

STATE OF NEW JERSEY  
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BKI-17272-15  
AGENCY DOCKET NO.: OTSC #E15-104

MARLENE CARIDE,<sup>1</sup> )  
COMMISSIONER, NEW JERSEY )  
DEPARTMENT OF BANKING AND )  
INSURANCE, )  
 )  
Petitioner, )  
 )  
v. )  
 )  
WAYNE M. CITRON )  
 )  
Respondent. )

FINAL DECISION AND ORDER

This matter comes before the Commissioner of Banking and Insurance (“Commissioner”) pursuant to the authority of N.J.S.A. 52:14B-1 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”), the New Jersey Insurance Fraud Prevention Act, N.J.S.A. 17:33A-1 to -34 (“Fraud Act”), and all powers expressed or implied therein, for the purposes of reviewing the December 21, 2018 Initial Decision (“Initial Decision”) of Administrative Law Judge Susan M. Scarola (“ALJ”), which granted a Motion for Summary Decision brought by the Department of Banking and Insurance (“Department”) on five Counts alleged in the Department’s Order to Show Cause No. E15-104 (“OTSC”), and recommended revocation of the Respondent Wayne M. Citron’s (“Citron”) insurance producer license and the imposition of civil monetary penalties in the amount of \$10,000.

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

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about September 10, 2015, the Department issued the OTSC against Citron seeking to revoke his producer license and impose civil monetary penalties and costs of investigation for alleged violations of the Producer Act, the New Jersey Public Adjusters' Licensing Act, N.J.S.A. 17:22B-1 to -20 ("Public Adjusters' Act"), and the Fraud Act. Originally, the OTSC contained eight Counts alleging that Citron engaged in the following activities in violation of the insurance laws of this State:

Count One – Citron's New York insurance producer license was revoked on or about May 14, 1993, in violation of N.J.S.A. 17:22A-40(a)(2) and (9);

Count Two – Citron failed to notify the Department within 30 days of the revocation of his New York insurance producer license, in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (18), and N.J.S.A. 17:22A-47(a);

Count Three – Citron acted as a public adjuster, as defined in N.J.S.A. 17:22B-2, without being licensed to do so, by acting or aiding on behalf R.R. and C.R. in negotiating for, or effecting the settlement of claims for loss or damages caused by, or resulting from any incident covered under a property insurance policy, in exchange for money, in violation of N.J.S.A. 17:22A-40(a)(2) and (8) and N.J.S.A. 17:22B-3(a);

Count Four – Citron made a written or oral statement as part of or in support of a claim for payment or other benefit pursuant to an insurance policy, knowing that the statement contained false or misleading information concerning any fact or thing material to the claim when he falsely stated to New Jersey Manufacturers Insurance Co. ("NJM") that R.R. and C.R. had suffered food spoilage damages resulting from "lack of power . . . due to the wind blowing down the pole and wires," in violation of N.J.S.A. 17:33A-4(a)(1);

Count Five – Citron intentionally withheld material information or made a material misstatement in an application for a license by failing to disclose the revocation of his New York insurance license on his Louisiana insurance agent license application, in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (15);

Count Six – Citron failed to notify the Department within 30 days of the issuance of the Notice and disciplinary action by the Louisiana Department of Insurance, in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (19), and N.J.S.A. 17:22A-47(a);

Count Seven – Citron failed to notify the Department within 30 days of his indictment for Insurance Fraud and Attempted Theft by Deception, in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (18); and

Count Eight – Citron intentionally withheld material information or made a material misstatement in an application for a license when he falsely stated that he had not been charged with committing a felony on his insurance producer renewal application, in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (15).

The Department later withdrew Counts Two and Three, which left Counts One and Four through Eight. Department Brief in Support of Motion of Summary Judgment at 1, Initial Decision at 4.

On or about October 12, 2015, Citron filed an Answer, wherein he admitted and denied certain allegations set forth in the OTSC and requested a hearing. The Department transmitted the matter as a contested case to the Office of Administrative Law (“OAL”) on October 27, 2015, pursuant to N.J.S.A. 52:14B-1 to -31 and N.J.S.A. 52:14F-1 to -23.

The Department then filed a separate Order to Show Cause requesting the immediate suspension of Citron’s insurance producer license pending the completion of these proceedings. Initial Decision at 2. A hearing on the suspension was held on April 17, 2017. Ibid. An initial decision was filed on June 1, 2017 (“Initial Suspension Decision”). Ibid. A Final Decision that suspended Citron’s license pending the final hearing was issued by the Commissioner on August 29, 2017 (“Final Suspension Decision”). Ibid. Citron filed for Leave to File an Interlocutory Appeal of the Initial Suspension Decision with the Appellate Division pursuant to R. 2:5-6, which the Appellate Division denied on July 17, 2017. Ibid.

On or about April 17, 2017, the Department moved for Summary Decision against Citron. Citron filed a reply on August 21, 2017. Id. at 3. The record was closed on October 30, 2018 and the ALJ granted summary decision to the Department on the remaining Counts of the OTSC, that is, Counts One, Four, Five, Six, Seven, and Eight. The ALJ recommended revocation of Citron's producer license and the imposition of civil monetary penalties against Citron in the amount of \$10,000.

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

The ALJ applied the standard for summary decision pursuant to N.J.A.C. 1:1-12.5 and Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995). The ALJ noted that a Summary Decision may be rendered if the competent legal evidence presented, when viewed in favor of the non-moving party, permit a rational factfinder to resolve the dispute in the non-moving party's favor. Initial Decision at 8, citing L.A. v. Bd. Of Educ. Of Trenton, 221 N.J. 192, 203 (2015).

The ALJ found that although Citron disagreed with the Department's statutory interpretations and appropriate penalties, Citron did not dispute the facts in evidence. Id. at 8. Accordingly, the ALJ concluded that there was no genuine issue of material fact and found that summary decision was appropriate. Ibid.

As to Count One, the ALJ found that it was uncontested that Citron's insurance producer license was suspended in New York on or about May 14, 1993 in violation of N.J.S.A. 17:22A-40(a)(2) and (9). Initial Decision at 4, 8.

As to Count Four, the ALJ found that Citron pled guilty to one count of insurance fraud in the third degree; and, as part of the plea, Citron admitted to making at least one false statement, that is, "a telephone pole supplying power to the [insureds'] property had been knocked down by Hurricane Sandy." Initial Decision at 4-5, quoting Initial Suspension Decision at 3, 4. Further,

the ALJ found that Citron was aware that the statement was material because NJM was relying upon that statement when processing the insurance claim. Initial Decision at 4-5. The ALJ found that Citron admitted to the allegations contained in Count Four when he pled guilty to insurance fraud. Id. at 5. Accordingly, the ALJ concluded that Citron knowingly made a false claim to NJM regarding a power outage that led to food spoilage in violation of N.J.S.A. 17:33A-4(a)(1). Id. at 9-10.

As to Count Five, the ALJ found that Citron did not disclose the revocation of his New York insurance producer license on his insurance producer application submitted to the Louisiana Department of Insurance. Id. at 5, 10. The ALJ concluded that Citron violated a Louisiana statute prohibiting the submission of incorrect, misleading, incomplete, or materially false statements in the license renewal application, and that in doing so Citron's conduct was "dishonest or sloppy enough to be deemed 'incompetence' within the meaning of the Producer Act," in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (15). Id. at 5, 10-11.

