

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION**

In the Matter of) **PROPOSED ORDER**
)
BARBARA J. SICHENEDER,)
Licensee.) Case No. INS 0703010

On April 2, 2007, the Insurance Division of the Department of Consumer and Business Services (hereinafter the “Division”) issued a Notice of Proposed Action to Barbara J. Sicheneder (Licensee), seeking revocation of her insurance producer license. Licensee requested a hearing on the Notice, and the matter was referred to the Office of Administrative Hearings (OAH), on April 25, 2007.

The hearing initially convened on August 15, 2007, in the OAH offices on Cherry Avenue in Salem. Administrative Law Judge Rick Barber presided over the hearing. Licensee was present for the hearing, and was represented by attorneys Adam Gould and Roger Gould. The Insurance Division was represented by Judith Anderson, Assistant Attorney General. Ruth Johnson was the Division’s representative. On the first day of hearing, the following individuals testified for the Division: Ruth Johnson, Norma Fitzgerald, Tim Taylor, Dolores Hart, Ross Hart, Ralph King, and Roberta Taylor.¹ Willard “Dale” Poyer, Evelyn Wechter, Bruce Wechter, David Robertson, Robert Wright, Delphine Wallace, Tom Melville, and Mitch Curzon all testified for Licensee. The hearing was continued for the taking of additional testimony.

Hearing reconvened on November 15, 2007, at the same location, and further testimony was taken from Robin Grier, Licensee, and Ruth Johnson. The evidentiary record closed on that date, but the record was held open for written closing arguments. The last of those arguments was received on December 19, 2007, and the hearing record closed on that date.

ISSUES

1. Whether Licensee violated ORS 746.075(2)(c) (making false or misleading representations about the financial condition of an insurer when trying to sell insurance) in her contact with the Fords and the Kings.

2. Whether Licensee violated ORS 744.074(1)(h) (using fraudulent, coercive or dishonest practices or demonstrating incompetence, untrustworthiness in business practices) in her contacts with Roberta Taylor and the Harts.

¹ The Harts, Mr. King, and Ms. Taylor all testified by telephone.

3. Whether Licensee violated ORS 744.074(1)(k) (forging a name on an application on an insurance document) in her contact with the Harts.

4. If Licensee violated any of the rules noted above, whether revocation of her producer license is the appropriate sanction?

Licensee raised five affirmative defenses, only three of which will be addressed in this order: 1) Retaliation; 2) Estoppel; and 3) Mitigation.²

EVIDENTIARY RULINGS

On the first day of hearing, the Division offered Exhibits A1 through A39 and Licensee offered Exhibits B1 through B27 into evidence. All exhibits were admitted into evidence without objection, with the exception of Exhibits B1, B10, B11, B12 and B25. B1 was withdrawn based upon a stipulation (noted below), and B12 was excluded because it was an unsigned affidavit and because it was not relevant to the case. All other objections were overruled and the documents admitted into evidence.

On the second day of the hearing, three additional documents were introduced into evidence. Due to a numbering error on my part, another Exhibit A39 was received, along with A40 and A41. For clarity's sake, the new Exhibit A39 (an email from Jack Mackin to Ruth Johnson), is now renumbered AA39. All three of the new documents were admitted into evidence.

In addition to the exhibits, the following procedural documents were designated part of the documentary record: The Notice of Proposed Action (P1), the Request for Hearing (P2), the Notice of Hearing (P3), relevant statutes (P4), Notice of Defenses (P5), Gould letter of August 7, 2007 (P6), Updated Witness List (P7), and the Gould letter of August 14, 2007 (P8). Licensee's Closing Argument is designated P9 and the Division's Closing Argument is P10.

STIPULATIONS

1. The parties stipulate that Licensee's tort claim notice is dated March 26, 2007; as a result, Exhibit B1 is withdrawn (i.e. is not being offered as evidence in this case).

2. The parties stipulate that Exhibit B15 was sent from Adam Gould to witness Tom Melville.

3. The parties stipulate that, if Gloria Kohl and Helen Jackson were called to testify, they would attest to their satisfaction with Licensee as their insurance agent in essentially the same fashion as the testimony of Evelyn Wechter, Bruce Wechter, David Robertson, Robert Wright, and Delphine Wallace.

