

STATE OF NEW JERSEY  
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BKI-09327-21  
AGENCY DOCKET NO.: OTSC #E21-15

MARLENE CARIDE,	)	
NEW JERSEY	)	ORDER OF REMAND
DEPARTMENT OF BANKING AND	)	
INSURANCE,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
JOHN COLLINS,	)	
	)	
Respondent.	)	

This matter comes before the Commissioner of the Department of Banking and Insurance (“Commissioner”) pursuant to the authority of N.J.S.A. 52:14B-1 to -31, N.J.S.A. 17:1-15, the New Jersey Producer Licensing Act of 2001, N.J.S.A. 17:22A-26 to -48 (“Producer Act”), and all powers expressed or implied therein, for the purposes of reviewing the December 14, 2022 Initial Decision (“Initial Decision”) of Administrative Law Judge Hon. Irene Jones (“ALJ”). In the Initial Decision, the ALJ granted Respondent John Collins’s (“Respondent”) Motion for Summary Decision and dismissed the matter because Order to Show Cause No. E21-15 (“OTSC”) was issued past the statute of limitations.

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

On March 26, 2021, the Department of Banking and Insurance (“Department”) issued the OTSC against the Respondent which sought to revoke the Respondent’s insurance producer license, impose civil monetary penalties, and costs of investigation, for violations of the Producer

Act and related regulations. In the OTSC, the Department alleges that the Respondent engaged in the following activities in violation of the laws of this State:

Count One: Respondent's sales of annuities to G.K. in August 2008, September 2008, March 2009 and August 2009 were improper and prohibited in that Respondent knowingly accepted said insurance business from Kevin Collins, who was not then licensed as an insurance producer in New Jersey, in violation of N.J.S.A. 17:22A-40(a)(2) and (12); and

Count Two: Respondent received commissions in connection with the sales of said annuities to G.K. and thereafter paid a portion thereof to Kevin Collins as compensation for his solicitation efforts in New Jersey which was improper and prohibited in that Kevin Collins was not then licensed insurance as an producer in New Jersey, in violation of N.J.S.A. 17:22A-40(a)(2) and N.J.A.C. 11:17B-2.1(a); and

Count Three: On behalf of G.K., Respondent completed and submitted to Sun Life and Reliance annuity applications which contained false and misleading material statements, specifically that G.K. had executed each said application while present in Connecticut when, in fact, G.K. executed all said applications in New Jersey; and that Respondent had maintained a ten year business relationship with G.K when, in fact, Respondent had never met with nor spoken to G.K., in violation of N.J.S.A. 17:22A-40(a)(2), (7), (8) and (16) and N.J.A.C.11:17A-4.2; and

Count Four: On behalf of G.K., Respondent had established several annuity accounts with Sun Life and authorized transfers of funds between said accounts without the authorization, knowledge, or consent of G.K., in violation of N.J.S.A. 17:22A-40(a)(2), (7), (8) and (16) and N.J.A.C. 11:17A-4.10; and

Count Five: Respondent failed to respond or to produce any of the requested documents or information requested by the Department by a deadline of April 8, 2016, in violation of N.J.S.A. 17:22A-40(a)(2) and N.J.A.C. 11:17A-4.8.

The Respondent filed an Answer and requested a hearing in a timely manner and the matter was transmitted as a contested case to the Office of Administrative Law (“OAL”) on November 5, 2021 pursuant to N.J.S.A. 52:14B-1 to -31 and N.J.S.A. 52:14F-1 to -23. Initial Decision at 2. The Respondent filed a motion for summary decision on January 19, 2022 and the Department filed its opposition on February 18, 2022. Ibid. The Respondent filed his reply on March 11, 2022. Ibid. The ALJ heard oral argument virtually on April 18, 2022. Id. at 2-3. On July 8, 2022,

the Respondent filed a letter supplementing his motion, and the Department filed opposition on July 12, 2022. Id. at 3. The ALJ issued an order granting the Respondent’s motion for summary decision on November 10, 2022 and issued the Initial Decision in conjunction with said order. Ibid.

