ORDER NO. E21-45

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

AGENCY DOCKET NO.: E18-52

IN THE MATTER OF PROCEEDINGS BY THE COMMISSIONER OF BANKING AND INSURANCE, TO FINE, SUSPEND, AND/OR REVOKE THE INSURANCE PRODUCE LICENSE OF HANY SHEHATA D/B/A MHM INSURANCE AGENCY REFERENCE NO. 9939802	))))))))	ORDER AMENDING FINAL ORDER NO. E19-80 ON REMAND FROM APPELLATE DIVISION TO CONSIDER MONETARY PENALTIES

This matter comes before the Commissioner of Banking and Insurance ("Commissioner") pursuant to the December 21, 2020 opinion of the Superior Court of New Jersey, Appellate Division, No. A-0119-19T (App. Div. Dec. 21, 2020) remanding the matter to consider the imposition of monetary penalties that were ordered in Order No. E19-80 issued on August 25, 2019 (“Final Order”).

Statement of the Case and Procedural History

On or about April 20, 2018, the Department of Banking and Insurance (“Department”) issued Order to Show Cause No. E18-52 (“OTSC”) against Hany Shehata (“Respondent”) seeking to revoke or suspend his producer license and impose civil monetary penalties and costs of investigation for alleged violations of the New Jersey Producer Licensing Act of 2001, N.J.S.A. 17:22A-26 to -57 (“Producer Act”), and the regulations governing the conduct of insurance producers in this State.

According to the OTSC, the Respondent wrote a home improvement insurance policy to L.C., which was underwritten by Tapco Underwriters. Tapco cancelled the policy, and issued a refund, which the Respondent placed in his personal trust account. The Respondent issued a refund check to L.C. from his personal account after being contacted by an investigator with the Department. The OTSC contains three counts as follows:

> Count One: The Respondent failed to inform L.C. about the cancellation of his policy in violation of N.J.S.A. 17:22A-40(a)(8);
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> Count Two: The Respondent failed to forward to L.C. the refunded premium within five days in violation of N.J.S.A. 17:22A-40(a)(2), (4), (8), and N.J.A.C. 11:17C-2.2; and
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> Count Three: The Respondent failed to maintain a trust account in violation of N.J.A.C. 11:17C-2.3.

Although the Respondent's attorney corresponded with the Department, the Respondent did not file an Answer or request a hearing. The Commissioner found that the allegations were admitted under N.J.A.C. 11:17D-2.1(b)(1) because the Respondent did not file an Answer. The Commissioner issued the Final Order on August 25, 2019.

In the Final Order, the Commissioner revoked the Respondent's insurance producer license. The Commissioner also imposed a fine of $5,000 for Count One of the of the OTSC for failing to advise a client of the cancellation of an insurance policy in violation of N.J.S.A. 17:22A-40(a)(8) (fraudulent coercive or dishonest practices, demonstrating incompetence, unworthiness, or financial irresponsibility). The Commissioner also imposed a fine of $10,000 for Count Two of the OTSC for not forwarding the refund to the client within five business days in violation of N.J.S.A. 17:22A-40(a)(2) (violating any insurance law), (4) (improperly withholding, misappropriating, or converting moneys), (8) (demonstrating incompetence, untrustworthiness, and financial irresponsibility), and N.J.A.C. 11:17C-2.2(b) (all premiums due to 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). Lastly, the Commissioner imposed a fine of $10,000 for Count Three of the OTSC for failing to maintain a trust account in violation of N.J.A.C. 11:17C-2.3(a) (requiring an insurance producer to establish and maintain a trust account into which cash, checks and other instruments payable to the insurance producer shall be deposited). The total amount of penalties was $25,000, the maximum under N.J.S.A. 17:22A-45, which provides that the Commissioner may impose a penalty not exceeding $5,000 for the first offense and not exceeding $10,000 for each subsequent offense. The Commissioner also assessed $487.50 for costs associated with prosecution and investigation pursuant to N.J.S.A. 17:22A-45(c) and N.J.A.C. 11:1-32.4(b)(20).

The Respondent appealed to the Appellate Division arguing that the amount of civil penalties ordered by the Commissioner was excessive and challenged the revocation of his insurance producer license. The Respondent did not challenge the imposition of the costs associated with prosecution and investigation.

