ORDER NO. E17-65

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

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

This matter comes before the Commissioner of the Department of Banking and Insurance ("the Commissioner") pursuant to the authority of N.J.S.A. 52:14B-1, et seq., N.J.S.A. 17:1-15, the Insurance Producer Licensing Act of 2001 (N.J.S.A. 17:22A-26, et seq.) ("the Producer Act"), N.J.S.A. 17:29B-1 et seq., and all powers expressed or implied therein, for the purpose of reviewing the March 6, 2017 Initial Decision ("Initial Decision"), issued by the Hon. Laura Sanders, ALJ ("ALJ Sanders" or "the ALJ") which granted the Motion for Summary Decision in favor of the Department of Banking and Insurance ("the Department") as to Counts 1 and 3 of the Order to Show Cause dated July 20, 2015 ("OTSC"), and which denied Summary Decision as to Count 2 of the OTSC. ALJ Sanders recommended imposition of a civil penalty of $51,517, joint and severally, upon First Jersey Insurance Agency, Inc. ("First Jersey"), Gerald E. Conner ("Conner") and James W. Blumetti ("Blumetti") (collectively known as "Respondents").

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Commissioner issued a three count OTSC on July 20, 2015, seeking to revoke the insurance producer licenses of Respondents and impose monetary fines and assess costs incurred by the Department during the investigation of this matter regarding the mass mailing of an advertisement entitled "2013 Medicare Update," which stated that, "[a]s of January 1st, a leading senior organization and other Medicare Supplement insurers may increase their rates up to 30% on Medicare supplement coverage." The Department alleged that Respondents did not consult with the Department to determine the rate increase for Medicare supplement coverage for 2013 and that, in 2013 no Medicare supplement coverage insurance had a State approved increase of 30 percent. The Commissioner alleged that the Respondents' conduct violated N.J.S.A. 17:22A-40a(2), (7) and (8), N.J.S.A. 17:29B-4, N.J.A.C. 11:2-11.2, N.J.A.C. 11:17A-2.6(a) and N.J.A.C. 11:17A-2.8.

Specifically, in Count 1 of the OTSC, the Department alleged that Respondents' mailing of an untrue, deceptive or misleading advertisement for insurance products to a New Jersey resident constituted violations of N.J.S.A. 17:22A-40a(2), (7) and (8), N.J.S.A. 17:29B-4, and N.J.A.C. 11:2-11.2.

In Count 2 of the OTSC, the Department further alleged that Respondents' mailing of an advertisement for insurance products to a New Jersey resident, which failed to identify the name of the insurer to the person he or she is soliciting prior to commencing his or her solicitation, constituted violations of N.J.S.A. 17:22A-40a(2) and (8), and N.J.A.C. 11:17A-2.6(a)2. Count 2 was amended by Order dated November 16, 2015, following a formal motion by the Department, to reflect that such conduct violated N.J.A.C. 11:17A-2.6(a) generally instead of N.J.A.C. 11:17A-2.6(a)2.

The Department further alleged in Count 3 of the OTSC that Respondents' mailing of an advertisement for insurance products to a New Jersey resident, which made misleading representations or incomplete or fraudulent comparison of insurance policies for the purpose of inducing or tending to induce the recipient 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 with another insurer, constituted violations of N.J.S.A. 17:22A-40a(2) and (8), and N.J.A.C. 11:17A-2.8.

On August 10, 2015, Respondents filed an answer denying and contesting the allegations contained in Counts 1 through 3 of the OTSC and requested a hearing. The matter was transferred to the Office of Administrative Law ("the OAL") on August 25, 2015.

On October 13, 2015, Respondents filed a Motion for Summary Decision requesting that Count 2 of the OTSC be dismissed stating that there was no dispute that Respondents identified First Jersey as the insurance producer on the advertisement at issue in conformance with N.J.A.C. 11:17A-2.6(a)2. The Department opposed Respondents' Motion for Summary Decision on November 2, 2015[1] and, in this same briefing, filed a Cross-Motion to Amend the OTSC to correct a technical pleading error to include the entirety of N.J.A.C 11:17A-2.6(a) instead of the limited portion of N.J.A.C 11:17A-2.6(a)2. On November 10, 2015, Respondents filed a brief in further support of Respondents' Motion for Partial Summary Decision and In Opposition to Petitioner's Motion to Amend its Pleadings arguing that, even if the motion were granted, the result would be the same - Partial Summary Decision on Count 2 of the OTSC in favor of the Respondents. The Department also filed a reply on November 10, 2015, arguing

[1]ALJ Sanders indicates, in the March 6, 2017 Initial Decision, that the Department filed on November 15, 2015 a Cross-Motion for Leave to Amend the OTSC, and a brief in Opposition to Respondent's Motion for Partial Summary Decision. However, the Notice of Cross-Motion for Leave to Amend Pleading prepared and submitted by the Department is stamped 'Received' by the OAL on November 2, 2015, but signed and dated by DAG Schaffer on November 11, 2015.

that the amended pleading would survive a Motion to Dismiss Count 2 of the OTSC. In an Order dated November 16, 2015, ALJ Sanders granted the Department's request for leave to amend Count 2 of the OTSC to include the entirety of N.J.A.C. 11:17A-2.6(a) and denied Respondents' Motion for Partial Summary Decision.

Almost one year later, on November 10, 2016, the Department moved for Summary Decision on all counts of the First Amended OTSC ("Amended OTSC") and, on December 13, 2016, Respondents opposed the Department's Motion and filed a Cross-Motion for Summary Decision. The Department replied to Respondents' Cross-Motion for Summary Decision on January 13, 2017 and Respondents' Sur-Reply was filed on January 19, 2017. The record in this matter was closed on January 20, 2017.

On March 6, 2017, ALJ Sanders granted Summary Decision to the Department against Respondents, jointly and severally, on Counts 1 and 3. With respect to Count 2, ALJ Sanders determined that the Department did not meet its burden. The ALJ further recommended the imposition of civil monetary penalties in the amount of $51,517.00 against Respondents, jointly and severally.[2]

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[2] Via letter dated May 10, 2017, and received by the Department on May 11, 2017, Respondents requested oral argument before the Commissioner and a conference with the Commissioner and DAG Schaffer, who represents the Department in this matter. The Department opposed this request on May 11, 2017. Moreover, on May 16, 2017, Respondents submitted an additional letter reiterating their request for oral argument and for a settlement conference, arguing that the rules do not prohibit oral argument or settlement conferences and averring that Respondents should have the ability to orally explain why the ALJ did not consider a piece of evidence that would warrant dismissal of the matter entirely. In support of the request for oral argument before the Commissioner, the Respondents reiterated assertions in their Exceptions and Reply submissions. The Department responded to this letter on May 17, 2017, arguing that Respondents arguments should be disregarded entirely. I would note that the arguments offered by Respondents in these letters are addressed herein because these issues are set forth in the Exceptions and Replies prepared by both parties. Therefore, I herein DENY this request for oral argument and for a conference. The administrative record in this matter is closed. Both parties had an opportunity to request oral argument and to conference this matter with ALJ Sanders before the Initial Decision was entered. Given that the underlying motion concerns a Final Order, any oral argument would likely require that the matter be transmitted to the Office of Administrative Law. Additional oral argument before the Commissioner is not necessary, required or warranted in this case, and is herein DENIED.

ALJ'S FINDINGS OF UNDISPUTED FACTS

ALJ Sanders found the following undisputed facts in her grant of Summary Decision. First, it was undisputed that Conner, Blumetti and First Jersey were licensed as resident insurance producers and that Conner and Blumetti were acting as the designated responsible licensed producers (DRLP) for First Jersey during all relevant times. Initial Decision at 3. Moreover, ALJ Sanders determined that, in August 2013, Respondents mailed 51,517 advertisements to New Jersey senior citizens which indicated that rates for certain Medicare supplement coverage may increase significantly as of January 1. Ibid. The language in the mailing, targeted to senior citizens, was as follows:

> 2013 MEDICARE UPDATE
>
> As of January 1st, a leading senior organization and other Medicare Supplement insurers may increase their rate up to 30% on Medicare supplement coverage. Many seniors have turned to HMOs seeking lower premiums only to find out that patient care is inadequate. Some HMOs have even closed their doors.
>
> Based on this there is now available a plan in your state to supplement Medicare at lower rates for seniors over 65 years of age.
>
> To find out how to qualify, return this Medicare Supplement inquiry card within 5 days.
>
> [Ibid.]

ALJ Sanders further described this advertisement to contain a blank space so that a recipient could fill in his or her name, date of birth, spouse's name and date of birth, and phone number. Ibid. ALJ Sanders described the advertisement as displaying the name "First Jersey Insurance Agency" and the note, "PLEASE VERIFY ADDRESS AND INCLUDE PHONE #. NOT AFFILIATED WITH OR ENDORSED BY ANY GOVERNMENT AGENCY." Ibid.