### **THE ALJ’S FINDINGS OF FACT**

The ALJ found that the Respondent was licensed as a non-resident insurance producer by the State of New Jersey pursuant to N.J.S.A. 17:22A-32(a), until his license expired on or about December 31, 2018. Ibid. The Respondent was also licensed as a resident insurance producer in Connecticut and was employed by Metropolitan Life Insurance Company (“MetLife”) to sell insurance and investment products through MetLife and other insurance entities affiliated with or approved by MetLife. Ibid. The ALJ found that sometime in 2008, the Respondent’s brother, Kevin Collins, a formerly licensed insurance producer in the State of New Jersey, began soliciting New Jersey residents for insurance business “allegedly” on behalf of the Respondent. Ibid. The ALJ further found that the Respondent was designated as the “Agent of Record” for G.K., a resident of New Jersey for the following transactions: an August 2008 sale of an “Indexed Annuity” in the principal amount of \$100,000 from Sun Life Assurance Company of Canada (“Sun Life”); a September 2008 sale of an “Indexed Annuity” in the principal amount of \$200,000 from Sun Life; a March 2009 sale of “Indexed Annuity” in the principal amount of \$150,000 from Sun Life; and an August 2009 sale of a “Fixed Annuity” in the principal amount of \$1.2 million from Reliance Standard Life Insurance Company (“Reliance”). Id. at 3-4.

The ALJ found that on December 14, 2015, MetLife terminated its relationship with the Respondent and concluded that the Respondent’s business transactions with G.K. violated the Respondent’s agency agreement with MetLife because the insurance products that the Respondent

sold to G.K. were not from companies that MetLife affiliated with or approved. Id. at 4. On January 25, 2016, Metlife advised the Department that it had terminated the Respondent's employment for cause and the Department initiated its investigation. Ibid.

The ALJ found that the Respondent received commissions from the sales transactions to G.K. and "allegedly" paid a portion to his brother, Kevin Collins, as compensation for his solicitations of "customers/G.K." in New Jersey. Ibid. The ALJ further found that the Respondent conducted business with G.K. over a ten-year period and G.K. died in 2019. Ibid.

The ALJ also found that on March 23, 2016, the Department requested that the Respondent produce information and documents related to the G.K. annuity transactions by April 8, 2016. Ibid. The ALJ further found that the Department "alleges" that the Respondent failed to produce the documents by the deadline. The Respondent "alleges" that that he provided documents on June 16, 2016 and July 1, 2016. Ibid. Lastly, the ALJ found that the Respondent "alleges" that in May of 2018 the Department contacted him again and that he provided a submission to the Department on July 13, 2018, after which he did not hear from the Department for the next thirty-four months. Id. at 5.

### **THE ALJ'S ANALYSIS AND CONCLUSIONS**

The ALJ noted that pursuant to N.J.A.C. 1:1-12.5(b) a motion for summary decision requires analysis of whether "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 challenged and that the moving party is entitled to prevail as a matter of law." Ibid. The opposing party must submit responding affidavits showing that there is indeed a genuine issue of material fact, which can only be determined in an evidentiary proceeding, and that the moving party is not entitled to summary decision as a matter of law. Ibid. Failure to do so entitles the moving party to summary judgment.

Ibid. (citing Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995)). Moreover, even if the non-moving party comes forward with some evidence, the courts must grant summary judgment if the evidence is “so one-sided that [moving party] must prevail as a matter of law.” Ibid. (citing Brill 142 N.J. at 536). If the non-moving party’s evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. Ibid. (citing Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998)). Id. However, “the court must grant all the favorable inferences to the non-movant.” Ibid. (citing Brill v. Guardian Life Ins. Co., 142 N.J. at 536).

The ALJ summarized the parties’ legal arguments involving the statute of limitations, the doctrine of laches, and the discovery rule. Id. at 5-7. The ALJ found that the central issue in the Respondent’s argument concerning the statute of limitations is whether the discovery rule is applicable and allows the Department to pursue the action more than ten years after the alleged conduct. Id. at 7.

The ALJ stated that although no case law could be found holding that the discovery rule could not be applied to enforcement actions brought by the government, the doctrine was created to protect injured plaintiffs and it does not appear that it has ever been applied to a claim by a government entity. Ibid. The discovery rule allows a plaintiff to extend the statute of limitations by “starting the clock” on the date the plaintiff discovers their injury, as opposed to the date the injury occurred. Id. at 7-8. (citing Lopez v. Swyer, 62 N.J. 267, 272 (1973)). The purpose of the rule is to prevent the unjust results that may arise from a rigid application of the statute of limitations. Id. at 8. The ALJ stated that while the rule allows a plaintiff to bring their claim outside the normal statutory period, it is not indifferent to the Respondent’s equitable considerations. Ibid. (citing Lopez, 62 N.J. at 274). The ALJ stated that in some cases it may be “unjust . . . to compel a person to defend a law suit long after the alleged injury has occurred.”

