

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BK1-6983-08
AGENCY DOCKET NO.: OTSC #E08-46 & E08-87

KENNETH E. KOBYLOWSKI)
COMMISSIONER OF BANKING)
AND INSURANCE)

Petitioner,)

v.)

ROBERT I. BERLIN, C/O ANNUITY)
STORE AND NATIONAL)
WESTERN LIFE INSURANCE)
COMPANY)

Respondents)

FINAL DECISION AND ORDER

This matter comes before the Commissioner of Banking and Insurance (“Commissioner”) 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 Insurance Producer Licensing Act of 2001, (“the Producer Act”), N.J.S.A. 17B:30-1 et seq., the Insurance Trade Practices Act, (“the Trade Practices Act”), and all powers express or implied therein, for the purpose of reviewing the Initial Decision of Administrative Law Judge Solomon A. Metzger (“ALJ”) decided on April 29, 2015 (“Initial Decision”). In that Decision, the ALJ recommended a penalty of \$1,148,000 be imposed on Respondent Robert I. Berlin (“Berlin”) for his previously determined violations of the Producer Act and the Trade Practices Act as set forth in Order No. E12-135 issued in this matter on November 28, 2012.

The ALJ also found that revocation of Berlin's insurance producer license would be warranted were it not already revoked.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter originally arose out of an Order to Show Cause ("OTSC E08-46") issued by the Department of Banking and Insurance ("Department") on June 20, 2008 against Berlin and National Western Life Insurance Company ("NW") seeking: suspension or revocation of Berlin's insurance producer license; suspension or revocation of NW's certificate of authority; and the imposition of monetary fines and penalties against both Berlin and NW for alleged violations of the Producer Act and Trade Practices Act. On October 16, 2008, the Commissioner issued an Amended Order to Show Cause in this matter ("OTSC E08-87" or "AOTSC").

The AOTSC contained 150 counts alleging that Berlin engaged in a pattern of misrepresentation and fraud with respect to the sale of annuities to senior citizens. Specifically, the AOTSC alleged that Berlin knowingly misrepresented the age of the annuitants on their annuity applications and other correspondence over 120 times by making the annuitant younger than he or she actually was to obtain a higher commission, and repeatedly misrepresented the material terms of annuity contracts to induce senior citizens to purchase them.

In response to the issuance of the AOTSC, both Respondents sought a hearing and the matter was transferred to the Office of Administrative Law ("OAL") as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. The parties then filed cross-motions for summary decision pursuant to N.J.A.C. 1:1-12.5; Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995).

On October 13, 2010, ALJ Donald J. Stein issued separate orders for each respondent ("Berlin Initial Order" and "NW Initial Order" or "Initial Orders"), granting summary decision in part and denying in part. In the Berlin Initial Order, the ALJ found in favor of the Department

on the vast majority of counts relating to Berlin's date of birth misrepresentations and his intentional misrepresentations of the material terms of annuity contracts. The ALJ, however, did not make any specific findings pertaining to the issuance of sanctions against Berlin.

On June 1, 2011, Berlin pled guilty to one count of executing a document by deception, a crime of the fourth degree (see N.J.S.A. 2C:21-16), in connection with his submission of the fraudulent annuity applications to several of the insurers for which he served as an appointed agent. Berlin was sentenced to two years of probation and was ordered to pay \$5,500 in restitution to those insurers.

On November 28, 2012, after reviewing the Initial Orders under interlocutory review pursuant to N.J.A.C. 1:1-12.5(e), which permits an agency head to immediately review an initial decision for the purpose of avoiding unnecessary litigation or expense to the parties, the Commissioner issued two Final Decisions and Orders on Partial Summary Decision as to both Respondents (Order No. E12-135 as to Berlin and Order No. E12-136 as to NW). The NW Order incorporated the factual findings contained in the Berlin Order. In Order No. E12-135, the Commissioner adopted the ALJ's findings concerning Berlin's violations of the Producer Act and the Trade Practices Act, but remanded the case to the OAL for fact finding on Count 45 of the AOTSC. Order No. E12-136 remanded the case to the OAL for fact finding on seventeen violations. Both orders remanded the case for a hearing on the penalty.