The Appellate Division upheld the revocation of the Respondent's license. In re Shehata, No. A-0119-19T (App. Div. Dec. 21, 2020) (slip op. at 7-8). However, the Appellate Division reversed and remanded the matter on the issue of civil penalties. Id. at 10. The Appellate Division noted that there is nothing in the Producer Act that supports the maximum penalty because there has been a default, and that penalties should not be calculated simply based on the maximum allowable amount. Ibid. The Appellate Division concluded that because the Commissioner did not consider the factors at Kimmelman v. Henkles & McCoy, Inc., 108 N.J. 123, 137-39 (1987), or any other information, the Commissioner did not appropriately exercise her discretion. Ibid. The Appellate Division vacated the civil penalties and remanded the issue to the

Commissioner for further consideration and analysis on the amount of civil penalties. Ibid. The Department issued a letter on June 22, 2021, requesting the parties submit briefs on the matter by July 22, 2021 and responsive briefs on August 6, 2021. The parties submitted timely briefs on the issue.

Respondent's Brief

The Respondent argues that in Kimmelman, the New Jersey Supreme Court established seven factors that must be considered when the State imposes civil penalties upon an individual. Respondent's Brief at 3. The Respondent lists these factors as:

> (1) '[t]he good or bad faith of respondent'; (2) '[d]efendant' s ability to pay'; (3) the '[a]mount of profits obtained from illegal activity'; (4) any '[i]njury to the public'; (5) the '[d]uration of the conspiracy'; (6) the '[e]xistence of criminal or treble damages actions' and whether '[a] large civil penalty may be unduly punitive if other sanctions have been imposed for the same violation of the [same act],'; and (7) any '[p]ast violations.'
>
> Ibid., (quoting Kimmelman at 137-9).

The Respondent argues that the Respondent made a mistake, but acted in good faith when he deposited L.C.'s refund check into his personal account. Respondent's Brief at 4. The Respondent learned of this mistake after receiving a letter from an investigator with the Department and rectified it right away by issuing a check to L.C. Ibid.

As to the second factor, the Respondent's ability to pay a fine, the Respondent argues that the Commissioner failed to address this issue, although she ordered the Respondent to pay the maximum fine. Id. at 4-5.

As to the third factor, the amount of profit from illegal activity, the Respondent argues that he did not realize any profit and there was no illegal activity. Id. at 5. The Respondent reiterates that he mistakenly deposited L.C.'s refund check into his account, but that he issued a check to L.C. when he realized his mistake. Ibid.

As to the fourth factor, the Respondent argues that the public was not harmed by his actions. Ibid. The Respondent argues that he remediated his actions by issuing L.C. a check for the amount that was due to him. Ibid. Although, admittedly, L.C. was unknowingly uninsured for one year, he did not suffer financial harm, as the Respondent paid him the refund. Ibid.

The Respondent states that the fifth factor is the "duration of any conspiracy." Ibid. The Respondent argues that "there was no conspiracy whatsoever…" Ibid.

As to the sixth factor, the Respondent argues that "the Kimmelman Court found that '[a] large civil penalty may be unduly punitive if other sanctions have been imposed for the same violation of the [same act]'." Ibid. (quoting Kimmelman at 139). The Respondent argues that this factor is of "critical importance" because the Respondent's insurance producer license was revoked. Ibid. The Respondent argues that the State imposed two punishments, the maximum penalty and revoking his insurance producer license, for the same inadvertent act. Ibid. The Respondent argues that this was unduly punitive. Id. at 5-6.

As to the final factor, the Respondent argues that the record is devoid of any prior infractions or mistakes on his part. Id. at 6.

The Respondent argues that given the above analysis of the Kimmelman factors, the financial penalties should be "set aside." Ibid.

The Respondent further argues that the Commissioner should consider "inadvertence" and the "lack of moral unfitness" when imposing penalties. Ibid. (quoting Fortunato v. Winograd, 93 N.J.A.R.2d (INS) 46. The Respondent argues that the Commissioner did not consider either. Ibid. The Respondent repeats that he took remedial measures to reimburse L.C. and his actions do not make him "morally unfit." Ibid.

