ORDER NO.: E18-84

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BKI-06304
AGENCY DOCKET NO.: OTSC E16-612

MARLENE CARIDE, COMMISSIONER, NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE, Petitioner, v. RANDOLPH A. FISHER, JR., KEVIN G. MADDEN, AND REGAL FINANCIAL GROUP, LLC, Respondents.	)	ORDER DENYING STAY PENDING APPEAL

This matter comes before the Commissioner of Banking and Insurance ("Commissioner")[1] pursuant to the authority of N.J.S.A. 52:14B-1 to -31, N.J.S.A. 17:1-15, the New Jersey Producer Licensing Act of 2001 ("Producer Act"), N.J.S.A. 17:22A-26 to -48, and all powers expressed or implied therein, for the purposes of reviewing a motion by Randolph A. Fisher, Jr. ("Fisher"), Kevin G. Madden ("Madden"), and Regal Financial Group, LLC ("Regal") (collectively, "Respondents") to stay Final Decision and Order No. E18-75, entered by the Commissioner on July 20, 2018 ("Final Decision"). In that decision, the Commissioner adopted in part and modified in part the Initial Decision of the Administrative Law Judge ("ALJ") as follows.

[1] Pursuant to R. 4:34-4, Commissioner Marlene Caride has been substituted in place of former Commissioner Richard J. Badolato in the caption.

Order to Show Cause No. E16-12 ("OTSC") charged the Respondents in 17 counts with numerous violations of the insurance law of this State, including numerous violations of the Producer Act. These violations included: Incompetence and Breach of Fiduciary Duty (Respondents Fisher and Regal) (Counts 1, 4, 7, and 10); Prohibition of Unfair and Deceptive Acts (Respondents Fisher and Regal) (Counts 2, 5, 8 and 11); Assisting an Unauthorized Insurer (Respondents Fisher and Regal) (Counts 3, 6, 9 and 12); Failure to Notify the Department of FINRA Proceedings (Respondent Fisher) (Counts 13 and 14); Failure to Respond to the Department's Inquiry Within 15 Days (Respondent Fisher) (Count 15); Failure to Respond to the Department's Inquiry Within 15 Days (Respondent Fisher) (Count 16); and Failure to Supervise as DRLP (Respondent Madden) (Count 17).

During the course of the OAL proceeding and as adopted by the Commissioner, it was found that the Respondents Fisher and Regal sold an annuity product not authorized in this State that was issued by an unlicensed company to four sets of clients over the age of 80 in New Jersey without conducting the appropriate due diligence required of insurance producers in this State. The record demonstrated that the company issuing the annuity product, the National Foundation of America ("NFOA"), was structured like a Ponzi scheme, so that the annuity product could not deliver any of the benefits promised.

In the Initial Decision, the ALJ found in favor of the Department on Counts 1 through 12 of the OTSC against Fisher and Regal. The ALJ found in favor of Fisher as to Counts 13 through 16. Finally, the ALJ found in favor of the Department against Madden as to Count 17. The ALJ recommended the imposition of civil monetary penalties against Fisher and Regal, jointly and severally, in the amount of $10,900, and Madden, individually, in the amount of $2,000. The ALJ

recommended suspension should be imposed only if Respondents failed to comply with the payment of penalties within a reasonable time.

On January 29, 2018, the Department filed its exceptions to the Initial Decision. The Respondents did not file any exceptions to the Initial Decision. On February 14, 2018, the Respondents filed their reply to the Department's exceptions. On February 22, 2018, the Department filed a sur reply to the Respondents' reply. Upon review of the exceptions, the responses thereto, and the record, the Commissioner issued the Final Decision adopting in part, rejecting in part, and modifying in part, the Initial Decision. Among other things, I adopted the ALJ's findings that the Respondents violated the Producer Act as charged in Counts 1 through 12 and 17 of the OTSC. In addition, I modified the Initial Decision to find that the Respondent Fisher violated the Producer Act as charged in Counts 13 and 14 of the OTSC. I also modified the civil penalty recommended by the ALJ and imposed upon Respondents Fisher and Regal, jointly and severally, civil monetary penalties of $60,000;[2] upon Respondent Fisher, individually, an additional civil monetary penalty of $5,000; and upon Respondent Madden, individually, an increased civil monetary penalty of $5,000 for violations of the above-referenced provisions of this State's insurance laws. In addition, the Commissioner revoked the licenses of Fisher and Regal Financial, effective upon issuance of the Final Decision. The Respondents filed an appeal of the Final Decision on July 23, 2018, which remains pending in the Appellate Division of the Superior Court of New Jersey.

