

**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**  
 )  
 **DARLENE J. RETHWILL, and** )  
 **Trautman, Perrin & Hale Insurance, Inc.** ) Case No. INS 0711007

On November 21, 2007, the Insurance Division of the Department of Consumer and Business Services (hereinafter the "Division") issued a Notice of Proposed Action to Darlene J. Rethwill (Licensee) and Trautman, Perrin & Hale Insurance, Inc.,<sup>1</sup> seeking revocation of her insurance producer license and other relief. Licensee requested a hearing on the Notice, and the matter was referred to the Office of Administrative Hearings (OAH), on December 17, 2007.

The hearing initially convened on March 20, 2008, in the OAH offices in Salem. Administrative Law Judge Rick Barber presided over the hearing. Licensee was present for the hearing, and was represented by attorney Donald Roach. The Insurance Division was represented by Judith Anderson and Kyle Martin, Assistant Attorneys General. Investigator Dale White was the Division's representative. On the first day of hearing, the following individuals testified for the Division: Eric Cutler, Jennifer Brill, Alexander Rogers, Karen Cragg, Robert Maddy, Donna Pickering, Wally Hancock, Rita Claussen, and Brian Shea.<sup>2</sup>

Hearing reconvened on March 21, 2008, at the same location, with the same parties and representatives present. On the second day of hearing, Georgiann Lawson and Dale White testified for the Division. William Black testified for Licensee; Licensee did not testify. The record was held open for receipt of additional documents from Oregon Mutual Insurance (see discussion of Motion to Quash, below), and for written closing arguments. The arguments were received on April 10, 2008. The documents from Oregon Mutual were received on April 28, 2008, and the hearing record closed on that date.

### ISSUES

1. Whether Licensee violated ORS 744.074(1)(d) by misappropriating or withholding insurance premiums from persons living in Oregon.

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<sup>1</sup> The actions of Trautman et al (TPH) will be treated as the actions of Licensee in this order, based upon the evidence that Rethwill is the sole owner of TPH and handled all financial matters.

<sup>2</sup> Witnesses Rogers, Shea and Cragg testified by telephone.

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 clients Hancock and Maddy.

3. Whether Licensee violated ORS 731.296 by failing to promptly and truthfully respond to inquiries from the Director.

4. Whether, if Licensee violated any of the rules noted above, revocation of her producer license (and TPH's license) is the appropriate sanction.

5. Whether Licensee should be assessed civil penalties in the amount of \$10,000 pursuant to ORS 731.988(1).

6. Whether Licensee should be assessed a civil penalty of \$33,714.07 pursuant to ORS 731.988(2).

### EVIDENTIARY RULINGS

During the hearing, the Division offered Exhibits A1 through A133 and Licensee offered Exhibits L1 through L114 into evidence. The Division objected to Exhibits L111 to L114. Those documents were admitted over the Division's objections. Similarly, as addressed in the Motion to Exclude below, Licensee's objections to certain exhibits were also overruled. I have also received and admitted the documents provided by Oregon Mutual after the hearing (see Motion to Quash below) as Exhibit L115.<sup>3</sup>

In addition to the exhibits, the following procedural documents were designated part of the documentary record: Documents P1 through P7, as outlined in the Division's list, Document P8 (Licensee's Trial Memorandum), P9 (Licensee's Motion to Exclude), P10 (the Division's closing argument), P11 (Licensee's closing argument), and P12 (Motion to Quash Service).

**Motion to Exclude.** Three days before the start of the hearing, a prehearing conference was held to discuss Licensee's Motion to Exclude Exhibits A64, A125 and A126. The motion was denied and the documents were admitted (at hearing) over Licensee's objections.

**Motion to Quash.** On the first day of hearing, a representative of Oregon Mutual Insurance presented me with a Motion to Quash Subpoena Duces Tecum, referring to a subpoena served by Licensee two days earlier. Oregon Mutual objected to both the breadth and the timing of the subpoena, and the Division echoed Oregon Mutual's arguments.

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<sup>3</sup> By letter dated April 30, 2008, I informed the parties that the documents were being admitted into evidence, and gave them the opportunity to object within a specific period of time. No objections were received.

Licensee reasonably established that the timing of the request was caused by my ruling on the admissibility of the documents (the Motion to Exclude) earlier in the week, and later established the possible relevance of some of the documents requested from Oregon Mutual. Accordingly, the record was held open for those documents. On March 24, 2008, I wrote a letter to the counsel for Oregon Mutual (not a party to this proceeding), and asked him to provide the record of “sweeps” for a finite period in 2007. 27 pages of records were received in my office on April 28, 2008. Those documents are now in evidence as Exhibit L115.

### **CREDIBILITY ISSUES**

Although Licensee did not testify at the hearing, there are several documents in evidence that she purportedly authored. For reasons that will be made clear in the Opinion section below, I do not find those documents reliable, especially as to actions Licensee allegedly took, and as to the dates the documents were supposedly created. In several instances, Licensee alleged that she was sending a second (or “replacement”) copy of a letter, a statement, or a check. I find no evidence of the previous submissions, and have concluded (again for reasons made clearer below) that Licensee’s statements about the previous submissions were false.