Additionally, the ALJ found as fact certain statistics set forth in the Certification of Frank Biskup dated October 28, 2016 ("Biskup"), Insurance Analyst for the Department. Id. at 4. The Biskup Certification was provided as support for the Department's Motion for Summary Decision and the Respondents did not challenge the accuracy of this document. Ibid. With respect to 2013, Biskup certified, and ALJ Sanders found as fact, that Medicare Supplement insurance rates in New Jersey increased on average by 2.4 percent, with the highest increase being 15 percent for United World Life Insurance Company ("United World"), which was for Plan N only. Ibid. (citing Department's Motion for Summary Decision dated November 9, 2016 ("Department's Nov. 9, 2016 Summary Decision Brief") Biskup Certification dated October 28, 2016 ("Biskup Certif.") at ¶¶16-17). Biskup further certified that United World Life had a New Jersey market share of 1.9 percent. Ibid. Further, ALJ Sanders found that the three largest insurers, namely United Healthcare Insurance Company ("United"), with a market share of 55.2 percent, Horizon Health Care Services, Inc. ("Horizon Healthcare"), with a market share of 12.7 percent, and Horizon Insurance Company ("Horizon Insurance"), with a market share of 12.6 percent, only had rate increases approved by the Department of 2.8 percent, 1.2 percent, and 0.0 percent, respectively. Ibid. (citing Biskup Certif. at ¶¶18-19). The overall average increase of all New Jersey State Medicare Supplement rates was 2.4 percent. Ibid. (citing Biskup Certif. at ¶ 20 and Exhibit 5).

With respect to 2014, Biskup certified, and ALJ Sanders found as fact, that the highest New Jersey State Medicare Supplement approved rate increase was 10.4 percent granted to American Progressive, which had a market share of 0.3 percent. Ibid. (citing Biskup Certif. at ¶¶22-23 and Exhibit 5). United and Horizon Insurance, the two largest insurance companies, had market shares of 54.9 and 24.9 percent respectively. Ibid. (citing Biskup Certif. at ¶25 and

Exhibit 7. The average rate increase granted for Medicare Supplement policies was 2.7 percent in 2014. Ibid. (citing Biskup Certif. at ¶25 and Exhibit 7).

ALJ Sanders further referenced Horizon's handout, upon which Respondents relied to support the truthfulness of the advertisement at issue. Ibid. ALJ Sanders found that this document demonstrates that Horizon's contracts for single seniors are grouped by age and that rates rise considerably when the holder reaches ages 70, 75, or 80. Ibid. Horizon Plans A, C, and F rose 30 percent on a policy holder's 70th birthday, and Plans G, K, and N rose 27 percent at age 70. Ibid. (citing Conner Certification ("Conner Certif.") at ¶¶13-14 and Exhibit E).

ALJ Sanders further found that, "on a direct-premiums-earned basis, [Horizon Healthcare] and [Horizon Insurance] had 12.7 and 12.6 percent market share, respectively, in 2013 with about 93,000 insured lives each, which was well above the next largest." Id. at 5 (citing Biskup Certif. at Exhibit 6). Therefore, as the two Horizon companies held significant market share, the ALJ found that the portion of the advertisement which referred to the two Horizons as a "leading senior organization" was true. Ibid. The ALJ further found as true that Horizon planned to raise rates by 30 percent and 27 percent for some of its policyholders. Ibid.

However, where the advertisement states "and other Medicare Supplement insurers may increase their rates up to 30 percent on Medicare supplement coverage," ALJ Sanders determined that such language was not factual because the Department demonstrated that, "given that even a recent download from Merriam-Webster indicates that at least some probability of occurrence is incorporated in the common definition of 'may,' the fact that there was virtually no possibility of others raising rates at that level renders the statement not factual" because no other insurance companies were proposing to raise rates to this level or had been granted rate increases of 30 percent. Id. at 5-6.

ALJ Sanders also found as fact that Respondents purchased a "canned" solicitation from a leading direct-mail company which then mailed this advertisement to consumers on Respondents' behalf, that only one person issued a complaint about said mailing and that, based on the certification of Department Investigator Ellena Herbert, the Department reviewed 1,061 advertisement-response cards. Id. at 6-7.

Regarding the Department's allegations in Count 2 of the OTSC that Respondents failed to properly identify in the advertisement the insurance producers making the solicitation and the nature of the relationship between the producers and the agency, ALJ Sanders found as fact that the advertisement included only the name and address of the entity First Jersey and that Respondents did not represent any specific insurer in relation to the advertisement. Id. at 7. ALJ Sanders further noted that the Department did not dispute the certification executed by Respondent Conner wherein he certified that First Jersey did not have a specific insurer relationship relating to the solicitation. Ibid.

ALJ Sanders also addressed the allegations of "twisting" in Count 3 of the OTSC. The Department alleges that the advertisement made misleading representations for the purpose of inducing the recipients to surrender or lapse existing policies and to take out new policies. The Department contends that the following language is problematic:

> Based on this there is now available a plan in your state to supplement Medicare at lower rates for seniors over 65 years of age.
>
> To find out how to qualify, return this Medicare Supplement inquiry card within 5 days.

Noting that the phrase "for seniors over 65 years of age" could be interpreted differently depending upon whether the word "all" or "some" is read into it, ALJ Sanders did not find that

this portion of the statement was untrue as no specific promise was made that any particular senior citizen will save money. Id. at 8.

ALJ's LEGAL CONCLUSIONS

ALJ Sanders determined that, pursuant to N.J.A.C. 1:1-12.5(b) and Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995), Summary Decision is appropriate because the issues presented for resolution, namely whether the Respondents should be subjected to fines or licensing actions as a result of sending the subject solicitation and whether the statements made in the advertisement constituted misrepresentations, are entirely legal in nature. ALJ Sanders determined that the Department met its burden with respect to the violations alleged in Counts 1 and 3 and thereby granted Summary Decision in this regard, and further found that the Department did not meet its burden with respect to the violations alleged in Count 2 and therefore denied Summary Decision with respect to this count. ALJ Sanders utilized the standard elucidated in Brill and noted that, "a determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the nonmoving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the nonmoving party." Id. at 9, quoting Brill, supra, 142 N.J. at 540. The ALJ further noted that a Motion for Summary Decision may be granted if "the papers and discovery which have been filed, together with affidavits, if any, show that there is no genuine issue as to any material fact." Id. at 8 citing N.J.A.C. 1:1-12.5(b). The ALJ further noted that N.J.A.C. 1:1-12.5(b) also provides that an adverse party must respond to a Motion for Summary Decision by affidavit which sets forth specific facts showing that there is a genuine issue that can only be determined in an evidentiary hearing. Id. at 8.

The ALJ also noted that the Producer Act governs insurance producer conduct. Ibid.

Count 1

ALJ Sanders found that the Department carried its burden with respect to Count 1 of the OTSC wherein the Department challenged the accuracy of the statements in the advertisement at issue herein. Id. at 10. ALJ Sanders noted that N.J.S.A. 17:29B-4(2) defines "unfair methods of competition and unfair and deceptive acts or practices" as follows:

> making, publishing, disseminating, circulating or placing before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance...which is untrue, deceptive or misleading.
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> [Id. at 9.]

When reviewing the facts in light of N.J.S.A. 17:22A-40a(2) that prohibits producers from violating any insurance law or regulation and N.J.S.A. 17:22A-40a(7) that prohibits insurance producers from committing any insurance unfair trade practice codified in N.J.S.A. 17:29B-1 et seq., ALJ Sanders found that "[R]espondents caused the dissemination of a postcard containing an assertion with respect to the business of insurance that was untrue." Id. at 9-10.

Count 2

The Department, through Exceptions filed in this matter, withdrew Count 2 in its entirety from the OTSC and, therefore, it is unnecessary to discuss at length the arguments propounded by both parties and the ultimate determination rendered by ALJ Sanders in this regard. The Department's Exceptions Brief ("Department Exceptions" at 1-2).

Count 3

ALJ Sanders concluded that the Department met its burden as to Count 3 of the OTSC, wherein the Department alleged that Respondents violated the insurance laws by trying to improperly induce policyholders through use of the untrue advertisement into changing Medicare

supplement insurance carriers. Id. at 14. This conduct is otherwise known as "twisting," which is prohibited by N.J.A.C. 11:17A-2.8. Ibid. N.J.A.C. 11:17A-2.8 states the following:

> No insurance producer 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 with another insurer.
>
> [Ibid.]

With regard to N.J.S.A. 17:22A-40a2 (an insurance producer shall not violate any insurance law, regulation, subpoena, or order of the Commissioner), ALJ Sanders concluded that, "the solicitation was not entirely true, and was undoubtedly aimed at persuading some recipients to trade in one policy for another one." Ibid.

