

ORDER NO.: E22-90

STATE OF NEW JERSEY  
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BKI-02214-21  
AGENCY DOCKET NO.: OTSC #E20-27

MARLENE CARIDE,	)	
NEW JERSEY	)	FINAL DECISION AND ORDER
DEPARTMENT OF BANKING AND	)	
INSURANCE,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
RYAN FABIAN,	)	
	)	
Respondent.	)	

This matter comes before the Commissioner of Banking and Insurance (“Commissioner”) pursuant to the authority of the New Jersey Insurance Producer Licensing Act at N.J.S.A. 17:22A-26 to -48 (“Producer Act”), and all powers expressed or implied therein, for the purposes of reviewing the November 3, 2022 Initial Decision (“Initial Decision”) of Administrative Law Judge Hon. Susan L. Olgiati (“ALJ”).

This matter was initiated by the Department of Banking and Insurance (“Department”) upon receiving information that Ryan Fabian (“Fabian” or “Respondent”) violated various provisions of the insurance laws of the State of New Jersey. In the Initial Decision, the ALJ granted the Department’s motion for summary decision. Additionally, the ALJ recommended that Fabian’s insurance producer license be revoked; that civil penalties in the amount of \$20,000 be

imposed against Fabian and that Fabian reimburse the Department \$2,062.50 for the costs of investigation and prosecution.

### **STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

On December 1, 2020, the Department issued the Order to Show Cause (“OTSC”) against Fabian which sought to revoke his insurance producer license, impose civil monetary penalties, and costs of investigation, for violations of the Producer Act. In the OTSC, the Department alleges that the Fabian engaged in the following activities in violation of the laws of this State:

Count One: Fabian failed to remit three money orders to Allstate Insurance Agency and misappropriated the funds for his own personal use, in violation of N.J.S.A. 17:22A-40(a)(2), (4), (8) and (16);

Count Two: Fabian failed to issue receipts for the money orders received from M.H., in violation of N.J.S.A. 17:22A-40(a)(2) and (8), and N.J.A.C. 11:17C-2.4(c); and

Count Three: Fabian failed to pay the civil penalty under Consent Order E16-98<sup>1</sup>, in violation of N.J.S.A. 17:22A-40(a)(2).

Fabian filed an Answer on February 9, 2021 in which he admitted the allegations alleged in Counts One and Two and requested a hearing. As to Count Three, he indicated that he paid all of the penalties. On or about February 24, 2021, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case, pursuant to N.J.S.A. 52:14B-1 to -31 and N.J.S.A. 52:14F-1 to -23. On March 12, 2021, Fabian remitted the balance of the fine consented to under Consent Order E16-98 that was the subject of Count Three. On September 21, 2021, the

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<sup>1</sup> Pursuant to the terms of Consent Order E16-98, Fabian agreed to pay a \$2,500 penalty to the Department for a violation of N.J.S.A. 17:22A-40a(2), (4) and(8) and N.J.A.C. 11:17C-2.2(a) and (b) for accepting premium payments from insureds and failing to properly credit said premium payments to the insureds’ accounts within five days and failing to properly remit said premium payments to State Farm Insurance within five business days. The underlying conduct occurred in 2014.

Department issued discovery requests that were unanswered and the Department thereafter filed a Motion for Summary Decision, which was unopposed. On November 3, 2022, the ALJ issued the Initial Decision.

### **ALJ'S FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS**

#### **The ALJ's Factual and Legal Findings**

The ALJ noted that pursuant to N.J.A.C. 1:1-12.5, a motion for summary decision may be granted if the papers and discovery presented, together with affidavits, if any, show that there is no genuine issue as to any material fact, and the moving party is entitled to prevail as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 550 (1995). Initial Decision at 4. Further, the ALJ stated that when evidence is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment. Id. at 533 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)). Ibid.

In light of this standard, the ALJ found that the Department should prevail as a matter of law on the violations alleged in Counts One, Two, and Three of the OTSC. Id. at 6. The ALJ found the following facts were undisputed in granting summary decision.

The Respondent was licensed as an insurance producer between February 1, 2015 and January 31, 2017. Id. at 2. His license expired on January 31, 2017. Id. at 2-3.

