ORDER NO. E17-72

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

COMMISSIONER OF BANKING AND INSURANCE, Petitioner, v. FIRST JERSEY INSURANCE AGENCY, INC., GERALD E. CONNER, AND JAMES W. BLUMETTI, Respondents.	)	OAL DKT. NO: BKI 13160-2015S AGENCY DKT. NO.: E15-82 ORDER DENYING STAY PENDING APPEAL

This matter comes before the Commissioner of Banking and Insurance ("the Commissioner") pursuant to the authority of N.J.S.A. 52:14B-1 et seq., the Administrative Procedure Act ("the APA"), 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" or "the Act"), N.J.S.A. 17:29B-1 et seq., and all powers expressed or implied therein, for the purpose of reviewing a motion by First Jersey Insurance Agency, Inc. ("First Jersey"), Gerald E. Conner[1] ("Conner") and James W. Blumetti (Blumetti") (collectively known as "Respondents") to stay Final Decision and Order No. E17-65 entered by the Commissioner on July 19, 2017 ("the Final Decision" or "Final Order"). In that decision, the Commissioner adopted and modified the Initial Decision of Administrative Law Judge Laura Sanders, ("the ALJ") as follows.[2]

Counts 1 and 3 of the Amended OTSC charged numerous violations of Producer Act in addition to violations of N.J.S.A. 17:29B-4(2), N.J.A.C. 11:2-11.2 and N.J.A.C. 11:17A-2.8.

[1] Conner is deceased.
[2] The Department withdrew Count 2 of the Amended OTSC.

During the course of the OAL proceeding and as adopted by the Commissioner, it was found that the Respondents used a vendor to mass mail an advertisement to over 51,000 New Jersey residents that contained misleading and false information about possible large increases in their Medicare supplement insurance premiums in an attempt to obtain business and therefore induce recipients to change their insurance policies. The Final Decision agreed with the ALJ and found that through this conduct the Respondents violated N.J.S.A. 17:22A-40a(2), (7), & (8) in the Producer Licensing Act, N.J.S.A. 17:29B-4(2), N.J.A.C. 11:2-11.2 and N.J.A.C. 11:17A-2.8. However, after the filing of Exceptions by the parties, the Commissioner increased the civil penalty recommended by the ALJ of $51,517.00, and imposed upon Respondents, jointly and severally, civil monetary penalties of $100,000 for the 51,517 acts by Respondents in violation of the above-referenced provisions of our State's insurance laws. Respondents filed an appeal of the Final Decision which remains pending in the Appellate Division of the Superior Court of New Jersey.

RESPONDENT'S MOTION

On July 31, 2017, Respondents filed the instant motion to stay the provisions of the Final Decision pending their appeal. Respondents aver that they have met their burden for a stay. Respondents' Motion for a Stay of the Final Decision and Order ("Stay Motion") at 2. Moreover, Respondents assert that, if a stay is not granted, they will suffer irreparable harm. Id. at 3. Specifically, Respondents assert that, if the $100,000.00 fine and several findings in the Final Order that they violated insurance laws are not stayed, First Jersey will lose business from its biggest insurance carriers and be unable to sustain itself. Id. at 2. In fact, Blumetti certified that he was personally notified by First Jersey's largest carriers that they will terminate their business relationship if First Jersey is fined more than $5,000 and he provided documentation

that two of First Jersey's larger clients terminated First Jersey's services but restored their status pending final resolution. Stay Motion, Blumetti Certification at ¶2, Exhibit A. Respondents note that they employ 14 full time employees, have 25 agents, and 18 retirees whose families depend upon their current operation. Stay Motion at 2. Respondents argue that First Jersey has been "providing insurance products to New Jersey residents for 32 years" and that Blumetti has been licensed for over 20 years and has never been accused of any insurance related violation. Ibid. Respondents further note that Blumetti holds "policy-related" positions in the insurance industry and licenses in other states and the decision may result in revocation of his out-of-state licenses. Ibid. Respondents further argue that this decision will permanently damage their pristine professional reputations, especially if the decision is posted on the Department's website before an appeal is concluded. Id. at 3.