ALJ'S FINDINGS AS TO THE PENALTY AGAINST RESPONDENTS

After an analysis of governing case law and statutes and a review of prior orders issued by the Commissioner, ALJ Sanders recommended imposition of a total fine of $51,517.00 for Respondents' underlying misconduct. Id. at 19. ALJ Sanders noted that the Producer Act empowers the Commissioner to impose penalties not exceeding $5,000 for the first offense and $10,000 for each subsequent offense, and further outlined the standards for determining the appropriateness of civil monetary penalties as set forth in Kimmelman v. Henkles & McCoy, Inc., 108 N.J. 123, 137-39 (1987). Id. at 14. Specifically, certain factors are to be examined when assessing administrative civil monetary penalties that may be imposed upon insurance producers. Ibid. These factors include: (1) the good faith or bad faith of the violator; (2) the violator's ability to pay; (3) the amount of profit obtained from the illegal activity; (4) injury to the public; (5) duration of the illegal conduct; (6) existence of criminal or treble damages actions; and (7) past violations. Id. at 10 (citing Kimmelman, supra, 108 N.J. at 137-39).

When evaluating the first Kimmleman factor, ALJ Sanders noted that, since one portion of the solicitation was untrue, the conduct constituted bad faith but stated that, "one postcard with a single inflated phrase, 'other Medicare Supplement insurers,' is far different from other cases cited by the Department, where there was a pattern of ignoring New Jersey law." Id. at 15.

In analyzing the "ability to pay" Kimmelman factor, ALJ Sanders acknowledged the Department's contention that the Respondents have the burden to demonstrate an inability to pay compared to Respondents' contention that the Department has the burden to demonstrate an inability to pay. While the Department relied upon Commissioner v. Shah, OAL Dkt. No. BKI 11903-05, Initial Decision (04/15/08), Final Decision and Order (09/02/08)) to support such proposition, ALJ Sanders noted that "the case does not explicitly cite a burden of proof in that regard" but "[n]onetheless, it should be noted that, in general, the Appellate Division defers to administrative agencies with regard to penalty." Id. at 16 (citing Commissioner v. Shah, supra).

With respect to profits that inured to the benefit of Respondents from the mailing of the advertisement, ALJ Sanders observed that the record contains no related evidence except that the Department reviewed 1,061 returned postcards. Id. at 16. ALJ Sanders further determined that the Department has no proof of actual harm to the insured, but that "the harm is the generalized degradation of trust in the insurance industry caused by misleading activity and information." Ibid. Further, ALJ Sanders determined that, while the conduct occurred within the month of August 2013 and that neither criminal actions nor actions concerning treble penalties exist, this lack of criminal punishment supports a larger civil penalty. Ibid. (citing Kimmelman, supra, 108 N.J. at 128). Lastly, with respect to the seventh Kimmelman factor, ALJ Sanders noted that neither Blumetti nor Conner had a history of prior regulatory enforcement actions, but that First Jersey entered a Consent Order in 2006. Ibid.

ALJ Sanders also acknowledged the additional arguments propounded by the Department and Respondents about the scope of the penalty. ALJ Sanders specifically noted the Department's argument that each postcard mailed should be considered a separate violation for penalty purposes and that a larger penalty should be exacted for those who had more income and overall financial resources. Ibid.

ALJ Sanders also addressed Respondents' due process concerns regarding the insufficiency of the Department's notice as to the scope of the charges because the OTSC seemed to indicate a single postcard violation, as opposed to the mass mailing of the 51,517 advertisements. ALJ Sanders ultimately concluded that, "[R]espondents have had adequate notice and an opportunity to defend," that "it has been obvious since at least the filing of Petitioner's Motion for Summary Decision on November 10, 2016, that the Department was contemplating action based on all of the cards," and that "[R]espondents have not disputed the number of postcards sent, or the language on the cards, nor have they argued that material facts are at issue." Ibid.

Additionally, ALJ Sanders concurred with Respondents' argument that the matters relied upon by the Department to support imposition of a substantial fine, specifically Commissioner v. Bonnell, OAL Dkt. No. BKI 06993-08, Initial Decision (05/19/14), Final Decision and Order (10/06/14) and Commissioner v. Uribe and Inter-America Insurance Agency, OAL Dkt. No. BKI 07363-07, Initial Decision (03/31/11), Final Decision and Order (09/28/11),[3] were inapposite to the underlying facts herein because those matters involved more egregious conduct and numerous violations. Id. at 17. Thus, the ALJ determined that,

[3] It appears that the Department also relied upon Comm'r v. Prime Insurance Syndicate, OAL Dkt. No. BKI 1168-05, First Initial Decision (January 31, 2006), Second Initial Decision (March 9, 2006), Final Decision and Order (May 24, 2006). Department's Brief in Support of Motion for Summary Decision ("Department Summary Decision Motion") at 20. ALJ Sanders, however, does not distinguish Prime Insurance from the underlying facts herein.

> Looking at the factors overall in the current situation, the violation of the solicitation provisions of the statutory and regulatory scheme was serious, but brief, and for Conner and Blumetti, limited to a single occasion over long careers. The Department has not shown that this was part of an overall pattern of sloppiness, disregard for the insurance laws, or an indifference to the importance of insurance to consumers.
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> [Id. at 18.]

In light of this analysis, ALJ Sanders ultimately agreed with the Department's position that each separate mailing constituted a violation; however, where the Department requested a $3 fine for each violation,[4] the ALJ recommended imposition of a $0.50 fine for each of 51,517 violations in Count 1, for a subtotal of $25,785.50; and $0.50 for each of 51,517 violations in Count 3, for a subtotal of $25,785.50. Therefore, ALJ Sanders recommended a total penalty of $51,517.00 upon Respondents, joint and severally. Id. at 19. ALJ Sanders based this in part on the fact that the solicitation apparently only yielded a 2 percent response rate. Ibid.

PETITIONER'S EXCEPTIONS

The Department submitted timely Exceptions requesting the following modifications and supplements to the Initial Decision.[5]

As to Count 1, the Department challenges ALJ Sanders' findings that "Horizon planned to raise rates by 30 percent and 27 percent for some of its policyholders." Department Exceptions Brief ("Department Exceptions") at 2. The Department avers that these findings fail

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[4] In the Department's Summary Decision Brief dated November 10, 2016, the Department requested that civil penalties be imposed upon Respondents, jointly and severally, in the amount of $257, 585.00, consisting of a $5.00 civil penalty for the three violations contained in each of the 51,517 postcards. Petitioner's Brief in Support of Motion for Summary Decision dated November 10, 2016 ("Department's Summary Decision Brief") at 24. However, in the Department's Reply Brief to the Respondent's Opposition to Summary Decision, the Department argues, apparently in error, that its demand for a $3.00 penalty for each of the 51,517 postcards is authorized by law and appropriate. Petitioners Reply Brief in Support of Motion for Summary Decision ("Department's Reply to Summary Decision") at 10. Thereby, because of this confusion, ALJ Sanders incorrectly interprets the Department's penalty demand.

[5] As noted above, the Department withdrew the charges of Count 2 of Amended OTSC and therefore requested the Commissioner to neither modify nor adopt ALJ Sanders' finding on this Count. Department Exceptions Brief at 1-2.

to acknowledge the distinction between carrier rate increases and "Attained Age" increases noting that, for Attained Age rating, policyholders are charged a different premium depending on their age. Ibid. Therefore, for such policies, rates increase as the policyholder ages. Ibid. The Department notes that the 30 percent increase advanced by the Respondents only applies to Horizon Medicare Supplement policyholders turning 70 due to a predetermined Attained Age premium increase, but that neither Horizon nor any other Medicare Supplement insurer raised rates by 30 percent. Id. at 2. However, the Department acknowledges that, "(i)n the instant circumstance, certain Horizon Medicare Supplement policy holders were due to graduate into a subsequent age-group bracket." Id. at 2-3. According to the Department, ALJ Sanders' findings fail to recognize that "Respondents' use of the 30 percent number creates the false impression that all Medicare Supplement insureds may experience drastic rate increases" and that, given Respondents' experience in the industry, they should have known that rates historically have not risen even close to 30 percent. Id. at 3. Ultimately, the Department urges that the Initial Decision be modified as to Count 1 to find that "the advertisement was false and misleading in part because Horizon did not raise rates by 30%." Ibid.

The Department also contends that the Initial Decision be modified with respect to Count 1 to take into account the overall implication of the advertisement or, in other words, the advertisement in its entirety as opposed to breaking the advertisement into segments. Ibid. The Department propounds that the "ALJ made findings of fact but did not appreciate the sum of the parts." Ibid. The Department further urges that the Initial Decision be modified to reflect that the overall advertisement is misleading in its nature. Ibid. Furthermore, the Department emphasizes that N.J.A.C. 11:2-11.2, which is pleaded in the OTSC, states that, "[a]dvertisements for insurance must be truthful and not misleading in fact or in implication." [emphasis added]. The Department discusses the definition of "implication" and relies upon two prior decisions for

support, including Comm'r v. Automated Insurance Concepts Agency, Inc., et al., 96 N.J.A.R.2d(INS) 13, Initial Decision (December 11, 1995), Final Decision and Order (January 9, 1996) at 17 and Comm'r v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (August 15, 2011), Final Decision and Order (December 28, 2011). The Department further notes that the advertisement itself does not disclose that any potential rising rates are limited only to Horizon Medicare Supplement insureds turning 70, which ultimately gives the false impression of "doom and gloom" in the industry and "skyrocketing premiums." Id. at 4-5.