Lastly, the Respondent argues that the fines imposed in this matter were

unconstitutional. Id. at 6-7. The Respondent argues that "a fine is unconstitutionally excessive if it is 'grossly disproportional' to the gravity of the defendant' s offense." Id. at 6 (quoting U.S. v. Bajakajian, 524 U.S. 321, 324 (1998). The Respondent argues that he was fined the maximum allowable penalty, $25,000, because of his delay in issuing a refund check for $809.37. Id. at 7. The Respondent argues that he was fined over twenty-five times the amount of the check at issue, which was refunded to L.C., making him whole. Ibid.

The Respondent concludes by asking that the financial penalties against him be set aside. Ibid.

Department's Brief

The Department also argues that the factors in Kimmelman should be analyzed in determining the monetary penalty. Department Brief at 3.

The Department notes that the first Kimmelman factor is the good or bad faith of the Respondent. Ibid. The Department argues that the Commissioner should analyze the egregiousness of the Respondent's conduct and whether or not it was reasonable for him to believe that his conduct was legal. Id. at 3-4 (citing Kimmelman, 108 N.J. at 137). The Department argues that the Respondent's behavior in retaining money meant for someone else cannot be considered good faith. Id. at 4. Further, the Department argues that it is not reasonable to believe that the Respondent believed that his conduct was legal. Ibid. The Respondent deposited the refund check into his personal account, and retained the money for more than a year, "an affirmative act of misappropriation." Ibid. The Department further argues that the claim of mistake would have been more believable if the Respondent had misplaced the check instead of depositing into his account. Ibid. The Department also argues that the Respondent's failure to inform L.C. that the policy had been cancelled was egregious because it placed L.C. in danger of significant financial

loss if something occurred that required insurance coverage. Id. at 4-5. The Department also argues that the Respondent failed to maintain a trust account, which is egregious because the requirement is necessary to prevent scenarios such as the case at issue, where a producer commingled funds. Id. at 5.

As to the second factor, the Respondent's ability to pay, the Department argues that this factor is neutral because the Respondent failed to present any evidence of his inability to pay a fine. Ibid.

As to the third factor, the amount of profits obtained as the result of the illegal activity, the Department argues that the Respondent kept $809.37 of his client's money for more than a year and only returned it after being contacted by an investigator. Ibid. The Department argues that the eventual return of the money does not negate this factor, as the Respondent argues. Ibid. (citing Respondent's Appellate Division Brief at 5).[1] The Department concludes this factor suggests a greater penalty for the failure to return the premium and failure to inform the client of the policy's cancellation. Ibid.

As to the fourth factor, injury to the public, the Department argues that the Respondent is incorrect in arguing that "there was certainly no harm to the public given the remedial measures taken." Id. at 6 (quoting Respondent's Appellate Division Brief at 5).[2] The Department argues that keeping L.C.'s money until the Respondent was contacted by an investigator caused harm to the public. Further, the Department argues that the Respondent's failure to inform L.C. that the

[1] The Commissioner does not have the Respondent's Brief to the Appellate Division. However, the Respondent made a similar argument in his brief submitted to the Commissioner on remand. Respondent's Brief at 5.

[2] This quote also appears in the Respondent's brief submitted to the Commissioner on remand. Respondent's Brief at 5.

policy had been cancelled was egregious because it placed L.C. in danger of significant financial loss if something occurred that required insurance coverage. Ibid. Further, the Respondent's actions harm the public because his actions erode public confidence in insurance producers and the insurance industry. Ibid. The Department argues that this factor weighs in favor of a greater monetary penalty. Ibid.

As to the fifth factor, the duration of the violations, the Department argues that the Respondent is incorrect that that this factor is inapplicable because of Respondent's assertion that "there was no conspiracy whatsoever." Ibid. (quoting Respondent's Appellate Division Brief at 6).[3] The Department argues that this factor is meant to address the duration of the violations, "as Kimmelman is being applied outside of its original context, which was a conspiracy to fix prices." Ibid. (citing Kimmelman 108 N.J. at 126). The Department argues that the Respondent retained L.C.'s money and failed to inform him that he was uninsured for more than a year, and it is unclear how long he failed to maintain a trust account. Id. at 6-7. The Department argues that this factor weighs in favor of a higher monetary penalty. Id. at 7.