² Two defenses, violation of due process and privilege, were withdrawn during the hearing.

FINDINGS OF FACT

1. Licensee has been a licensed insurance producer in Oregon since 1999. At all times pertinent to this proceeding, Licensee worked for Pyramid Life (Pyramid). Licensee previously worked for Banker's Life (Bankers) selling Medicare supplements, life insurance and annuities. The majority of Licensee's business is the sale of Medicare supplements, and most of Licensee's clients are senior citizens. (Test. of Licensee).

2. On August 14, 2003, an Insurance Division representative wrote to Licensee about a complaint filed by M. Maki. One of the matters brought to Licensee's attention was the allegation that she had been talking to clients about the possible financial insolvency of a competitor company, Bankers. Licensee was given a copy of the statute and warned not to make such comments about Bankers. (Ex. A34). On June 10, 2004, Investigator Ruth Johnson wrote to Licensee to say that the investigation was ending, but that she would be monitored for other similar complaints. (Ex. A35).

King Complaint

3. On March 3, 2005, Ralph, Bertha June and Kim King filed a complaint against Licensee with the Insurance Division. The complaint was based upon a February 25, 2005 home visit by Licensee and a trainee. The Kings at first thought Licensee was an employee of Medicare. (Ex. A5). Licensee was attempting to sell a Medicare supplement policy to the Kings, who already had a similar policy with Bankers. Licensee told the Kings that Bankers was a weak company financially, and that it was expected to "go under" by the end of the year. (Ex. A4, A5).

4. Licensee presented highlighted documents from her sales binder, showing inaccurate information about Bankers. She showed the Kings a 2002-2003 Weiss rating report, giving Bankers a low grade (E) for long term care insurance. Licensee did not show the Kings any other Weiss ratings, such as those for Medicare supplement insurance, nor did she show them the ratings of other reputable services, such as Fitch, Standard & Poor, or Best. (Ex. A7 at 5). Licensee knew she was showing the Kings a long term care insurance rating, and that it had nothing to do with Medicare supplements. (Ex. A8 at 17, 18). The other rating services rated Bankers as BBB or BB+ for that period of time. (Ex. A9, A10, A11).

5. After making the comments about Bankers, Licensee asked the Kings about their health issues and found out that they did not qualify for any of the products she sold. She ended the appointment, but the Kings were left wondering about the financial stability of Bankers, their insurer. The Kings contacted Bankers to ask their agent about the financial issues, and their agent told them Licensee had been untruthful. The agent suggested contacting the Insurance Division about Licensee's comments. Bertha June King did so in a letter drafted by her daughter, Kim, commenting that she thought it inappropriate to "bad-mouth one company in order to scare people into going with your company." (Ex. A4 at 2). The Division opened an investigative file on this complaint. (Test. of Johnson).

Ford Complaint

6. On March 31, 2005, Jack and Betty Ford filed a complaint against Licensee, stemming from a sales presentation Licensee made to them on February 1, 2005. The Fords were insured through Bankers. Licensee told the Fords that Bankers had been in financial trouble in the past and was going to be in trouble again very soon. She said Bankers was on the watch list, and that premiums were expected to rise 20 percent as a result. Licensee showed the Fords the E-rated long term care page from Weiss (the one described in the King complaint), and did not show them any other ratings. (Ex. A8 at 10-22). Licensee persuaded the Fords to cancel their Bankers Plan F policy and purchase a Plan G policy from Pyramid instead. (Ex. A3). After selling the insurance, Licensee had the Fords sign a bank draft cancellation form to stop the automatic withdrawal of the Bankers premium. (Ex. A8 at 26).

7. Dale Poyer was a Bankers agent at the time, and he was sent by Bankers to meet with the Fords. Bankers considered the Fords as “orphans,” meaning they were no longer insured, but the company wanted to know why the Fords were switching from a Plan F to a Plan G, and from Bankers to Pyramid. Poyer met with the Fords and they told him what Licensee had said about Bankers’ poor performance. Poyer told them that the information was incorrect, but Mr. Ford asked Poyer why they should believe him and not Licensee. Poyer recognized there was no good reason for them to believe him instead of Licensee, so he suggested that they contact the Insurance Division to find out the truth. Poyer helped them write the letter, which states in part:

What I would like to know from you is. Is Bankers Life on the brink of Bankruptcy? If they are not about to go Bankrupt is it appropriate for a agent from one company to tell Senior citizens such as we that our current company is going to go Bankrupt if it really is not? That news is a little unnerving when you are retired with a some what fixed income.