During September 2016, while working at Bruce Coles Allstate Agency ("BCAA"), Fabian's client, M.H., submitted three money orders of \$185 each to Fabian, believing he was purchasing auto insurance and left the "pay to" line of the orders blank. Id. at 3. Fabian altered the money orders to make them payable to himself by inserting his own name on the "pay to" line. Ibid. Fabian did not provide M.H. receipts for the payments and no insurance policy was issued. Ibid. On October 4, 2016, Fabian was terminated from his position at BCAA and was prosecuted

and convicted for his theft of the three money orders. Ibid. Thereafter, BCAA paid \$555 to cover the stolen premiums and to provide M.H. with insurance coverage. Ibid. On January 25, 2017, the Gloucester Township Municipal Court issued a Summons and Complaint to Fabian. Ibid. On May 3, 2017, Fabian entered into a Pretrial Intervention (“PTI”) agreement as a resolution of the charges. Ibid. The PTI agreement ordered Fabian to pay \$555 in restitution to BCAA for replacing M.H.’s insurance policy. Ibid. Restitution has been made. Ibid.

On October 7, 2016, Fabian entered into Consent Order E16-98 with the Department, in which he admitted to committing a violation of the Producer Act in 2014. Id. at 3. The Consent Order required consistent monthly payments until the fine was paid in full. Id. at 4. However, Fabian failed to make the required payments. Ibid. Final payment was made on March 12, 2021, after the OTSC was issued. Ibid.

Based on the above findings of fact, the ALJ concluded that the Department proved that Fabian misappropriated client insurance premiums in violation of N.J.S.A. 17:22A-40(a)(4), N.J.S.A. 17:22A-40(a)(8), and N.J.S.A. 17:22A-40(a)(16) (Count One); failed to issue receipts for client premiums collected, in violation of N.J.A.C. 11:17C-2.4 and N.J.S.A. 17:22A-40(a)(2) (Count Two); and failed to comply with an order of the Commissioner, in violation of N.J.S.A. 17:22A-40(a)(2) (Count Three). Id. at 6.

#### Penalties Recommended by the ALJ

The ALJ noted that the Producer Act empowers the commissioner to “place on probation, suspend, revoke or refuse to issue or renew an insurance producer’s license” for a violation of N.J.S.A. 17:22A-40. Id. at 7. The ALJ noted that Fabian misappropriated client insurance premiums and has not presented any extenuating circumstances. Ibid. The ALJ concluded that

the revocation of the Respondent's insurance producer license was appropriate pursuant to N.J.S.A. 17:22A-40(a). Ibid.

As to the appropriate monetary penalty, the ALJ noted that pursuant to the Producer Act, a penalty of not more than \$5,000 for the first offense and \$10,000 for each subsequent offense, along with reimbursement of costs of investigation and restitution of monies owed, may be imposed. Id. at 6. The ALJ evaluated the penalty amount utilizing the seven factors for determining monetary penalties set forth in Kimmelman v. Henkles & McCoy, Inc., 108 N.J. 123, 137-39 (1987). Id. at 6. These factors include: (1) the good faith or bad faith of the producer; (2) the producer's ability to pay; (3) the amount of profits obtained from the illegal activity; (4) injury to the public; (5) duration of the illegal activity or conspiracy; (6) existence of criminal or treble damages actions; and (7) past violations. Id. at 6.

As to the first factor in Kimmelman, the ALJ stated the undisputed facts demonstrated that Fabian acted in bad faith by misappropriating client insurance premiums. Ibid. As to the second factor in Kimmelman, the ALJ stated that due to Fabian's failure to respond to the motion, his ability to pay is unknown. Ibid. However, this factor is not determinative of penalty. Ibid.

As to the third factor, the ALJ stated that Fabian repaid the amount he misappropriated from BCAA as part of the resolution of criminal charges against him. Id. at 6-7. As to the fourth factor, the ALJ stated that through Fabian's actions, he failed to adhere to the law, violating his duty and the public trust in the process. Id. at 7. In addition, he caused the State to expend money on its investigation. Ibid. As to the remaining factors in Kimmelman, the ALJ stated that while Fabian's fraud took place in a single transaction, he committed similar fraudulent acts in the past. Ibid. Fabian was criminally charged for his actions and entered into a PTI agreement and has partially accounted for his violations. Ibid. at 7.