[2] The Final Decision No. E18-75 issued on July 20, 2018 included a typographical error stating that the civil monetary penalties imposed upon Respondents Regal and Fisher, jointly and severally, totaled $45,000, instead of $60,000. Amended Final Decision and Order No. E18-80 was issued on July 30, 2018, to correct the aforementioned error and stated that the amount imposed upon Respondents Fisher and Regal, jointly and severally, totaled $60,000. For purposes of clarity, throughout this Order, Order No. E18-75 and Order No. E18-80 will be referred to collectively as the "Final Decision."

On July 31, 2018, Respondents filed the instant motion to stay the Final Decision pending their appeal. The Department filed a reply to this motion on August 3, 2018. On August 6, 2018, the Respondents filed their reply to the Department's response to the July 31 motion.

RESPONDENT'S MOTION

Respondents aver that they have met their burden for a stay. Respondents' Motion for a Stay of the Final Decision ("Stay Motion") at 4. Respondents state that they have a reasonable likelihood of success on appeal, in that the Final Decision misapplied the factors set forth in Kimmelman v. Henkles & McCoy, Inc., 108 N.J. 123, 137-39 (1987), both factually and legally. Ibid. The Respondents discuss the Kimmelman analysis at length, arguing that the ALJ's analysis of the factors in the Initial Decision was correct and is preferred to that of the determinations made by the Commissioner in the Final Decision. The Respondents repeatedly emphasize that the sale of the NFOA products were made only to four clients, and not "some hypothetical mass of customers." Id. at 7. Lastly, the Respondents argue that the revocation of Fisher's insurance producer license is "shocking" to one's sense of fairness. Id. at 12. Thus, the Respondents aver that there is reasonable probability of success on the merits.

Respondents also note that a balancing of the relative hardships to the parties reveals that greater harm would occur if a stay was not granted then if it were granted. Ibid. Respondents state that the conduct at issue occurred over a decade ago. Id. at 5. In addition, the Respondents put forth that the conduct at issue no longer presents any danger, as the NFOA product at the heart of this matter was not generally solicited to their client base and was only presented to four specific clients due to their financial needs at that time. Ibid. The Respondents assert that, aside from the sale of the NFOA product, Fisher is not a threat to the public or of the public's perception of the

insurance industry as a whole. Ibid. Furthermore, the Respondents argue that the four clients at issue in this matter, two remained his customers after the "NFOA fiasco," one until his death. Ibid. The Respondents describe their history in the insurance industry as uncheckered and compare this to the hardships their employees, clients, and families will suffer if a stay is not granted. Id. at 6.

The Respondents assert that without a stay, Fisher will permanently lose his business, suffering irreparable injury because he will be unable to support his dependents, some of whom suffer from chronic medical conditions. Further, Respondents assert that Fisher's employee will be unable to support her two young children; and, that his 450 active insurance clients, most of whom are elderly, will no longer have an insurance contact. Ibid.

DEPARTMENT'S RESPONSE

The Department states that the Respondents did not meet their burden of showing each of the requisite factors under Crowe v. DeGioia, 90 N.J. 126, 132 (1982).

First, the Department states that the Respondents fail to address why they have a reasonable probability of success in the Superior Court, Appellate Division. In fact, the Department asserts that the Final Decision is likely to be upheld on appeal. The Department notes that a presumption of reasonableness attaches to the Commissioner's Final Decision and the burden is placed on Respondents to show otherwise. Maple Hill Farms, Inc. & Hughes v. New Jersey Real Estate Comm'n., 67 N.J. Super. 223, 232 (App. Div. 1961). The Respondents can obtain a reversal of the Final Decision only if they convince the Appellate Division that the administrative decision "is arbitrary, capricious or unreasonable or it is not wholly supported by substantial credible evidence in the record as a whole." Henry v. Rahway State Prison, 81 N.J. 573, 579-80 (1980).

The Department states that the Respondents fail to point to any error in the Final Decision, do not cite any law or fact as misapplied, and instead only argue that the penalties are draconian and will cause financial hardship. Department's Opposition to Respondents' July 31, 2018 Motion to Stay dated August 3, 2018 ("Department Response") at 3 and 4, citing Stay Motion at 4 and 10.