On September 3, 2013, the Department filed the current Motion for Summary Decision seeking: resolution of the remanded allegations against Berlin and NW through dismissals and additional grants of summary decision; the imposition of substantial monetary penalties against both Berlin and NW; the suspension of NW's certificate of authority to write annuities in this State; and the reaffirmation of the revocation of Berlin's insurance producer license as originally

adjudicated on August 4, 2008 in Final Decision and Order No. E08-63. No response to the motion was received from Berlin. On January 6, 2014, the Department entered into Consent Order No. E14-03 with NW wherein NW agreed to pay a monetary penalty of \$250,000 and to pay \$2,723,656 in restitution.¹ In its September 3, 2013 Motion for Summary Decision, the Department dismissed Count 45, the only remaining count that was remanded for further fact finding by Order No. E12-135. Thus, the only outstanding issue to be decided was the appropriate penalty to be imposed against Berlin.

On April 29, 2015, the ALJ rendered the Initial Decision, recommending that a fine of \$1,148,000 be imposed against Berlin and finding that revocation of Berlin's insurance producer license would be warranted were it not already revoked.

ALJ'S FINDINGS OF FACT

The ALJ noted that the narrow issue presented in this matter is the appropriate penalty for Berlin's previously determined violations of the Producer Act and Trade Practices Act as found and adjudicated in Order No. E12-135 issued on November 28, 2012. (Initial Decision at 2). The ALJ incorporated those findings by reference. Ibid.

In sum, in Order No. E12-135, the Commissioner found that Berlin violated the insurance laws of New Jersey in 148 counts spanning the period 1999 to 2007. Specifically, the Commissioner concluded that in Counts 1-7, 14, 18, 20-30, 32-44, 46-123, 125-130, 133, 134, 137, and 148-150 of the AOTSC, Berlin falsely and intentionally misrepresented the dates of birth of the annuitants named in those Counts on their annuity applications in violation of the

¹ In its Exceptions, summarized below, the Department requests that this Final Decision and Order clarify that NW was not dismissed as a party as noted in the Initial Decision. The Initial Decision is so clarified.

Producer Act, N.J.S.A. 17:22A-40a(2), (5), (8), and (16). Additionally, the Commissioner concluded that in Counts 1, 4-19, 124, and 131-147 of the AOTSC, Berlin intentionally misrepresented the terms of annuity contracts in violation of the Producer Act, N.J.S.A. 17:22A-40a(2), (5), (8), and (16), the Trade Practices Act, N.J.S.A. 17B:30-1 et seq., N.J.S.A. 17B:30-6 and N.J.A.C. 11:17A-2.8 by engaging in “twisting²” as alleged in those 35 counts.

The ALJ noted that these violations reflect a pattern of fraud consisting mainly of changing dates of birth of annuitants in order to achieve higher commissions, and misrepresenting or failing to disclose annuity terms and conditions in order to induce mostly elderly, sometimes frail, annuitants to purchase policies.

ALJ's LEGAL ANALYSIS AND CONCLUSIONS

The ALJ noted that the Department seeks a penalty of \$10,000 per count, for a total of \$1,148,000, pursuant to N.J.S.A. 17:22A-45c; see also, Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123 (1987); In re Parkwood Co., 98 N.J. Super. 263 (App. Div. 1967). The ALJ stated that the penalty is steep, but that there are many aggravating factors. First, the ALJ found that Berlin's conduct was intentional, a conclusion previously reached by the OAL and by the Commissioner. The ALJ noted the victims were elderly and the correctives for all of these deceptions were costly and time consuming. Moreover, the volume and character of the wrongdoing has the capacity to undermine public trust in the industry. It was noted that Berlin pled guilty to one count of executing a document by deception, N.J.S.A. 2C:21-16, a crime of the

² “Twisting” is prohibited by N.J.S.A. 17B:30-6, which provides,

No person shall make any misleading representations or incomplete or fraudulent comparison of any insurance policies or annuity contracts or insurers for the purpose of inducing, or tending to induce, any person to lapse, forfeit, surrender, terminate, retain, or convert any insurance policy or annuity contract, or to take out a policy of insurance or annuity contract in another insurer.

fourth degree, and received a sentence of probation and paid a small sum in restitution to insurers. This criminal matter did not address the defrauded annuitants.

The ALJ took note that the requested fines are per count and not per violation, and many counts involved more than one infraction. The ALJ further stated that in the absence of a response from Berlin, the motion record is devoid of any evidence in mitigation. Based on those findings, the ALJ recommended that Berlin pay a penalty of \$1,148,000.

Moreover, the ALJ stated that the sum and nature of the violations warrants revocation of Berlin's producer license were it not already revoked.