As to Count 3, the Department argues that the conclusions of law should be modified to reflect that the advertisement is a misleading inducement in violation of N.J.A.C. 11:17A-2.8, given ALJ Sanders' determination that the statement in the advertisement with respect to how the recipient would qualify is untrue. Id. at 5 (citing Initial Decision at 7-8). The Department avers that the Initial Decision should be modified to reflect that, "a misleading advertisement from a producer to a policyholder is an inducement to take out a policy of insurance with another insurer, in violation of N.J.A.C. 11:17A-2.8." Id. at 6.

Lastly, the Department challenges ALJ Sanders' penalty determination of $51,517.00 and requests imposition of a $2.00 civil penalty for each of the violations for each of the 51,517 advertisements in the Initial Decision, for a total civil penalty of $206,068.00. The Department avers that the total fine imposed by ALJ Sanders does not reflect the severity of the misconduct. Id. at 8. The Department notes that, under the second Kimmelman factor, Respondents have the burden to establish an inability to pay and Respondents have been silent on this issue. Id. at 7 (citing Comm'r v. Shah, supra). Moreover, the Department urges that greater consideration be given to the Kimmelman factor addressing the amount of profits obtained from the conduct because the mailing of mass advertisements could have resulted in substantial gain for Respondents. Id. at 7-8 (citing Comm'r v. Strandskov, OAL Dkt. Nos. BKI 03451-07, BKI

03452-07, Initial Decision (September 25, 2008), Final Decision and Order (February 4, 2009); see also Comm'r v. Battista, OAL Dkt. No. BKI 4940-07, Initial Decision (March 6, 2008), Final Decision and Order (September 2, 2008)).

The Department also contends that the penalty does not reflect the severity of the violations and needs to be large enough to dissuade others from similar conduct. Id. at 8 (citing Sheeran v. Nationwide Mut. Ins. Co.,supra,; Comm'r v. Goncalves, OAL Dkt. No. BKI 3301-05, Initial Decision (November 17, 2005), Final Order (February 15, 2006) at 11).

Lastly, the Department urges the Commissioner to adopt ALJ Sanders' conclusion of law wherein she determined that "each mailed advertisement constitutes a separate violation of the applicable laws and is subject to a separate civil penalty." Id. at 8-9 (citing Comm'r v. Prime Insurance Syndicate, OAL Dkt. No. BKI 1168-05, First Initial Decision (January 31, 2006), Second Initial Decision (March 9, 2006), Final Decision and Order (May 24, 2006) Final Decision and Order (May 24, 2006); citing State v. Nasir 355 N.J. Super. 96 (App. Div. 2002); see also Comm'r v. Uribe, OAL Dkt. No. BKI 7363-07, Initial Decision (March 31, 2011), Final Decision and Order (September 28, 2011) Aff'd Goldman v. Uribe, A-1285-11T1 (App. Div. March 7, 2013)).

RESPONDENTS' EXCEPTIONS

Respondents aver that ALJ Sanders erred by finding that Respondents caused an untruthful advertisement to be disseminated. Respondents argue that, consistent with the language in the advertisement, more than one Medicare Supplement provider proposed a 30 percent rate increase. Respondents' Exceptions at 2. Respondents specifically take issue with ALJ Sanders' determination that the portion of the advertisement which states that "other Medicare Supplement (sic) may increase their rates up to 30 percent" was untrue. Ibid. Respondents note that the "ALJ mistakenly held that "no others were ***proposing*** rate increases of

that magnitude." Ibid. (citing Initial Decision at 5 (emphasis added)) Respondents note that the Department, during discovery, produced all proposed rate increases by Medicare supplement providers over a five-year period which Respondents maintain conclusively proves that United World proposed a 30 percent rate increase in 2012 and a 25 percent rate increase in 2013. Ibid. Respondents also note that they "should have been given the benefit of all reasonable inferences and ALJ Sanders should have interpreted United World's proposed 25% and 30% rates in Respondents' favor as it relates to any inferences gained from the proposed rate increases." Id. at 4 citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, (1994).

Respondents also contend that ALJ Sanders erred by resolving disputed questions of fact without an evidential hearing supported by testimonial evidence. Id. at 5. Respondents contend that Respondents' state of mind was in dispute regarding whether Respondents knew or should have known that any information in the advertisement was untrue and whether Respondents purposely disseminated misleading, incomplete or fraudulent information to twist insurance policies. Ibid. Respondents note that they raised this issue in briefing for the Summary Decision motion, and that the Department argued that the Producer Act does not contain a mens rea element, but that ALJ Sanders never resolved the issue. Id. at 5-6. Instead, the ALJ determined that the parties were in agreement as to the fact that "Respondents' state of mind was a legal conclusion" which, according to Respondents, is untrue. Id. at 6.

Respondents also dispute the Department's claim that the Producer Act does not contain a mens rea element stating that "an inquiry into an actor's mens rea is relevant when the information that is alleged to have been false concerns an issue that is not within the speaker's personal knowledge." Ibid. (citing Comm'r v. Hohn, OAL Dkt. No. BKI 12444-11, Initial Decision (11/1/12), Final Decision and Order (03/18/13) and Comm'r v. Dobrek, OAL Dkt. No. BKI 2360-13, Initial Decision (06/02/14), Final Decision and Order (01/15/15)). Respondents

also point to Liberty Plus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436 (2007) for support. Ultimately, Respondents argue that "Respondents do not make nor receive Medicare supplement providers' requests for rate increases. Therefore, information relating to the rates increases that are requested are not in their personal knowledge; instead they rely upon information collated and disseminated by the Department. Therefore, whether Respondents knew or should have known about the information in the Advertisement requires a subjective inquiry into what they knew, and how they interpreted that information." Id. at 8.

Respondents also contend that no evidence exists to support ALJ Sanders' finding that Respondents engaged in insurance twisting. Id. at 9. Respondents note that the "Department presented no evidence that Respondents were attempting to have the recipients of the [a]dvertisement lapse, forfeit, change or sign up for any new Medicare supplement insurance policy. The [a]dvertisment itself simply informs the recipients that some Medicare supplement providers have requested 30% rate increases, which is 100% true, and also invites the recipients to talk to Respondents to see if they qualify for lower rates. The [a]dvertisement does not state that Respondents will place anyone with a new insurance policy, switch their plans or let their current ones lapse, and not one a single recipient complained that twisting occurred....Even [ALJ Sanders] acknowledged that the [a]dvertisement 'does not specifically promise that any particular senior citizen will save money.'" Id. at 9-10 (citing Initial Decision at 8).

Lastly, Respondents contend that the monetary penalty of $51,517.00 imposed by ALJ Sanders should be reduced because it is excessive, grossly disproportionate to the conduct alleged by the Department, and not supported by penalties issued in other matters. Id. at 11. Respondents noted that ALJ Sanders correctly applied many of the Kimmelman factors. Id. at 12. However, Respondents argued ALJ Sanders utilized an arbitrary formula (multiplying $.50 by the number of advertisements put in the mail and then doing that calculation twice) that is not

supported by precedent. Id. at 12-13. Respondents point to prior consent orders and attach said consent orders to the supporting brief. Respondents further note that the Department first offered to resolve this entire case for $1,000 and that this higher fine represents a "trial tax." Id. at 13-15.

PETITIONER'S REPLY

The Department submitted a reply brief to Respondents' Exceptions on April 4, 2017. The Department contends that Respondents' prolonged attempts to explain the accuracy and truth of the advertisement lend credence to the fact that the advertisement is in fact misleading. Department's Reply at 1.

Further, the Department avers that, "[i]t is misleading to advertise the requested rate increases because those increases are rarely granted in the requested amounts." Id. at 2 (citing Respondents' Exceptions, Exhibit A). Additionally, the Department argues that Respondents' failure to distinguish a requested or "proposed" rate increase from a "granted" rate increase is "coercive"' as the "public does not known (sic) the difference." Ibid. The Department also points out that United World proposed the 30 percent increase in 2012, but the mass advertisement at issue was issued in 2013. Ibid.

In opposition to Respondents' argument, the Department avers that Respondents' use of the word "may" in the advertisement is not dispositive that the advertisement was not misleading. Ibid. "Under Respondents' logic they could have advertised that rates 'may' increase by any amount and it not be misleading." Ibid.

Moreover, the Department opposes Respondents' contention that they were not afforded all reasonable inferences as required by governing law for summary decision motions because such an argument was not raised in the record below as required by N.J.A.C. 1:1-15.1(a).

The Department also opposes Respondents' contention that this matter should be remanded to the OAL for a hearing and for specific consideration of the Respondents' state of mind, noting that the state of mind of Respondents is not relevant. Id. at 3 (citing Comm'r v. Dobrek, supra; Comm'r v. Pino, OAL Dkt. No. BKI 8070-02, Initial Decision (09/11/03), Final Decision and Order (10/30/03)). The Department notes that the statements in the advertisements are objective statements and the Respondents should have sought to ascertain the truth of these statements before engaging in a mass-mailing campaign.

The Department also notes that the postcard was an insurance advertisement, as opposed to, as Respondents argue, an effort to inform senior citizens about potential rate increases. Id. at 4. Lastly, the Department opposes Respondents' argument for decreased civil penalties and observes that submission of consent orders in support of such decreased civil penalties does not constitute precedent. Id. at 4-5.