I would also like to know if Bankers Life is about to raise our premiums by 20%. I would also like to know if Bankers Life and Casualty Company is about to go bankrupt?

(Ex. A3 at 2).

8. Licensee responded to the Ford’s complaint by writing: “This complaint is an entire fabrication of facts. None of this happened. Not one word of this complaint is true.” Licensee wrote that she showed the Fords “ratings from all the ratings firms for Bankers”, and suggested that the source of the complaint was the Bankers agent, who had coerced the Fords into signing the complaint. (Ex. A6).

Hart Complaint

9. On November 18, 2005, Ross and Dolores Hart filed a complaint against Licensee, arising from a presentation that Licensee made in the Harts' home on August 31, 2005. Karri Anderson, Licensee's niece and a sales trainee, accompanied Licensee to the Harts' home. At the time of the visit, the Harts were insured by Mutual of Omaha, with a Plan F policy. Licensee sold the Harts a Plan G policy, indicating it would be better coverage at a lower premium. The Harts bought the insurance in part because Licensee told them that only five insurance companies would be able to sell the new Medicare Part D coverage when it was available, and the Harts were led to believe that they could not get it from their regular insurer, and could only get it from Licensee if they purchased the Plan G Medigap coverage. (Ex. A12).

10. After the sale, the Harts indicated that they were going to contact their Mutual of Omaha agent to let him know of the cancellation. Licensee told them that she would "handle it." Licensee sent a notice in the Harts' names to Mutual of Omaha, advising of the cancellation of the policy and instructing Mutual to put the Harts on a "do not call" list, forbidding its agents from coming into the home. There are signatures, "Ross C. Hart" and "Dolores M. Hart," on the form. (Ex. A12 at 4). The Harts did not sign the document. (Test. of Ross and Dolores Hart). Licensee filled out the form and had it in her possession. (Ex. A14 at 22).

Taylor Complaint

11. On August 31, 2005, the same day as the presentation to the Harts, Licensee and Anderson met with Roberta Taylor to make a sales presentation. Taylor had a Blue Cross Blue Shield (BCBS) individual health insurance policy that included a 50 percent prescription benefit; she was frustrated with the high cost of insurance and filled out a lead card that led to Licensee's visit. (Ex. A28). Licensee believed the existing policy was a railroad retirement policy. (Ex. A29 at 10). During the visit, Anderson filled out the paperwork as part of her training, but Licensee was the agent making the sale. (Ex. A14 at 27; A29 at 32, 40).

12. Licensee asked Taylor for a copy of her policy, but Taylor did not have the policy with her. Licensee accepted Taylor's inaccurate explanation of the policy (she said it was a railroad retirement policy, with a \$600-plus monthly premium, and some prescription coverage), as accurate. Licensee never saw Taylor's policy. Licensee asked to see Taylor's prescription medications, and was shown three or four inexpensive prescriptions. Licensee did not see all of Taylor's prescriptions, including the more expensive ones. Licensee wrote a Penn Life Plan G policy for Taylor, eliminating her prescription benefit from the other policy, and indicated on the form that the change in policy was for an "additional benefit at lower cost." (Ex. A33). A Plan G has less benefits and less premiums than a Plan F. (Test. of Fitzgerald and Tim Taylor).

13. As a result of canceling the previous policy and purchasing Licensee's product, Taylor had to pay \$750.40 of prescription expenses she would not have had to pay under the BCBS policy. (Ex. A21). After the complaint was filed by Taylor, Penn

Life reimbursed BCBS for the amount of additional prescription expenses, on Taylor's behalf. (Ex. A26).

14. In response to the complaint, Licensee claimed that Taylor did not knowingly file the complaint. (Ex. A27). Licensee attributed the Taylor complaint, as well as the Hart complaint, to Clayton Netzel, a Brookings insurance agent. Licensee stated she had read Taylor's insurance policy, (Ex. A30), but later stated she never saw the policy. (Test. of Licensee).