EXCEPTIONS

On May 15, 2015, the Office of the Attorney General on behalf of the Department, submitted Exceptions to the Initial Decision. On June 11, 2015, Berlin submitted Exceptions to the Initial Decision after having received a 30 day extension to do so.

The Department's Exceptions

The Department concurs with the overall conclusions of the ALJ concerning the penalties to be imposed. The Department, however, sought to clarify several issues.

First, the Final Decision and Order should clarify that NW was not dismissed as a party as noted in the Initial Decision. Instead, on January 6, 2014, the Department entered into Consent Order No. E14-03 with NW, wherein National Western agreed to pay a penalty of \$250,000 and to pay \$2,723,656 in restitution. Thus, NW was not dismissed as a party.

Next, the Department asserts that although the Initial Decision correctly states that the \$1,148,000 fine is warranted, it should be clarified that the basis for the fine is both that violations were found in each of the 148 counts of the AOTSC and that the violations were subsequent offenses pursuant to N.J.S.A. 17:22A-45c.

Lastly, the Department requests that the Commissioner revoke Berlin's insurance producer license effective as of the date of the final order and decision for this case. The Department notes that on August 4, 2008, the Commissioner issued Final Decision and Order No. E08-63 wherein Berlin's insurance producer license was revoked as a result of a separate enforcement action that had begun in 2003. The revocation stemmed from a finding that Berlin had made three fraudulent misrepresentations in the course of selling insurance. The Department further notes that in this case, the AOTSC contained 150 counts alleging that Berlin engaged in a pattern of misrepresentation and fraud with respect to the sales of annuities to senior citizens. The Initial Decision states that "with respect to the Department's request to reaffirm the revocation, it is apparent that the sum of and nature of the violations found well support revocation." (Initial Decision at 3.) Therefore, the Department requests that the Commissioner should again revoke Berlin's insurance producer license, effective on the date of the new Final Decision and Order, for the separate and subsequent violations found in each of the 148 counts.

Berlin's Exceptions

Berlin's Exceptions primarily claim that numerous parts of this and the prior enforcement action against him have been unfair. Berlin asserts that it is unfair that the ALJ presiding over the current case never looked at the previous Initial Decision issued by ALJ Diana C. Sukovich, which Berlin avers was decided in his favor since ALJ Sukovich recommended suspension, rather than revocation, of his insurance producer license, and recommended a penalty of \$15,000 rather than the \$85,000 penalty the Department sought. Berlin further claims that it is unfair that an ALJ who presides in the courtroom and listens to testimony can be overruled by the Commissioner who was not in the courtroom and did not listen to any testimony.

Next, Berlin avers that the burden of proof is extremely high in administrative law and that if this case was anything other than an administrative law case, he would still be licensed as an insurance producer and practicing a career that he loved.

Berlin also states that the 2011 criminal charge came right after his insurance producer license was revoked, and that his resources were drained from litigating the first administrative action against him. Accordingly, Berlin states that he did what was best for him and his family by trying to work out a quick conclusion through pleading guilty.

Berlin further states that every annuitant associated with this proceeding wanted the product they purchased and that he did not file any opposition to the Department's motions because his insurance producer license is already revoked and his resources are gone.

Lastly, Berlin states that the Department has already won by revoking his insurance producer license in the previous enforcement action and requests that the penalties issued by the ALJ in the Initial Decision be waived.

DISCUSSION

N.J.A.C. 1:1-12.5 governs motions for summary decision, which mirrors the language of New Jersey Court Rule 4:46-2, the rule regarding motions for summary judgment. Pursuant to these rules, a case may be decided on the papers if "there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submissions of the issues to the trier of fact." R. 4:46-2. When a motion for summary decision is made and supported, the burden shifts to the adverse party to set forth by affidavit, specific facts showing there is a genuine issue

resolvable only by an evidentiary proceeding. N.J.A.C. 1:1-12.5(b). Therefore, the opposing party must show that “there is a genuine issue which can only be determined in an evidentiary proceeding” to survive summary decision. Ibid. Failure to do so entitles the moving party to summary judgment. Brill v. Guardian Life Ins. Co. of America, supra.