RESPONDENTS' REPLY[6]

Respondents' Reply avers that the Department's interpretation of the content of the subject advertisement is faulty. Id. at 3. Respondents assert that the Department incorrectly advanced the argument that "Medicare Supplement rates did not rise anywhere near 30% in 2013" whereas the ALJ correctly determined that Horizon raised rates by 30 percent and the evidence conclusively demonstrates that United World proposed a 30 percent rate increase. Ibid.

Respondents characterize the Department's argument as a subjective belief that the advertisement gives off improper inferences. In response to this, they argue that under Brill, "all inferences are to be decided in the non-moving party's favor on summary judgement" and "only the judge is permitted to make inferences." Id. at 4. Respondents also argue that it is improper

[6] Without objecting to the withdrawal of Count 2 of the OTSC, the Respondents' Reply attempts to characterize that withdrawal and other aspects of the Department's prosecution of this case; however, these arguments will not be addressed herein because they are not relevant or necessary to disposition of the remaining counts of the OTSC and the substance of the Initial Decision that is before me for review.

to raise such argument at this juncture and that this matter should be remanded for a hearing to be held in this regard. Id. at 4-5. Respondents also propound that "the advertisement is merely an invitation to talk about whether one qualifies for cheaper rates but not, contrary to the Department's contentions, an inducement to change plans." Id. at 5. Respondents also oppose the Department's argument that "all statements about rates to the public somehow qualify as an inducement," asserting that this was not the intent of the Legislature. Id. at 6.

Lastly, Respondents again advocate for a much reduced fine because: they view the Department's position as "meritless;" this case is victimless; and, the ALJ correctly held that Respondents acted in good faith, have a good history and would likely never do anything similar again. Ibid. Respondents again point to the prior Consent Orders where a much lower fine was imposed for identical conduct. Id. at 6. Respondents allege that the Department is trying to abuse its power by imposing a "grossly excessive trial tax." Ibid. Respondents also argue that the Department's original offer to settle this matter is substantially less that the fine the Department proposes to be imposed at this juncture and that "Respondents' right to exercise its right to have a hearing does not entitle the Petitioner to spitefully raise the fine from $1,000.00 to $206,068.00." Id. at 6-8.

LEGAL DISCUSSION

Following a complete review of the evidential record and the Exceptions and Reply Briefs submitted by the Department and Respondents, I have concluded for all of the reasons set forth in the Initial Decision, and as MODIFIED herein, that summary decision is appropriate as to Counts One and Three of the OTSC issued against Respondents. As found by the ALJ, Respondents failed to adduce evidence that creates a genuine issue as to any material fact and their defenses fail as a matter of law.

N.J.S.A. 52:14B-9 provides a party in a contested administrative case the opportunity for a hearing at which the party may present evidence and argument on all issues involved. Such matters, however, may be subject to summary decision. N.J.A.C. 1:1-12.5(b) provides the standard to determine whether summary decision should be granted in a contested case. Specifically, the rule states that a summary decision may be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Ibid. The rule also provides that "when a motion for summary decision is made and supported, an adverse party, in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

In Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995), the New Jersey Supreme Court clarified the summary judgment standard. The Court held that a determination whether there exists a genuine issue of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The Court said:

> The judge's function is not himself (or herself) to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. ... To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed worthless and will serve no useful purpose.
>
> [Id. at 540-541 (quoting Liberty Lobby, 477 U.S. 242 at 251-252)].

Similarly, motions for summary judgment in civil actions are considered under R. 4:46-2. This Rule provides that the motion sought shall be granted if the evidence adduced shows that there is no genuine issue as to any material fact challenged and that the moving party is entitled

to a judgment or order as a matter of law. R. 4:46-2(c). 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 submission of the issue to the trier of fact. Ibid. The Brill Court noted that "by its plain language, R. 4:46-2 dictates that a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a genuine issue as to any material fact challenged." Id. at 529.

Based upon this well-established standard, I concur with ALJ Sanders that Respondents failed to adduce evidence to demonstrate a genuine issue as to any material fact and that the current record constitutes ample evidence upon which to grant the Department's Motion for Summary Decision as to Counts 1 and 3.[7] The certifications and uncontested findings of fact[8] demonstrate that the Respondents used a vendor to mass mail an advertisement to over 51,000 New Jersey residents that contained misleading and false information about possible large increases in their Medicare supplement insurance premiums in an attempt to obtain business and therefore induce recipients to change their insurance policies. As found by the ALJ and discussed further below, there was no need for a hearing to establish that Respondents engaged in such conduct.

The conduct of insurance producers after November 4, 2002, is governed by the New Jersey Insurance Producer Licensing Act of 2001, N.J.S.A. 17:22A-26 to 48. The Producer Act endows the Commissioner with the authority to regulate the business of insurance producers in the State of New Jersey. The Act and its predecessor were intended not only to impose penalties

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[7]As earlier noted, Count 2 of the OTSC has been withdrawn by the Department without objection from Respondents. Therefore, the merits of ALJ Sanders' ruling as to Count 2 of the OTSC will not be addressed herein.

[8]Respondents contend that there is a disputed fact but, as addressed subsequently herein, the issue raised by Respondents is legal in nature.

but, more importantly, to protect the public from illegal and unethical actions by insurance producers. See In Re Parkwood, 98 N.J. Super. 263, 268 (App. Div. 1967); Fortunato v. Del Mauro, 93 N.J.A.R.2d (INS) 37.

Under the Producer Act, the Commissioner has the authority to revoke or suspend an insurance producer license and to require the payment of fines, restitution, and costs of investigation and prosecution for any of the enumerated prohibited conduct or for other violations of the insurance laws of this State. N.J.S.A. 17:22A-40. N.J.S.A. 17:22A-40a provides that I may suspend or revoke the license of an insurance producer for any one or more of the following causes:

> (2) Violating any insurance laws or regulation;
> (7) Having admitted or been found to have committed any insurance unfair trade practice or fraud; [and]
> (8) Using any fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of insurance business.

The primary and undisputed facts underlying Counts 1 and 3 of the OTSC as found by the ALJ are that in August 2013, Respondents Blumetti and Conner, as licensed insurance producers and DRLPs of First Jersey, caused the mailing of 51,517 advertisements containing the following language:

2013 MEDICARE UPDATE

> As of January 1st, a leading senior organization and other Medicare Supplement insurers may increase their rate up to 30% on Medicare supplement coverage. Many seniors have turned to HMOs seeking lower premiums only to find out that patient care is inadequate. Some HMOs have even closed their doors.
>
> Based on this there is now available a plan in your state to supplement Medicare at lower rates for seniors over 65 years of age.
>
> To find out how to qualify, return this Medicare Supplement inquiry card within 5 days.

[Initial Decision at 5.]

This advertisement included a request that the recipient provide the Respondents with recipient's name, date of birth, spouse's name, spouse's date of birth, and their phone number, in order to "find out how to qualify" for what the advertisement asserts are available Medicare supplement plans with lower rates. Ibid.

With respect to the both the factual and legal findings related to Count 1 and Count 3, ALJ Sanders underwent a parsing analysis of the subject advertisement to determine whether the statements made therein could have any basis in truth. While I ADOPT ALJ Sanders' ultimate legal determination that the subject advertisement as a whole is misleading and deceptive and therefore violative of N.J.S.A. 17:29B-4(2), N.J.S.A. 17:22A-40(a)(2) and (7), and N.J.A.C. 11:2-11.2, the piecemeal review of this advertisement is unnecessary, confusing and does not fulfill the ultimate legislative intent of N.J.S.A. 17:29B-4(2) which prohibits "unfair methods of competition and unfair and deceptive acts or practices" and fails to recognize the Department's rules in N.J.A.C. 11:2-11.2 on advertisements. N.J.A.C. 11:2-11.2 provides that, "[a]dvertisements shall be truthful and not misleading in fact or in implication. Words or phrases the meaning of which is clear only by implication or by familiarity with insurance terminology shall not be used."

By conducting an analysis of this particular advertisement in this piecemeal manner, i.e. by considering the authenticity of individual lines and phrases of the advertisement separately, the ALJ risked misconstruing the overall message conveyed by this advertisement which, taken as a whole, was intended to scare its recipients.[9] Simply put, the advertisement was misleading

[9] This does not mean that a review of certain segments of an advertisement is never warranted. In this particular situation, certain terms used in the advertisement, such as "leading senior organization" were generic, vague and non-specific and did not refer to any particular company or policy. Therefore, for ALJ Sanders to attempt to attribute facts and circumstances to one particular company, namely Horizon, was an incorrect approach. However,

and deceptive as a whole. When read in its entirety, the overall impression to the consuming public was that Medicare Supplement rates were likely to rise by 30 percent; this was untrue. Respondents had little foundation to believe the assertions in this advertisement to be true and presented no salient evidence to defend the substance of the advertisement when read in its totality. Moreover, certain of ALJ Sanders' piecemeal findings were incorrect. Therefore, I REJECT the ALJ's piecemeal approach and make the following modifications to the Initial Decision.