Consequently, references in the Findings of Fact to Licensee’s representation of having made a prior submission (or having sent a replacement check), are included to establish the fact that Licensee made the representation, not that the representation was true.<sup>4</sup>

### **FINDINGS OF FACT**

1. Darlene Rethwill has been a licensed insurance producer in Oregon since September 1990. She is the sole principal in the agency of Trautman, Perrin & Hale, Inc., (TPH), located in Lake Oswego, Oregon. (Ex. A131 at 2, 3). At the time this action was taken, TPH employed four licensed producers (including Licensee and two “customer service representatives, or CSRs), and one unlicensed receptionist. (Ex. A131 at 10). Another agent in the office, Sam Sundby, died in December 2006. (Test. of Black).

#### **Alexander Rogers**

2. On August 1, 2005, TPH client Alexander Rogers mailed a check to TPH for \$260, the full premium for renewal of a surety bond on behalf of his brother, a disabled veteran. TPH received the check and deposited it in the TPH account. (Ex. A1; Test. of Rogers). The bond was with Ohio Casualty for the period of September 21, 2005 through September 21, 2006. As the due date for the premium approached and then passed, Ohio Casualty billed TPH repeatedly for the premium but TPH did not pay the

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<sup>4</sup> The timing and nature of Licensee’s representations are important factual matters, particularly concerning the allegations of her failure to promptly and truthfully respond to the Director.

premium or respond in any other way. Some time in early 2006, Ohio Casualty began contacting Rogers directly to seek payment of the premium. (Ex. A4).

3. Rogers attempted to contact Licensee at TPH on several occasions to find out why the premium had not been paid to Ohio Casualty. On April 7, 2006, Rogers called to talk to Licensee and was told she would call him back; she did not. He called again on April 18, with no response, so he retained an attorney (Hess) to resolve the issue. Hess contacted TPH and TPH paid the premium to Ohio Casualty in May 2006. (Test. of Rogers; Ex. A4).

4. On May 11, 2006, Rogers filed a complaint against Licensee concerning the delays on payment of the surety bond. (Ex. A2). On May 16, 2006, a Division representative wrote to Licensee to obtain her response to the allegations. Licensee was given 21 days to respond to the allegations. (Ex. A3). On June 24, an unidentified person from TPH sent a handwritten note to the Division, indicating that the May 16 letter had just been received, that the agent was out until July 7, and that a response would be sent at that time. (Ex. A5).

5. No response to the Division's letter was received in July 2006. On August 1, 2006, the Division sent a follow-up letter to Licensee, again asking for an explanation of the nonpayment of premium in Rogers' case. The Division required Licensee to respond by August 11. (Ex. A6). On August 14, 2006, Licensee responded. Licensee wrote that she was reprinting a document originally sent to the Division on May 26, 2006. She wrote that TPH had made the payment to Ohio Casualty on four separate occasions but three of the four payments were never received or applied to the owed premiums by Ohio Casualty. (Ex. A8).

### **Robert Maddy**

6. Robert Maddy is a classic car collector who was referred to TPH by his wife's sister. He bought a collectible Mercedes in California and purchased a short-term policy with Farmers to cover the drive to Oregon. After returning to Oregon, he met with Licensee to purchase insurance on September 7, 2006. Maddy's wife filled out an application for insurance, and Maddy gave Licensee a check for \$137 made out to Condon & Skelly, a New York-based agent of Metropolitan Life Insurance. Licensee deposited the check in the TPH account. (Ex. A45). On September 22, 2006, Licensee sent an email to Maddy, telling him that the email was evidence of coverage for the Mercedes and a second vehicle, a Chevy Nova. Licensee wrote that the insurer was "Condon & Skelly – Metropolitan Insurance Co." (Ex. A46).

7. Maddy wanted more information about his coverage, including insurance cards and the policy, and he kept contacting Licensee to obtain that information. Licensee promised to provide them to Maddy in an email dated November 10, 2006. (Ex. A50). When Maddy did not receive those documents from Licensee, he contacted Condon & Skelly directly. (Test. of Maddy). Condon and Skelly told Maddy they had no record of his application or a new policy, and no information from TPH. (Ex. A52).

8. Condon & Skelly is the sole agent for Metropolitan Life's collectible car insurance program. No other agency, including TPH, is able to bind coverage or provide temporary proof of insurance cards to customers on behalf of Met Life. When an application is received by Condon & Skelly, it is scanned and a record is kept in the computerized system, even if coverage is rejected. The information is easily retrievable if an agent calls with a question about a policy or application. Condon & Skelly never received an application or a check from Maddy or from TPH on Maddy's behalf. The binder number Licensee used in Exhibit A46 was not a Condon & Skelly number. (Test. of Cragg). TPH refunded the sum of \$137 to Maddy in November 2006. (Ex. A54).

9. On November 24, 2006, Maddy filed a complaint against Licensee and TPH with the Division. (Ex. A55). On November 28, 2006, a Division representative sent a letter to Licensee, giving her 21 days to respond. (Ex. A56). Licensee did not respond within the time period set by the Division. On January 23, 2007, Licensee provided an unsigned statement to the Division, stating it was a summary of a document previously submitted to the Division on December 7, 2006. Licensee stated that she submitted the Maddys' check and application to Condon and Skelly, but claimed that processing was delayed because Condon & Skelly have a manual system for issuing policies. Since the Maddys were worried about coverage, she wrote, coverage was arranged with a different company while waiting. (Ex. A59). Licensee later told an investigator that she bound interim coverage for the Maddys with Safeco Insurance. (Ex. A131 at 54). Safeco never insured the Maddys' vehicles. (Ex. A57).