Here, there are no genuine issues of material fact that require a hearing, and the Department is entitled to prevail on its Motion for Summary Decision to impose penalties against Berlin. The material facts concerning Berlin’s egregious pattern of insurance law violations as found in Order No. E12-135 are not in dispute. Moreover, there are no genuine issues of material fact that require a hearing on the issue of penalties. Berlin had an opportunity to contest the facts as set forth by the Department in its Motion for Summary Decision and to provide any evidence of mitigation to support a lesser penalty. Instead, Berlin failed to submit any opposition. Moreover, in his Exceptions, Berlin makes broad allegations that the first administrative action against him was unfair. This is not the appropriate forum to challenge the August 4, 2008 Final Decision and Order. The Department, therefore, is entitled to prevail as a matter of law. Brill, supra, 142 N.J. at 540; Commissioner v. Nicolo, OAL Dkt. No. BKI 10722-04, Final Decision and Order (10/12/06) (in a motion that seeks Summary Decision on the quantum of sanctions to be imposed, an opposing party is required to establish the existence of a genuine issue of material disputed fact and, if the opposing party fails to do so, summary decision may be entered without the need for a further hearing on the issue of penalties.) Accordingly, for the reasons stated below, I ADOPT the findings in the Initial Decision and grant the Department’s Motion for Summary Decision.

Revocation of Berlin's Insurance Producer License

As to the appropriate action to take against Berlin's insurance producer license, I find that the record is more than sufficient to support license revocation and, in fact, compels the revocation of Berlin's license. The AOTSC charges Respondent with violations of the Producer Act, which governs the licensure of New Jersey insurance producers and empowers the Commissioner to suspend or revoke the license of, and fine, an insurance producer for violations of its provisions. N.J.S.A. 17:22A-40a. In Order No. E12-135, in 148 counts consisting of more than 170 violations, Berlin was found to have engaged in a pattern of misrepresentation and fraud related to the sales of annuities to senior citizens.

A licensee's honesty, trustworthiness and integrity are of paramount concern, since an insurance producer acts as a fiduciary to both the consumers and insurers they represent. The nature and duty of an insurance producer "calls for precision, accuracy and forthrightness." Fortunato v. Thomas, 95 N.J.A.R. (INS) 73 (1993). In addition, a licensed producer is better placed than a member of the public to defraud an insurer. Hence, a producer is held to a high standard of conduct, and should fully understand and appreciate the effect of fraudulent or irresponsible dealing on the industry and on the public.

Our strong public policy is to instill public confidence in both insurance professionals and the industry as a whole. In re Parkwood Co., supra. Courts have 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 Inc., 80 N.J. 548, 559 (1979). Only the existence of extraordinary mitigating factors can form a basis for withholding the sanction of license revocation where a licensee engages in fraudulent conduct, and particularly insurance fraud. See Commissioner v. Weiran Dobrek and

Thomas Dobrek, Initial Decision (06/02/14), Final Decision and Order (01/15/15). The record establishes that no such factors are present in this matter.

Here, on numerous occasions over a nine year period, Berlin fraudulently induced people into purchasing annuity contracts. In many cases, Berlin convinced vulnerable customers, primarily senior citizens who were in some instances wheelchair bound and stroke victims, to purchase annuities on which payments were not scheduled to commence until they were well into their 90s or more than 100 years of age. Berlin's pattern of deceiving the most vulnerable of consumers renders him unworthy of licensure.

I disagree with the ALJ's conclusion that revocation is not appropriate because Berlin's license is currently revoked. On August 4, 2008, Final Decision and Order No. E08-63 ordered the revocation of Berlin's license. Pursuant to N.J.A.C. 11:17D-2.7, an individual whose producer license has been revoked may, after a period of five years, apply for reinstatement of the license. Berlin is currently eligible to apply for reinstatement of his license. Moreover, the fact that a license is no longer active at the time an action is initiated, pending or concluding does not prohibit the revocation of a license. See N.J.S.A. 17:22A-40d. Berlin was licensed when he engaged in the deceptive and fraudulent conduct.

Here, the repetitiveness, fraudulent, and overall dishonest conduct exhibited by Berlin warrants the revocation of his insurance producer license effective from the date of this Final Decision and Order. Accordingly, I MODIFY the ALJ's finding and hereby REVOKE Berlin's insurance producer license.

Monetary Penalty Against Berlin

The Producer Act empowers the Commissioner to impose a fine of up to \$5,000 for a first violation and not exceeding \$10,000 for each subsequent violation. N.J.S.A. 17:22A-45c.

The Department argues that because Berlin was previously found to have violated the Producer Act in Final Order No. E08-63, which resulted in license revocation and the imposition of fines, each of Berlin's violations in this matter are subsequent offenses. Thus, the Department sought, and the ALJ recommended, that a fine of \$10,000 per count, totaling \$1,480,000, be imposed. In his Exceptions, Berlin requests that monetary penalties be waived.