Respondents also argue that they have a reasonable likelihood of success in that the "advertisement was 100% truthful and all violations should be reversed upon appeal." Ibid. Respondents specifically address the finding in the Initial Decision wherein, "the ALJ held that the advertisement was partly untrue because no other insurer proposed a 30% rate increase, but, if there was another insurer proposing such a rate increase, the advertisement would have been 100% truthful" stating that the ALJ failed to consider evidence that United World proposed a 30% rate increase in 2012 and a 25% rate increase in 2013. Ibid. Respondents note that, contrary to the Final Decision, the advertisement states that insurers proposed a 30% rate increase rather than approved a 30% rate increase which, when juxtaposed to Horizon Blue Cross' ("Horizon") rate sheet showing a 30% increase and United World's request for a 30% increase, proves that the advertisement was true. Ibid.

Respondents also aver that, contrary to the findings in the Final Order, Horizon is the leading senior organization based upon common knowledge and statements made by the Department's analyst. Id. at 4.

Respondents also note that a balancing of the hardships favor the granting of the stay because it would maintain the status quo. Ibid. Respondents aver that there is no threat that Respondents will repeat such conduct as these acts were isolated and occurred four years ago and the Department did not seek a cease and desist order. Id. at 4-5. Respondents describe their history in the insurance industry as uncheckered and compare this to the hardships their employees and families will suffer and the irreparable damage to their reputation that would occur if a stay is not granted. Ibid.

Respondents also request, in the alternative to the granting of a stay, that the supersedeas bond required to be posted be waived or greatly reduced while the appeal is pursued because Appellants/Respondents do not present a risk of defaulting on the penalty and the fine has been imposed jointly and severally. Stay Motion at 5-6.

DEPARTMENT'S RESPONSE

The Department opposes Respondents' Motion for a Stay arguing that such motion should be denied because Respondents have not established the prerequisites for a stay by clear and convincing evidence. Department's Opposition to Motion to Stay ("Department's Opposition") at 5. The Department argues that Respondents cannot show a likelihood of success on the merits in that the findings in the Final Order were not arbitrary or capricious and that, ultimately, Respondents will not be able to overcome the deference ordinarily afforded to the agency's expertise. Id. at 5-6.

The Department emphasizes that, despite Respondents' contentions that the advertisement in question was true, the Commissioner properly determined that: 1) Horizon did not raise rates by 30% in 2013; and 2) Respondents' claim that rates would rise by 30% was misleading and speculative because United World only requested a 30% increase, but was not granted such an increase. Id. at 7. The Department further contends that "Respondents knew that they should not have relied on the requested increases for their advertisements because such rate requests are almost always adjusted." Ibid.

The Department also argues that, contrary to the Respondents' assertions, the advertisement does not use the verbiage "proposed" or "approved" but instead states that carriers *may* increase their rate up to 30%, which was found to be misleading. Id. at 7-8.

The Department also contends that Respondents misread the Final Decision, noting that it was determined in the Final Decision that the advertisement's use of the term "leading senior organization" was vague and contributed to the overall deceptive nature of the advertisement. Id. at 8. Further, the Department states that, contrary to Respondents' contentions, the Final Order did not make a determination that Horizon was not a leading senior organization. Ibid.

The Department also argues that Respondents failed to demonstrate that irreparable harm will result if a stay is not granted. Ibid. The Department contends that Respondents provide no support for the notion, aside from mere speculation, that failure to grant a stay would result in job loss and that, regardless, such a consequence is irrelevant to the ultimate determination of whether or not a stay should be granted. Id. at 8-9. The Department also notes that loss of income does not constitute irreparable harm. Id. at 9.

The Department also avers that the public's interest in denying the stay outweighs the benefit of the relief to the movant. Id. at 10. The Department contends that Respondents failed

to consider the public interest when claiming that no hardship would occur in the granting of the stay, most notably the vulnerable senior citizen population. Ibid.

The Department also opposes Respondents' request to not post the Final Order on the Department's website as such posting is required by the Administrative Procedure Act at N.J.S.A. 52:14B-3(3). Id. at 11.