A) Determination that Horizon was the Referenced "Leading Senior Organization"

First, I MODIFY ALJ Sanders' determination that the portion of the advertisement which refers to Horizon as a "leading senior organization" is true. Respondents assert and ALJ Sanders ultimately determined that the facts as certified to by Frank Biskup established that, in 2013, Horizon carried double-digit percentages of the Medicare supplement market share in this State and therefore the term "leading" can apply to Horizon. I disagree with this analysis and I find that the term "leading" is vague in and of itself and contributes to the overall deceptive nature of the advertisement. Moreover, "senior organizations" do not conduct insurance in the state of New Jersey and, although ALJ Sanders accepts Respondents' assertions that Horizon clearly fits this profile, the advertisement does not contain specific language, such as health service corporation, insurer, or even carrier, which would clearly indicate that Horizon was the "leading senior organization" being referenced in the advertisement.

B) Determination that Horizon as the "Leading Senior Organization" Had Rate Increases As Purported in the Advertisement

an advertisement or a specific portion of an advertisement may lend itself to this type of analysis on a limited basis, especially if this advertisement makes specific, fact-driven assertions which may need to be considered.

Secondly, ALJ Sanders concluded that the statement in the advertisement that "Horizon planned to raise rates by 30 percent and 27 percent for some its policyholders" was true. Id. at 5. It is not accurate, and as explained below, I REJECT this finding. ALJ Sanders reasoned that,

> for people about to reach one of these age thresholds, the statement that their rates were going up steeply was not a scare tactic-simply fact. Moreover for policyholders who were 68 or 73 or 78, they were not facing a big jump in 2013, but unless something changed drastically, they also were in line for a large increase in the fairly near future."
>
> [Ibid.]

In arriving at this, it appears that ALJ Sanders relied upon the Horizon handout which sets forth contract rates for single seniors grouped by age and which purportedly demonstrates that rates rise substantially when the policyholder reaches the age of 70, 75 and 80. Brief in Support of Respondents' Cross-Motion for a Summary Decision and In Opposition to Petitioner's Motion for Same ("Respondents Summary Decision Brief"), Certification of Respondent Gerald E. Conner ("Conner Certification") at ¶¶13, 14 and Exh. E. This reasoning is misguided and for the following reasons I MODIFY this finding.

The increases in premiums for the policies referenced in Horizon's handout, namely Attained Age rated policies, were not rate increases granted by the Department. They were predetermined premium increases based upon an approved rating system wherein rates automatically rise when an individual reaches certain age thresholds. Department's Reply Brief in Support of Motion for Summary Decision dated January 13, 2017 ("Department's Reply to Summary Decision dated January 13, 2017"), Supplemental Certification of Frank Biskup ("Supplemental Biskup Certif."). For such Attained Age Rated policies, the premium is based on the policyholder's current age and increases as the policyholder ages as compared to community rated policies which charge the same premium to all policyholders regardless of age

and which will not increase as the policyholder ages. Ibid. Although Medicare supplement policies using Attained Age Rating systems are approved by the State and have automatic increases based upon a policyholder age band, Biskup certified that, "DOBI has not in the past seven years received any requests from Horizon to adjust their Attained Age rating scale." Id. at ¶14. Moreover, at the time that each policyholder purchased each Attained Age rated policy, each policyholder would be advised that the policy premium would rise depending upon the age of the individual based upon disclosures like the Horizon handout submitted by the Respondents. This means that Horizon had not requested to increase the amount of premium increase in the Attained Age rating scale for its Medicare Supplement products. Therefore, the advertisement's assertions of 30 percent rate increases for Medicare Supplement policies – even if it was referring to Horizon (which as I noted above cannot be determined based upon the language of the Respondents' advertisement) were false and misleading. Accordingly, I MODIFY this finding to specify that it was untrue for the advertisement to claim that a leading senior organization may raise rates for Medicare Supplement policies up to 30 percent.[10]

C) Determination Regarding Rate Increases of All Other Medicare Supplement Carriers

As found by the ALJ, the Department proved that no other carriers were granted such steep rate hikes. The ALJ further found that the Respondents' advertisements were sent in August 2013, during 2013 Medicare Supplement insurance rates in New Jersey increased on

[10] In opposition to the Department's Motion for Summary Decision, Respondents defended the authenticity of their advertisement by arguing that they reasonably relied upon a comparison of information from Medicare.gov, which incorrectly indicated that Horizon Medicare Supplement plans are Community Rated, in addition to Horizon's rate sheets which Respondents purport revealed that a Horizon Medigap subscriber's rates would rise 30% on his or her 70th birthday for Plans A, C & F in 2013 and 2014 and by 27% on his or her 70th birthday for Plans G,K & N in 2013 and 2014. Respondents Summary Decision Brief at 5-11. However, even a cursory look at the Horizon rate sheets demonstrates that the Horizon Medicare supplement plans are Attained Age rated because Horizon rate sheets for 2013 and 2014 state, "To find the correct monthly rate, find the age you attained on January 1st." Respondents Summary Decision Brief at 5, Conner Certif. ¶14, Exhibit E. Furthermore the rate sheets contain graduated age brackets providing the Attained Age rate increases. Ibid. This type of language would not have appeared on a Community rated plan and this would have been obvious to Respondents as producers with significant experience in the industry.

average by 2.4 percent with the highest increase being 15 percent for United World (Plan N only) and during 2014 the highest New Jersey State Medicare Supplement approved rate increase was 10.4 percent granted to American Progressive, which had a market share of 0.3 percent. The Respondents argue that the advertisement was not false or misleading because United World proposed a 30 percent rate increase in 2012, and a 25 percent rate increase in 2013. Respondents' Exceptions, Exhibit A. ALJ Sanders rejected this argument, and I do the same. ALJ Sanders correctly held that it is misleading for the Respondents to advertise based upon requested rate increases because such rate requests are almost always adjusted as the Department undertakes its review as demonstrated by the actual rate increases granted for Medicare Supplement plans during 2013 and 2014. Additionally, I would further note that Respondents admit that, as a matter of course, they did not receive requested rate adjustment information. See Respondents' Exceptions at 8. Therefore, Respondents admit that they were not aware of this requested rate increase at the time that the advertisement was distributed, but rather obtained the proposed rate increases information at a later date apparently in an attempt to demonstrate that their advertisement was not false or misleading. Therefore, I ADOPT the ALJ's finding that this portion of advertisement is deceptive and misleading but once again I note that it was unnecessary to parse this piece from the other phrases in the advertisement.

D) Determination Regarding Plans with Lower Rates

With respect to Count 3, ALJ Sanders engaged in another piecemeal analysis of the subject advertisement, analyzing the following language:

> Based on this there is now available a plan in your state to supplement Medicare at lower rates for seniors over 65 years of age.
>
> To find out how to qualify, return this Medicare Supplement inquiry card within 5 days.

ALJ Sanders determined that:

> Whether the statement is true or not depends on what one reads into the statement 'for seniors over 65 years of age.' If the word 'all' is read in, then it clearly is untrue. If the word 'some' is read in, then it [is] (sic) true, because some of the people being affected by the threshold increases could save money. Certainly 'to find out how to qualify' is a much harder sell than 'to find out whether you qualify,' but either way, the statement does not specifically promise that any particular senior citizen will save money. Thus I do NOT FIND that this portion of the statement was untrue.
>
> Id. at 8.

I REJECT the ALJ's analysis set forth above which attempts to determine whether this particular segment is true depending upon whether the word "all" or "some" is read into this segment of the advertisement. Again, this parsing is unnecessary and confusing. The advertisement should be evaluated on its plain language when read by a recipient consumer in our State. In this vein, I must consider that this was a mass mailing by the Respondents, who had no knowledge of the Medicare Supplement product owned by the recipient consumer or the premium rate being paid by those consumers. Because of this, the Respondents had no way of knowing whether the statement in the advertisement that "there is now available a plan in your state to supplement Medicare at lower rates" was true or not for any particular consumer recipient. This section contributes to the entire message of fear employed by the advertisement and was not truthful for at least a portion of the over 51,000 mailer recipients. Therefore, I MODIFY ALJ Sanders' determination in this regard and find that this piece of the advertisement contributes to the overall deceptive and misleading nature of the advertisement.

E) Determination as to the Advertisement as a Whole

With respect the advertisement as a whole, I herein conclude that the ALJ failed to consider the "sum of the parts" of the advertisement and failed to consider the implication of the

overall message conveyed in the advertisement. Respondents admit that they engaged in the dissemination of the subject advertisement in a mass mailing campaign. Respondents Summary Decision Brief, Conner Certif. at ¶6. This advertisement contained vague language like "leading senior organization," "may increase their rate up to 30% on Medicare supplement coverage," and "there is now available a plan in your state to supplement Medicare at lower rates" that when read individually and as a whole were misleading both in fact and in implication. The statements clearly send the message to layperson recipient consumers, who are less knowledgeable about how the health insurance system works than insurance producers, that Medicare Supplement insurance rates were due to rise sharply.