As to the sixth factor, the existence of criminal or treble damages actions, the Department argues that the Respondent is incorrect in his use of the comparison of the penalty and the $809.37 he kept from his client. Ibid. (citing Respondent's Appellate Division Brief at 6).[4] The Department argues that the Respondent's assertion should be considered as part of the third factor, the amount of profits obtained. Ibid. The Department argues that there is no

[3] This quote also appears in the Respondent's brief submitted to the Commissioner on remand. Respondent's Brief at 5.

[4] The Respondent does not make this argument when analyzing this factor in his brief submitted to the Commissioner on remand. Rather, the Respondent argues in his brief submitted to the Commissioner that revoking his license and imposing the highest monetary penalty was excessive. Respondent's Brief at 5-6.

evidence that the Respondent was subject to any criminal charges or treble damages actions for the conduct at issue here and a higher monetary penalty is appropriate under this factor. Ibid.

As to the final factor, past violations, the Department submits that there is no evidence that the Respondent violated the Producer Act in the past, and this factor supports a lower penalty. Ibid.

The Department concludes that five factors support a higher monetary penalty, one factor is neutral, and one factor supports a lower monetary penalty. Id. at 8. The Department states that it seeks a monetary penalty of $20,000. Ibid. The Department did not indicate how the penalty should be allocated among the three counts.

Respondent's Reply Brief

In his reply brief, the Respondent argues that the Department "resorted to conjecture, speculation, and baseless accusations in addressing Mr. Shehata's deposit of a $809.37 check." Respondent Reply at 1. The Respondent argues that he had multiple bank accounts, that he routinely received commission checks, and that he deposited L.C.'s refund check in a personal account, mistakenly believing it was a commission check. Id. at 2. The Respondent submits "that given the circumstances…[the] penalty was extreme and that his misstep was understandable." Ibid.

In support of these arguments, the Respondent attached a certification. The Respondent certifies that he had been a licensed New Jersey insurance producer for 29 years and "was never accused of wrongdoing until May of 2018." Certification of Hany Shehata ("Respondent Cert") at ¶2. The Respondent further certifies that he had accidentally deposited a reimbursement check into a personal account and when he became aware of this mistake, he immediately forwarded the

check to the client. Ibid. He also certifies that he did not profit from his error and he never intended to deprive his client "of what was rightfully theirs." Ibid.

The Respondent certifies that he generally received 30 checks a month, mostly commission checks from underwriters, and had four bank accounts at the time. Id. at ¶3. The Respondent certifies that he believed that the check at issue was for a commission. Ibid.

The Respondent certifies that the revocation of his producer license had a devasting impact on his family. Id. at ¶4. Until his license was revoked, he earned approximately $50,000 a year in the insurance industry. Ibid. The Respondent certifies that he is 66 years old, unemployed, and "unable to replace the money [he] once earned." Ibid. He further certifies that he was devastated by the decision and is unable to afford a sizable monetary penalty "given the impact of the revocation." Ibid. He certifies that he has difficulties understanding why the penalties were "so harsh for one single, solitary mistake." Ibid. The Respondent certifies that despite his clean record, the penalties constituted half his gross earnings and ended his livelihood. Ibid.

The Respondent asked that the decision be "fair and reasonable under the circumstances." Id. at ¶5.

Department's Reply Brief

The Department argues that the Respondent did not address the amount of monetary penalties that should be imposed, but merely argues that the financial penalties "should be set aside" and are "certainly excessive." Department Reply at 1-2 (quoting Respondent Brief at 3, 4, and 7). The Department posits that the Appellate Division already vacated the penalty and remanded to give the Respondent the opportunity to submit arguments regarding what the appropriate penalty should be, but the Respondent failed to do so. Id. at 2. The Department also

argues that the Respondent's violations merit a monetary penalty in addition to the license revocation and that the Respondent's analysis of the Kimmelman factors is incorrect. Ibid.