With respect to Respondents' request for a waiver/reduction of the supersedeas bond , the Department argues that it is not within the Department's discretion to waive the supersedeas bond required, which is required pursuant to R. 2:9-5(a), in that Respondents have failed to show good cause why this prerequisite for issuance of a stay should be waived. Id. at 11-12. However, the Department states that it is "willing to agree to stay enforcement of and collection efforts with respect to the penalties if the Respondents post a bond in an amount equal to the full penalty plus post-judgment interest." Id. at 12.

DISCUSSION

Based upon my examination of the criteria under which such applications are to be determined, for the reasons set forth below, Respondents' request for a stay of the Order is denied.

It is well settled that the movant has the burden of establishing by clear and convincing evidence that a stay should be granted. American Employers' Ins. Co. v. Elf Atochem N.A., Inc., 280 N.J. Super. 601, 611 fn8 (App. Div. 1995); Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 639 (App. Div. 1999) (citing American Employers' Ins. Co., supra). In this application, Respondents have failed to recite facts or present evidence in their moving papers that meet the legal requirements entitling them to the relief required. Indeed, Respondents have

done little more than reiterate the claims previously asserted by Respondents, which were previously reviewed and deemed meritless by the Commissioner in the Final Decision.

A stay pending appeal of a final administrative decision is an extraordinary equitable remedy involving the most sensitive exercise of judicial discretion. See Crowe v. DeGioia, 90 N.J. 126, 132 (1982); Zoning Bd. of Adjustment of Sparta v. Service Elec. Cable Television of N.J., Inc., 198 N.J. Super. 370, 379 (App. Div. 1985). It is not a matter of right, even though irreparable injury may otherwise result. Yakus v. United States, 321 U.S. 414, 440, 64 S. Ct. 660, 674, 88 L. Ed. 834 (1944). Because it is the exception rather than the rule, GTE Corp. v. Williams, 731 F. 2d 676, 678 (10th Cir. 1984), the party seeking such relief must clearly carry the burden of persuasion as to all the prerequisites in most circumstances. United States v. Lambert, 695 F. 2d 536, 539 (11th Cir. 1983).

The injunctive relief of a stay is appropriate only in instances where the party seeking this extraordinary measure demonstrates that each of the following conditions has been satisfied: 1) a reasonable probability of success on the merits of the underlying appeal; 2) the public interest will be served by the stay; 3) on balance, the benefit of the relief to the movant will outweigh the harm such relief will cause other interested parties, including the general public; and 4) irreparable injury will result if a stay is denied. Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982); Garden State Equal. v. Dow, 216 N.J. 314, 320-321 (2013); McNeil v. Legis. Apportionment Comm'n, 176 N.J. 484 (2003). Granting a stay pending appeal is the exercise of an extremely far-reaching power, one not to be indulged in except in a case in which it is clearly warranted. Here, Respondents have failed to carry their burden of demonstrating facts that establish any of the Crowe prerequisites for the issuance of a stay.

LIKELIHOOD OF SUCCESS ON THE MERITS

First, Respondents' arguments fail to establish that there is a reasonable probability that they will prevail on the merits of its appeal. Appellate courts will reverse the decision of an administrative agency if it is arbitrary, capricious or unreasonable, or if it is not wholly supported by substantial credible evidence in the record as a whole. L.M. v. Div. of Med. Assistance and Health. Serv., 140 N.J. 480, 489 (1995). Here, Respondents merely reiterate the arguments propounded below, which have already been aptly addressed in the Final Order and, therefore, they have failed to demonstrate that the determinations made in the Final Oder were arbitrary, capricious, or unreasonable.

In the context of actions by an administrative agency, "arbitrary and capricious" means "willful and unreasoning action, without consideration and in disregard of circumstances." Bayshore Sewerage Co. v. Department of Envtl. Pro., 122 N.J. Super. 184 (App. Div. 1974), quoted in Worthington v. Fauver, 88 N.J. 183, 204-205 (1982). Action that is "exercised honestly and upon due consideration," is not arbitrary and capricious, even if there is room for another option and "even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewerage Co., supra, 122 N.J. Super. at 199. Finally, there is a presumption that an agency's actions are reasonable, and the burden is placed on the challenging party to show otherwise. Bergen Pines Hosp. v. Dept. of Human Serv., 96 N.J. 456, 477 (1984); DiMatta v. New Jersey Merit Sys. Bd., 325 N.J. Super. 368, 375 (App. Div. 1999). As discussed in full below, Respondents merely rehash the arguments previously addressed in the Final Decision.