Pursuant to Kimmelman, supra, 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. The 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 137-139.

The record herein indicates the following with respect to the Kimmelman factors. First, over the course of nine years, Berlin engaged in a pattern of fraud, deception and lies in the course of conducting insurance business, where he lied and victimized elderly insurance consumers, and falsified dates of birth on 123 annuity applications to fraudulently increase his commissions. The length, nature, and repetitiveness of Berlin's fraudulent misrepresentations alone clearly demonstrate bad faith and led the ALJ to find that Berlin's conduct was intentional, a finding with which I agree.

Next, there is no credible evidence in the record regarding Berlin's ability or inability to pay. In his Exceptions, Berlin asserts that the Department's prior administrative prosecution and the criminal prosecution depleted his resources. However, Berlin has failed to submit, despite ample opportunity to do so, any credible evidence of an inability to pay. Moreover, even if an

inability to pay a significant fine had been demonstrated, I have previously found that an inability to pay is only one factor to be considered and can be outweighed by other factors. Commissioner v. Erwin, OAL Dkt. No. BKI 4573-06, 2007 N.J. Agen. Lexis 995, Initial Decision, (07/09/07), Final Decision and Order (09/17/07). Here, Berlin profited from his repetitive fraudulent conduct as he earned commissions on the annuities sold through or with misrepresentations. In fact, his commissions in many cases were artificially inflated by his intentional misrepresentations of dates of birth. The ALJ found that the public and the defrauded elderly annuitants were greatly harmed by Berlin's actions and the correctives for all of the deceptions Berlin committed were costly and time consuming. Additionally, as noted by the ALJ, the volume and character of the wrongdoing has the capacity to undermine public trust in the industry. When insurance producers breach their fiduciary duties and engage in a pattern of fraudulent sales and unfair trade practices, harm is caused through the erosion of public confidence in the insurance industry as a whole.

Berlin's illegal and fraudulent activity was a pattern and practice as it occurred on a consistent basis over the course of nine years. Moreover, Berlin was charged and pleaded guilty to Execution of a Document by Deception in the Fourth Degree in connection with his submission of fraudulent annuity applications to several of the insurers for which he served as an appointed agent. He was not, however, charged with defrauding any of the annuitants at issue in this case, served no jail time for his crime, and was ordered to pay a small amount of restitution to the insurers – not the annuitants. Thus, Berlin has not in any way been penalized criminally for his defrauding of the annuitants, which fact cuts in favor of imposing substantial administrative penalties in this case, as the administrative penalties imposed would not result in an unduly punitive sanction for this misconduct. See Kimmelman, supra.

Finally, Berlin has a prior history of similar violations which resulted in: a finding that Berlin has made fraudulent misrepresentations in the course of selling insurance; revocation of his license; and the imposition of fines, costs and restitution. See Commissioner v. Berlin, Initial Decision (05/16/07), Final Decision and Order (08/04/08).

In light of the above Kimmelman analysis and based on the violations found to have been committed by Berlin in this matter as set forth in Order No. 12-135, I ADOPT the ALJ's recommendation that the imposition of \$1,148,000 fine is appropriate. I agree with the ALJ that the presence of numerous aggravating factors support the imposition of this penalty. I also agree with the Department that the basis for the fine is both that violations were found in 148 counts of the AOTSC and those violations are subsequent offenses pursuant to N.J.S.A. 17:22A-45c. The record in this matter clearly demonstrates that the fine is fully warranted, not excessive or unduly punitive, and succeeds to the required level of opprobrium for Respondent's conduct.

CONCLUSION

Having carefully reviewed the Initial Decision and entire record associated with this matter, I hereby partially ADOPT the Findings and Conclusions as set forth in the Initial Decision. I MODIFY the Initial Decision to clarify that the Department's Motion for Summary Decision is granted. I ADOPT the ALJ's recommendations that Berlin be ORDERED to pay a penalty of \$1,148,000. I MODIFY the ALJ's conclusion that revocation of Berlin's insurance producer license would be warranted were it not already revoked, and hereby ORDER the revocation of said license effective as of the date of this Final Order and Decision.

IT IS SO ORDERED on this 9th day of September, 2015.

A handwritten signature in black ink, appearing to read "Richard J. Badolato". The signature is stylized with large loops and a long horizontal stroke at the end.

Richard J. Badolato
Acting Commissioner

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