15. Licensee served a Tort Claim Notice on the Department of Human Services on March 26, 2007. (Stipulation). Ruth Johnson had continued her investigation of Licensee, receiving complaints from the Kings, Fords, Harts and Ms. Taylor. The Taylor complaint, the last one received by Ms. Johnson, was received in April 2006. Ms. Johnson submitted her investigative report to Bill Karakelas in January 2007. Karakelas passed the report to his superior, Lydon, and Lydon passed it to Mitch Curzon some time in March 2007. (Test. of Johnson). Curzon met with some people to discuss the case in March 2007, and a decision was made to seek revocation of Licensee's producer license. Curzon did not know about the Tort Claim Notice at the time the revocation decision was made. (Test. of Curzon).

16. Licensee resigned her position with Pyramid in August 2007. If she had not resigned, Pyramid would have terminated her employment for cause. (Ex. AA39).

CONCLUSIONS OF LAW

1. Licensee violated ORS 746.075(2)(c) (making false or misleading representations about the financial condition of an insurer when trying to sell insurance) in her contact with the Fords and the Kings.

2. Licensee violated ORS 744.074(1)(h) (using fraudulent, coercive or dishonest practices or demonstrating incompetence, untrustworthiness in business practices) in her contacts with Roberta Taylor, the Harts and the Kings.

3. The Division failed to prove that Licensee violated ORS 744.074(1)(k) (forging a name on an application on an insurance document) in her contact with the Harts.

4. The appropriate sanction in this case is revocation of Licensee's producer license.

OPINION

The Division contends that Licensee's producer license should be revoked because of her interactions with several clients: the Kings, the Fords, the Harts and Roberta Taylor. As the proponent of those contentions, the Division has the burden of

producing evidence to support its case. ORS 183.450(2). For the reasons following, I conclude that the Division has proved its case, in all but one particular.

The Division has alleged violations of several different statutory provisions. I am going to address the violations by statute rather than by party; in other words, I will discuss all alleged violations of each statute together rather than discussing each of the alleged violations by complainant. This will allow a better discussion of each of the allegations, and what Licensee did or failed to do.

AFFIRMATIVE DEFENSES

However, before addressing those issues I will discuss the affirmative defenses alleged by Licensee to determine their applicability in this case. There are three surviving affirmative defenses alleged by Licensee.

Estoppel. Of the three remaining, one is easily disposed of. Licensee did not present any evidence supporting her estoppel defense, and did not argue the defense in closing argument. The estoppel defense is considered withdrawn.

Mitigation. One of the two affirmative defenses Licensee actively argued was mitigation. Licensee presented testimonials from several of her insurance clients to show that she had “satisfied customers” who would be hurt if she was to lose her license. (Ex. B25). I have no reason to doubt the credibility of any of the people who prepared the written testimonials on Licensee’s behalf, nor any reason to doubt the credibility of those who testified.

However, the issue in a licensing sanctions case is whether Licensee violated the statutes in specific situations. Presenting evidence to show times when Licensee did not violate the statutes is ultimately not very helpful in addressing the specific times when she did, or allegedly did, violate the statutes. Therefore, while I consider the mitigation evidence somewhat helpful in general terms, the evidence does not really mitigate the accusations before me.

Furthermore, although Licensee makes the argument that her satisfied customers testified in person while some of the complainants testified by telephone, (Arg. at 8), I do not attach any special significance to the *method* of testifying, whether it be in person or by phone. No objections were made concerning telephone testimony. With the exception only of Licensee, whose credibility is addressed in the discussion below, I found that the witnesses on the phone and in person all testified credibly.

Retaliation. The other affirmative defense presented and argued by Licensee alleges that the Notice of Revocation sent to Licensee was initiated in response to her Notice of Tort Claim filed on March 26, 2007. Licensee relies upon *Soranno’s Gasco Inc. v. Morgan*, 874 F 2d 1310 (9th Cir CA, 1989), for the proposition that the Division’s revocation proceeding was initiated in retaliation for the tort claim notice, thereby violating Licensee’s constitutional rights. Licensee argues that it has established a cause

and effect relationship between the tort claim notice and the revocation notice, and that it has shown “the public body’s desire to maximize harm.” (Arg. at 1).