Ibid. (quoting Lopez, 62 N.J. at 274). The ALJ stated that in every case, “the equitable claims of opposing parties must be identified, evaluated and weighed.” Ibid. (quoting Lopez, 62 N.J. at 274). The ALJ stated that it is the burden of the party asserting the rule to establish that it is applicable. Ibid. (citing Vispiano v. Ashland Chem. Co., 107 N.J. 416, 432 (1987)).

The ALJ found that the United States Supreme Court held that the discovery rule is not applicable to government penalty actions. Id. at 9 (citing Gabelli v. SEC, 568 U.S. 442 (2013)). In Gabelli, the SEC sought civil penalties against an investment adviser who violated the Investment Adviser Act of 1940 by defrauding clients. Ibid. (citing Gabelli, 568 U.S. at 445). The Supreme Court gave four major reasons for its prohibition on application of the discovery rule in enforcement actions, which the ALJ found to be relevant to this matter. Ibid. First, there is a distinction between an injured person and a government agency in that injury victims are generally not “seeking out their claims, whereas enforcing agencies are tasked with doing just that.” Ibid. (citing Gabelli, 568 U.S. at 450–51). Second, as a rule of equity, the discovery rule is designed to ensure that injured victims receive compensation, but an enforcement action is penal in nature. Ibid. (citing Gabelli, 568 U.S. at 451–52). Third, applying the discovery rule in favor of the government would leave citizens constantly wondering whether an action would be brought against them. Ibid. (citing Gabelli, 568 U.S. at 452). Finally, it is much harder for courts to determine at what time a government agency “knew” of its claim. Ibid. (citing Gabelli, 568 U.S. at 452). The discovery rule requires a determination of when the party discovered its cause of action. Ibid. Since Government agencies have hundreds of employees making that determination is much more difficult than with a single injured person. Ibid.

The ALJ found that this matter concerns a government entity charged with enforcing the Producer Act, which are the same “types of facts and motivations” in Gabelli, and that the

Supreme Court's reasoning is applicable. Id. at 10. The ALJ concluded that the discovery rule should not apply to this matter. Ibid.

The ALJ also addressed the Respondent's claim of laches. Id. at 10-11. The ALJ found that the Respondent's laches claim failed because there was an applicable statute of limitations and the Respondent failed to meet his burden to demonstrate that his claim or defense had been prejudiced by the Department's delay in bringing this case. Ibid.

The ALJ granted the Respondent's motion for summary decision and dismissed the matter. Id. at 11.

### **EXCEPTIONS**

The Department submitted its Exceptions to the Initial Decision on December 21, 2022. ("Department Exceptions"). In its Exceptions, the Department argues that the ALJ erred in finding that the discovery rule did not apply to this matter and relying on the Supreme Court's interpretation of a federal statute of limitations. Department Exceptions at 2-5. The Department argued that Gabelli is not binding or authoritative on an enforcement action by a state agency under New Jersey law. Department Exceptions at 2-4.

The Department generally agreed with the ALJ's recitation of the procedural history, but took exception to the ALJ only providing a synopsis of Count Two of the OTSC, relating to the payment of commissions to Kevin Collins, who was not a licensed insurance producer. Id. at 5. The Department argued that the ALJ should have more specifically referenced the other four counts of the OTSC. Ibid.

The Department also took exception to the ALJ's finding of fact that the Respondent conducted business with G.K. over a ten-year period. Ibid. The Department argues that there was no evidence to support this factual finding and Count Three of the OTSC alleges that the

Respondent completed and submitted annuity applications that contained false and misleading statements, including that he had maintained a ten-year business relationship with G.K. at the time of the application. Id. at 5-6. The Department argued that this fact is in dispute and requests that this statement is rejected. Id. at 6.