10. In her January 23, 2007 fax, Licensee agreed to provide more documents to the Division the next day. (Ex. A59). She did not do so. On January 29, 2007, the Division representative sent another letter to Licensee, requiring her to provide the additional information on the Maddy matter no later than February 8, 2007. (Ex. A62). As of March 28, 2007, the date the Division representative sent another letter to Licensee about the Maddys, Licensee had not provided the additional information. (Ex. A63).

### **Brill (Streamline Plumbing)**

11. Jonathan and Jennifer Brill are plumbing contractors and the owners of Streamline Plumbing (Streamline). They were TPH customers since 2000. On June 27, 2005, Jennifer Brill came to TPH to purchase three policies for the company, a business automobile policy with Nationwide, a contractor's commercial general liability policy with AMCO, and a contractor's commercial property policy also issued by AMCO. AMCO is part of the Nationwide group. Brill gave TPH a check in the amount of \$1,696.30 for premiums, and Rethwill deposited the check in the TPH bank account on July 1, 2005. (Ex. A82 at 8). Rethwill did not forward the premiums to AMCO or Nationwide, and the insurers canceled the three insurance policies on August 20, 2005 due to nonpayment of premium. (Ex. A79).

12. Rethwill did not tell Brill that the insurance policies were canceled due to nonpayment of premiums. In addition to the initial payment, Brill paid the following

amounts to TPH for premium on the three policies, thinking they were still in force: \$750 on December 13, 2005; \$6,424.87 on February 10, 2006; \$1,800 on August 21, 2006; and \$5,347.87 on August 21, 2006. All amounts were paid by check to TPH and were received and deposited into the TPH account by Rethwill. (Test. of Brill; Ex. A82). None of the premiums were forwarded to Nationwide or AMCO. (Ex. A79).

13. Brill became concerned when she could not get insurance cards for the company vehicles, and when she did not receive any insurance documents showing coverage. Brill had other friends or relatives, also customers of TPH, who told her they were having problems with Licensee, having found out they had no insurance coverage because premiums had not been forwarded to the insurance companies. Brill repeatedly tried to reach Licensee by telephone but was told she was unavailable. Finally, Licensee contacted Brill and told her that TPH had obtained auto insurance for them through Safeco and other insurance through Kenneth I. Tobey. Licensee never provided policies of insurance to the Brills to show that these policies were in effect. The Brills never applied for insurance with Safeco. The Brills were never told they were insured through Kenneth I. Tobey, and never received any documentation that they were so insured. (Test. of Brill).

14. On May 14, 2007, Brill filed a complaint against Licensee and TPH with the Division. (Ex. A76). On June 4, 2007, the Division sent a certified letter to Licensee asking her to respond to the complaint and provide specific information to the Division on or before June 13, 2007. (Ex. A77). Licensee did not provide any information until her statement was taken on June 28, 2007, after service of an administrative subpoena. (Ex. A131).

#### **Hancock General Liability Policy**

15. Wally Hancock is the principal of Hancock Enterprises, Inc., in Aloha, Oregon. Rita Claussen is his bookkeeper. On November 13, 2005, Hancock gave a check to Licensee in the amount of \$8,124.03 as payment of the annual premium for a general liability insurance policy with Nationwide Insurance (Allied). (Ex. A44 at 2). TPH deposited the check in its account. (Id. at 2a).

16. TPH sent an application to Allied, but did not send the premium Hancock provided with the application. As a result, Allied (Nationwide) cancelled the policy for nonpayment of premium. Licensee provided documents stating that she applied for reinstatement of Hancock's policy with Allied on February 3, 2006, enclosing what she referred to as a replacement check in the amount of \$8,124.03 and stating that payments had been sent on November 14, 2005 and December 10, 2005. (Ex. L84). Licensee also provided documents stating that checks in the same amount (\$8,124.03) were sent to Safeco on March 31, 2006, (Ex. L87), to Zurich Insurance on May 1, 2006, (Ex. L88), and to Oregon Mutual on June 2, 2006. (Ex. L89). Hancock never received a policy from any of the insurers above. (Test. of Hancock).

### **Hancock Builder's Risk Policy**

17. On July 28, 2005, Hancock gave Licensee a check in the amount of \$7,458, for payment of the annual premium for a builder's risk policy. (Ex. A44 at 2; Ex. A35). Licensee deposited the check in the TPH account and told Hancock he had coverage, but she never gave Hancock the name of the insurance company or a copy of any policy. (Test. of Hancock; Test. of Claussen).