As to Count Six, the ALJ found that Citron had the obligation to notify the Department of the \$250 fine imposed by the Louisiana Department of Insurance, which constituted discipline. Id. at 11-12. However, the ALJ found that Citron did not notify the Department of the discipline in Louisiana in violation of N.J.S.A. 17:22A-40(a)(18).<sup>2</sup> Id. at 11.

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<sup>2</sup> Count Six of the OTSC alleges that Citron violated N.J.S.A. 17:22A-40(a)(2), (8), and (19), and N.J.S.A. 17:22A-47(a) when he failed to notify the Department of the discipline in Louisiana within 30 days. The ALJ did not specifically discuss whether Citron violated N.J.S.A. 17:22A-40(a)(2), (8), and (19) or N.J.S.A. 17:22A-47(a), as alleged in the OTSC. Count Six does not allege that Citron violated N.J.S.A. 17:22A-40(a)(18), as the ALJ concluded. The ALJ indicated that the Department argued that Citron violated N.J.S.A. 17:22A-40(a)(18). Initial Decision at 11. However, in its brief for Summary Decision, the Department argues that Citron violated N.J.S.A. 17:22A-40(a)(19). Department Brief for Summary Decision at 15.

As to Count Seven, the ALJ found that Citron did not notify the Department that he had been indicted on February 5, 2015 of insurance fraud and theft by deception. Id. at 6. The ALJ found that Citron admitted that he was indicted and did not deny that he failed to inform the Department of the Indictment. Ibid. Citron argued that he was not required to inform the Department of the Indictment because the Department was a party to the proceeding and already had knowledge of the indictment. Ibid. However, the ALJ found that the requirement to notify the Department is a statutory requirement and is not subject to relaxation based on whether the producer believes that the Department had prior knowledge of the Indictment. Id. at 13. Accordingly, the ALJ concluded that Citron failed to notify the Department within 30 days of being indicted in violation of N.J.S.A. 17:22A-40(a)(18). Id. at 12.<sup>3</sup>

As to Count Eight, the ALJ found that on his insurance-producer license renewal application completed on July 15, 2015, that Citron answered “No” to the question, “Have you been convicted of a felony...or are you currently charged with committing a felony, which has not been previously reported to this insurance department?” Id. at 6. The ALJ found that Citron should have responded “Yes” to this question, and that the Department has proven the charge by a preponderance of the evidence<sup>4</sup>. Id. at 6-7 and 13.

The ALJ concluded that revocation of Citron’s insurance producer license was appropriate under N.J.S.A. 17:22A-40(a)(6)<sup>5</sup> because he was convicted of insurance fraud in the third degree

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<sup>3</sup> The ALJ did not address whether Citron also violated N.J.S.A. 17:22A-40(a)(2) and (8) as alleged in Count Seven of the OTSC.

<sup>4</sup> The ALJ did not specifically address whether the conduct proved by the Department constitutes violations of N.J.S.A. 17:22A-40(a)(2), (8), and (15) as alleged in Count Eight of the OTSC.

<sup>5</sup> In its brief in support of its Motion for Summary Decision, the Department requested to amend the OTSC pursuant to N.J.A.C. 1:1-6.2(a) to add violations of N.J.S.A. 17:22A-40(a)(6), (7), and (8) to Count Four. Department Brief in Support of Motion of Summary Judgment at 12. The

for making a false statement regarding an insurance claim. Id. at 13-14. The ALJ noted that revocation has consistently been imposed upon producers who were convicted of crimes touching upon their licenses. Id. at 13-14, citing Commissioner v. Tuite and Rapid Release Bail Bonds, OAL Dkt. No. BKI 663-14, Initial Decision (03/17/16), Final Decision and Order (06/16/16); Commissioner v. Stone, OAL Dkt. No. BKI 6301-07, Initial Decision (06/16/08), Final Decision and Order (09/15/08); Commissioner v. Malek, OAL Dkt. Nos. BKI 4520-05 and BKI 4686-05, Initial Decision (12/06/05), Final Decision and Order (01/18/06).

As to the appropriate monetary penalty in this matter, the ALJ noted that the factors for determining monetary penalties are set forth in Kimmelman v. Henkles & McCoy, Inc., 108 N.J. 123, 137-39 (1987). Id. at 15. 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 actions; and (7) past violations. Ibid.

Regarding the first factor, the ALJ determined that fraudulent acts are undertaken in bad faith and Citron pled guilty to insurance fraud in the third degree. Ibid. Further, Citron repeatedly failed to disclose required information to the Department, which also demonstrated bad faith. Ibid.

As to the second factor, the ALJ concluded that there was no evidence to support that Citron is unable to pay fines. While Citron certified that he is unable to find employment outside of the insurance field and has a disabled wife who is unable to work, and while the ALJ noted the circumstances that Citron presented were "compelling," the ALJ found that Citron did not demonstrate that he is without assets or income. Id. at 15-16.

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Initial Decision did not directly address this request, however, the ALJ relied upon N.J.S.A. 17:22A-40(a)(6) to conclude revocation was appropriate.

Regarding the third factor, the ALJ concluded that Citron profited from failing to notify the Department of his discipline in Louisiana in 2014 because he had the advantage of being able to continue to sell insurance. Id. at 16.

As to the fourth factor, the ALJ concluded that insurance fraud hurts the public and its confidence in the insurance industry. Ibid. However, the ALJ determined that Citron's significant pro bono work in helping victims of Superstorm Sandy determine their insurance coverage, the information to make the necessary filings, and how to follow up on their claims, worked as a mitigating factor. Id. at 17.

As to the fifth factor, the duration of the conduct, the ALJ concluded that if Citron had been honest on his license renewal materials and informed the Department of his discipline in Louisiana, he may have been subject to discipline in this State sooner and could have possibly have had his license revoked then. Ibid.

As to the sixth factor, the ALJ determined that Citron was convicted of insurance fraud in the third degree, completed probation, and paid approximately \$2,500 in fines. Ibid. As to the final factor, the ALJ concluded that Citron has been a licensed insurance producer in New Jersey since 1993 and this was Citron's first disciplinary incident in this State. Id. at 17-18.

Based upon the above analysis, the ALJ recommended that a civil monetary penalty be imposed against Citron in the amount of \$10,000, to be allocated as follows: \$5,000 for the violation in Count Four and \$1,000 each for Counts One, Five, Six, Seven, and Eight. Id. at 18.

As to other monetary penalties, the ALJ found that the Department did not renew its request for further penalties, such as the costs of investigation and prosecution, including attorneys' fees, and restitution. Ibid. Nor did the Department offer any evidence as to these costs. Ibid. Accordingly, the ALJ declined to recommend any further monetary penalties on Citron. Ibid.



## EXCEPTIONS

### The Department's Exceptions to the ALJ's Findings and Conclusions

By letter dated January 3, 2019, the Office of the Attorney General, on behalf of the Department, submitted Exceptions to the Initial Decision ("Department Exceptions Brief").

The Department agreed with the Initial Decision as to the conclusions that Citron violated the insurance laws as set forth in Counts One and Four through Eight. Department Exceptions Brief at 2. However, the Department requested that the Commissioner also assess: 1) the costs of investigation pursuant to N.J.S.A. 17:22A-45(c); 2) a surcharge pursuant to N.J.S.A. 17:33A-5.1 of the Fraud Act; and 3) attorneys' fees pursuant to N.J.S.A. 17:33A-5(c). Ibid. The Department also requested that the Initial Decision be modified to exclude Citron's public service work as a mitigation in to the fourth factor of the Kimmelman analysis. Id. at 2-3.