Respondents argue they have a reasonable likelihood of success on the merits. They argue that the advertisement at issue was 100% truthful because, despite the ALJ's initial determination that no other insurer proposed a 30% rate increase, United Word proposed a 30%

rate increase in 2012 and a 25% increase in 2013. Respondents Motion for a Stay of the Final Decision and Order ("Stay Motion") at 3. In fact, Blumetti certifies that:

> the drastic divergence between the Commissioner's opinion and the opinion expressed by the ALJ shows our appeal has merit and a good probability of success. Moreover, we proved that another major insurance company, United Word, a Mutual of Omaha company, another leading national insurer, requested rate increases of 30% and 25% during the applicable time periods. That fact alone should result in success on this appeal. I am not trying to reargue our position, but simply explaining that we have a good faith basis to take an appeal and irrefutable factual support for our positions. Stay Motion, Blumetti Certification at ¶6.

However, contrary to Blumetti's contentions, Respondents are doing just that – reiterating the same arguments that have already been fully and properly addressed in the Final Order. As the Department propounds, the Final Order has "rejected these contentions as fallacious." Department's Opposition to Motion to Stay ("Department's Opposition") at 7. I have already determined that:

> ALJ Sanders correctly held that it is misleading for the Respondents to advertise based upon requested rate increases because such rate requests are almost always adjusted as the Department undertakes its review as demonstrated by the actual rate increases granted for Medicare Supplement plans during 2013 and 2014. Additionally, I would further note that Respondents admit that, as a matter of course, they did not receive requested rate adjustment information [prior to using the advertisement.] See Respondents' Exceptions at 8. Therefore, Respondents admit that they were not aware of this requested rate increase at the time that the advertisement was distributed, but rather obtained the proposed rate increases information at a later date apparently in an attempt to demonstrate that their advertisement was not false or misleading.
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> [Final Decision at 30.]

The Final Order very clearly establishes that the advertisement at issue was misleading and deceptive because it gives the impression that steep rate increases are anticipated in the Medicare Supplement market, when such rate increases, although proposed by certain insurers

unbeknownst to the Respondents despite their advertisement, were highly unlikely to have been - and ultimately were not -granted at the amounts requested.

Moreover, Respondents also assert that they have a reasonable likelihood of success on the merits because it is based upon language that "simply does not appear in the advertisement" in that the "advertisement never states that the State approved 30% rate increase; instead, the advertisement truthfully states that insurers proposed 30% rate increases." Stay Motion at 4. However, to the contrary, the Final Order thoroughly addresses not only the precise language of the advertisement, but the overall implications of such language. As advanced by the Department, the advertisement itself does not use either the word "approved" or "proposed." Department's Opposition at 7. Rather, as noted in the Final Decision, the advertisement entitled "2013 Medicare Update" reads, in part, that: "As of January 1st, a leading senior organization and other Medicare Supplement insurers may increase their rate up to 30% on Medicare supplement coverage." Final Decision and Order No. E17-65 ("Final Order") at 5. As earlier noted, it was determined in the Final Decision that the advertisement was misleading in this regard because the Department rarely grants a rate increase of such magnitude, even if such rate increases are often sought by insurers, and that Respondents should be well aware of this. Moreover, the Final Decision determined that because the Respondents admit having no knowledge of the amount of any requested rate increases at the time the advertisement was issued, their use of this language when read in its entirety was misleading and aimed at scaring senior citizens into believing drastic rate increases were going to affect them in an attempt to generate business in violation of the insurance laws as charged.