Based upon the above analysis, the ALJ recommended that a civil monetary penalty of \$20,000 be imposed. Ibid. The ALJ additionally found that reimbursement of the costs of investigation in the amount of \$2,062.50 was appropriate. Ibid.

### **EXCEPTIONS**

Pursuant to N.J.A.C. 1:1-18.4, exceptions were due on November 16, 2022. Neither the Department nor Fabian filed exceptions.

### **LEGAL DISCUSSION**

The Department bears the burden of proving the allegations in an Order to Show Cause by a preponderance of the competent, relevant, and credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as would lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance may be described as “the greater weight of credible evidence in the case. It does not necessarily mean...the greater number of witnesses but...carries the greater convincing power...” State v. Lewis, 67 N.J. 47 (1975).

As noted by the ALJ, 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 provision 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.

The ALJ found that the Respondent failed to adduce evidence that would create a genuine issue as to any material fact challenged and that summary decision is appropriate as to the allegations contained in Counts One through Three of the OTSC. I concur that summary decision is appropriate.

### Allegations Against Respondent

The OTSC charges Fabian with violations of the Producer Act, which governs the licensure and conduct of New Jersey insurance producer licensees and empowers the Commissioner to suspend or revoke the license of, and to fine, an insurance producer for violations of its provisions.

### Count One

Count One of the OTSC alleges that Fabian committed fraudulent acts in the conduct of doing insurance business, by failing to remit three money orders to Allstate Insurance Agency and misappropriating funds for his own personal use, in violation of N.J.S.A. 17:22A-40(a)(2), (4), (8), and (16).

The evidence is undisputed that during September 2016, while working at BCAA, Fabian's client submitted three money orders of \$185 each to Fabian, believing he was purchasing auto insurance and left the "pay to" line of the orders blank. Id. at 3. Fabian altered the money orders to make them payable to himself by inserting his own name on the "pay to" line. Ibid. On October 4, 2016, Fabian was terminated from his position at BCAA and was prosecuted and convicted for his theft of the three money orders. Ibid. Thereafter BCAA paid \$555 to cover the stolen premiums and to provide M.H. with insurance coverage. Ibid. As stated above, neither party took exception to the ALJ's findings.

Accordingly, I ADOPT the ALJ's determination and I find that the Department proved that the Fabian violated N.J.S.A. 17:22A-40(a)(2) (violating any insurance law or regulation),

(4) (improperly withholding, misappropriating or converting any monies or properties received in the course of doing insurance business), (8) (fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of insurance business in this State or elsewhere), and (16) (committing any fraudulent act).

#### Count Two

Count Two of the OTSC alleges that Fabian did not provide his client receipts for the payments received from his client, in violation of N.J.S.A. 17:22A-40(a)(2), and (8), and N.J.A.C. 11:17C-2.4(c).

The ALJ found that Fabian failed to issue receipts for the stolen money orders. Initial Decision at 3. Neither party took exception to the ALJ's findings.

Accordingly, I ADOPT the ALJ's determination and I find that the Department proved that the Fabian violated N.J.S.A. 17:22A-40(a)(2) (violating any insurance law or regulation), (8) (fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of insurance business in this State or elsewhere), and N.J.A.C. 11:17C-2.4(c) (failure to issue receipts).

#### Count Three

Count Three of the OTSC alleges that the Respondent failed to pay the civil penalty under Consent Order E16-98, in violation of N.J.S.A. 17:22A-40(a)(2). The ALJ found that respondent failed to make consistent monthly payments consistent with the Consent Order, and that it was undisputed that final payment was made on March 12, 2021, after the OTSC was issued. Initial Decision at 4.

Accordingly, I ADOPT the ALJ's determination and I find that the Department proved that the Fabian violated N.J.S.A. 17:22A-40(a)(2) (violating an order of the Commissioner).



## **PENALTY AGAINST THE RESPONDENT**

### **Revocation of the Respondent's Insurance Producer License**

With respect to the appropriate action to take against the Respondent's insurance producer license, I find that the record compels the revocation of the Respondent's license.