Pursuant to N.J.S.A. 17:22A-45(c), the Department requested the costs of investigation in the amount of \$1,562.50. Id. at 3. The Department took exception that the Initial Decision did not assess the costs of investigation, despite concluding that Citron violated several provisions of the Producer Act and recognizing that the Department requested these penalties in the OTSC. Ibid.

Pursuant to N.J.S.A. 17:33A-5(c), the Department also requested attorneys' fees in the amount of \$10,000. Id. at 4. The Department argued that it had the right to seek attorneys' fees up until the time of the entry of a Final Order pursuant to R. 4:42-9(d). Id. at 3-4. The Department recognized that there was no rule in the Uniform Administrative Procedure Rules regarding when a party may seek attorneys' fees. Ibid.

The Department also stated that pursuant to N.J.S.A. 17:33A-5.1, "in addition to any other penalty, fine or charge imposed pursuant to law, a person who is found in any legal proceeding to have committed insurance fraud shall be subject to a surcharge in the amount of \$1,000."

Accordingly, the Department requested a surcharge in the amount of \$1,000, as was requested in the OTSC. Id. at 4.

Lastly, the Department took exception to Citron's public service being considered as mitigation to the fourth factor of the Kimmelman analysis. Id. at 5. The Department argued that the public is damaged by all insurance fraud, but particularly insurance fraud perpetrated by licensed producers. Ibid., citing, Commissioner v. Goncalves, OAL Dkt. No. BKI 31188-03, Initial Decision (12/03/03), Final Decision and Order (05/24/04), OAL Dkt. No. BKI 3301-05, On Remand, Initial Decision (11/17/05), Final Decision and Order (02/15/06). The Department argued that if Citron's public service was considered in mitigation, anyone who committed fraud could seek to reduce monetary penalties by engaging in unrelated community service. Id. at 5-6. The Department noted that Citron's public service could be considered in mitigation of the analysis of the revocation of Citron's license, but argued that Citron's fraudulent conduct countermanded his public service. Id. at 5.

The Department did not take exception to the amount of the monetary fines of \$10,000 as recommended by the ALJ for the violations alleged in the OTSC.

#### Citron's Exceptions to the ALJ's Findings and Conclusions

By e-mail dated January 3, 2019, Citron, through counsel, Michael P. Berkley, P.C., submitted timely Exceptions to the Initial Decision ("Citron's Exceptions Certification").<sup>6</sup> Citron certified that he is sixty-seven years old and has been unable to work in either New Jersey or Louisiana as an insurance producer since his resident insurance producer license was suspended in New Jersey. Citron's Exceptions Certification, ¶¶ 3, 20. He further certified that he is unable

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<sup>6</sup> Citron's Exceptions was in the form of a Certification of Wayne M. Citron, rather than a letter brief.

to work in the insurance field and unable to find other employment. Id. at ¶ 13. Further, Citron certified that he does not have any savings since paying fines in the criminal case, and that he has been supporting his family on the Social Security he has been receiving since November 2016. Id. at ¶¶ 8, 14. He also certified that the \$5,000 monetary penalty for Count Four is excessive because the false claim for food spoilage only carried a maximum payout of \$500. Id. at ¶ 21.

Citron certified that the \$250 fine imposed by Louisiana for not correctly completing his renewal application is “de minimis” and there were no formal or administrative hearings against him in Louisiana. Id. at ¶¶ 17-18. He further certified that he paid the \$250 fine and that it was unfair now to be fined an additional \$1,000 for the same violation. Accordingly, he certified that he should not be fined for Count Six. Id. at ¶ 19.

Citron further certified that on or about May 10, 2016 he informed the Department of his guilty plea, which occurred on April 19, 2016<sup>7</sup>. Id. at ¶ 9. He also certified that the Department was already aware of his guilty plea because the Department was responsible for prosecuting him in the criminal case. Ibid. Accordingly, he certified that he should not be fined for Count Seven. Id. at ¶ 12.

Citron certified that he did not disclose on his renewal application that he was indicted for a felony because New Jersey does not use the term, “felony” but rather “indictable offenses.” Id. at ¶ 11. He certified that he cannot be held accountable for knowing what offenses are felonies, as there is no such thing as felonies in New Jersey. Ibid. Accordingly, he certified that he should not be fined for Count Eight. Id. at ¶ 12.

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<sup>7</sup> Citron pled guilty on January 4, 2016. Transcript of Guilty Plea, attached as Ex. 6 to Herbert Certification. He was sentenced on April 19, 2016. Judgment of Conviction, attached as Ex. 7 to Herbert Certification.

Citron certified that the Initial Suspension Decision recognized his guilty plea constituted “one blemish in a thirty-four-year career in New Jersey alone.” Id. at ¶ 22, quoting Initial Suspension Decision at 6. Citron further certified that the Initial Suspension Decision found that “the Department did not show threat of immediate, direct harm to insured posed by lifting the suspension on [Citron’s] license”, found that Citron’s testimony was credible, and that the possibility of Citron “making a false statement to an insurance company during the time that the remainder of the proceedings take to complete is remote.” Id. at ¶ 23, quoting, Initial Suspension Decision at 16. Citron also certified that the Initial Suspension Decision found that the linkage between Citron’s statement to NJM and the cancellation of the policy by NJM was insufficient because it was not clear “what house, what policy, or what statements were involved.” Id. at ¶ 24, quoting, Initial Suspension Decision at 6. Accordingly, Citron certified that the ALJ’s findings of injury to the insured were incorrect and contradicted the findings of fact in the Initial Suspension Decision. Id. at ¶ 25. Citron further certified that the ALJ’s decision to revoke his license was “in direct contradiction to the above findings of fact by the Department in the summary proceedings.” Id. at ¶ 26. Accordingly, Citron certified that “the Department has failed to satisfy its burden of proof warranting a revocation rather than a suspension is the appropriate penalty.” Ibid. Finally, Citron certified that his license should be reinstated immediately because it had already been suspended for two years, and that the fines imposed in the Initial Decision should be lowered. Id. at ¶ 27.

### The Department's Reply to Citron's Exceptions

By e-mail dated January 8, 2019, the Department submitted a timely Reply to Citron Exceptions ("Department Reply Brief").<sup>8</sup> The Department argued that Citron's contention that he could not be held accountable for not reporting his indictments on his application for license renewal because he did not know that the charges he was indicted for were considered felonies is without merit. Department Reply Brief at 2. The Department stated that Citron was indicted for insurance fraud in the second degree and attempted theft by deception in the third degree. Ibid., citing Initial Decision at 6. "Felony" is defined by the insurance regulations as "[a]ny crime identified as an offense of the first, second, third, or fourth degree." Ibid., quoting, N.J.A.C. 11:17E-1.2. The Department argues that as a licensed insurance producer, Citron is "required to have knowledge of and comply with all regulations of the Department." Id. at 2-3, quoting, Commissioner v. First Jersey Insurance Agency, OAL Dkt. No. BKI 13160-15, Initial Decision, (03/06/17). Accordingly, the Department argues, Citron should have been aware that the charges in the indictment are considered felonies and he should have disclosed them to the Department. Id. at 3.

The Department next contends that Citron's argument that the \$250 amount that Louisiana fined him for not disclosing that his criminal indictment in New York is "de minimis" and he should not be fined for Count Six is without merit. Ibid. The Department argues that pursuant to N.J.S.A. 17:22A-47(a), Citron had a duty to notify the Department of the administrative action and fine in Louisiana and failed to do so. Ibid. Accordingly, the Department states that Citron may be fined for this violation. Ibid.

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<sup>8</sup> The Department titled their letter "Petitioner's Exceptions to the Initial Decision." However, the letter brief was in reply to the Citron's Exceptions Certification.