The Respondent submitted his reply to the Department's Exceptions on December 27, 2022. ("Respondent's Reply"). In his reply, the Respondent argues that the Department's Exceptions do not comply with N.J.A.C. 1:1-18.4 because the Department's Exceptions are "in the form of a mere disagreement." Respondent Reply at 3. The Respondent argues that the Department attempted to diminish Gabelli, 568 U.S. 442, but does not cite to any authority to support the contention that Gabelli is not good law or has been misapplied. Ibid. The Respondent argues that the Department relies on Burd v. New Jersey Bell Tel. Co., 76 N.J. 284 (1978) to argue that a cause of action does not accrue until the plaintiff discovers that there is a claim. Id. at 4. However, the ALJ had already considered Burd in her ruling. Ibid. Further, the Respondent argues that the Department's exception to the ALJ's finding of fact refer to evidence that the Department did not previously rely on. Id. at 3. The Respondent argues that the Department's exception to the ALJ's finding that the Respondent had maintained a ten-year business relationship with G.K. at the time of the application is inappropriate because the Department does not propose a finding of fact "in lieu of" or in addition to the ALJ's finding of this "unrebutted" fact. Id. at 4-5 (citing N.J.A.C. 1:1-18.4(b)). The Respondent states that the Department failed to justify why it issued the OTSC past the statute of limitations, and three years after it last contacted the Respondent. Id. at 5-6. The Respondent requests that the Commissioner adopt the Initial Decision. Id. at 6.



## DISCUSSION

The ALJ granted the Respondent's motion for summary decision and dismissed the OTSC finding that the OTSC was filed outside of the ten-year statute of limitations in N.J.S.A. 2A:14-1.2(a) and the discovery rule did not apply.

Count One of the OTSC relates to sales of annuities in August 2008, September 2008, March 2009, and August 2009. The ALJ found that the Respondent was designated as the "Agent of Record" for G.K. for the following transactions: an August 2008 sale of an "Indexed Annuity" in the principal amount of \$100,000 from Sun Life; a September 2008 sale of an "Indexed Annuity" in the principal amount of \$200,000 from Sun Life; a March 2009 sale of "Indexed Annuity" in the principal amount of \$150,000 from Sun Life; and an August 2009 sale of a "Fixed Annuity" in the principal amount of \$1.2 million from Reliance. Initial Decision at 3-4. This conduct falls outside of the ten-year statute of limitations in N.J.S.A. 2A:14-1.2(a) (unless otherwise provided by common law or statute, "any civil action commenced by the State shall be commenced within ten years next after the cause of action shall have accrued"); Cumberland Cty. Bd. of Chosen Freeholders v. Vitetta Grp., P.C., 431 N.J. Super. 596, 603, (App. Div. 2013) (N.J.S.A. 2A:14-1.2 "is a statute of limitations governing civil actions commenced by the State or its political subdivisions").

The ALJ analyzed whether the discovery rule applied to this matter. Initial Decision at 7-10. The discovery rule "provides that in an appropriate case a cause of action will be held not to accrue until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim." Lopez, 62 N.J. at 272. "The discovery rule is essentially a rule of equity" that allows a plaintiff relief from a statute of limitations bar. Id. at 272-73. The linchpin of the discovery rule is the unfairness of barring

claims of unknowing parties. Mancuso v. Neckles, 163 N.J. 26, 29 (2000). “The essential purpose of the [discovery] rule is to avoid harsh results that otherwise would flow from mechanical application of a statute of limitations.” Vispiano, 107 N.J. at 426.

The ALJ found that the United States Supreme Court held that the discovery rule is not applicable to government penalty actions and found that the considerations and reasoning applied by the Supreme Court are applicable to this matter. Initial Decision at 9 (citing Gabelli, 568 U.S. 442). Accordingly, the ALJ found, that the discovery rule should not apply to this matter. Id. at 10. In Gabelli, the Supreme Court considered the statute of limitations in 28 U.S.C. § 2462, which reads, “[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued...” However, the statute of limitations that applies to the issue here reads, “...subject to any statutory provisions or common law rules extending limitations periods, any civil action commenced by the State shall be commenced within ten years next after the cause of action shall have accrued.” N.J.S.A. 2A:14-1.2(a). Accordingly, the statute of limitations that applies to New Jersey enforcement agencies specifically contemplates that the statute of limitations could be extended by a common law rule, such as the discovery rule. Further, the New Jersey Appellate Division had the opportunity to hold, as the Supreme Court did in Gabelli, that the discovery rule did not apply to state agencies, but declined to do so in Caride v. Young, No. A-5419-17T4, 2019 N.J. Super. Unpub. LEXIS 2195 (App. Div. Oct. 25, 2019).