### **Hancock Workers' Compensation Policy**

18. In July 2005, Hancock took a large remodeling job and had to hire employees to do the work. Hancock, who had previously worked without employees, was required to purchase workers' compensation insurance. Hancock went to TPH to obtain workers' compensation coverage. On September 28, 2005, Hancock gave TPH a check in the amount of \$7,235, of which \$6,340 was payment for the estimated premium of the workers' compensation policy. (Test. of Claussen). TPH deposited the check in its account. (Ex. A44). TPH did not obtain workers' compensation coverage for Hancock's employees until December 1, 2005, when insurance was obtained in the assigned risk pool through NCCI.<sup>5</sup> TPH paid \$4,227 to NCCI to bind coverage through SAIF Corporation, (Ex. A128, A129), but never paid the additional sum of \$2,113 to SAIF or any other carrier. Hancock's policy with SAIF (through the assigned risk pool) was eventually cancelled for several reasons; one of the reasons was because TPH failed to provide the additional premium requested by SAIF. (Test. of Lawson).

19. On October 25, 2006, Hancock filed a complaint with the Insurance Division, contending that Licensee had misappropriated the premium from the policies Hancock purchased through TPH. (Ex. A36). On October 26, 2006, the Division mailed a letter to Licensee, requesting that she respond and provide additional information to the Division within 21 days. (Ex. A37). Licensee did not provide any information or response within the time period set by the Division. On January 12, 2007, the Division sent a follow-up letter to Licensee, again requesting a response to the complaint; the letter was sent certified and was signed for by an employee of TPH on January 18, 2007. (Ex. A39). Additional follow-up letters were sent to Licensee on January 25, 2007 and February 22, 2007. Licensee did not respond to the requests at those times, and the last letter from the Division informed her that a formal investigation was being opened. (Ex. A40, A41).

### **Gullings**

20. On February 23, 2007, a TPH client named Gullings filed a complaint against Licensee. (Ex. A87). On February 26, 2007, the Division mailed a letter to Licensee, requesting that she respond and provide additional information to the Division within 21 days. (Ex. A88). Licensee did not respond within the time allowed by the Director. Licensee provided a partial response to the Director in an unsigned, undated document received by the Division on April 20, 2007. (Ex. A90). On May 4, 2007, the

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<sup>5</sup> The National Council on Compensation Insurance.

Division again requested information about the Gullings matter, giving Licensee until May 18, 2007 to respond. (Ex. A91).

**Schmidt (two complaints)**

21. On January 19, 2007, a TPH client named Schmidt filed two complaints against Licensee with the Division. (Ex. A103). On January 22, 2007 and January 24, 2007, the Division sent two letters to Licensee, requesting that she respond and provide information about the two complaints and giving her 21 days from the date of each letter to respond. (Ex. A104, A105). On March 28, 2007, the Division wrote a follow-up letter to Licensee, asking for her response on the two Schmidt complaints and the Maddy complaint. (Ex. A113).

**Reverend Knutson**

22. On August 24, 2006, the Rev. Mark Knutson of Desarrollo Integral de la Familia, a Lutheran church and TPH client, filed a complaint against Licensee. (Ex. A119). On August 25, 2006, the Division mailed a letter to Licensee, requesting that she respond and provide additional information to the Division within 21 days. (Ex. A120). Licensee did not respond and the Division wrote follow-up letters to Licensee on October 11, 2006 and October 25, 2006. (Ex. A121, A122).

**CONCLUSIONS OF LAW**

1. Licensee violated ORS 744.074(1)(d) by misappropriating or withholding insurance premiums from persons living in Oregon.
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 clients Hancock and Maddy.
3. Licensee violated ORS 731.296 by failing to promptly and truthfully respond to inquiries from the Director.
4. Revocation of Licensee's producer license (and TPH's license) is the appropriate sanction.
5. Licensee should be assessed civil penalties of \$10,000 pursuant to ORS 731.988(1).
6. Licensee should be assessed a civil penalty of \$33,714.07 pursuant to ORS 731.988(2).

## OPINION

The Insurance Division has the burden of presenting evidence to establish that Licensee violated the statutes and rules alleged in its Notice, and, if it is successful at proving the violations, to establish what is the appropriate sanction under the circumstances. ORS 183.450(2). In this case, the Division has established multiple violations of its statutes and rules and presents a compelling case for revocation of Licensee's producer license.

My opinion will set forth the applicable law in each of the three areas of violation, and I will then discuss, at least briefly, each of the allegations the Division made under those areas of violation. I will then analyze the civil penalty allegations and the sanction of revocation.

**Credibility.** Before addressing the specifics of each case, however, I must more fully address the credibility of the evidence as noted above. I am actually determining the credibility of Licensee's documents rather than her testimony because Licensee did not testify at hearing. There are many reasons why I do not accept the documents as accurate.

First, evidence submitted by the Division shows that Licensee's representations in the documents are untrue. For instance:

- Licensee told the Maddys that she had bound coverage for their classic Mercedes with Condon & Skelly, (Ex. A46), and told the Division's investigator that she had binding authority with Condon & Skelly. She further stated that Condon & Skelly did not keep applications and only processed policies by hand. (Ex. A131 at 36, 40). However, Licensee did not (and never did) have binding authority with Condon & Skelly, and that company always keeps computerized copies of all applications and other documents received. (Test. of Cragg).
- Licensee told the Division's investigator that she had found insurance for the Maddys with another company, Metropolitan, while waiting for Condon & Skelly to respond. (Ex. A131 at 53, 54; *see also*, Licensee's Closing Argument at 6). However, Condon & Skelly are the sole agent with Metropolitan for collectible cars. Therefore, Licensee could not have bound the coverage. (Test. of Cragg; Ex. A58).
- Licensee also told the investigator that she had the Maddys' vehicles covered with Safeco for a short period of time. (Ex. *Id.* at 54). However, Safeco denies ever insuring them. (Ex. A57).
- In May 2007, Licensee told Safeco's investigator, Shea, that she did not have any Insurance Division complaints against her in the preceding twelve months; (Ex. A64 at 6, 7). However, she was aware of most or all of the complaints in this action at that time she made that statement to Shea.