Lastly, the Department argues that it was inappropriate for Citron to quote the Initial Suspension Decision when the Final Suspension Decision disagreed with and modified those findings. Id. at 3-4, citing Final Suspension Decision at 34-35. Specifically, the Commissioner disagreed with the Initial Decision's description of Citron's conduct as a "blemish on his career." Id. at 4, citing Final Suspension Decision at 34. Further, the Commissioner found that the Department showed that failure to suspend his license would result in immediate harm to Citron's clients. Ibid., citing Final Suspension Decision at 34.

#### Citron's Reply to the Department's Exceptions

By e-mail dated January 8, 2019, Citron requested an extension of time to file a Reply to the Department's Exceptions until January 14, 2019, which was granted. Citron submitted his Reply to the Department's Exceptions on January 14, 2019 ("Citron's Reply Certification").<sup>9</sup> Citron certified that, while the Department sought to charge Citron with additional penalties in its Exceptions, the ALJ had found that the Department had waived the imposition of additional penalties because the Department did not renew its request for additional penalties in its Motion for Summary Decision. Citron's Reply Certification at ¶ 4. Citron certified that the ALJ's decision was correct and the Department is not entitled to request additional penalties at this time, after waiving them in its Motion for Summary Decision. Id. at ¶ 5-6. Citron also certified that the Department did not oppose the arguments regarding Counts One and Five in its Reply Brief, and therefore, the penalties for those two counts should be abated. Id. at ¶ 7.

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<sup>9</sup> Citron's Reply to the Department's Exceptions was in form of a Certification of Wayne M. Citron, rather than a letter brief.

## LEGAL DISCUSSION

The Department bears the burden of proving the allegations in the OTSC 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 has been described as “the greater weight of credible evidence in the case is not necessarily dependent on the number of witnesses, but having the greater convincing power.” State v. Lewis, 678 N.J. 47 (1975).

### Allegations Against Citron

Count One and Counts Five through Eight<sup>10</sup> of the OTSC charge Citron with violations of the Producer Act, which governs the licensure and conduct of New Jersey insurance producers and empowers the Commissioner to suspend or revoke the license of, and to fine, an insurance producer for violations of its provisions. Those counts of the OTSC specifically charge Citron with: violating any insurance law(s) or regulations (five violations); using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness, or financial irresponsibility in the conduct of insurance business (four violations); having an insurance producer license denied, suspended, or revoked in another state (one violation); intentionally withholding material information or making a material misstatement in an application for a license (two violations); failing to notify the commissioner within 30 days of the initiation of formal disciplinary proceedings in a state, other than this State, affecting the producer’s insurance license (one violation); and failing to notify the commissioner within 30 days of administrative actions as

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<sup>10</sup> After issuance of the OTSC, the Department withdrew Counts Two and Three, which left Counts One and Four through Eight. Department Brief in Support of Motion of Summary Judgment at 1, Initial Decision at 4.

required by N.J.S.A. 17:22A-40 and 17:22A-47 (one violation). See N.J.S.A. 17:22A-40a(2), (8), (9), (15), (18), and (19), and N.J.S.A. 17:22A-47(a). Additionally, Count Four of the OTSC charges Citron with violating the Fraud Act by presenting any written or oral statement as part of a claim for payment or other benefit pursuant to an insurance policy knowing that the statement contains any false or misleading information concerning any fact or thing material to the claim (one violation). Specifically, Count Four charges Citron with knowingly making a false claim to NJM regarding food spoilage food spoilage damages resulting from wind blowing down a pole and wires. Citron was aware that this statement was false, and he made it as part of claim to an insurance policy. See N.J.S.A. 17:33A-4(a)(1).

Based upon the Summary Decision standard discussed above, I concur with the ALJ that Citron failed to adduce evidence that creates a genuine issue of material fact and that summary decision is appropriate as to the allegations related to Counts One and Four through Eight of the OTSC.

#### Counts One, Four, and Five

As to Count One, I ADOPT the ALJ's findings that Citron's New York insurance producer license was revoked on or about May 14, 1993<sup>11</sup>, in violation of N.J.S.A. 17:22A-40(a)(2) (violating any insurance law) and (9) (having an insurance producer license, or its equivalent, denied, suspended or revoked in any other state). Initial Decision at 8.

As to Count Four, I ADOPT the ALJ's findings that Citron made a fraudulent statement to NJM that R.R. and C.R. suffered food spoilage damages resulting from a power outage due to the wind blowing down a pole and wires in violation of N.J.S.A. 17:33A-4(a)(1) (presenting any

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<sup>11</sup> No evidence was presented regarding why Citron's New York insurance producer license was revoked.



written or oral statement as part of a claim for payment or other benefit pursuant to an insurance policy knowing that the statement contains any false or misleading information concerning any fact or thing material to the claim).

As to Count Five, I ADOPT the ALJ's findings that Citron intentionally withheld material information or made a material misstatement in an application for a license by failing to disclose the revocation of his New York insurance license on his Louisiana insurance agent license application, in violation of N.J.S.A. 17:22A-40(a)(2) (violating any insurance law or regulation), (8) (using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility), and (15) (intentionally withholding material information or making a material misstatement on an application for a license).

#### Count Six

Count Six alleges that Citron failed to notify the Department within 30 days of the issuance of the Notice and disciplinary action by the Louisiana Department of Insurance, in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (19), and N.J.S.A. 17:22A-47(a). The ALJ found that Citron failed to notify the Department of said disciplinary action, and in doing so violated N.J.S.A. 17:22A-40(a)(18). Initial Decision at 11. The ALJ did not address whether Citron also violated N.J.S.A. 17:22A-40(a)(2), (8), or N.J.S.A. 17:22A-47(a) as alleged in the OTSC.

For the following reasons, I MODIFY the ALJ's findings and find that Citron also violated N.J.S.A. 17:22A-40(a)(2) (violating any insurance law or regulation), (8) (using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility), and N.J.S.A. 17:22A-47(a) (failing to report to the Commissioner any administrative action taken against the insurance producer in another jurisdiction within 30 days of the final disposition of the matter). I further MODIFY the ALJ's findings and find that Citron

did not violate N.J.S.A. 17:22A-40(a)(18), but instead violated N.J.S.A. 17:22A-40(a)(19) (failing to inform the Commissioner within 30 days of the final disposition of any formal disciplinary proceedings initiated against the producer), as alleged in the OTSC.

There is no genuine issue of material fact that Citron was fined \$250 by the Louisiana Department of Insurance and then failed to notify the Commissioner of that administrative action and its final disposition within 30 days as required by N.J.S.A. 17:22A-47(a) and N.J.S.A. 17:22A-40(a)(19). Failing to report the administrative action is also in violation of N.J.S.A. 17:22A-40(a)(8) in that it demonstrates untrustworthiness and N.J.S.A. 17:22A-40(a)(2) in that Citron violated an insurance regulation. Citron does not deny that he did not report the administrative action to the Department, but argues that he was not required to because the conduct and the amount of the fine was “de minimus.” Citron’s Exceptions Certification at ¶¶ 17-18. However, under the plain language of the statute, the amount of the fine is irrelevant to whether Citron had the obligation to report the administrative action to the Department.

Accordingly, I MODIFY the ALJ’s findings and conclude that Citron violated N.J.S.A. 17:22A-40(a)(2), (8), (19), and N.J.S.A. 17:22A-47(a) because he failed to notify the Department of the administrative action in Louisiana. I also MODIFY the ALJ’s findings and conclude that Citron did not violate N.J.S.A. 17:22A-40(a)(18) because that violation was not alleged in the OTSC, and the Department did not move to amend the pleadings to allege that violation, and the facts do not fit.