The Division argues that *Soranno’s* is an interpretation of California law and is inapplicable to matters in Oregon. Furthermore, it argues that Licensee has failed to show a cause and effect between the tort claim notice and the revocation notice. I agree that there is no case law applying *Soranno’s* in Oregon, and I question its application. However, regardless whether the case applies in Oregon, the facts do not support the causal connection alleged by Licensee.

Licensee argues that the timing of the two notices creates an inference of a causal relationship:

The Tort Claims Notice was dated March 26, 2007, and the Notice of Enforcement Action was filed one week later. One week later, for conduct that allegedly last occurred in December of 2005. *It can be inferred* from the timing of this enforcement action that it was brought in retaliation of Ms. Sicheneder’s exercise of protected speech.

(Arg. at 2; emphasis added). Licensee’s argument, without further evidence, is an example of the logical fallacy known as “*Post hoc.*”³ The argument that two events following close in time establishes that the first caused the second, again without any evidence in support, has been called a “specious doctrine” by the Oregon Supreme Court. *Horn v. National Hospital Association*, 169 Or 654, 679 (1942). In essence, chronology does not prove causation.

Licensee argues the inference, contending that she has been prevented from proving her case because the Division refuses to give her access to internal memoranda that might show the connection. Then Licensee argues that the “documents were not produced because they do not exist.” (Arg. at 7). This is not a case where Licensee has presented evidence of smoke and is inferring there was a fire; this is a case where there is no smoke and no fire—and Licensee is suggesting that the very lack of smoke is proof of the fire.

The record indicates that the investigation of the complaints against Licensee had been going on for a considerable period of time, long before the tort claim was filed. Curzon testified that he knew nothing of the Tort Claim Notice at the time he decided to pursue revocation, and I have no basis to dispute his testimony.

Licensee urges me to disregard Curzon’s testimony on the basis of his demeanor:

Mitch Curzon is the Chief Enforcement Officer, who’s job title is now Administrative Law Specialist. Mr. Curzon has been with the agency for nearly 20 years. He has a law degree. He has no doubt testified many times before in many proceedings. It is interesting then, that he seemed so

³ In the Latin, *Post hoc ergo propter hoc*, (after this, therefore because of this).

frightened and confused on the stand. His testimony lacked confidence and he frequently contradicts himself and claims to recall facts and situations he should have no problem recalling in detail.

(Arg. at 6). Licensee’s argument assumes facts not in evidence and argues conclusion without any factual support.

It was clear in the hearing that Licensee was trying to evoke a response from Curzon and was frustrated when she could not:

Mr. Curzon’s reaction to these charges is not anger or indignation, even though his integrity is being called into question. His demeanor can more aptly be described as trepidation. In addition, when called upon to describe the events and documents that can refute these serious charges, he struggled to recall almost any significant occurrence with confidence.

(*Id.*). In essence, Licensee’s argument is that Curzon is not credible because he did not respond when “his integrity [was] being called into question.” However, no evidence was presented to put Curzon’s credibility into question. I concluded that Curzon testified appropriately, and credibly.

What Licensee fails to acknowledge in her argument is the fact that *Licensee* subpoenaed Curzon to the hearing—a personal subpoena that failed to request that he bring any specific documents and failed to ask him to review specific documents. There was nothing in Curzon’s demeanor that would affect his credibility. Curzon testified cautiously, trying to answer questions about documents he had reviewed months earlier, and trying to address what his state of mind was at that time. As I stated earlier, I have no basis to discount his testimony, and I accept it as credible.

Licensee has failed to establish even the inference that the revocation notice was sent out in retaliation for the Tort Claim Notice. Accordingly, even if *Soranno’s* is good law in Oregon, and even if retaliation was an actual affirmative defense,⁴ the facts of the case fail to establish the requisite cause and effect.