These are representative examples of Licensee's misrepresentations in the record, and are not an exhaustive list.

Second, the record is full of occasions where Licensee's communications with the Division and with insurance companies allege that she was summarizing a document previously sent or otherwise alleged that documents were not getting through to the Division or a client or an insurance company, or sending a "replacement check" to a company. (*See, e.g.*, Ex. A8, A10, A35 at 3, A51, A60, A61, A66 at 3, A90, A123). Licensee did not provide any of the original checks or summaries to establish the truth of her assertions, nor did she offer any other evidence in support of her assertions.

The evidence in the Rogers complaint shows Licensee's lack of credibility in this area. When Rogers filed his complaint on May 11, 2006, the Division sent a letter to Licensee requesting a response. Many weeks later, on June 24, Licensee's office indicated that the letter had just been received, that the agent (presumably Licensee) was out, and that she would respond when she returned. (Ex. A5). However, when Licensee finally did respond on August 14, she claimed she was "reprinting" a response previously sent in on May 26. (Ex. A8). Licensee did not explain how she could have sent such a letter on May 26 if the original letter was not received until June 24.

The evidence convinces me that the so-called "replacement" documents or checks were actually the initial document or check. Furthermore, Licensee's allegation of having sent a previous document or check was a ploy to avoid responsibility for the tardiness of her responses.

Third, many of the documents that Licensee provided as exhibits are suspicious. Some of them are poor copies and appear to be pieced together from several documents. For example, Exhibit 114 appears to be pieced together from a TPH letter, another document from Premium Financing Specialists, Inc., and a fax confirmation. As a further example, a comparison of Exhibits L11, L12 and L13, all of which purport to be a "log" or a "customer documentation report" from TPH. All three of them have entries concerning TPH's contacts with Hancock Industries; none of them coincide on date or content. Either those documentation reports were kept by three separate people, all working at cross-purposes, or they were created afterwards.

Other documents, such as those on the letterhead of Kenneth Tobey or billing sheets purporting to show that some of the insureds involved in the complaints had insurance, raise more questions than they answer. Most of those documents first appeared at hearing, despite earlier repeated requests for documents by the Division. If Kenneth Tobey or other insurers were actually providing insurance at the times in question, why did Licensee fail to provide that information to her clients and to the Division when the complaints were filed? If there is a billing from an insurance company—for instance, the direct bill statements in Exhibit L105—why are there no other documents, such as policies and declaration sheets? And why were the insureds never told about these alleged policies in force? Given the other credibility evidence in the case, I give the documents little weight.

In summary, the reliability of the documents originating from Licensee is very suspect. I give that evidence little weight, as I likewise give little weight to the other documentary evidence she has provided.

**1. Misappropriating or Withholding Money or Property**

ORS 744.074 states in pertinent 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:

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(d) Improperly withholding, misappropriating or converting any moneys or properties received in the course of doing insurance business.

(3) The director may suspend, revoke or refuse to issue or renew the insurance producer license of a business entity if the director determines that an individual licensee's violation was known or should have been known by one or more of the partners, officers or managers acting on behalf of the partnership or corporation but the violation was not reported to the director and corrective action was not taken.

Under this statute, any improper withholding, misappropriation or conversion of the money or property of a client would subject the licensee to discipline by the Division.

Licensee argues that the statute impliedly requires the Division to prove an intent on Licensee's part to withhold, misappropriate or convert the monies withheld from her clients. (Closing Arg. at 8). However, the language of the statute does not contain that requirement.<sup>6</sup> Furthermore, if intent was a necessary requirement, I would infer such an intent in this case based upon Licensee's lack of credibility and continued evasiveness.

The evidence establishes that Licensee withheld or misappropriated the premium dollars of her clients, as follows:

***Hancock (General Liability).*** Hancock gave Licensee a check in the amount of \$8,124.03 on November 13, 2004, for a policy with Nationwide Insurance. Licensee deposited the check but did not forward that money to Nationwide, and Nationwide cancelled the policy for nonpayment of premium on February 1, 2005. The evidence

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<sup>6</sup> A lack of intent to withhold, misappropriate or convert a client's funds might be very important, in some cases, when looking at the appropriate sanction for a violation of the statute. It is not an important point at this stage of the analysis.

shows that Licensee withheld the premiums rather than paying the insurance company. The evidence also shows that Licensee never returned the premium to Hancock.

Licensee argues that the Division's evidence is incorrect:

TPH bound coverage with Allied Insurance from February 5, 2006 to March 6, 2006 (L84), American States (Safeco Insurance) from April 1, 2006 to May 1, 2006 (L87), with Zurich Insurance from May 1, 2006 to June 1, 2006 (L88) and Oregon Mutual from June 1, 2006 to July 1, 2006 (L88).