#### Count Seven

Count Seven of the OTSC alleges that Citron failed to notify the Department within 30 days of his Indictment for Insurance Fraud and Attempted Theft by Deception, in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (18). The ALJ found that Citron failed to do so as alleged in

Count Seven of the OTSC in violation of N.J.S.A. 17:22A-40(a)(18) (failing to notify the commissioner within 30 days of his conviction for any crime, indictment, or the filing of formal criminal charges). Initial Decision at 12. The ALJ did not address, however, whether Citron's undisputed conduct also violated N.J.S.A. 17:22A-40(a)(2) and (8) as alleged in the OTSC. For the following reasons, I find that Citron's failure to timely notify the Department of his Indictment also constitutes a violation of those provisions.

Citron was indicted on February 5, 2015. Certification of Ellena Herbert, attached as Ex. A to the Department's Brief for Summary Decision ("Herbert Cert.") Ex. 5. He pled guilty to third degree insurance fraud on January 4, 2016. Herbert Cert., Ex. 6. Citron does not dispute that he failed to notify the Department of his Indictment. He certified that he informed the Department of his guilty plea. Citron's Exceptions Certification at ¶9. However, whether he informed the Department of his guilty plea is not the basis for the allegations in Count Seven of the OTSC. Rather, he is charged with not informing the Department of the Indictment. He does not offer any evidence that he informed the Department of his Indictment.

In his Exceptions, Citron argues that he should not have to report the Indictment to the Department, because the Department was responsible for his prosecution. Citron's Exception Certification at ¶ 9. This argument is inaccurate and without merit. The Department does not criminally prosecute insurance producers in New Jersey Superior Court. The Office of the Insurance Fraud Prosecutor in the Office of the Attorney General or a County Prosecutor's Office is the state authority responsible for criminal prosecutions. The Department only has responsibility for civil Fraud Act prosecutions through its Bureau of Fraud Deterrence. See N.J.S.A. 17:33A-1 to -34. Further, regardless of the party responsible for prosecuting Citron, he has a statutory obligation to inform the Department of his Indictment. Failing to inform the Department that he

had been indicted also constitutes a violation of N.J.S.A. 17:22A-40(a)(8) in that it demonstrates untrustworthiness and a violation of N.J.S.A. 17:22A-40(a)(2) in that he violated an insurance regulation.

Accordingly, I ADOPT the ALJ's findings and find that Citron violated N.J.S.A. 17:22A-40(a)(18). Further, I MODIFY the ALJ's findings and conclude that Citron also violated N.J.S.A. 17:22A-40(a)(2) and (8).

#### Count Eight

Count Eight alleges that Citron intentionally withheld material information or made a material misstatement in an application for a license when he falsely stated that he had not been charged with committing a felony on his insurance producer renewal application, in violation of N.J.S.A. 17:22A-40(a)(2) (violating any insurance law or regulation) (8) (using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility) and (15) (intentionally withholding material information or making a material misstatement on an application for a license). The ALJ found that the Department proved the charge by a preponderance of the evidence, but did not specifically address the statutory violations. Initial Decision at 13. For the following reasons, I MODIFY the ALJ's findings and conclude that Citron violated N.J.S.A. 17:22A-40(a)(2), (8), and (15).

There is no dispute that on February 5, 2015, Citron was indicted for insurance fraud in the second degree and attempted theft by deception in the third degree. Citron then failed to disclose that he had been indicted on his renewal application. Further, he does not deny that he did not disclose the Indictment on his renewal application. Rather, he argues that he was not required to disclose the Indictment because he was not indicted on felony charges. Citron's Exceptions Certification at ¶ 11.

Citron certified that he did not disclose on his renewal application that he was indicted for a felony because New Jersey does not use the term, “felony” but rather “indictable offenses.” Ibid. He certified that he cannot be held accountable for knowing what offenses constitute felonies because there are no such things as felonies in New Jersey. Ibid. Pursuant to N.J.S.A. 2C:1-4, offenses can be crimes or disorderly persons offenses. Crimes can be of the first, second, third, or fourth degree. N.J.S.A. 2C:1-4(a). “Felony” is defined in the insurance regulations by N.J.A.C. 11:17E-1.2(2) as “any crime identified as an offense of the first, second, third or fourth degree pursuant to N.J.S.A. 2C:1-4.” As a producer, Citron is responsible for knowing and understanding the applicable insurance laws that regulate his license and profession. Commissioner v. Vinci, BKI 7510-16, Initial Decision, (03/30/17), Final Decision and Order, (08/11/17). Ignorance of the law is not an excuse. Accordingly, Citron should have been aware of his obligation and indicated on his renewal application that he had been charged with committing a felony. By not doing so, he violated N.J.S.A. 17:22A-40(a)(18). Failing to report the indictment on his renewal application is also a violation of N.J.S.A. 17:22A-40(a)(8) in that it demonstrates untrustworthiness and a violation of N.J.S.A. 17:22A-40(a)(2) in that he violated an insurance regulation. Accordingly, I MODIFY the ALJ’s findings and conclude that Citron violated N.J.S.A. N.J.S.A. 17:22A-40(a)(2), (8), and (15).

Violation of N.J.S.A. 17:22A-40(a)(6)

In its Brief for Summary Decision, the Department requested that the pleadings be amended to conform with the proofs and that Count Four be amended so that Citron’s false statement to NJM could be considered an additional violation of N.J.S.A. 17:22A-40(a)(6) (having been convicted of a crime of the fourth degree or higher), (7) (having admitted or been found to

have committed any insurance fraud), (8) (using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility) and (16) (committing any fraudulent act). Department's Brief for Summary Decision at 12-13. The Initial Decision does not address Petitioner's request, but the ALJ did recommend revocation Citron's license because she found that he violated N.J.S.A. 17:22A-40(a)(6). Initial Decision at 13-14.

N.J.A.C. 1:1-6.2(a) provides that "[u]nless precluded by law or constitutional principle, pleadings may be freely amended when, in the judge's discretion, an amendment would be in the interest of efficiency, expediency and the avoidance of over-technical pleading requirements and would not create undue prejudice." Prior Final Decisions and Orders have permitted such amendments. For example, in Commissioner v. Furman, OAL Dkt. No. BKI 3891-06, Initial Decision (06/21/07), Final Decision and Order (09/17/07), the respondent's supplying of false information to an insurer was not alleged in the Order to Show Cause. However, the respondent admitted to supplying said false information during cross-examination. Accordingly, the Commissioner cited to N.J.A.C. 1:1-6.2 and concluded that "the pleadings in this case should be modified to conform with the evidence on the record and that Furman committed violations of N.J.S.A. 17:22A-40a(2), (7) and (8) by submitting to [the insurer] his November 20, 2001 memorandum." Ibid. See also, Commissioner v. Charles, OAL Dkt. No. BKI-06530-14, Initial Decision (03/02/15), Final Decision and Order (08/28/15).

