misappropriated cash collateral in the amount of $110,000 from their client, including a $15,000 check from FIA that was made payable to their client, were criminally convicted for this conduct, and this collateral still has not been returned in full. Further, the Respondents failed to remit bail bond premiums to their appointing insurer in violation of their Sub-Producer Agreement and the insurance laws of this State. The fact that the Respondents made partial restitution of the collateral funds to Thomas K. under a Judgment of Conviction for Theft by Unlawful Taking, does not have any bearing on the decision to revoke Respondents' producer licenses. Theft of insurance premiums and collateral held in trust for a client is one of the most egregious violations an insurance producer can commit. It runs counter to all of the fiduciary obligations of the profession and partial repayment of stolen funds does not obviate these actions. I have a duty to protect all New Jersey insurance consumers from producers that engage in such unlawful and egregious conduct. Accordingly, based upon my review of the record and the ALJ's Initial Decision, I am compelled to agree with the ALJ's determination that the revocation of both Respondents' producer licenses is necessary and appropriate.

Under Kimmelman v. Henkles & McCoy, Inc., 108 N.J. 123 (1987), certain factors are to be examined when assessing administrative monetary penalties such as those that may be

imposed pursuant to N.J.S.A. 17:22A-45 upon insurance producers (up to $5,000 for the first violation and up to $10,000 for any subsequent violations). These factors include: (1) the good faith or bad faith of the violator; (2) the violator's ability to pay; (3) the amount of profit obtained from the illegal activity; (4) injury to the public; (5) duration of the illegal conduct; (6) existence of criminal actions and whether a large civil penalty may be unduly punitive if other sanctions have been imposed; and (7) past violations. Kimmelman, supra, 108 N.J. at 137-39.

The record herein indicates the following with respect to these factors. Respondents demonstrated bad faith by misappropriating cash collateral, which was provided to them in a fiduciary capacity. After Thomas K.'s bail was reduced from $300,000 to $100,000, he approached the Respondents and requested a partial refund of the $110,000 cash collateral he originally provided to the Respondents to secure the bail bond. Thereafter, the Respondents issued a check for $30,000 which was returned for insufficient funds. Further, the Respondents fraudulently endorsed and cashed a check that was issued and made payable to Thomas. K. Moreover, even though the Respondents entered into a Collateral Agreement wherein the Respondents agreed to return the collateral at the disposition of the criminal case against Thomas K. and the Respondents were made aware that the criminal case against Thomas K. was dismissed in 2011, the Respondents still failed to return the $110,000 cash collateral. Further, the Respondents admitted that they misappropriated funds when they failed to pay Bankers for premiums on bail bonds.

As to the second Kimmelman factor, the Respondents have not provided any indication that they are unable to pay a civil penalty. Respondents who claim an inability to pay civil penalties bear the burden of proving their incapacity. Goldman v. Shah, OAL Dkt. No. BKI 11903-05, Initial Decision (04/15/08), Final Decision and Order (09/02/08). Regardless, an

insurance producer's ability to pay is only a single factor to be considered in determining an appropriate fine and does not obviate the need for the imposition of an otherwise appropriate monetary penalty. Moreover, the Commissioner has issued substantial fines against insurance producers despite their arguments regarding their inability to pay. See Fonseca, supra (issuing a $100,500 civil penalty despite the producer arguing that he was unable to pay); Erwin, supra (fine of $100,000 imposed despite evidence of the Respondent's inability to pay); Commissioner v. Malek, OAL Dkt. Nos. BKI 4520-05 and BKI 486-05, Initial Decision (12/06/05), Final Decision and Order (01/18/06) (fine increased from $2,500 to $20,000 even though the producer argued an inability to pay fines in addition to restitution).