The Department maintains that the Commissioner acted squarely within the authority granted by the Producer Act. The Department notes that the Commissioner may revoke an insurance producer's license or may levy a civil penalty of up to $5,000 for the first offense, and up to $10,000 for each subsequent offense for any violation of the Producer Act. N.J.S.A. 17:22A-40(a) and 17:22A-45(c). Here, a lengthy review of the mitigating and aggravating factors, the Commissioner ordered revocation and $70,000 in total civil penalties. Department Response at 4.

Further, the Department noted that "[a]n appellate court must grant deference to an agency's expertise when such expertise is relevant to the case." Campbell v. N.J. Racing Comm'n, 169 N.J. 579, 588 (2001). Pursuant to In re Aetna Casualty & Sur. Co., 248 N.J. Super. 367, 376 (App. Div. 1991), the Commissioner's expertise in the field of insurance must be given great weight. Ibid.

The Department maintains that the Commissioner acted squarely within her expertise in finding that "Fisher's breach of his fiduciary duties through his gross incompetence breached the trust of his customers and constitutes a gross deviation from the standard of care required of insurance producers in this State." Department Response at 4 to 5 (citing Final Decision at 73). The Department asserts that the Commissioner's determination that this warranted license revocation should be granted great deference. Id. at 5.

The Department concluded that because Respondents are unlikely to succeed on appeal, they have failed to meet that prong of the Crowe test. Ibid.

Secondly, the Department argues that the Respondents' assertion that the revocation will inflict pecuniary harm on them and their employees, and negatively impact their clients do not compel the extraordinary remedy of a stay. Ibid. The Department states that 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). "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 of Sparta v. Service Elec. Cable Television of N.J., Inc., 198 N.J. Super. 370, 381 (App. Div. 1985). Department Response at 5.

In this matter, the Department asserts that the financial hardship claimed by Respondents does not rise to the level of irreparable injury required by the courts to grant injunctive relief. Crowe, 90 N.J. at 130 and 133. The Department states that the Respondents fail to explain how a loss of income is irreparable harm or why they cannot seek or utilize other sources of income. The Department notes that Fisher admits in his motion that there are additional sources of household income. Department Response at 5 to 6 (citing Stay Motion at 7). Regarding the concerns for the Respondents' clients, the Department states that their insurance policies are not cancelled with their respective insurance carriers as a result of the Final Decision, and thus their clients are not impacted. The Department asserts that these reasons are neither harm nor irreparable. Crowe, 90 N.J. at 132-34. The Department concluded that because Respondents have not shown that irreparable harm will result if the stay is not granted, their motion is without merit. Department Response at 6.

Finally, the Department maintains that the Respondents fail to consider the public interest by arguing that their clients were not harmed and that "there was no loss in the insurance industry."

Ibid. (citing Stay Motion at 8). The Department states that 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, 216 N.J. 314, 321 (2013). In the Final Decision, the Department maintains that the Commissioner correctly held that:

> The public's confidence in a producer's honesty, trustworthiness and integrity is of paramount concern. As the Respondents acted in bad faith by violating their fiduciary duties as insurance producers, their actions harmed, not only their elderly clients, but also harmed the public's confidence in insurance producers and the public's perception of the profession as a whole.
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> [Department Response at 6 to 7 (citing Final Decision at 66).]

The Department maintains that the need to protect the public significantly outweighs the pecuniary impact upon Respondents. Thus, Department asserts that the Respondents fail to satisfy this necessary element of the Crowe test. Department Response at 7.

RESPONDENTS REPLY TO DEPARTMENT'S RESPONSE

The Respondents Reply to the Department's Response ("Respondents Reply Motion") reiterates their position that, through their submissions, they have proven relief is needed to prevent irreparable harm and that the Respondents have demonstrated a reasonable probability of succeeding on the merits. Respondents Reply Motion at 1.

The Respondents reiterate that irreparable harm will result if a stay is not granted. Respondents assert that the revocation of Fisher's license will result in "zero income for the Fisher household, forever" and that acts destroying a complainant's business, custom and profits do an irreparable injury and authorize the issue of a preliminary injunction. Respondents Reply Motion at 2 (citing Board of Educ. of Union Beach, 96 N.J. Super. at 390-91).

In addition, the Respondents reiterate that they have demonstrated a likelihood of success on the merits. The Respondents attempt to bolster the arguments made previously made in their Stay Motion with additional case law. The Respondents reiterate that in light of the inaccuracies in the application of the Kimmelman factors and the punitive nature of the penalties assessed, the Respondents are likely to succeed on the merits on appeal. Respondents Reply Motion at 5.