Moreover, contrary to Respondents' assertion, no determination was made in the Final Order that Horizon was not a "leading senior organization." In fact, in the Final Order, I

addressed this specific issue by making a determination that the term "leading" was "vague in and of itself and contributes to the overall deceptive nature of the advertisement. Moreover, 'senior organizations' do not conduct insurance business in the State of New Jersey and, although ALJ Sanders accepts Respondents' assertions that Horizon clearly fits this profile, the advertisement does not contain specific language, such as health service corporation, insurer, or even carrier, which would clearly indicate that Horizon was the 'leading senior organization' being referenced in the advertisement." Final Order at 27.

Overall, the Respondents have failed to demonstrate that the findings in the Final Order are arbitrary or capricious, or not supported by credible evidence in the record, because the Final Order was entered after careful consideration and analysis of the facts and circumstances involved in the case. Therefore, Respondents have failed to demonstrate by clear and convincing evidence the likelihood that they can sustain this burden and prevail on appeal.

BENEFITS VS. HARM OF GRANTING THE STAY AND PUBLIC INTEREST

A balancing of the benefits and the harms of granting the request for a stay of the Final Order weighs heavily against granting the stay. To obtain a stay, Respondents must also show that the opposing party will not be substantially harmed and that the public interest will be served, or that a "balancing of the equities" weighs in favor of the relief sought by Respondents. Crowe, supra, 90 N.J. at 134; Morris Cty. Transfer Station v. Frank's Sanitation Serv., 260 N.J. Super. 570, 574-77 (App. Div. 1992). The Department has a paramount interest in protecting the public from unscrupulous insurance practices. Courts have long recognized that the insurance industry is strongly affected with the public interest and that the Commissioner is charged with the duty to protect the public welfare. See Sheeran v. Nationwide Mut. Ins. Co., 80 N.J. 548, 559 (1979). Respondents incorrectly assert that a balancing of the hardships dictates that the stay

be granted because it will maintain the status quo and that there is little risk that Respondents will reoffend during the pendency of this appeal. Respondents further assert that they have not engaged in bad conduct since the underlying conduct occurred and that the Department did not seek a cease and desist issue or license revocation. Stay Motion at 4. Respondents compare this to the harm that their employees and families will suffer and the severe impact that such a ruling would likely have on Respondents professionally. Ibid.

However, the Department argues, and I agree, as follows:

> Respondents fail to consider the public interest by arguing that 'the Department will suffer literally no hardship by a stay.' Respondents' use of the misleading advertisement compelled the imposition of civil monetary penalties in order to protect the public from the pernicious effects of malfeasance in the insurance industry. Respondents specifically targeted senior citizens with the advertisements. Senior citizens are especially vulnerable to fraudulent activity. Comm'r v. Joseph Schifano, OAL Dkt. No. BKI 1947-12 Final Decision and Order (September 11, 2013) at 11. The need to protect the public outweighs the pecuniary impact upon Respondents. To maintain the status quo would disregard the Department's core missions of industry and consumer protection.
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> When a case presents an issue of 'significant public importance,' a court must consider the public interest in addition to the traditional Crowe factors. Garden State Equal. v. Dow, supra, 216 N.J. at 321 (citing McNeil v. Legislative Apportionment Comm'n of N.J., 176 N.J. 484 (2003)). Courts have long recognized that the insurance industry is strongly affected with the public interest and that the Commissioner is charged with the duty to protect the public welfare. See, e.g., Sheeran v. Nationwide Mut. Ins. Co., 80 N.J. 548, 559 (1979).

Respondents fail to show how their interest is not outweighed by the Department's interest in protecting the public and ensuring confidence in the insurance industry, consistent with the Commissioner's authority to regulate the market place. The Final Order and the penalties therein serve as a deterrent to the Respondents and other licensees and furthers the

Department's statutory obligation to protect the public. These considerations demonstrate that the public interest is best served by allowing the Final Order to stand. Thus, when all these facts are balanced, it is evident that the public interest would not be best served by granting a stay in favor of Respondents.