The third Kimmelman factor addresses the amount of profits obtained from the illegal activity. The greater the profits an individual is likely to obtain from illegal conduct, the greater the penalty must be if penalties are to be an effective deterrent. Kimmelman, supra, 108 N.J. 123 at 138. In the present action, the Respondents unlawfully retained $110,000 of Thomas K.'s funds, minus the amount Respondent Brown paid to the Probation Department pursuant to the Judgment of Conviction entered against him, and at least $4,848 in bond premiums owed to Respondents' surety, Bankers. It should also be noted that Respondent Brown was required, under the Judgment of Conviction, to pay $30,000 in restitution to Thomas K. within 60 days of the date the Judgment of Conviction. The Judgment of Conviction was entered on December 13, 2013, and to date, Respondent Brown, through his own admission, has failed to pay the full $30,000 even though almost two years have passed since the Judgment of Conviction was entered. While the Respondents disagree as to the actual amount of their misappropriations, and the Respondents have refused to provide checks and bank account information thus preventing the Department from knowing the full extent of the misappropriations, the Respondents have

admitted that they failed to return the cash collateral remitted by Thomas K. and have failed to pay the bail bond premiums owed to Bankers. This factor weighs in favor of a significant penalty.

The fourth Kimmelman factor addresses the injury to the public. Licensed producers act in a fiduciary capacity. In re Parkwood Co., supra, 98 N.J. Super. at 268. Moreover, the Commissioner is charged with the duty to protect the public welfare and to instill public confidence in both insurance producers and the insurance industry. "When insurance producers breach their fiduciary duties and engage in fraudulent practices and unfair trade practices, the affected insurance consumers are financially harmed and the public's confidence in the insurance industry as a whole is eroded." Fonseca, supra at 13. Here, the Respondents took advantage of Thomas K. and Banker's trust and misappropriated over $114,000. The Respondents have eroded the confidence of the New Jersey consumers in insurance producers and the insurance business. This harm is cognizable and significant and warrants imposition of a substantial monetary penalty.

The fifth Kimmelman factor to be examined is the duration of the illegal activity. Respondents' initial illegal and fraudulent activities occurred over the course of two years in 2010 and 2011, and continues to this day as the Respondents have not made full restitution of the misappropriated collateral and premium funds. Respondents have provided nothing but empty assurances that they will reimburse Thomas K. and Bankers for the funds owed, and this weighs heavily in favor of a substantial monetary penalty.

The existence of criminal actions and whether a civil penalty may be unduly punitive if other sanctions have been imposed is the sixth factor. The Supreme Court held in Kimmelman that a lack of criminal punishment weighs in favor of a more significant civil penalty because the

defendant cannot argue that he or she has already paid a price for his or her unlawful conduct. Kimmelmen, supra, 108 N.J. at 139. In the present matter, Respondent Brown faced criminal punishment for only a portion of his illegal acts. Brown was convicted of Theft by Unlawful Taking and was ordered to pay restitution of $30,000, which was the amount of the check that Respondents issued to Thomas K. that was returned for insufficient funds. Neither of the Respondents were held accountable in a criminal action for the remaining $80,000 of collateral that the Respondents owed Thomas K. or the $4,841 in premiums that Respondents owed to Bankers. As Brown was only ordered to pay partial restitution and received only one year of probation in the criminal matter, imposition of license revocation, a significant penalty, and an order of restitution in this administrative enforcement matter is not unduly punitive.

The last Kimmelman factor deals with whether the producer had previously violated the Producer Act and if past penalties have been insufficient to deter future violations. Respondent Brown has committed a previous violation. On June 17, 2015, Brown entered into a Consent Order No. E15-62 with the Department wherein he admitted to committing violations of the Producer Act. The Consent Order stipulates that Brown failed to maintain complete records of bail bond transactions and failed to inform the Commissioner of changes to his residential and business address. This prior violation is an aggravating factor and demonstrates a need for significant monetary penalties to deter such conduct by the Respondents and in the insurance producer industry.