DISCUSSION

Upon review and for the reasons set forth below, Respondents' request for a stay of the Final Decision 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 n.8 (App. Div. 1995); Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 639 (App. Div. 1999) (citing American Employers' Ins. Co., 280 N.J. Super. at 611 n.8). In this application, Respondents have failed to recite facts or present evidence in their moving papers that demonstrate clear and convincing evidence that they have met each of the criteria that would entitling them to the relief requested. Indeed, Respondents have done little more than reiterate arguments previously asserted that were reviewed and addressed 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, 90 N.J. at 132; Zoning Bd. of Adjustment of Sparta, 198 N.J. Super. at 379. It is not a matter of right, even though irreparable injury may otherwise result. Yakus v. United States, 321 U.S. 414, 440 (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) on balance, the benefit of the relief to the movant will outweigh the harm such relief will cause other interested parties, including the public interest; and 3) irreparable injury will result if a stay is denied. Crowe, 90 N.J. at 132-34; Garden State Equal., 216 N.J. at 320-321; 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 establishing any of the three necessary Crowe prerequisites for the issuance of a stay. Each of the prerequisites for the granting of a stay is addressed below.

LIKELIHOOD OF SUCCESS ON THE MERITS

First, the Respondents' arguments fail to establish that there is a reasonable probability that they will prevail on the merits of its appeal. Appellate courts will only 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). The Respondents have failed to meet this standard.

A presumption of reasonableness attaches to the Commissioner's Final Decision and the burden is placed on Respondents to show otherwise. Maple Hill Farms, Inc., 67 N.J. Super. at 232. The Respondents can obtain a reversal of the Final Decision only if they convince the

Appellate Division that the administrative decision "is arbitrary, capricious or unreasonable or it is not wholly supported by substantial credible evidence in the record as a whole." Henry, 81 N.J. at 579-80. 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., 122 N.J. Super. at 199.

The Respondents provide no argument, other than to reiterate arguments raised during the exceptions period of the contested case that, in essence, the ALJ's Initial Decision was correct and proper and should not be modified. These arguments were fully considered and rejected by the Commissioner in the Final Decision. As noted above, the Respondents state that they believe they will succeed based on a "factual review, as well as the penalty. That discussion will be raised in our appellate brief." Stay Motion at 3. Respondents Reply Motion at 4. The Respondents also assert that the Commissioner[3] misapplied the factors applied in Kimmelman. I do not agree, for the reasons set forth in the Final Decision. The Respondents have put forth no new factual or legal basis to demonstrate that the determinations made in the Final Decision were arbitrary, capricious, or unreasonable, or not supported by substantial credible evidence in the record. Overall, the Respondents fail to point to any error in the Final Decision, do not cite any law or fact as

[3] The Respondents repeatedly assert that Denise Illes, Chief of the Office of Regulatory Affairs, misapplied the Kimmelman factors in the Final Decision. It is noted that the Final Decision was issued by the Commissioner Marlene Caride.

misapplied, and instead only argue that the penalties are draconian and will cause financial hardship. This fails to demonstrate a reasonable likelihood of success on the merits of the appeal.

As the Commissioner, I have broad authority to assess penalties for violations of the Producer Act. Specifically, N.J.S.A. 17:22A-45(c) provides: "Any person violating any provision of this act shall be liable to a penalty not exceeding $5,000 for the first offense and not exceeding $10,000 for each subsequent offense to be recovered in a summary proceeding in accordance with the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.)." Given the numerous individual violations in this matter, the maximum monetary penalties that could be imposed is far in excess in what was determined appropriate in the Final Decision and were determined to be necessary and appropriate under a fulsome Kimmelman analysis. The Respondents have not demonstrated that they there is a reasonable probability that they will be disturbed on appeal.

Moreover, the Respondents have put forth no basis to demonstrate that license revocation is unreasonable. The Producer Act 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-40(a). As discussed in the Final Decision, 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 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. 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. Nationwide Mutual Ins. Co. Inc., 80 N.J. at 559.