THE ALLEGED VIOLATIONS

Violations of ORS 746.075(2)(c). Licensee is accused of violating the misrepresentation statute, which states in part:

Misrepresentation generally. (1) A person may not engage, directly or indirectly, in any action described in subsection (2) of this section in connection with:

- (a) The offer or sale of any insurance; or
- (b) Any inducement or attempted inducement of any insured or

⁴ Even if retaliation was proved, I would still have to review the allegations of violation of portions of the Insurance Code. Therefore, it would technically not be an affirmative defense.

person with ownership rights under an issued life insurance policy to lapse, forfeit, surrender, assign, effect a loan against, retain, exchange or convert the policy.

(2) Subsection (1) of this section applies to the following actions:

* * *

(c) Making any false or misleading representation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates[.]

ORS 746.075. Under this statute, a person violates the law if she attempts to sell an insurance policy by providing inaccurate information about the financial condition of a competitor.

The evidence in this case shows that Licensee repeatedly violated the law in this fashion. With both the Fords and the Kings, Licensee went into their home and presented documentary evidence—inaccurate documentary evidence—that the customer’s current insurer was an extremely poor risk. In both homes, Licensee showed a Weiss rating sheet about an unrelated type of insurance to demonstrate to the customer just how bad an insurance company Bankers was. The rating sheet, more than two years old at the time she showed it, gave Bankers an E (poor) rating for long term care insurance. Other rating services for the correct time (early 2005), were giving Bankers a BBB or BB+ rating, significantly higher. (Ex. A9, A10, A11).

Neither the Fords nor the Kings were sophisticated purchasers. The Kings were distressed by Licensee’s comments, especially after Licensee determined she could not insure them. After Licensee left them, the Kings contacted the Insurance Division to determine if there was any truth in what Licensee told them. (Ex. A4).

The Fords actually bought a policy from Licensee based upon her representations that Bankers was a company in trouble, that its premiums were going to rise 20 percent, and also based upon her statement that only a few companies could sell Medicare Part D. The Fords believed they needed to buy the Plan G policy from Licensee in order to be able to purchase the Part D. It was at that point they met Dale Poyer.

Poyer was Licensee’s witness at the hearing, but his testimony actually provided excellent evidence of Licensee’s violations in the Ford case. Bankers sent Poyer to visit the Fords, to find out about the cancellation of the policy. He encountered the Fords after they had been given negative information about Bankers, their former insurer, and did not know whether to believe him or Licensee about the issue. Poyer wisely recognized that someone more impartial would be a better source for answers to the Fords’ questions, and helped them write a letter to the Division. The Fords’ letter poignantly shows the fear and confusion Licensee caused when she spoke negatively about Bankers. (Ex. A3).

Licensee’s response to the evidence in the Ford case is confusing. She initially alleged that the Fords had made up the entire story: “This complaint is an entire fabrication of facts. None of this happened. Not one word of this complaint is true.”

(Ex. A6). However, her own witness at hearing established that the allegations were, in fact, entirely true. Licensee's only response to the Poyer evidence at hearing was to testify that those negative documents about Bankers are no longer in the sales presentation. This evidence does not contradict the fact that inaccurate evidence was provided to clients before, and that it was used to convince the Fords and others to leave Bankers and buy a different product. The evidence establishes that Licensee violated ORS 745.075(2)(c) in her presentation to the Kings and her presentation to the Fords.

These violations are particularly disturbing given the warning Licensee received about the same actions in the Maki matter in 2003 and 2004. Licensee was instructed at that time not to make disparaging comments about Bankers. (Ex. A34). Yet her meetings with the Kings and the Fords demonstrate she was still doing the same thing in 2005. This is an important factor in my review of the sanction the Division is proposing.

Violation of ORS 744.074(1)(h). The Division has accused Licensee of using fraudulent, coercive or dishonest marketing practices in the complaints filed by the Harts and Ms. Taylor. The statute states in part:

Authority of director to place licensee on probation or to suspend, revoke or refuse to issue or renew license. (1) The Director of the Department of Consumer and Business Services may place a licensee on probation or suspend, revoke or refuse to issue or renew an insurance producer license and may take other actions authorized by the Insurance Code in lieu thereof or in addition thereto, for any one or more of the following causes:

* * *

(h) Using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere.

ORS 744.074(1)(h).