(Licensee's Arg. at 2).

The Division questions the authenticity of the documents submitted by Licensee, and a careful review of those documents does raise questions about whether they are what they purport to be. First, the documents themselves are patently suspect. Comparing the applications and the checks, it would appear that Licensee submitted the *entire* sum of \$8,124.03 with each of those binders.<sup>7</sup> There is no other paperwork from TPH or from the insurers as to why in each case the policy was declined (or why the premium would be in exactly the same amount). The check allegedly sent to Safeco on March 31, 2006 is check number 6659, while the check sent a month later to Zurich is check number 11791.

Second, even if the documents are correct, there was a gap of about 16 months between the payment of premium and the first alleged binder of insurance. Taken together, these documents do not show that Hancock was insured; they show (at most) that there were irregular periods where Licensee attempted to bind insurance for Hancock.

When these problems are combined with the other issues involving credibility, I find insufficient evidence to establish that Licensee's documents are accurate. The preponderance of the evidence indicates that Licensee withheld the sum of \$8,124.03 and converted it to her own use.

***Hancock (Builders Risk).*** On July 28, 2005, Hancock gave TPH a check in the amount of \$7,458 as payment for the annual premium for a "builder's risk" policy. Licensee deposited the check in the TPH account on July 29, 2005, but did not obtain a contract of insurance for Hancock, and did not return the funds to Hancock.

Again, Licensee contends that she "procured a builder's risk policy with Zurich Insurance Company effective July 26, 2005, policy number BR60815265 (L15)." (Licensee's Arg. at 3). While the document does appear to say there was a policy, Hancock and Claussen knew nothing about the alleged policy. Licensee did not provide information about the alleged policy to her clients, and she did not provide the

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<sup>7</sup> Even if I accepted these documents as accurate, the fact there was still \$8,124.03 to "send" to Oregon Mutual on June 1, 2006 shows that TPH was not providing premiums to the previous insurers—making it clear why there was no coverage.

information to the Division. She has not presented any additional evidence beyond the declaration page, such as a copy of the policy or a statement of insurance from Zurich, to support her argument. I do not find sufficient evidence of insurance in this situation.

***Hancock (Workers' Compensation).*** TPH purchased a workers' compensation policy for Hancock in December 2005, three months after Hancock thought he was insured.<sup>8</sup> The evidence also shows that TPH held onto \$2,113 of intended premium dollars rather than forwarding them to SAIF.

Licensee argues that there were many reasons for the cancellation of SAIF's policy covering Hancock, and Licensee is correct. However, Licensee's argument ignores the key point: even if the sum of \$2,113 played no part in the cancellation, the money was not Licensee's to withhold or keep.

Licensee further contends that she sent a check in the amount of \$2,110 to SAIF on January 7, 2006. (Ex. L109). SAIF never received that check. (Test. of Lawson). As with other documentary evidence in this case, I question whether the check was ever sent. The date on the check is written in a lighter hand, and there is no cover letter indicating that the check was being sent to SAIF. I conclude that Licensee withheld the sum of \$2,113 from her client, Hancock.

***Alexander Rogers.*** On August 1, 2005, Rogers gave TPH a check in the amount of \$260 to pay the premium on the bond he was required to have for his disabled brother. Licensee did not forward the premium to the insurer, Ohio Casualty, causing that company to begin collection efforts against Rogers directly. Licensee did not pay the premium on the bond until May 2006, eight months late. The delay in this case constituted a violation of the statute.

Licensee argues, in essence, that as long as the money was eventually paid and since the bond could not be cancelled, Rogers was not harmed and Licensee should not be disciplined. However, the evidence shows that Licensee had Rogers' money from August 2005 until the following May, a total of nine months, and put her client through considerable extra work trying to make sure the bond was paid.

When the statute uses the word "withholding," it does not require that the withholding be permanent. It is a reasonable reading of the statute to find that a temporary withholding of a client's premium dollars is still a withholding. Licensee violated the statute when she withheld Rogers' premiums and failed to pay for the bond until May 2006.

***Brill (Three Policies).*** Starting on June 27, 2005, when Licensee accepted \$1,696.30 in premium from the Brills for a commercial auto policy, a commercial general liability policy, and a commercial property policy, Licensee repeatedly withheld her

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<sup>8</sup> Although not raised as an issue, this delay in coverage is also an important matter, since Hancock had workers who may have been working without workers' compensation coverage, a violation of Oregon law that could lead to severe consequences for Hancock.

client's funds. Including the initial premium check, the Brills paid \$16,019.04 in premium for insurance coverage that was nonexistent. The Nationwide coverage initiated by TPH for the three policies lapsed when Licensee failed to make the premium payments. Licensee also failed to let the Brills know about the cancellation of the policies and their lack of insurance.

Licensee argues that she actually bound coverage for the Brills with another carrier, one that she failed to tell them about. The carrier, she claims, was Navigators Insurance. (Ex. L95). There are again issues about the veracity of the document, since it appears to be put together from several pieces of paper. More importantly, though, the evidence at hearing established that Licensee did not have authority to bind Navigators Insurance. As of August 24, 2007, Navigators had never appointed TPH as agents, and the company had "no record" of TPH doing business with them. (Ex. A80).