As found in the Final Decision, the Respondents induced four separate clients, all senior citizens over the age of 80, to divest their life savings totaling over $800,000 from legitimate financial products and invest in a product – not authorized for sale in this State – and for which the producers had failed to conduct proper due diligence. That product touted returns that the Respondents – as licensed insurance producers – should have known as experienced insurance producers, were too good to be true. The Respondents' sale of the insurance product only ceased upon notification by Tennessee that the product's issuer, the NFOA, was under investigation. But for the Tennessee regulatory investigation, the number of elderly victims who could have lost their life savings to Fisher's poorly conceived investment strategy could have been substantial. Based on this misconduct conduct and the Department's precedent, revocation was necessary and appropriate to protect the public and to deter similar misconduct by the Respondents and other licensed producers. See Commissioner v. Berlin, BKI 05377-03, Final Decision and Order, (08/11/2009); Commissioner v. Uribe, BKI 07363-07, Final Decision and Order, (09/28/2011), adopting Initial Decision, (03/31/2011), <http://njlaw.rutgers.edu/collections/oal/>, aff'd, No. A-1285-11T1 (App. Div. March 7, 2013); and N.J.S.A. 17:22A-40 and -40(c).

For these reasons, I have determined that the Respondents have failed to demonstrate a reasonable probability of success on the merits of their appeal. The failure to demonstrate this Crowe criteria prohibits granting the stay; however, I will also analyze the remaining Crowe criteria below.

BALANCING THE BENEFITS AND THE HARM OF A STAY TO OTHER PARTIES, INCLUDING THE PUBLIC INTEREST

A balancing of the benefits and the harms of granting the request for a stay of the Final Decision weighs heavily against granting the stay. To obtain a stay, the 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 the Respondents. Crowe, 90 N.J. at 134; Morris Cty. Transfer Station v. Frank's Sanitation Serv., 260 N.J. Super. 570, 574-77 (App. Div. 1992). As noted in the Final Decision, 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). The 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 posed by the Respondents during the pendency of this appeal. Stay Motion at 5. The Respondents further assert that, aside from selling the NFOA product to elderly clients, Fisher is not a threat to the public or to the public's perception of the insurance industry as a whole. Ibid. The Respondents compare this to the potential harm that their employees and families will suffer and the purported impact that such a ruling would likely have on Respondent Fisher's business, namely that his elderly clients would have no other insurance contact. Ibid.

I disagree. A producer'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). The Respondents in this matter were found to have demonstrated gross incompetence in their failure to ascertain the legitimacy and security of

a product that they sold to four of their elderly clients, jeopardizing their life savings by investing in a Ponzi scheme that was not properly vetted by the Respondents. Final Decision at 47. Based on the findings made in the Final Decision and the fact that that the impacted clients were elderly, public interest is of paramount concern in this matter. Senior citizens are especially vulnerable to fraudulent activity. Comm'r v. Joseph Schifano, BKI 1947-12, Final Decision and Order, (09/11/2013) at 11. As set forth in the Stay Motion at 4, Fisher's clients are predominantly elderly and because Fisher has been found to have been grossly negligent in his fiduciary duties to this vulnerable population in the present matter, the need to protect the public outweighs the potential pecuniary impact upon the Respondents. To maintain the status quo would disregard the Department's core missions of protecting consumers and the insurance industry as a whole. Adopting the Respondents' position would lead to the absurd result, wherein an insurance producer's license could not be revoked because it would negatively impact financially on that producer and because the producer's clients would have to seek insurance services elsewhere; but, where revocation and/or significant fines are order – this will always be the case. My duty is to ensure that insurance producers are held to the high standards required of the profession in order to protect consumers and therefore I find that the balancing of the benefits and harms weighs in favor of denying the stay.

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, 216 N.J. at 321 (citing McNeil, 176 N.J. at 484). 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, 80 N.J. at 559. The Respondents fail to demonstrate how their interest is 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 penalties imposed by the Final Decision demonstrate the appropriate level of opprobrium for such conduct and serve as a deterrent to the Respondents and other licensees engaging in such misconduct. Immediate imposition of the penalties furthers the Department's statutory obligation to protect the public. I believe that these considerations demonstrate that the public interest is best served by allowing the Final Decision to remain in effect. Thus, when all these facts are considered, I find that the Respondents have failed to demonstrate that on balance the benefits of relief will outweigh the harm of granting the stay to other parties, including the public interest.

IRREPARABLE HARM

The Respondents argue that, if a stay is not granted, the Respondents will suffer irreparable harm in that Fisher's elderly clients would no longer have an insurance contact and Fisher's family and employees would be severely affected. Stay Motion at 2. Respondents Reply Motion at 2. The "harm" cited by the Respondents is not certain, imminent, or irreparable. The only harm offered is monetary in nature and therefore does not satisfy the 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, 96 N.J. Super. at 390.