The Department notes that the first Kimmelman factor is the good or bad faith of the Respondent. Ibid. The Department argues that the Commissioner should analyze the egregiousness of the Respondent's conduct and whether or not it was reasonable for him to believe that his conduct was legal. Ibid. (citing Kimmelman, 108 N.J. at 137). The Department argues that although the Respondent claims that he deposited and retained his client's money for more than a year as an "honest mistake" there "is no way [the Respondent] could have reasonably believed his conduct was reasonable." Ibid. The Department again argues that this claim would have been more believable if the Respondent had misplaced the check instead of depositing into his account. Ibid. The Department argues that instead, the Respondent deposited the check into a personal account, and did not inform his client, L.C., about the cancellation of his home improvement insurance policy, possibly exposing L.C. to significant financial loss if an event occurred for which L.C. was uninsured. Id. at 2-3. The Department argues that the failure to return the premium and inform the client of the policy's cancellation are "particularly egregious." Id. at 3. The Department also argues that the Respondent does not address the good or bad faith of his failure to maintain a trust account as required by N.J.A.C. 11:17C-2.3. Ibid. (citing Respondent's Brief at 4). The Department argues that trust accounts are mandated to prevent commingling and misappropriation of client funds. Ibid. The Department reiterates that the Respondent could not have reasonably believed his conduct was legal. Ibid.

As to the second factor, the Respondent's ability to pay, the Department argues that the Respondent failed to take this opportunity to present any evidence to the Commissioner regarding

his inability to pay monetary penalties. Id. at 3-4. The Department posits that this factor is neutral. Id. at 4.

As to the third factor, the amount of profits obtained as the result of the illegal activity, the Department argues that the Respondent incorrectly argues that he "did not realize any profit, nor was there any illegal activity." Ibid. (quoting Respondent's Brief at 5). The Department argues that the Appellate Division affirmed the revocation of his license for his conduct, and that the Respondent claims that he did not engage in illegal activity "evidences his lack of remorse for or acceptance of his multiple egregious violations." Ibid. The Department also argues that the Respondent kept $809.37 of his client's money for more than a year and only returned it after being contacted by an investigator. Ibid. The Department argues that the eventual return of the money does not negate this factor, as the Respondent argues. Ibid. (citing Respondent's Brief at 5). The Department concludes this factor suggests a greater penalty for the failure to return the premium and failure to inform the client of the policy's cancellation. Ibid.

As to the fourth factor, injury to the public, the Department argues that the Respondent is incorrect in arguing that "there was certainly no harm to the public given the remedial measures taken." Ibid. (quoting Respondent's Brief at 5). The Department argues that the Respondent did not take remedial measures, and simply kept L.C.'s money until he was contacted by an investigator. Id. at 4-5. The Department argues that just because did not have any claims during the time he was uninsured does not mean that the public was unharmed. Id. at 5. Further, the Department reiterates its argument that Respondent's actions harm the public because his actions erode public confidence in insurance producers and the insurance industry. Ibid. The Department argues that this factor weighs in favor of a greater monetary penalty. Ibid.

As to the fifth factor, the duration of the violations, the Department argues that the

Respondent is incorrect that that this factor is inapplicable because "there was no conspiracy whatsoever." Ibid. (quoting Respondent's Brief at 5). The Department again argues that this factor is meant to address the duration of the violations, "as Kimmelman is being applied outside of its original context, which was a conspiracy to fix prices." Ibid. (citing Kimmelman 108 N.J. at 126). The Department again argues that the Respondent retained L.C.'s money and failed to inform him that he was uninsured for more than a year, and it is unclear how long he failed to maintain a trust account. Ibid. The Department reiterates that this factor weighs in favor of a higher monetary penalty. Ibid.