Based on a preponderance of the evidence, I conclude that the Brills paid \$16,019.04 to Licensee for insurance, and were never provided with insurance or a refund of their premium.

*Maddy.* In September 2006, the Maddys gave a check for \$137 to Licensee in order to secure insurance for a collectible vehicle, but Licensee never purchased the insurance and held on to the Maddys premium for two months before finally returning that amount to them. Robert Maddy contacted Condon & Skelly, the agent supposedly processing the policy on the vehicle, and was told that no application and no premium had been received by Condon & Skelly. Again, there was a temporary withholding of the insured's premiums.

In summary, the Division alleged ten separate instances of misappropriated or withheld money or property (one instance each involving Rogers and Maddy, three instances involving Hancock and five involving Brill). In every case, the Division has established that Licensee failed to pay the premiums she received to the insurance companies, or that she did so very late. In some cases, important insurance coverage was lost as a result. In some, the evidence indicates there never was insurance. The Division has established all ten violations of ORS 744.074(1)(d).

## **2. Fraudulent, Coercive or Dishonest Practices**

ORS 744.074, the statute quoted earlier, also gives the Division the right to discipline a licensee when he or she is:

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 Division alleges two such instances in this case, both involving Licensee's representations that an insured had automobile coverage.

**Hancock.** In August 2006, Licensee instructed an employee to create insurance identification cards for Hancock, indicating that his business had automobile coverage with American States Insurance. The employee faxed and mailed the cards to Hancock. (Test. of Black; Ex. A35 at 2). This representation was false, because there was never an automobile insurance policy from American States covering Hancock's vehicles. (Ex. A42).

**Maddy.** Similarly, in September 2006, Licensee sent a fax to the Maddys to inform them she had bound coverage with "Condon & Skelly – Metropolitan." (Ex. A46). Again, this was an untrue statement. Licensee did not have binding authority with Condon & Skelly, and had never submitted an application on the Maddys' behalf. (Test. of Cragg).

In both cases, Licensee argues that she did find insurance for her clients but with different companies than stated. She has variously stated that she insured the Maddys with Met Life or with Safeco. For the reasons stated in my credibility findings above, I do not believe her statement. Condon & Skelly is the *sole* agent for Metropolitan's collectible car program, (Test. of Cragg), so it is not possible that Licensee arranged with Metropolitan to insure the vehicles without using Condon & Skelly. Condon & Skelly had no record of the application or a policy, and they keep track of such information even on applications that are not accepted.

Furthermore, even if it were true that insurance with another company had been arranged, Licensee would still have violated this statute by her failure to provide updated information to the insured about which company was on the risk. Again, the Division has established violations of ORS 744.074 in both instances raised.

### **3. Failure to Timely Respond**

The Notice of Proposed Action in this case alleged that Licensee violated her obligation to promptly and truthfully respond to the Director in ten separate cases. The Division did not present any evidence concerning one of them, the allegations concerning a client named Witt, an employee of Grange Capital LLC. Accordingly, I conclude that the Division has failed to prove that specific violation by Licensee. In all other cases, however, the Division has established that Licensee failed to promptly and truthfully respond.

When a producer is being investigated, he or she is required to respond promptly and truthfully to reasonable requests of the Division. ORS 731.296 states:

The Director of the Department of Consumer and Business Services may address any proper inquiries to any insurer, licensee or its officers in relation to its activities or condition or any other matter connected with its transactions. Any such person so addressed shall promptly and truthfully reply to such inquiries using the form of communication requested by the

director. The reply shall be verified by an officer of such person, if the director so requires. A reply is subject to the provisions of ORS 731.260.

As I stated previously in my assessment of Licensee's credibility, Licensee has repeatedly failed to respond, or responded in an extremely tardy fashion, when additional information was requested concerning the following complaints: (1) Rogers on May 15, 2006; (2) the Rev. Mark Knutson on August 24, 2006; (3) Hancock on October 25, 2006; (4) Maddy on November 27, 2006; (5) Schmidt on January 18, 2007; (6) Schmidt again on January 22, 2007; (7) Gullings on February 22, 2007, (8) Witt on May 8, 2007, and (9) Brill on May 30, 2007. In most of those cases, several follow-up letters had to be sent to Licensee to obtain a response; in all cases, the response was incomplete. No purpose would be served by repeating the instances in which Licensee failed to respond. I find that Licensee repeatedly violated the duty to promptly and truthfully respond in all of these instances.

#### **4. Civil Penalties**

The appropriateness and the amount of civil penalties for violations of the Insurance Code are set by statute:

**731.988 Civil penalties.** (1) Any person who violates any provision of the Insurance Code, any lawful rule or final order of the Director of the Department of Consumer and Business Services or any judgment made by any court upon application of the director, shall forfeit and pay to the General Fund of the State Treasury a civil penalty in an amount determined by the director of not more than \$10,000 for each offense. In the case of individual insurance producers, adjusters or insurance consultants, the civil penalty shall be not more than \$1,000 for each offense. Each violation shall be deemed a separate offense.

(2) In addition to the civil penalty set forth in subsection (1) of this section, any person who violates any provision of the Insurance Code, any lawful rule or final order of the director or any judgment made by any court upon application of the director, may be required to forfeit and pay to the General Fund of the State Treasury a civil penalty in an amount determined by the director but not to exceed the amount by which such person profited in any transaction which violates any such provision, rule, order or judgment.