The Respondents' arguments are primarily speculative in nature as they provide little to no support for these contentions. As to the argument that Fisher's elderly clients would no longer have an insurance contact, this harm is not irreparable as they may seek an alternate insurance producer upon the revocation of Fisher's license. Moreover, this factor relates to irreparable harm

to the moving party. In any event, I do not believe that being required to seek another insurance producer for insurance services constitutes irreparable harm. In addition, as the Department noted, the insurance policies of Fisher's clients are not cancelled with their respective insurance carriers as a result of the Final Decision, and thus they are not irreparably affected.

As to the argument that Fisher's family and employees would face financial instability, Courts have consistently held that the loss of income or pecuniary harm does not constitute irreparable harm for purposes of obtaining an interlocutory injunction. Ibid. "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 of Sparta, 198 N.J. Super. at 381 (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.

I also agree with the Department that, in this matter, the financial hardship claimed by Respondents does not rise to the level of irreparable injury required by the courts to grant injunctive relief. Crowe, 90 N.J. at 130 and 133. The Respondents fail to explain how a loss of income is irreparable harm or why they cannot seek or utilize other sources of income. The Department notes that Fisher admits in his motion that there are additional sources of household income. Department Response at 5 to 6 (citing Stay Motion at 7). The Respondents note that the Department's reliance on this statement is improper as it is based on a typographical error in their Stay Motion.[4] Respondents Reply Motion at 2. The Respondents correction of the typographical error appearing in their Stay Motion fails to alter the conclusion that the financial hardship claimed by Respondents does not rise to the level of irreparable injury required by Crowe.

[4] The Respondents state that the Stay Motion should have read as follows: "The last tax return for Mr. Fisher and his wife Peggy reflects a taxable income of only $21,869...His wife does **not** work." Respondents Reply Motion at 2.

The Respondents Reply relies on Board of Educ. of Union Beach v. New Jersey Educ. Ass'n., 96 N.J. Super. at 390, citing Scherman v. Stern, 93 N.J. Eq. 626, which states that the act of destroying a complainant's business, custom and profits constitutes irreparable injury and authorizes the issue of a preliminary injunction, necessitating a stay be granted. Respondents Reply Motion at 2. However, the facts in Scherman are not analogous to those in the instant matter. The Schermans purchased a business from the Abraham Miller, who employed Jack and Mary Stern, with the agreement that the Sterns and Miller would not compete with the business following the sale, as they had considerable acquaintance in the area and personal influence with local trade. All parties agreed. However, one month after the Schermans opened for business, the Sterns opened similar business two hundred feet away from the Schermans' store. It is in this context that the court held that act of destroying a complainant's business constitutes irreparable injury. This is very distinct from the current circumstances where the Respondents are licensees of this Department and I have a duty as Commissioner to protect the public.

Similarly, in Board of Education v. Union Beach, the action at issue was a dispute between a governmental body, the Union Beach Board of Education, and union representing teachers where the union would prohibit any members from employment if they were on the Board of Education. The instant matter involves the licensing of an insurance producer, the issuance, renewal, non-renewal, suspension and revocation of which is within the discretion of the Commissioner under the Producer Act. Application of the Respondents' argument in the context of the revocation of an insurance producer is inappropriate and would lead to the absurd result where an insurance producer license could not be revoked by the Commissioner because of the "harm" it would cause the licensee. As noted previously, the Commissioner appropriately exercised her broad authority under the Producer Act, which permits the revocation of licensure when deemed appropriate. To

find that revocation of licensure, which, by definition, can lead to the winding down of an insurance producer's business, constitutes irreparable injury would effectively strip the Commissioner of her ability exercise her authority as provided by the Legislature under the Producer Act when it is found to be required. As set forth extensively in the Final Decision, I found such action necessary and appropriate as to Fisher and Regal in this case.

Therefore, I do not believe that the reasons for irreparable harm cited by Respondents are neither harm nor are irreparable. Consequently, the Respondents have failed to establish that they will suffer irreparable harm if a stay is not granted.

CONCLUSION

For the reasons set forth above, I find that the 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. Therefore, the Respondents Motion to Stay Final Decision and Order No. E18-75, as amended by Order No. E18-80, is DENIED.

8/9/18
Date

Marlene Caride
Commissioner