As to the sixth factor, the existence of criminal or treble damages actions, the Department argues that the Respondent is incorrect to use this factor to claim that his monetary penalty should be lower due to his license revocation. Ibid. (citing Respondent's Brief at 5). The Department points that under this factor, civil monetary penalties may be lower due to criminal or treble damages actions, which have not been imposed here. Ibid. The Department also points out that the Producer Act authorizes license revocation and monetary penalties for the same acts, and there is no legal authority that one penalty mitigates against the other. Ibid. The Department further argues that the Respondent continually demonstrates his lack of remorse by claiming that he was punished with "two significant sanctions for the same, inadvertent act." Ibid. (quoting Respondent's Brief at 5). The Department argues that the Appellate Division affirmed the license revocation and directed some amount of monetary penalties for three acts: "failing to inform his client the policy was cancelled, keeping his client's money for a year, and failing to establish a trust account." Ibid. The Department also argues that the Respondent misses the point in his brief by arguing "the maximum amount allowed by law was unduly punitive." Ibid. (quoting Respondent's Brief at 5-6). The Department posits that the Appellate Division already vacated

the monetary penalty, and the Respondent did not address what the appropriate monetary penalty should be.

As to the final factor, past violations, the Department submits that if the Respondent had previously violated the Producer Act, a higher penalty would be appropriate. Id. at 7. The Department submits that there is no evidence the Respondent violated the Producer Act in the past, and this factor supports a lower penalty. Ibid.

The Department also addresses the Respondent's additional arguments. First, the Department argues that the Respondent's brief incorrectly cites Fortunato v. Winograd, 93 N.J.A.R.2d (INS) 46 for the proposition that additional factors should be considered when imposing administrative penalties. Ibid. (citing Respondent's Brief at 6).

The Department also argues that the Eighth Amendment does not apply because civil fines that are purely remedial are not subject to the Eighth Amendment's excessive fines clause. Ibid. (citing Austin v. United States, 509 U.S. 602 (1993)). The Department argues that the Producer Act's civil penalties are remedial because they are imposed pursuant to the regulatory powers of the Commissioner. Id. at 8. Accordingly, the Department argues, the Respondent's arguments based on the Eighth Amendment's excessive fines clause are misplaced. Id. at 8-9.

Monetary Penalty Against the Respondent

The Commissioner has broad discretion in determining sanctions for violations of the laws that she is charged with administering. In re Scioscia, 216 N.J. Super. 644, 660 (App. Div. 1987). The Producer Act provides that the Commissioner may impose 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-45.

As noted above, under Kimmelman, certain factors must be examined when assessing administrative monetary penalties that may be imposed pursuant to the Producer Act. These

factors include: (1) the good faith or bad faith of the producer; (2) the producer's ability to pay; (3) the amount of profits obtained from the illegal activity; (4) injury to the public; (5) duration of the illegal activity or conspiracy; (6) existence of criminal actions; and (7) past violations. No one Kimmelman factor is dispositive for or against fines and penalties. See Kimmelman, 108 N.J. at 139 ("[t]he weight to be given to each of these factors by a trial court in determining . . . the amount of any penalty, will depend on the facts of each case").

The first Kimmelman factor addresses the good faith or bad faith of the violator. In this matter, the Respondent argues that he made a mistake, did not act in bad faith, and corrected the mistake as soon as it was pointed out to him by the Department. Respondent Brief at 4. The Respondent also argues that he had multiple bank accounts, that he routinely received commission checks, and that he deposited L.C.'s refund check in a personal account, mistakenly believing it was a commission check. Respondent Reply at 2. The Respondent certifies that he had accidentally deposited a reimbursement check into a personal account and when he became aware of this mistake, he immediately forwarded the check to the client. Respondent Cert at ¶2. The Department argues that that the Respondent's behavior or retaining money meant for someone else cannot be considered good faith and it is not reasonable to believe that the Respondent believed that his conduct was legal. Department Brief at 4, Department Reply at 2-3. Here, I agree with the Department that the Respondent acted in bad faith when he deposited a refund check meant for his client in his account.

The second Kimmelman factor is the ability to pay. Respondents who claim an inability to pay civil penalties bear the burden of proving their incapacity. Commissioner v. Shah, OAL Dkt. No. BKI 11903-05, Initial Decision (04/15/08), Final Decision and Order (09/02/08). Moreover, 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. Substantial fines have been imposed against insurance producers despite their arguments regarding their inability to pay. See Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11) (issuing a $100,500 civil penalty despite the producer arguing that he was unable to pay); See also Commissioner v. Erwin, OAL Dkt. No. BKI 4573-06, Initial Decision (07/09/07), Final Decision and Order (09/17/07) (fine of $100,000 imposed despite evidence of the Respondent's inability to pay); and 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).