Here, in its Motion for Summary Decision, the Department argued that the conduct as alleged in Count Four of the OTSC constituted a violation of N.J.S.A. 17:22A-40(a)(6), and Citron had the opportunity to respond to the allegation. Department's Brief for Summary Decision at 12-13. It is undisputed that Citron was convicted of insurance fraud in the third degree in violation of N.J.S.A. 17:22A-40(a)(6). See Judgment of Conviction, Herbert Cert., Ex. 7. These facts were

alleged in the OTSC, and they clearly also form a basis to find a violation of N.J.S.A. 17:22A-40(a)(6). In the interests of efficiency, expediency and the avoidance of over-technical pleading requirements and since this amendment of the pleadings would not unduly prejudice the Respondent, the OTSC in this matter should be conformed to reflect the proofs. I agree with the ALJ's determination that Citron was convicted of a crime in the third degree in violation of N.J.S.A. 17:22A-40(a)(6), and I AMEND the OTSC accordingly.<sup>12</sup>

### Penalties Against Citron

#### Revocation of Citron's Insurance Producer License

With respect to the appropriate action to take against Citron's insurance producer license, I FIND that the record is more than sufficient to support license revocation and, in fact, compels the revocation of his license. Accordingly, I concur with the ALJ's recommendation that Citron's license be revoked pursuant to the Producer Act.

The ALJ revoked Citron's license for having been convicted of a felony or crime in the fourth degree or higher, in violation of N.J.S.A. 17:22A-40(a)(6). Initial Decision at 13. While that violation is sufficient for the revocation of Citron's license, he also committed insurance fraud, a serious offense that also warrants revocation.

The public, in general, is significantly adversely affected by insurance fraud. New Jersey views insurance fraud as a serious problem to be confronted aggressively and it has a particularly

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<sup>12</sup> In its brief in support of its Motion for Summary Decision, the Department requested to amend the OTSC pursuant to N.J.A.C. 1:1-6.2(a) to add additional violations of N.J.S.A. 17:22A-40(a)(6), (7), (8), and (16) to Count Four. Department Brief in Support of Motion of Summary Judgment at 12-13. The ALJ found that Citron violated N.J.S.A. 17:22A-40(a)(6), but did not address whether the OTSC should be amended to include violations of N.J.S.A. 17:22A-40(a)(7), (8), and (16), and the Department did not take exception to this oversight in its Exceptions to the Initial Decision. Accordingly, this Final Decision and Order will not address this motion to amend the pleadings to include violations of N.J.S.A. 17:22A-40(a)(7), (8), and (16).

strong public policy against the proliferation of insurance fraud. Palisades Safety and Insurance Association v. Bastien, 175 N.J. 144, 150 (2003); Liberty Mutual v. Land, 2010 N.J. Super. Unpub. LEXIS 89 at \*15 (App. Div. 2010). Our strong policy is to instill public confidence in both insurance professionals and the industry as a whole. In re Parkwood Co., 98 N.J. Super. 263, 268 (App. Div. 1963).

Courts have long recognized that the insurance industry is strongly affected with the public interest and the Commissioner is charged with the duty to protect the public welfare. See Sheeran v. Nationwide Mutual Insurance Company, 80 N.J. 548, 559 (1979). Both insureds and insurers must place their trust in the information insurance producers convey to them. There can be no compromise in the level of honesty and integrity required of these professionals. See also Commissioner v. Ladas, OAL Dkt. No. BKI 0947-02, Initial Decision, (02/05/04), Final Decision and Order (06/18/04), Amended Final Decision and Order (06/22/04). A licensee's honesty, trustworthiness, and integrity are of paramount concern. The nature and duty of an insurance producer "calls for precision, accuracy and forthrightness." Fortunato v. Thomas, 95 N.J.A.R.2d (INS) 73 (1993). In addition, a licensed producer is better placed than a member of the public to defraud an insurer. Hence, a producer is held to a high standard of conduct, and should fully understand and appreciate the effect of fraudulent or irresponsible dealing on the industry and on the public. For these reasons and those that follow, I agree with the ALJ's findings that Citron's conduct demands the revocation of his producer license.

On January 4, 2016, Citron pled guilty to one count of insurance fraud in the third degree in violation of N.J.S.A. 2C:21-4.6 in relation to a claim for food spoilage after a power outage. As part of the plea, Citron admitted to making at least one false statement, that is "a telephone pole supplying power to the [insureds'] property had been knocked down by Hurricane Sandy." Initial



Decision at 4-5, quoting Initial Suspension Decision at 3, 4. As noted above, insurance fraud is a serious and significant infraction from which the public must be protected. Revocation has consistently been imposed upon insurance producers that engage in fraudulent acts and made false statements to insurance companies. See Commissioner v. Thomas Dobrek and Mr. Lucky Bail Bonds, Inc., OAL Dkt. No. BKI 00361-05, Initial Decision (12/26/06), Final Decision and Order (03/26/07) (revoking insurance producer's license and imposing monetary penalties totaling \$20,000 for violations of the Producer Act for, among other things, making materially false statements in an application to an insurance company); Commissioner v. Martini, OAL Dkt. No. INS 1874-96, Initial Decision (04/18/97), Final Decision and Order (06/10/97) (revoking the producer license and imposing a \$15,000 fine for Producer Act violations for committing insurance fraud by submitting a false claim to his insurance company); and Commissioner v. Clendenny, OAL Dkt. No. BKI 13102-15, Initial Decision (01/07/15), Final Decision and Order (04/01/16) (revocation of insurance producer license was appropriate where the Respondent omitted and misrepresented previous substantial losses on two separate insurance policy applications).

Further, as the cases cited by the ALJ demonstrate, revocation is appropriate in cases where insurance producers were convicted of crimes touching upon their licenses. Initial Decision at 13-14, citing, Commissioner v. Tuite and Rapid Release Bail Bonds, OAL Dkt. No. BKI 663-14, Initial Decision (03/17/16), Final Decision and Order (06/16/16); Commissioner v. Stone, OAL Dkt. No. BKI 6301-07, Initial Decision (06/16/08), Final Decision and Order (09/15/08); Commissioner v. Malek, OAL Dkt. Nos. BKI 4520-05 and BKI 4686-05, Initial Decision (12/06/05), Final Decision and Order (01/18/06) (revoking license and imposing maximum fine of \$15,000 for two acts related to insurance fraud, following conviction on theft-by-deception charge).

Citron also has also repeatedly failed to be forthright with the Department. He failed to inform the Department of administrative and criminal actions against him, including that on March 24, 2014, the State of Louisiana fined him \$250 for failing to inform the Louisiana Department of Insurance that his New York insurance producer license was revoked in 1993; and that he was indicted on February 5, 2015. In addition, Citron failed to disclose that his New York license was revoked in 1993 on his September 11, 2001 application for an insurance agent license to the State of Louisiana. Furthermore, Citron stated that he had not been convicted or charged with committing a felony on his July 15, 2015 New Jersey insurance producer license renewal application, when he had been indicted five months earlier.

In his Exceptions, Citron certified that the Initial Suspension Decision recognized his guilty plea constituted “one blemish in a thirty-four-year career in New Jersey alone.” Citron’s Exceptions Certification at ¶ 22, quoting Initial Suspension Decision at 6. Citron further certified that the Initial Suspension Decision found that “the Department did not show threat of immediate, direct harm to insured posed by lifting the suspension on [Citron’s] license”, found that Citron’s testimony was credible, and that the possibility of Citron “making a false statement to an insurance company during the time that the remainder of the proceedings take to complete is remote.” *Id.* at ¶ 23, quoting, Initial Suspension Decision at 16. Citron also certified that the Initial Suspension Decision found that the linkage between Citron’s statement to NJM and the cancellation of the policy by NJM was insufficient because it was not clear “what house, what policy, or what statements were involved.” *Id.* at ¶ 24, quoting, Initial Suspension Decision at 6.