N.J.A.C. 11:2-11.2, which governs advertisements in general, states that, "Advertisements shall be truthful and not misleading in fact or in implication. Words or phrases the meaning of which is clear only by implication or by familiarity with insurance terminology shall not be used." As noted in the Department's Exceptions, Black's Law Dictionary defines "implication" as "'Something that is not directly stated but is inferable; an inference drawn from something said or observed.'" Department Exceptions at 4 citing Black's Law Dictionary (10th ed. 2014). Prior enforcement decisions have consistently held that a producer utilizing an advertisement that is misleading in fact and in implication are violative of New Jersey law. For example, in Comm'r v. Automated Ins. Concept Agency, the Appellate Division upheld the Commissioner's Final Decision adopting the ALJ's recommendation "which concluded that a term life insurance advertisement placed by appellants had the capacity to mislead the average consumer, because the advertisement did not prominently or conspicuously display the 'disclaimer' which appeared at the bottom of the advertisement in the smallest lettering used in the entire wording of the advertisement, and violated the law, because the average prospective purchaser reading the advertisement would conclude that the policies were available to the reader

at the rates listed in the advertisement." Comm'r v. Automated Ins. Concepts Agency, Inc, 97 N.J.A.R.2d (INS) 2, Initial Decision (December 11, 1995), Final Decision and Order (January 9, 1996) at 17

Further, in Comm'r v. Bonnell, et al., Respondents were assessed a $250,000.00 civil penalty for, among other things, engaging in a mass-mailing campaign soliciting primarily New Jersey residents over the age of 60 by sending 66,536 postcards to New Jersey residents in an effort to set up appointments with the recipients for the prospective sale of annuity contracts. OAL Dkt. No. BKI 6993-08, Initial Decision (May 19, 2014), Final Decision and Order (October 6, 2014). These postcards contained language that stated that the recipients may have an annuity that has reached the end of the surrender period, despite the fact that Respondents did not know whether the recipients had an annuity or if the recipient's annuity had reached the end of its surrender period. Respondents then sold those pre-set appointments to local insurance producers. In Bonnell, it was determined that such postcards contained deceptive and misleading language and that the act of mailing these postcards and the language contained therein was clearly violative of the insurance laws of this State, including the Insurance Producer Act.

Respondents contend that the ALJ erred by failing to resolve a disputed question of fact, namely Respondents' state of mind or mens rea when disseminating the subject advertisements. It is clear that provisions of the Insurance Producer Act at issue here, namely N.J.S.A. 17:22A-40(a)2, 7 and 8, do not require a subjective analysis of the producer's state of mind as to whether Respondents knew, or should have known, that any information in the advertisement was untrue or that the Respondents purposely disseminated misleading, incomplete or fraudulent information to twist insurance policies. Comm'r v. Dobrek, supra; see also Commissioner v. Pino, OAL Dkt. No. BKI 8070-02, Initial Decision (09/11/03), Final Decision and Order (10/30/03) (there is no mens rea requirement for violations of N.J.S.A.

17:22A-1 et seq., the predecessor of the Producer Act); Commissioner v. Uribe, OAL Dkt. No. BKI 07363-07, Initial Decision, (12/28/10), Final Decision and Order (9/28/11). Under this legal analysis, the conduct of a licensed producer itself is the determinative factor as to whether or not a violation occurred. Respondents do not dispute that they disseminated the subject advertisement in a mass-mailing, which the ALJ found, and I ADOPT as MODIFIED herein, to be misleading. Therefore, there are no disputed facts and the ALJ correctly held that this matter is ripe for summary decision. Respondent's request for an evidentiary hearing as to their state of mind is hereby DENIED.

Ultimately here, Respondents caused the mailing of 51,517 advertisements to consumers, which gave the overall impression that rates for Medicare Supplement policies were due to rise by as much as 30 percent, when this was not true. This information was misleading. The ALJ failed to consider the overall implication of the message conveyed in the advertisement as required by the governing regulations, but instead focused on distinct parts of the advertisement. Ultimately, I FIND that Respondents utilized the advertisement as a scare tactic in an attempt to generate business, and such tactics are not appropriate of professional producers in our State. Therefore, I MODIFY the Initial Decision to reflect that this advertisement and its message taken, as a whole, is deceptive and misleading.

Given these and other uncontroverted factual findings outlined above, ALJ Sanders found (Initial Decision at 10), and I AGREE, that the Department met its burden with respect to Count 1 of the OTSC. Respondents' conduct in mailing the aforesaid advertisement violated N.J.S.A. 17:22A-40a(2) (prohibiting producers from violating any insurance law or regulation), N.J.S.A. 17:22A-40a(7) (insurance producers shall not commit any insurance unfair trade practice codified under N.J.S.A. 17:29B-1 et seq.) and N.J.S.A. 17:29B-4 (prohibiting unfair methods of competition and unfair and deceptive acts or practices). However, with respect to Count 1, the

Initial Decision is silent on whether ALJ Sanders found that Respondents violated N.J.S.A. 17:22A-40a(8), which prohibits demonstrating incompetence in the conduct of insurance business and N.J.A.C. 11:2-11.2 which requires that advertisements shall be truthful and not misleading in fact or in implication, as charged in the Amended OTSC. In this regard, I MODIFY the Initial Decision to reflect that Respondents' conduct, namely the dissemination of a misleading and deceptive advertisement aimed at increasing their business portfolio, demonstrated incompetence in violation of N.J.S.A. 17:22A-40a(8) and violated N.J.A.C. 11:2-11.2.

Moreover, with respect to Count 3, the Medicare supplement advertisement utilized by Respondents clearly contained misleading statements regarding forthcoming rate increases and expressly urged the recipient consumers to contact them to change their Medicare supplement insurers. N.J.A.C. 11:17A-2.8 states that

> No insurance producer shall make any misleading representations or incomplete or fraudulent comparison of any insurance policies or annuity contracts or insurance 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 with another insurer.

Without question, in this instance, Respondents mailed the subject deceptive advertisement with the intention of urging consumers to call First Jersey and to "potentially switch carriers." The advertisement contains language which urges recipients to contact Respondents to "find out how to qualify" for the Medicare Supplement plan with lower rates for seniors over 65 years of age. Initial Decision at 3. I have already ADOPTED the ALJ's conclusion that the advertisement is misleading and deceptive. Through this language in the advertisement, Respondents, indisputably, engaged in twisting by attempting to induce recipient consumers to buy insurance from another carrier through misleading and incomplete comparison of their current policy of

which the Respondents had no knowledge in violation of N.J.A.C 11:17A-2.8, and N.J.S.A. 17:22A-40a2 prohibiting insurance producers from violating insurance regulations.

E) Determination as to Penalty

I also ADOPT the ALJ's findings as to the analysis of the Kimmelman factors with the exception of those factors relating to Respondents' ability to pay and the amount of profits obtained from the illegal activity. Neither party took issue with any of the other five Kimmelman factors and I ADOPT the ALJ's findings with respect thereto.[11]

With respect to the second Kimmelman factor, namely Respondents' ability to pay, the Department contends that the ALJ's finding should be modified to indicate that "Respondents have not shown an inability to pay significant civil penalties." Department Reply at 7. The Department relies upon Shah to support the notion that Respondents have the burden to demonstrate an inability to pay the fine. Ibid. citing Comm'r v. Shah, OAL Dkt. No. BKI 11903-05, Initial Decision (April 15, 2008), Final Decision and Order (September 2, 2008). ALJ Sanders determined, with respect to this specific factor, that "[Shah] does not explicitly cite a burden of proof in that regard. However, it is fair to say that the Commissioner was unwilling to explicitly base a lower fine on unsupported statements concerning funds and Shah's assertions that his money was invested in his children's education and in enabling his family to do good

[11] While Respondents do not contest ALJ Sanders' finding with respect to the "bad faith" Kimmelman factor, Respondents aver that ALJ Sanders found that "Respondents acted in good faith and did not create the advertisement, which the Department is still permitting to be sold in New Jersey." Respondents' Exceptions at 12. Respondents incorrectly interpret ALJ Sanders' finding with respect to the bad faith Kimmelman factor. For this factor, ALJ Sanders determined that, "With regard to good or bad faith, the Department contends that [R]espondents knew the postcard was a false and misleading inducement. Conner, in his certification, makes two points in this regard-first, that [R]espondents reasonably believed that some seniors were about to experience 30 percent rate increases, and second, that First Jersey's attorney sought the Department's advice prior to making the solicitation. In the end, one portion of the solicitation was untrue, which puts the action within the realm of bad faith. However one postcard with a single inflated phrase, 'other Medicare Supplement insurers,' is far different from other cases cited by the Department, where there was as pattern of ignoring New Jersey law." In this language, ALJ Sanders clearly determined that Respondents acted in bad faith, but that their conduct was less egregious than other cases. Further, the fact that Respondents did not create the advertisement is not relevant because this advertisement was created for Respondents, utilized by Respondents and, essentially sanctioned by Respondents when the mass mailing occurred. .

works....Nonetheless, it should be noted that in general, the Appellate Division defers to administrative agencies with regard to penalty." Initial Decision at 16-17. I MODIFY that analysis as follows. While I agree with ALJ Sanders that Shah does not expressly state that Respondents have the burden to demonstrate an inability to pay, the implication from this decision is that such burden does fall upon the Respondents. For example, in Shah, the Commissioner reasoned that, "Rather than stating or proving his income and his ability to pay, Shah reiterates the arguments he originally set forth in a letter to the ALJ in 2007...the only evidence concerning the ability to pay presented by Shah are self-serving statements of financial strain accompanied by no statements or proofs of those finances. I give no weight to those statements. Therefore, I FIND that Shah has not shown an inability to pay the fine requested by the Department." See also Comm'r v. Dobrek, supra (wherein the Commissioner noted that Dobrek failed to provide specific evidence of her inability to pay civil penalties). The inference to be drawn is that Respondents must demonstrate an inability to pay civil penalties. Therefore, I FIND that the Department is correct in asserting that Respondents have the burden of setting forth their inability to pay a substantial fine. Here, Respondents do not set forth any reasons or legally competent evidence demonstrating a limited ability to pay a fine and I therefore MODIFY the ALJ's Initial Decision in this regard.