Here, the Respondent certified that he earned approximately $50,000 a year in the insurance industry prior to the revocation of his license. Respondent Cert at ¶4. The Respondent certifies that he is 66 years old, unemployed, and "unable to replace the money [he] once earned." Ibid. However, he did not address whether he had savings accounts, or other sources of income or assets that could be used to pay a fine. He also did not provide tax returns or other corroboration of his claims of his prior or current income. Accordingly, I find the Respondent has not met his burden to show that he cannot pay a fine and therefore this factor is neutral.

The third Kimmelman factor addresses the amount of profits obtained or likely to be 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,108 N.J. at 138. The Respondent argues that he did not make a profit because he returned the money to L.C. and there was no illegal activity. Respondent's Brief at 5. He further certifies that he did not profit from his error and he never intended to deprive his client "of what

was rightfully theirs." Respondent Cert at ¶2. The Department argues that the eventual return of L.C.'s money does not negate this factor. Department Brief at 5, Department Reply at 4. I agree that this factor weighs in favor of a monetary penalty, although the Respondent returned L.C.'s refund. Kimmelman does not limit consideration to actual profits, but rather warrants the consideration of the profits that the Respondent would have likely made if their acts in violation of the insurance laws of this State were successful. Kimmelman, 108 N.J. at 138. Here, the Respondent's failure to send L.C. the money from the cancellation and refund of his policy had – at least the potential – to profit from his illegal activity by $809.37, regardless of whether the monies were ultimately paid back to L.C. Accordingly, I find that this factor weighs in favor of a higher monetary penalty.

The fourth Kimmelman factor addresses the injury to the public. The Respondent argues that the public was not harmed and that L.C. was made financially whole. Respondent Brief at 5. The Department argues that keeping L.C.'s money until the Respondent was contacted by an investigator caused harm to the public and the Respondent's actions erode public confidence in insurance producers and the insurance industry. Department Brief at 6, Department Reply at 5. 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. Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11) (citing In re Parkwood, 98 N.J. Super. 263 (App. Div. 1967)). Here, the Respondent's actions harmed the public by eroding its confidence in the insurance industry. Further, L.C. was harmed by unknowingly being uninsured for a year. Potentially, L.C. could have suffered a catastrophic loss and not had insurance to cover it. I conclude that this factor weighs in favor of a monetary penalty.

The fifth Kimmelman factor to be examined is the duration of the illegal activity. The Court in Kimmelman found that greater penalties are necessary to incentivize wrongdoers to cease their illegal conduct. Kimmelman, 108 N.J. at 139. The longer the illegal conduct, the more significant civil penalties should be assessed. Ibid. The Respondent argues that there was no conspiracy, and this factor weighs against a monetary penalty. Respondent Brief at 5. The Department argues that this factor measures the length of time that violations occurred and is not limited to conspiracies. Department Brief at 6, Department Reply at 5. The Department argues that the Respondent retained L.C.'s money and failed to inform him that he was uninsured for more than a year, and it is unclear how long he failed to maintain a trust account. Department Brief at 6-7, Department Reply at 5. I agree that this factor is not limited to conspiratorial behavior, but to illegal conduct in general. I find that the Respondent's illegal conduct occurred over the course of a little more than a year. This factor weighs in favor of a higher penalty.

The sixth factor is the existence of criminal or treble damage actions and whether a civil penalty may be unduly punitive if other sanctions have been imposed. 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. Kimmelman, 108 N.J. at 139. The Respondent argues that the State imposed two punishments, the maximum penalty and revoking his insurance producer license, for the same inadvertent act, which is was unduly punitive. Respondent Brief at 5-6. The Department argues that there is no evidence that the Respondent was subject to any criminal charges or treble damages actions for the conduct at issue here and a higher monetary penalty is appropriate under this factor. Department Brief at 7. The Department also points out that the Producer Act authorizes license revocation and monetary penalties for the same acts, and there is no legal authority that

one penalty mitigates against the other. Department Reply at 5. Here, the Respondent has not been charged criminally or faced other penalties for his conduct in this matter. I agree with the Department that revoking the Respondent's insurance producer license does not weigh against the imposition of a higher monetary penalty and no legal authority could be found for that proposition. Accordingly, this factor weighs in favor of a monetary penalty.