IRREPARABLE HARM

The "harm" cited by Respondents is not certain, imminent or irreparable. The only harm offered is monetary in nature and therefore does not satisfy the fourth Crowe requirement. Irreparable harm is harm which "cannot be adequately compensated in damages or where there exists no certain pecuniary standard for the measurement of the damage." Board of Educ. Of Union Beach v. New Jerey Educ. Ass'n, 96 N.J. Super. 371, 390 (Ch. Div. 1967), aff'd, 53 N.J. 29 (1968). Respondents argue that, if a stay is not granted, Respondents will suffer irreparable harm in that First Jersey will lose its biggest clients; First Jersey's employees, agents and retirees would be severely affected; both First Jersey's and Blumetti's professional relationships would be seriously tarnished; and Blumetti's out-of-State licenses may be placed at risk of suspension or revocation. Stay Motion at 2.

Respondents' arguments are primarily speculative in nature as little to no support legally competent support is provided for these contentions. Courts have consistently held that the loss of income or pecuniary harm does not constitute irreparable harm for purposes of obtaining an interlocutory injunction. Board of Educ. of Union Beach v. New Jersey Educ. Ass'n, 96 N.J. Super. 371, 390 (Ch. Div. 1967), aff'd. 53 N.J. 29 (1968). "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." Zoning Bd. of Adjustment v. Service Elec. Cable Television of N.J., Inc., 198 N.J. Super. 370, 381 (App. Div. 1985) (quoting Virginia Petroleum Jobbers Ass'n v. Federal Power

Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958). There is nothing in the record here that would warrant a different result. Consequently, the Respondents have failed to establish that they will suffer irreparable harm if a stay is not granted because the harms that Respondents purport they will suffer do not rise to the level of the kind of harm contemplated by the courts.

Respondents request, in the alternative to having the stay granted, that the supersedeas bond be waived or greatly reduced while the appeal is pursued because Appellants/Respondent do not present a risk of defaulting on the penalty and the fine has been imposed jointly and severally. Stay Motion at 5-6. The Department argues that it is not within the Department's discretion to waive the supersedeas bond requirement and avers that Respondents have not shown good cause why such prerequisite should be waived. Department's Opposition at 5-6. However, the Department state that it would agree to stay enforcement of and collection efforts with respect to the penalties if the Respondents post a bond in an amount equal to the full penalty plus post-judgement interest. Ibid.

Pursuant to R. 2:9-5, an appellant must post a supersedeas bond as a prerequisite to issuance of a stay. R. 2:9-5(a) states in part:

> A judgment or order in a civil action adjudicating liability for a sum of money or the rights or liabilities of parties in respect of property which is the subject of an appeal or certification proceedings shall be stayed only upon the posting of a bond pursuant to R. 2:9-6 or a cash deposit pursuant to R.1:13-3(c) unless the court otherwise orders on good cause shown. Such posting or deposit may be ordered by the court as a condition for the stay of any other judgment or order in a civil action.

R. 2:9-6(a) continues, in part:

> [T]he supersedeas bond shall be presented for approval to the court or agency from which the appeal is taken...Unless the court otherwise orders after notice on good cause shown, the bond shall be conditioned for the satisfaction of the judgment in full, together with interest and trial costs, and to satisfy fully such modification

of judgment, additional interest and costs and damages as the appellate court may adjudge.

First, I agree with the Department that waiver and/or reduction of the required bond amount is beyond the scope of my jurisdiction as Commissioner. That is a determination that is squarely within the jurisdiction of the Appellate Division pursuant to the rules cited above. Regarding the offer by the Department in its reply to the Stay Motion to stay enforcement and collection efforts if Respondents post a bond in an amount equal to the full penalty plus post-judgement interest, this issue goes beyond the matter before me – namely whether a stay of my Final Order should be granted – and appears to be premature at this time because the Respondents are seeking to waive and/or post a reduced bond. Therefore, I decline to rule on this particular request.

CONCLUSION

Respondents have failed to satisfy the burden of proof to demonstrate by clear and convincing evidence that any of the Crowe prerequisites for a stay are present here. For the above reasons, Respondents Motion to Stay Final Decision and Order E17-65 is denied.

8/10/17
Date

Richard J. Badolato
Commissioner

Crm first jersey stay order/Orders