With respect to the Kimmelman factor that addresses the potential to gain from Respondents' wrongful conduct, ALJ Sanders determined that "the record is bereft of evidence as to the creation of profits from the postcard. It does show that 1,061 returned postcards were reviewed by the Department." Initial Decision at 16. The Department contends that the ALJ erred by not giving greater weight to the fact that Respondents had a substantial potential for gain from Respondents mass mailing due to the amount of postcards mailed and the amount of potential commissions that could have been earned from this potential new business. The

Department argues that "it is not only necessary to recognize the actual harm, but also the potential for gain from any wrongdoing." Department Exceptions at 7-8 (citing Comm'r v. Strandskov, supra, and Comm'r v. Battista, OAL Dkt. No. BKI 4940-07, Initial Decision (March 6, 2008), Final Decision and Order Initial Decision (March 6, 2008), Final Decision and Order (September 2, 2008)). The Department correctly relies upon Strandskov which states that "When considering the proper penalty, Kimmelman recognizes that it is not only the actual, but the potential gain from wrongdoing which must be considered..." Comm'r v. Strandskov, supra. See also Comm'r v. Battista, supra. I FIND that the Department is correct and that the ALJ should have given greater consideration to this factor. Respondents mailed 51,517 advertisements to seniors in New Jersey. Each mailing was misleading, was aimed at generating new business, and therefore had the potential to result in a sale and commission for Respondents. Such wrongful conduct afforded Respondents great opportunity for substantial profits. Therefore, I MODIFY the Initial Decision herein to give greater weight to this Kimmelman factor.

As to penalty, ALJ Sanders recommended penalties be imposed jointly and severally against the [R]espondents as follows: $0.50 for each of 51,517 violations on Count 1 for $25,785.50 and $0.50 for each for 51,517 violations on Count for $25,785.50, for a total penalty of $51,517.00. Initial Decision at 18-19. ALJ Sanders noted the Department's desire that a penalty be large enough to be a deterrent for future behavior. Id. at 18.

The Department contends that the recommended civil penalty of $51,517.00 does not reflect the severity of the Respondents' actions and urges the imposition of a $206,068, based upon a $2.00 civil penalty for the 51,517 advertising violations under Count 1 and a second $2.00 civil penalty for the 51,517 twisting violations under Count 2.

Respondents urge the reduction of the civil penalty, noting that ALJ Sanders' method for calculating such fine has no precedent, relying upon Consent Orders where Respondents paid a substantially lower fine that that recommended here. "This approach – of using the number (sic) advertisements multiplied by an arbitrary number – has no precedent, bears no relation to the fact this was truly a victimless event, and most importantly, resulted in a penalty that is many times more than the penalty imposed in similar prior case." Respondents' Exceptions at 12-13

First, I note that the facts underlying the allegations for both Counts 1 and 3 are the same, namely the mailing of the 51,517 misleading postcards to New Jersey consumers with the intent of getting those consumers to purchase a different Medicare Supplement policy from the Respondents. In total, the Respondents engaged in 51,517 acts that were in violation of multiple insurance laws as charged under Counts 1 and 3. The Producer Act empowers the Commissioner to impose penalties not exceeding $5,000 for the first offense, and not exceeding $10,000 for each subsequent offense.

I AGREE with ALJ Sanders' that, with the exception of one prior infraction by First Jersey in 2006, Respondents' had no prior violations of the Producer Act or other applicable law. Moreover, this conduct, in view of other precedent offered by the Department is less egregious and numerous. However, Respondents committed a significant number of acts in violation of our insurance laws. Moreover, as discussed above, ALJ Sanders failed to properly consider two Kimmelman factors, namely those factors addressing Respondents' ability to pay and amount of profits obtained, and therefore applied less weight to these factors when determining the overall penalty to assess the Respondents. In light of the above modifications that I have made to ALJ Sanders' Kimmelman analysis and based upon Respondents 51,517 acts in violation of the insurance laws as charged in Counts 1 and 3, and in consideration of similar matters involving deceptive advertising, I MODIFY the recommendations of the ALJ and HEREBY ORDER the

Respondents jointly and severally responsible for the payment of civil monetary penalties totaling $100,000.00 for their 51,517 acts in violation of multiple provisions of the insurance laws of this State. This level of penalty is necessary to deter the Respondents and the producer industry as a whole from similar misconduct in the future, and to demonstrate the appropriate level of opprobrium for the Respondents' misleading advertising practices.[12]

The Initial Decision is hereby MODIFIED to so provide.

CONCLUSIONS

Having carefully reviewed the Initial Decision dated March 6, 2017, the Exceptions and Replies, and the evidential record herein, I hereby ADOPT the ALJ's Findings of Fact and Conclusions of Law, except as MODIFIED as specified above, regarding the insurance law violations which Respondents have committed with respect to Counts 1 and 3 of the Amended OTSC.

I FIND that the record contains sufficient competent and credible evidence to establish that Respondents committed multiple violations of New Jersey insurance laws by mailing 51,517 deceptive and misleading postcards to New Jersey residents in an attempt to induce recipients of these advertisements to purchase other insurance. Through this advertisement, Respondents communicated a misleading message of rising insurance rates for Medicare Supplement insurance coverage in violation of N.J.A.C. 11:2-11.2. Such conduct also violated N.J.S.A. 17:22A-40a(2), (7) and (8) and N.J.S.A. 17:29B-4. Therefore I ADOPT the legal findings of ALJ Sanders in this regard as MODIFIED as outlined above. I also herein dismiss all

[12] No weight has been given to the Consent Orders offered by Respondents or their assertions as to the Department's position during settlement negotiations. The resolution of other matters before the Department that are achieved through a settlement is not precedential in the instant matter that was determined by an Initial Decision after ALJ Sanders made findings of facts and conclusions of law in a contested case. See also N.J.A.C. 1:1-15.10. (offers of settlement, proposals of adjustment and proposed stipulations shall not constitute an admission and shall not be admissible).

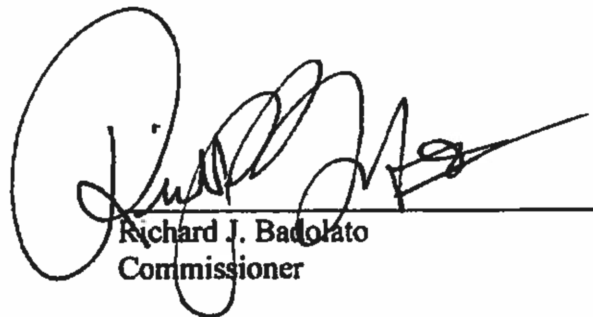
allegations in Count 2 of the Amended OTSC, and I do not ADOPT or REJECT the findings set forth by ALJ Sanders with respect to Count 2.

I also ADOPT the findings of ALJ Sanders with respect to Count 3 of the Amended OTSC as MODIFIED as set forth in this Order. The misleading advertisement disseminated by Respondents constituted an attempt by Respondents to induce policyholders to change coverage in clear violation of N.J.S.A. 17:22A-40a(2) and (8) and N.J.A.C. 11:17A-2.8.

I also MODIFY the recommendation of the findings and fine recommendations issued by ALJ Sanders in the Initial Decision dated March 6, 2017 as follows: Counts 1 and 3: $100,000 jointly and severally against all Respondents.[13]

IT IS SO ORDERED this 19th day of July, 2017 that the Initial Decision dated March 6, 2017 is ADOPTED as my Final Decision, except as MODIFIED as set forth herein.

This Order constitutes a final agency decision. Any appeal from this order must be filed with the Superior Court of New Jersey, Appellate Division, within 45 days from the date of the service of this Order.



Richard J. Badolato
Commissioner

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[13] Counsel for Respondents notified the Department via letter dated June 22, 2017, that Respondent Connor had passed away. The penalties herein are imposed jointly and severally upon all Respondents for their joint violations of the insurance laws, and as such, the amount of the fine is not diminished because Respondent Connor is deceased.