The Harts. The Division alleges that Licensee violated this statute in her dealings with Roberta Taylor and the Harts. With the Harts, Licensee persuaded them to change their Medicare supplement from a Plan F to a Plan G. The testimony of Ms. Fitzgerald and Mr. Taylor, both very experienced in the selling of Medicare supplement policies, establishes that the Harts were giving up much of their coverage when they made the switch. On the replacement statement, Licensee wrote⁵ that the Harts were receiving "additional benefits and lower premium." (Ex. A13 at 6). However, the correct designation was fewer benefits and lower premiums. (Test. of Fitzgerald, Taylor).

Licensee argues that there is an additional benefit involving in home care with the Plan G. However, the evidence from Taylor and Ms. Fitzgerald indicates it is of little

⁵ Technically, it was her trainee that wrote the application. However, since Licensee was the selling agent and had a responsibility to make sure all information was accurate, I attribute the document to her.

value, and that they almost never sell a Plan G because of the decrease in benefits from a Plan F. (Test. of Fitzgerald, Taylor).

Licensee showed a level of incompetence in her dealings with the Harts, and she also misled them. She told the Harts that only five companies would be marketing the Medicare Plan D, and led them to believe that their current insurer was not one of them, and that they needed to buy the Plan G from her in order to be able to get the Plan D when it was available. It is unclear whether this information was intentionally false, or whether Licensee made the misrepresentations in ignorance. Either way, the Division has proved a violation of the statute.

Roberta Taylor. Licensee argues that Ms. Taylor did not really make a complaint against her, and that it was the idea of a competitor agent, Clayton Netzel. The evidence shows that Ms. Taylor's son's letter was written by Netzel, and other documents were faxed from Netzel's office. However, Ruth Johnson (the person receiving the complaints) verified with Ms. Taylor (and her son) that it was her complaint. Most importantly, Ms. Taylor affirmed in her testimony that she intended to file the complaint. (Test. of R. Taylor).

When Licensee met with Ms. Taylor, she replaced Ms. Taylor's individual Blue Cross Blue Shield medical plan with a Medicare Supplement plan that did not have prescription coverage. As a result, Ms. Taylor lost over \$750 of prescription costs.⁶

As I have reviewed the facts in Ms. Taylor's case, it appears that she was very ready to purchase the new insurance because she did not want to keep paying the premiums she was paying. In other words, I have no doubt that Ms. Taylor was putting pressure on Licensee to sell the product.

However, Licensee is the professional in this matter. Especially with vulnerable senior citizens, who may not have a good understanding of their insurance needs and may be frustrated by high insurance costs, Licensee had a responsibility to make sure that the product she sold was what the client needed. In this case, that did not happen. Licensee made several important errors in this case. First, she made an assumption about the type of policy Ms. Taylor had; she believed it was a railroad retirement policy, mirroring a Medicare supplement. In fact, it was an individual health policy.

Second, she took the client's word for the type of policy without actually reviewing the policy. This is an important point because it was essential for her to review the policy in order to know what Ms. Taylor needed. Licensee's failure to review the policy, and her earlier statement that she had read it, is also important because it demonstrates a lack of accuracy in Licensee's reporting that affects her credibility.

When the Division contacted Licensee about her meetings with Ms. Taylor, Licensee indicated she had reviewed the insurance policy. (Ex. A30). In an interview in

⁶ Licensee correctly notes that Pyramid paid those costs for Ms. Taylor. While true, that fact does not affect my review of the damage caused by Licensee's actions.

late August 2006, though, she admitted she had never seen the policy. (Ex. A29 at 8). I am concerned about how long it took for her to admit she did not see the policy. I find it difficult to believe that Licensee would suddenly remember, many months later, that she had actually not reviewed the policy.

Third, she did not review all of Ms. Taylor's prescription medications to determine whether switching the policy would be in her benefit. Ms. Taylor showed her a few inexpensive medications, but never gave her a list. The few medications shown to her were incomplete, and did not include the expensive ones.

Fourth, she incorrectly filled out the application. When asked if there was a Medicare supplement in force, she marked "yes." The correct answer was "no," since the policy in force was not a Medicare supplement. Finally, as with the Harts, Ms. Taylor was led to believe that she could only buy a Part D plan (when available) from Licensee because only a few companies could carry it.