The Commissioner is charged with the duty to protect the public welfare and to instill public confidence in both insurance producers and the industry as a whole. Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), (citing In re Parkwood, 98 N.J. Super. 263 (App. Div. 1967)). An insurance producer collects money from insureds and acts as a fiduciary to both the consumers and the insurers they represent. Accordingly, the public's confidence in a licensee's honesty, trustworthiness, and integrity are of paramount concern. Ibid. 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). Additionally, a licensed producer is better placed than a member of the public to defraud an insurer. Strawbridge v. New York Life Ins. Co., 504 F. Supp. 824 (1980). A producer is held to a high standard of conduct and should fully understand and appreciate the effect irresponsible conduct has on the insurance industry and on the public.

Revocation is "appropriate in almost all cases wherein a licensed insurance producer has engaged in misappropriation of premium monies, bad faith, and dishonesty." Commissioner v. Brown and Guaranteed Bail Bonds, OAL Dkt. No. BKI 10377-13, Initial Decision (09/15/15), Final Decision and Order (12/14/15); See also Commissioner v. Strandkov, OAL Dkt. No. BKI 03451-07, Initial Decision (09/25/08), Final Decision and Order (02/04/09); Commissioner v. Stone, OAL Dkt. No. BKI 6301-07, Initial Decision (09/15/08), Final Decision and Order

(09/15/08); Shipitofsky v. Commissioner, 95 N.J.A.R.2d(INS) 67, OAL Dkt. No. INS 3722-93, Initial Decision (03/11/94), Final Agency Decision (04/29/94).

I concur with the ALJ's recommendation and find that revocation of the Respondent's insurance producer license is warranted. The Respondent misappropriated funds for his own personal use, failed to issue receipts for money orders received, and failed to timely pay penalties consistent with the terms of a previous Consent Order.

#### Monetary Penalty Against the Respondent

The Commissioner has broad discretion in determining sanctions for violations of the laws she is charged with administering. In re Scioscia, 216 N.J. Super. 644, 660 (App. Div. 1987). The penalties set forth in the Producer Act "are expressions by the Legislature that serve a distinct remedial purpose." Commissioner v. Strandskov, OAL Dkt. No. BKI 03451-07, Initial Decision (09/25/08), Final Decision and Order (02/04/09). The Producer Act provides that the Commissioner may impose a penalty not exceeding \$5,000 for the first offense and not exceeding \$10,000 for each subsequent offense. N.J.S.A. 17:22A-45. When determining penalties, the Department is not bound by the order in which the allegations were pled with regard to the imposition of monetary penalties. Commissioner v. Kwasnik, OAL Dkt No.: BKI-10910-16, Initial Decision (02/05/18); Final Decision and Order (12/05/18).

As noted by the ALJ, pursuant to Kimmelman, certain factors are to be examined when assessing administrative monetary penalties. No one Kimmelman factor is dispositive for or against fines and penalties. See Kimmelman, 108 N.J. at 139 ("[t]he weight to be given to each of these factors by a trial court in determining . . . the amount of any penalty, will depend on the facts of each case").

The first Kimmelman factor addresses the good faith or bad faith of the Respondent. I concur with the ALJ that the Respondent's underlying conduct involved bad faith in that he misappropriated client insurance premiums, failed to issue receipts for the insurance premium funds received from his client, and failed to comply with a Consent Order. This factor weighs in favor of a higher monetary penalty.

The second factor in Kimmelman is the Respondent's ability to pay. Fabian's ability to pay is unknown as he failed to respond. Respondents who claim an inability to pay civil penalties bear the burden of proving their incapacity. Commissioner v. Shah, OAL Dkt. No. BKI 11903-05, Initial Decision (04/15/08), Final Decision and Order (09/02/08). Therefore, this factor is neutral.

The third Kimmelman factor relates to the profits obtained. The greater the profits an individual is likely to obtain from illegal conduct, the greater the penalty must be if penalties are to be an effective deterrent. Kimmelman, 108 N.J. at 138. The ALJ found that Fabian repaid the funds he misappropriated from BCAA as part of the resolution of the criminal charges brought against him. Initial Decision at 6. Kimmelman does not limit consideration to actual profits, but warrants the consideration of the profits that the Respondents would have likely made if their acts in violation of the laws of this State were successful. Kimmelman, 108 N.J. at 138. Accordingly, considering that the Respondent had the opportunity to profit the amount of the money orders, this factor weighs in favor of a higher monetary penalty.