Citron’s reliance upon the findings in the Initial Suspension Decision is misplaced because the Final Suspension Decision disagreed with and modified those findings. See Final Suspension Decision. Specifically, the Commissioner at that time disagreed with the Initial Decision’s

description of Citron's conduct as a "blemish on his career" because insurance fraud is a serious and significant infraction from which the public must be protected. Final Suspension Decision at 34. Further, the prior Commissioner found that the Department demonstrated that failure to suspend Citron's license would not only be harmful to the public interest but would also result in immediate harm to Citron's clients. Id. at 34-35. The Final Suspension Decision also found that Citron's false statements to NJM directly harmed his clients and caused NJM to cancel the insurance policy maintained by his clients. Id. at 35.

In its exceptions, the Department requested that the Initial Decision be modified to exclude Citron's public service work as a mitigation in the fourth factor of the Kimmelman analysis, and instead, be considered in mitigation of the analysis of the revocation of Citron's license. However, the Department argued that Citron's fraudulent conduct countermanded his public service and revocation was still appropriate. Department Exceptions Brief at 2-3, 5. I agree with the Department in that Citron's pro bono service should be considered in mitigation of license revocation, not monetary penalties. Citron's many hours of volunteering after Hurricane Sandy, helping homeowners determine coverage and file claims, is commendable. However, it is not enough to negate his fraudulent conduct.

Accordingly, based upon my review of the record, the Initial Decision, the parties' Exceptions thereto, and the parties' Reply Exceptions, I ADOPT the ALJ's recommendation that revocation is necessary and appropriate in this matter.

#### Monetary Penalty Against Citron

The Commissioner has broad discretion in determining sanctions for violations of the laws that 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. Strandkov, 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. The Fraud Act provides that civil monetary penalties may be imposed of not more than \$5,000 for the first violation, \$10,000 for the second violation, and \$15,000 for each subsequent violation. N.J.S.A. 17:33A-5(b).

As discussed above, under Kimmelman, certain factors must be examined when assessing administrative monetary penalties that may be imposed pursuant to the Producer Act. 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”). Based on her Kimmelman analysis, the ALJ recommended a total fine of \$10,000 in monetary penalties, which was allocated as follows: \$5,000 for the violation in Count Four and \$1,000 each for Counts One, Five, Six, Seven, and Eight. Initial Decision at 18.

The first Kimmelman factor addresses the good faith or bad faith of the violator. The ALJ found that Citron acted in bad faith when he committed fraud and when he failed to inform the Department of information as required. Initial Decision at 15. As noted above, Citron pled guilty to insurance fraud in the third degree in violation of N.J.S.A. 2C:21-4.6. Fraud is inherently committed in bad faith. Further, Citron failed to inform the Commissioner of administrative and criminal actions, despite his statutory obligations to do so on multiple occasions. He failed to inform the Commissioner that the Louisiana Department of Insurance took an administrative action against him for making a false statement on his application and he also stated that there were no pending felony charges against him on his 2015 license renewal application. He also

failed to inform the Louisiana Department of insurance that his insurance producer license in New York was revoked. These concealments also demonstrate bad faith on the part of Citron. This factor weighs in favor of a significant monetary penalty.

As to the second Kimmelman factor, the ALJ concluded that there was no evidence to support that Citron is unable to pay fines. While the ALJ noted the circumstances that Citron presented were “compelling,” the ALJ found that Citron did not demonstrate that he is without assets or income. Initial Decision at 15-16. In his Exceptions Certification, Citron avers that he is unable to pay heavy fines because he has been unable to find employment and does not have any savings since paying fines in the criminal case. Citron’s Exceptions Certification at ¶¶ 3, 8, 13, 14, 20. 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). Moreover, an insurance producer’s ability to pay is only a single factor to be considered in determining an appropriate fine and does not obviate the need for the imposition of an otherwise appropriate monetary penalty. Substantial fines have been imposed against insurance producers despite their arguments regarding their inability to pay. See Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11) (issuing a \$100,500 civil penalty despite the producer arguing that he was unable to pay); See also Commissioner v. Erwin, OAL Dkt. No. BKI 4573-06, Initial Decision, (07/09/07), Final Decision and Order (09/17/07) (fine of \$100,000 imposed despite evidence of the Respondent’s inability to pay); and Commissioner v. Malek, OAL Dkt. Nos. BKI 4520-05 and BKI 486-05, Initial Decision (12/06/05), Final Decision and Order (01/18/06) (fine increased from \$2,500 to \$20,000 even though the producer argued an inability to pay fines in addition to restitution).

Here, Citron indicates that he is unable to pay a monetary fine and offers reasons for his inability to pay substantial fines, including having a disabled wife who is unable to work, paying for medical expenses, and being unable to find employment that is not in the insurance field. I find that this is a mitigating factor, though it is only one. I also note that the fines recommended by the ALJ for Counts One, Five, Six, Seven, and Eight are far below the maximum amount that could be imposed under applicable laws.

The third Kimmelman factor addresses the amount of profits obtained or likely to be obtained from the illegal activity. 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. I agree with the ALJ that Citron profited from failing to inform the Commissioner of the administrative action in Louisiana in 2014. He further profited because he was able to maintain his license because he failed to inform the Commissioner of his indictment within 30 days and he failed to disclose that he had been charged with a felony on his July 15, 2015 license application. Had Citron satisfied his statutory reporting obligations as a licensee of this Department, he may have faced discipline and loss of his licensee and livelihood sooner. Accordingly, I find that this factor weighs in favor of a 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. "When insurance producers breach their fiduciary duties and engage in fraudulent practices and unfair trade practices, the affected insurance consumers are financially harmed and the public's confidence in the insurance industry as a whole is eroded." Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11). Here, Citron pled guilty to insurance fraud in the third degree in

violation of N.J.S.A. 2C:21-4.6. The public is significantly harmed when licensed insurance professionals engage in illegal and dishonest activity. Further, Citron sought to hide his fraudulent conduct from the Commissioner and failed to report that he had been indicted and stated on his license renewal application that there were no pending felony charges against him. He also failed to inform the Commissioner that he had been the subject of an administrative action in Louisiana for failing to disclose that his New York insurance license had been revoked on his Louisiana insurance producer license application. This behavior also harms the public because it allows unscrupulous individuals to continue to engage in the business of insurance and places consumers who deal with them at risk of harm from further misconduct.

As noted above, while Citron's hours of pro bono work after Hurricane Sandy are admirable, I find that such actions do not work to mitigate either the fines or revocation of his license.

In his Exceptions Certification, Citron certified that the \$5,000 monetary penalty for Count Four is excessive because the false claim for food spoilage only carried a maximum payout of \$500. Citron's Exceptions Certification at ¶ 21. As noted above, insurance fraud is a serious infraction and must be addressed accordingly. Therefore, I find that this factor weighs in favor of a significant 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. The longer the illegal conduct, the more significant civil penalties should be assessed. Ibid. As noted above, Citron neglected to inform the Commissioner of the administrative action in Louisiana in 2014. His license in this State was not suspended until two years later, on November 28, 2016 when the Department issued Order No.

E16-115, which immediately suspended Citron's insurance producer license pending the completion of the administrative proceedings on this OTSC. Final Suspension Order at 4. I agree with the ALJ that had Citron fulfilled his statutory obligation and informed the Commissioner of the action in Louisiana in 2014, he may have been subject to discipline at that time. Further, he did not inform the Commissioner of his Indictment in 2015 and denied that he had pending felony charges on his renewal application months after he was indicted. He also had the opportunity over the course of approximately a month to correct his false statement to NJM regarding the food spoilage claim, but persisted in maintaining that the power outage was due to a downed pole after Hurricane Sandy. Herbert Cert. Ex. 3 and Ex. 4. Accordingly, this factor weighs in favor of a monetary penalty.