The last Kimmelman factor addresses whether the producer had previously violated the Producer Act, and if past penalties have been insufficient to deter future violations. Both parties agree that there is no evidence that the Respondent has previously violated the Producer Act. Respondent Brief at 6, Respondent Cert at ¶4, Department Brief at 7, Department Reply at 7. Accordingly, this factor mitigates against a high monetary penalty.

Weighing all of the Kimmelman factors, and based upon the violations as set forth above, I order the Respondent to pay $20,000 in civil monetary penalties to be allocated as follows:

Count One: $7,500 for failing to advise a client of the cancellation of an insurance policy in violation of N.J.S.A. 17:22A-40(a)(8);

Count Two: $7,500 for not forwarding the refund to the client within five business days in violation of N.J.S.A. 17:22A-40(a)(2), (4), and (8), and N.J.A.C. 11:17C-2.2(b).

Count Three: $5,000 for failing to maintain a trust account in violation of N.J.A.C. 11:17C-2.3(a).

These penalties are necessary and appropriate under the above Kimmelman analysis given the Respondent's conduct. The Respondent retained a refund that was meant for his client, L.C., for over a year. During this time, L.C. was unknowingly uninsured and could have suffered a catastrophic loss without the insurance to cover it, leaving him solely responsible. The Respondent only refunded the money to L.C. when he was contacted by a Department investigator. These

penalties demonstrate the appropriate level of opprobrium for such misconduct, and will serve to deter future misconduct by the industry as a whole.

I note that the Commissioner is not bound by the order in which the allegations were pled with regard to the imposition of monetary penalties. Commissioner v. Kwasnik, OAL Dkt. No. BKI 10910-16, Initial Decision (02/05/18), Final Decision and Order (05/01/18). Counts One and Two involve much more egregious conduct than Count Three, and thus are given higher penalties. Further, higher penalties are customary in cases where producers fail to remit premiums or return refunds and leave their clients unknowingly without insurance. See Commissioner Andrade, OAL Dkt No.: BKI 09149-18, Initial Decision (01/24/19), Final Decision and Order (04/04/19) (fine of $10,000 for failing to remit premium to an insurer, and allowing a client's auto insurance policy to be terminated for failure to make payment).

I also find that the Respondent's reliance on the Eight Amendment is misplaced. A payment required by the government is "punishment" within the meaning of the Eighth Amendment when it "can only be explained as serving in part to punish." Davanne Realty v. Edison Tp., 408 N.J. Super. 16, 23 (App. Div. 2009) (quoting Austin v. United States, 509 U.S. 602, 608 (1993)). The Legislature enacted the Producer Act not simply to penalize wrongdoers or provide restitution to defrauded victims but, more generally, to protect the public at large against unscrupulous insurance brokers and agents. Commissioner v. Shah, OAL Dkt. No. BKI 11903-05, Initial Decision (04/15/08), Final Decision and Order (09/02/08) (additional citations omitted). The penalties set forth in the Producer Act "are expressions by the Legislature that serve a distinct remedial purpose." Commissioner v. Strandskov, OAL Dkt. No. BKI 03451-07, Initial Decision (09/25/08), Final Decision and Order (02/04/09). Here, the Eighth Amendment is inapplicable to the fines that are imposed.

CONCLUSION

Having carefully reviewed the Appellate Division Decision and the parties' briefs, I ORDER the Respondent to pay a civil monetary penalty in the amount of $20,000. The civil monetary penalty shall be allocated as follows: Count One: $7,500, Count Two: $7,500, Count Three: $5,000.

This Order only amends the monetary penalty in Order No. E19-80, and not any findings in that Order, the revocation of the Respondent's insurance producer license, or the imposition of $487.50 for costs associated with prosecution and investigation pursuant to N.J.S.A. 17:22A-45(c) and N.J.A.C. 11:1-32.4(b)(20).

It is so ORDERED on this __27_____ day of __September_____ 2021.

Marlene Caride
Commissioner

JD Shehata FO on remand/Final Orders-Insurance