The fourth Kimmelman factor addresses the injury to the public. The Commissioner is charged with the duty to protect the public welfare and to instill public confidence in both insurance producers and the insurance industry. The public is harmed when licensed insurance professionals

engage in illegal and dishonest activity. This undermines the public's confidence in insurance producers. Accordingly, I find that this factor weighs in favor of a higher monetary penalty.

The fifth Kimmelman factor to be examined is the duration of the illegal activity. The Court in Kimmelman found that greater penalties are necessary to incentivize wrongdoers to cease their illegal conduct. Kimmelman, 108 N.J. at 139. Fabian's conduct occurred in a limited duration of time in September 2016. However, the timeframe in which the fine imposed under Consent Order E16-98 remained unpaid was October 7, 2016 through March 12, 2021. Initial Decision at 4. At the time the OTSC was issued, a balance of \$296.50 was owed. Ibid. I find that this factor weighs in favor of a higher monetary penalty.

The existence of criminal punishment and whether a civil penalty may be unduly punitive if other sanctions have been imposed is the sixth factor under the Kimmelman analysis. The Supreme Court held in Kimmelman that a lack of criminal punishment weighs in favor of a more significant civil penalty because the defendant cannot argue that he or she has already paid a price for his or her unlawful conduct. Kimmelman, 108 N.J. at 139. Regarding this factor, Fabian has entered into a PTI agreement and partially accounted for his violations. Accordingly, I find that this factor weighs against a significant monetary penalty.

The last Kimmelman factor addresses whether the producer had previously violated the Producer Act, and if past penalties have been insufficient to deter future violations. The ALJ found that the Respondent had previously violated the Producer Act, which supports an increased penalty. Initial Decision at 6. I concur with the ALJ that this factor weighs in favor of a higher monetary penalty.

Pursuant to N.J.S.A. 17:22A-45(c), a penalty of up to \$5,000 for the first violation and up to \$10,000 for any subsequent violations of the Producer Act may be imposed. Weighing all the

Kimmelman factors, and based upon the violations found as set forth above, I ADOPT the recommendation of the ALJ that the Respondent pay a monetary penalty of \$20,000 and the costs of investigation and prosecution. While I concur with the amount of the penalty, the penalty should be allocated. Accordingly, I MODIFY the recommendation of the ALJ and impose a total monetary penalty of \$20,000 to be allocated as follows: Count One: \$10,000 for failing to remit three money orders to Allstate Insurance Agency and misappropriating funds; Count Two: \$5,000 for failing to provide receipts; and Count Three: \$5,000 for failing to comply with the Consent Order. These penalties are necessary and appropriate given the Respondent's misconduct.

Pursuant to N.J.S.A. 17:22A-45(c), it also is appropriate to impose reimbursement of the costs of investigation and prosecution. I concur with the ALJ's recommendation that the Respondent reimburse the Department \$2,062.50 for the costs of investigation and prosecution.

#### CONCLUSION

Having carefully reviewed the Initial Decision and the entire record herein, I hereby ADOPT the findings and conclusions as set forth in the Initial Decision except as modified herein and hold that the Respondent violated the Producer Act as charged in the OTSC. Further, I ADOPT the conclusion that the Department's Motion for Summary Decision should be granted on all three Counts set forth in the OTSC.

I also ADOPT the ALJ's recommendation and hereby ORDER the revocation of the Respondent's insurance producer license. I ADOPT the ALJ's recommendation and ORDER that fines totaling \$20,000 be imposed, allocated as follows: Count One: \$10,000 for failing to remit three money orders to Allstate Insurance Agency and misappropriating funds; Count Two: \$5,000 for failing to provide receipts; and Count Three: \$5,000 for failing to comply with the Consent

Order. Lastly, I ADOPT the ALJ's recommendation and ORDER the Respondent to pay the costs of investigation and prosecution in the amount of \$2,062.50.

It is so ORDERED on this 08 day of December 2022.



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Marlene Caride  
Commissioner

LG Fabian/Final Orders-Insurance