In light of the above Kimmelman analysis and based on the violations I have concluded that Respondents committed, I concur with the recommendations of the ALJ that Respondents shall pay civil monetary penalties totaling $50,000. As requested by, and for the reasons asserted by, the Department in its Exceptions, I MODIFY the Initial Decision, in part, relating to the

allocation of the $50,000 civil monetary penalty in the Initial Decision and allocate the civil monetary penalty as follows: Count One: $5,000, Count Two: $10,000, Count Three: $10,000, Count Four: 5,000, and Count Six: $10,000, for a total civil monetary penalty of $40,000 against Respondent Brown and Respondent Guaranteed, jointly and severally; and Count Five: $5,000 for each notification failure, for a total of $10,000 against Respondent Brown, individually. The fines are fully warranted, not excessive or unduly punitive, and are necessary to demonstrate the appropriate level of opprobrium for the Respondents' egregious conduct.

In addition, I concur with the ALJ that Respondents shall pay costs in the amount of $3,625 pursuant to N.J.S.A. 17:22A-45c.

Furthermore, it is necessary that the Respondents be ordered to pay restitution to Thomas K. and Bankers. The Initial Decision recommended a total of $84,841 of restitution be paid, the amount argued by the Department in its Motion for Summary Decision and presumably representing the $110,000 cash collateral less the $30,000 restitution order in the criminal matter plus the $4,841 owed to Bankers. However, the record is not clear as to the actual exact amount of restitution due to Thomas K. While the ALJ found that no portion of the cash collateral had been returned to Thomas K., Thomas K. admitted that approximately $22,726 was received from Respondent Brown, through the Probation Department of the Union County Superior Court, as a result of the Judgment of Conviction entered against Respondent Brown on or about December 13, 2013. Thomas K. Cert. at 7, ¶ 28. However, Respondent Brown, in his answers to the Department's Request for Admissions, has indicated that the amount Respondents paid in restitution was $24,313. Bornmann Cert., Exh. 7, at 4. As the Respondents were entrusted with $110,000 of cash collateral from Thomas K., and even though a Judgment of Conviction was entered against Respondent Brown in the amount of $30,000, the record and Brown's own

admissions reflect that some payment has been made. In light of the foregoing, I MODIFY the Initial Decision, in part, and order the Respondents to pay restitution to Thomas K. for the full amount of collateral misappropriated totaling $110,000. The Respondents shall receive credit for any amounts previously paid to Thomas K. under the aforementioned Judgment of Conviction that can be supported through legally competent proofs. Additionally, the Respondents are ordered to pay restitution to Bankers for the unpaid premium totaling $4,841.

CONCLUSION

Having carefully reviewed the Initial Decision, the Exceptions, and the entire record herein, I hereby partially ADOPT the Findings and Conclusions as set forth in the Initial Decision. Specifically, I ADOPT the ALJ's conclusions and hold that the Respondents violated the Producer Act as charged in the AOTSC except as modified herein, and have failed to present any legally or factually viable defenses to the violations of the Producer Act. Further, I ADOPT the conclusion that the Department's Motion for Summary Decision should be granted on all six Counts charged in the AOTSC.

I also ADOPT the ALJ's recommendation and hereby ORDER the revocation of the Respondents' insurance producer licenses. Further, I ADOPT the ALJ's recommendations and ORDER the Respondents to pay costs in the amount of $3,625. I MODIFY the Initial Decision as to the amount of restitution and ORDER the Respondents to pay restitution to Thomas K. in the amount of $110,000 minus any amounts paid to Thomas K. under the aforementioned Judgment of Conviction that can be demonstrated through legally competent proofs, and pay restitution to Bankers in the amount of $4,841. I further MODIFY the Initial Decision as it relates to the allocation of the fines to all Counts of the AOTSC and impose the following fines: Count One: $5,000, Count Two: $10,000, Count Three: $10,000, Count Four: 5,000, and Count

Six: $10,000, for a total civil monetary penalty of $40,000 against Respondent Brown and Guaranteed, jointly and severally; and Count Five: $5,000 for each notification failure totaling $10,000 against Respondent Brown, individually.

It is so ORDERED on this 14th day of December, 2015

Richard J. Badolato
Acting Commissioner

Inoord/Brown and Guaranteed Bail Bonds Final Order av