In the Taylor matter, Licensee's actions are best described as incompetent. In her apparent rush to make the sale to Ms. Taylor, she neglected to perform her duties appropriately. This led to a loss by the client and, eventually, by Licensee's own company when they reimbursed Ms. Taylor for her losses. The Division has again shown a violation of the statute.

Violation of ORS 744.074(1)(k). Finally, the Division alleges that Licensee forged the names of Ross and Delores Hart on a Request to Cancel that was sent to Mutual of Omaha. Licensee acknowledges filling out the form and admitted she had it in her possession, but states the Harts signed the document. The Harts adamantly deny signing the document, although they signed other documents that day.

The statute states in part:

Authority of director to place licensee on probation or to suspend, revoke or refuse to issue or renew license. (1) The Director of the Department of Consumer and Business Services may place a licensee on probation or suspend, revoke or refuse to issue or renew an insurance producer license and may take other actions authorized by the Insurance Code in lieu thereof or in addition thereto, for any one or more of the following causes:

* * *

(k) Forging another person's name to an application for insurance or to any document related to an insurance transaction.

ORS 744.074(1)(k).

I have reviewed the signatures on the form with other examples of the Harts' signatures,⁷ and I am convinced (as a layman) that the signatures on the form in question are not theirs. I conclude, therefore, that the signatures on the document were forged. However, there is a difference between proving that a document was forged and that a specific individual committed the forgery. In this case, although it appears the document was in the possession of Licensee during the period in question, and it even appears there was a good possibility that she affixed their forged signatures to the document, there is insufficient proof to establish that she *probably* did it.⁸ Without more evidence, I conclude that forgery by Licensee has not been established.

In summary, I conclude the Division has established all of its allegations with the exceptions of proving that Licensee was the one who forged the Harts' signatures on the Mutual of Omaha cancellation form. Accordingly, sanctions are in order.

THE SANCTIONS

The statutes quoted above give the Director the right to revoke, suspend, or provide other sanctions against licensees who violate their responsibilities as insurance producers. Since it is the Director who has that right, I look to determine whether the proposed discipline matches the types of violations that are established. This can be a difficult task since there are no clear standards by which to judge the type of discipline imposed.

In the present case, however, the number of violations and the nature of the violations lead me to conclude that the Director is justified in imposing revocation of Licensee's producer license. Even without the forgery allegation, there are so many violations of the statutes that I consider the Director's decision to seek revocation to be justified and propose to affirm it. I give special consideration to Licensee's repeated use of inaccurate information concerning Bankers Life, even after the Division warned her to stop.

I am mindful of the many supporters who traveled to testify on Licensee's behalf, and I recognize that they will have to establish new relationships with insurance producers. I do not take their comments of support lightly, but as explained above, the focus of this case is on the matters where Licensee failed to do her job well. The standard is most definitely not perfection; no one could meet that standard. However, as a professional, Licensee was failing to meet the statutory standard far too often, even after having been warned about her actions. In these circumstances, I conclude that revocation is the appropriate result.

⁷ The forgery is Exhibit A12 at 4. I have compared it to their signatures on Exhibit A12's complaint and also to those in Exhibit A32.

⁸ I am applying a preponderance standard of proof to the forgery question, not the more rigorous criminal standard of proof.

PROPOSED ORDER

I propose that the Division issue the following order finding:

That the Notice of Revocation dated April 2, 2007 should be AFFIRMED.

/s/ Rick Barber
Rick Barber
Administrative Law Judge

Date Issued: February 5, 2008

Notice of Right to File Exception to Proposed Order

If the proposed order is adverse to a party, then the party has the right to file written exceptions to the order and present written argument concerning those exceptions pursuant to ORS 183.460. A party may file the exceptions and argument by sending them to the Insurance Division by delivering them to the Labor and Industries Building, 350 Winter Street NE, Room 440 (4th Floor), Salem, Oregon; or mailing them to P.O. Box 14480, Salem, Oregon 97309-0405; or faxing them to 503-378-4351; or e-mailing them to mitchel.d.curzon@state.or.us. The Insurance Division must receive the exceptions and argument within 30 days from the date this order was sent to the party.