Turning to the other counts in the OTSC, it is unclear when the conduct related to Count Two is alleged to have occurred. Count Two alleges that the Respondent received commissions in connection with the sales of annuities to G.K. and thereafter paid a portion of the commissions

to Kevin Collins as compensation for Kevin Collins's solicitation efforts in New Jersey, which was improper because he was not licensed as an insurance producer in New Jersey. The OTSC does not indicate when the Respondent received these commissions, or when he paid his brother, Kevin Collins. The ALJ found that the Respondent received commissions from the sales transactions to G.K. and "allegedly paid a portion to his brother, Kevin Collins, as compensation for his solicitations of customers/G.K. in New Jersey." Initial Decision at 4. The ALJ did not make a clear finding of fact as to whether the Respondent actually paid his brother commissions, or whether the Department just alleges that he did so. Further, the ALJ did not make a finding of fact as to when the Respondent paid his brother commissions, if he did so. Accordingly, it is unclear from the record before me whether this Count was properly dismissed as being outside of the statute of limitations in N.J.S.A. 2A:14-1.2(a).

Similarly, Count Three alleges that the Respondent completed and submitted to Sun Life and Reliance annuity applications which contained false and misleading material statements, specifically that G.K. had executed each said application while present in Connecticut when, in fact, G.K. executed all said applications in New Jersey; and that Respondent had maintained a ten year business relationship with G.K when, in fact, Respondent had never met with nor spoken to G.K. The ALJ found that the Respondent maintained a ten-year business relationship with G.K. Initial Decision at 4. However, the ALJ did not make any specific factual findings regarding when the Respondent submitted these annuity applications. Accordingly, it is unclear from the record before me whether this Count was properly dismissed as being outside of the statute of limitations in N.J.S.A. 2A:14-1.2(a).

Count Four alleges that on G.K.'s behalf, Respondent established several annuity accounts with Sun Life and authorized transfers of funds between said accounts without the authorization,

knowledge, or consent of G.K. The OTSC does not indicate the number of transfers nor does it indicate when these transfers are alleged to have occurred. The ALJ did not make any specific findings regarding the factual allegations in this Count.<sup>1</sup> Accordingly, it is unclear from the record before me whether this Count was properly dismissed as being outside of the statute of limitations in N.J.S.A. 2A:14-1.2(a).

Further, Count Five of the OTSC alleges that the Respondent failed to respond or to produce documents or information requested by the Department by a deadline of April 8, 2016. The ALJ found that the Department “alleges” that the Respondent failed to produce the documents by the deadline. Initial Decision at 4. The Respondent “alleges” that that he provided documents on June 16, 2016 and July 1, 2016. Ibid. Lastly, the ALJ found that the Respondent “alleges” that in May of 2018 the Department contacted him again and that he provided a submission to the Department on July 13, 2018, after which he did not hear from the Department for the next thirty-four months. Id. at 5. This conduct is alleged to have occurred within the statute of limitations, as the OTSC was issued approximately five years after this conduct is alleged to have occurred.

Pursuant to N.J.A.C. 1:1-18.7, “an agency head may enter an order remanding a contested case to the Office of Administrative Law for further action on issues or arguments not previously raised or incompletely considered.” This matter is remanded to the OAL to develop a factual record to determine whether equity doctrines, such as the discovery rule, apply and to make a recommendation as to the applicability based on the factual record. Further, the matter is being remanded to develop the record as to the timing of the conduct at issue in Counts Two, Three, and

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<sup>1</sup> I note that the Respondent alleges that the Department has been derelict in producing discovery. Respondent Reply at 6. Accordingly, it might be difficult for the Respondent to argue that this alleged conduct falls outside of the ten year statute of limitations in N.J.S.A. 2A:14-1.2(a).

Four of the OTSC. It is also remanded so that the ALJ can clarify the ruling and make a recommendation as to the disposition of Count Five of the OTSC.

**CONCLUSION**

Good cause having been shown, it is now, therefore ORDERED that, pursuant to N.J.A.C. 1:1-18.7, this matter is REMANDED to the OAL for further proceedings as discussed herein.

It is so ORDERED on this 23 day of January 2023.



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Marlene Caride  
Commissioner

Jd Collins Remand/Final Orders-Insurance