The sixth factor is the existence of criminal actions and whether a civil penalty may be unduly punitive if other sanctions have been imposed. 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. Ibid. Here, Citron pled guilty to insurance fraud in the third degree and was sentenced to a term of probation of two years, which he completed early, and was ordered to pay \$2,500 in fines. Initial Decision at 17, Citron's Exceptions Certification at ¶ 10. This mitigates the need for extensive civil monetary penalties; however, I note that the penalties recommended by the ALJ are well-below the available statutory maximums and thus do not rise to the level of being unduly punitive. Citron certified that he should not be fined \$1,000 for the violation when he was only fined \$250 in Louisiana for the same violation. Citron's Exceptions Certification at ¶ 19. However, the size of the fine is not at issue. Rather, the issue is whether Citron fulfilled his statutory obligation under N.J.S.A. 17:22A-40(a)(19), and N.J.S.A. 17:22A-47(a) to inform the Commissioner of the



discipline in Louisiana. Citron did not fulfill that obligation. Accordingly, I find that this factor is neutral with regard to a 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 OTSC issued by the Department in 2015 was the first action the Department took against Citron. Accordingly, this factor does not weigh in favor of a larger monetary penalty.

Weighing all of the Kimmelman factors, and based upon the violations as set forth above, I ADOPT the recommendations of the ALJ that Citron shall pay \$10,000 in civil monetary penalties to be allocated as follows:

Count One: \$1,000 for having his New York insurance producer license revoked in violation of N.J.S.A. 17:22A-40(a)(2) and (9);

Count Four: \$5,000 for making a false statement to NJM regarding a food spoilage claim in violation of N.J.S.A. 17:33A-4(a)(1);

Count Five: \$1,000 for withholding information or making a material misstatement on his Louisiana insurance producer license regarding the revocation of his New York insurance producer license in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (15);

Count Six: \$1,000 for failing to notify the Department within 30 days of the disciplinary action by the Louisiana Department of Insurance in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (19), and N.J.S.A. 17:22A-47(a);

Count Seven: \$1,000 for failing to notify the Department within 30 days of his indictment for Insurance Fraud and Attempted Theft by Deception, in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (18); and

Count Eight: \$1,000 for intentionally withholding material information or making a material misstatement in an application for a license when he falsely stated that he had not been charged with committing a felony on his insurance producer renewal application, in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (15).

These penalties are necessary and appropriate under the above Kimmelman analysis given Citron's fraudulent statement to NJM and his pattern of failing to inform the Department of administrative and criminal actions against him. Moreover, these penalties demonstrate the appropriate level of opprobrium for such misconduct, and will serve to deter future misconduct by Citron and the industry as a whole. I also note it is far less than the Department could have requested under N.J.S.A. 17:22A-45, which allows the imposition of up to a \$5,000 fine for the first violation and up to a \$10,000 fine for any subsequent violations of the Producer Act. Further, a maximum penalty of \$5,000 for a violation of the Fraud Act (Count Four) is appropriate and consistent with prior actions against producers who make false statements to insurance companies. See Commissioner v. Clendenny, OAL Dkt. No. BK1 13102-15, Initial Decision (01/07/15), Final Decision and Order (04/01/16) (imposing a \$5,000 fine for each of two counts involving false statements to insurance companies in violation of the Fraud Act).

In its Exceptions, the Department requested the imposition of the costs of investigation in the amount of \$1,562.50 pursuant to N.J.S.A. 17:22A-45(c). Department Exceptions Brief at 2. The Department also requested a surcharge pursuant to N.J.S.A. 17:33A-5.1 of the Fraud Act. Id. at 4. Lastly, the Department requested \$10,000 in attorneys' fees pursuant to N.J.S.A. 17:33A-5(c). Ibid.

The ALJ did not recommend the imposition of any costs, surcharge, or attorneys' fees on Citron because the Department did not request those penalties in its Motion for Summary Decision.

Initial Decision at 18. The Department does not take exception to the ALJ's finding that the Department failed to request these penalties in its Motion for Summary Decision, rather the Department submitted the request, along with documentation regarding the amount of the costs of investigation and attorneys' fees, in its Exceptions. This is not the appropriate venue to seek these fines. Pursuant to N.J.A.C. 1:1-18.4(c), evidence not presented at the hearing should not be submitted as part of Exceptions to the Initial Decision. Because the Department did not request these additional fees and penalties in its Motion for Summary Decision, it should not have requested them in its Exceptions. The Department waived its right to these additional fees and penalties when it did not submit evidence in support of them in its Motion for Summary Decision. Accordingly, I reject the Department's request to impose these additional fees and penalties.

#### CONCLUSION


Having carefully reviewed the Initial Decision, the parties' exception and the replies thereto, and the entire record herein, I hereby ADOPT the Findings and Conclusions as set forth in Initial Decision, except as modified herein. Specifically, as to Count One I ADOPT the ALJ's conclusion that Citron violated N.J.S.A. 17:22A-40(a)(2) and (9). As to Count Four, I ADOPT the ALJ's conclusion that Citron violated N.J.S.A. 17:33A-4(a)(1). As to Count Five, I ADOPT the ALJ's conclusion that Citron violated N.J.S.A.17:22A-40(a)(2), (8), and (15). As to Count Six, I MODIFY the Initial Decision to specifically find that Citron violated N.J.S.A.17:22A-40(a)(2), (8), and (19), and N.J.S.A. 17:22A-47(a). As to Count Six, I also MODIFY the Initial Decision and find that Citron did not violate N.J.S.A. 17:22A-40(a)(18) as found by the ALJ. As to Count Seven, I ADOPT the ALJ's conclusion that Citron violated N.J.S.A. 17:22A-40(a)(2)(18) and I MODIFY the Initial Decision to specifically find that Citron also violated N.J.S.A. 17:22A-40(a)(2) and (8). As to Count Eight, I ADOPT the ALJ's finding that the Department met its burden, and I MODIFY the Initial Decision to specifically find that Citron violated N.J.S.A.

17:22A-40(a)(2), (8), and (15). Lastly, I MODIFY the Initial Decision to amend the pleadings and FIND a violation of N.J.S.A. 17:22A-40(a)(6).

I further ADOPT the recommended civil monetary penalty and ORDER Citron to pay a total of \$10,000 in civil monetary penalties allocated as follows: \$1,000 for having his New York insurance producer license revoked in Count One; \$5,000 for intentionally making a false statement to NJM regarding a food spoilation claim in Count Four; \$1,000 for failing to disclose the revocation of his New York insurance license on his Louisiana insurance agent license application in Count Five; \$1,000 for failing to notify the Department within 30 days of the disciplinary action by the Louisiana Department of Insurance in Count Six; \$1,000 for failing to notify the Department within 30 days of his indictment for Insurance Fraud and Attempted Theft by Deception in Count Seven; and \$1,000 for intentionally withholding material information or making a material misstatement in an application for a license when he falsely stated that he had not been charged with committing a felony on his insurance producer renewal application in Count Eight.

Lastly, I ADOPT the conclusion in the Initial Decision that revocation of Citron's insurance producer license is the appropriate and necessary sanction and hereby ORDER the revocation of Citron's license effective as of the date of this Final Order and Decision.

It is so ORDERED on this 10<sup>th</sup> day of May 2019.

  
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Marlene Caride  
Commissioner

JD Citron FO/Final Orders