(3) In addition to the civil penalties set forth in subsections (1) and (2) of this section, any insurer that is required to make a report under ORS 742.400 and that fails to do so within the specified time may be required to pay to the General Fund of the State Treasury a civil penalty in an amount determined by the director but not to exceed \$10,000.

(4) A civil penalty imposed under this section may be recovered either as provided in subsection (5) of this section or in an action brought in the name of the State of Oregon in any court of appropriate jurisdiction.

(5) Civil penalties under this section shall be imposed and enforced

in the manner provided by ORS 183.745.

(6) The provisions of this section are in addition to and not in lieu of any other enforcement provisions contained in the Insurance Code.

ORS 731.988. The Insurance Division has established that Licensee violated several provisions of the Insurance Code, so this statute applies in this case.

*Penalties under subsection (1).* Under the statute, there are at least two types of civil penalty potentially applicable to this case. The Department contends that it would be justified to seek a penalty of \$1,000 for each of the violations it has proved, relying on subsection (1) of the rule above. The Department contends it has shown entitlement to multiple civil penalties—as many as 22 penalties of \$1,000 each—but that it seeks only \$10,000 in penalties under subsection (1).<sup>9</sup>

Based upon my review of the statutory language, as well as what I consider the egregious nature of Licensee's violations in this case, civil penalties totaling \$10,000 are amply justified and I propose that they be assessed.

*Penalty under subsection (2).* The second subsection of the statute provides for a different kind of penalty, one that is based upon the amount by which Licensee profited from the withholding of her clients' funds. The Division must establish that Licensee profited from the withholding and—to make a determination of the amount of a penalty—must show how much the profit was.

The answer to the first question is not in doubt. The record shows that Licensee deposited clients' checks into the TPH account, that she was the only one to have access to that account, and that those monies were never paid to the insurance companies. The only reasonable conclusion is that Licensee profited by withholding the funds.

As to the amount, the Division argues that this penalty should be in the amount of \$33,714.07, but does not explain the basis of this number. However, as I review the amounts paid by the Brills and by Hancock to TPH (the only two clients on this record to lose money to TPH), I find that their sum matches the Division's number. I conclude, therefore, that the civil penalty should be based on the following:

|                              |                    |
|------------------------------|--------------------|
| • Premium paid by the Brills | \$16,019.04        |
| • Premium paid by Hancock    | 17,695.03          |
| • <b>TOTAL</b>               | <b>\$33,714.07</b> |

Accordingly, I find that the civil penalties sought by the Division in this case are appropriate under both the law and the facts of the case.

## **5. Sanctions for Multiple Violations**

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<sup>9</sup> Because there are several more possible civil penalties than the ten alleged by the Division, I find that the lack of evidence concerning the Witt matter does not affect the number of penalties to be awarded in this case.

Finally, the Division seeks to revoke the licenses of Licensee and TPH based upon Licensee's many violations of the Insurance Code. As previously noted, the Division's authority to act upon the license comes from ORS 744.074, which states in pertinent 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:

(Emphasis added). I look to the statute and the facts of the case to determine if the proposed sanction—revocation in this case—is reasonable under the circumstances.

In this case, Licensee repeatedly took the money of her clients and failed to purchase insurance for them, then repeatedly refused to respond to the Division's request for information about the many complaints that were received. Licensee's multiple violations of at least these three portions of the Insurance Code lead me to the conclusion that revocation is the appropriate sanction in this case.

Furthermore, I conclude that the license of TPH should also be revoked under ORS 744.074(3), since the company did not take action when its producer, Licensee, was violating the provisions of the Insurance Code as set forth above. In this case, TPH had the responsibility to protect the agency's clients from an agent who was violating the Code; the fact that the agent who violated the Code was also the sole principal of TPH strengthens the argument for revocation rather than weakening it. It is therefore appropriate that the agency lose its license just as Licensee is to lose hers.

**PROPOSED ORDER**

I propose that the Division issue the following order finding:

That the Notice of Revocation dated November 21, 2007 should be AFFIRMED IN PART and REVERSED IN PART. The Division's allegation of a violation in the Witt/Grange Capital LLC matter should be reversed, and all other matters, including revocation of the licenses and imposition and amounts of the civil penalties, should be affirmed.



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Rick Barber  
Administrative Law Judge

Date Issued: 6/11/08

**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](mailto: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.

CERTIFICATE OF SERVICE

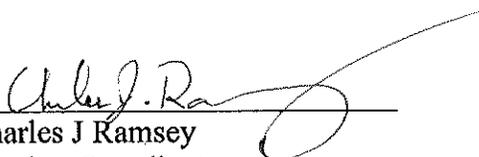
On 11th day of June 2008, I mailed the foregoing Proposed Order in Reference No. 0711007.

BY FIRST CLASS MAIL:

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|--|--|
| <p>Darlene J Rethwill President<br/>Trautman Perrin &amp; Hale Ins Inc<br/>5319 SW Westgate Dr Suite 250<br/>Portland OR 97221-2431</p> <p>Donald P Roach<br/>Attorney at Law<br/>3718 SW Condor Suite 110<br/>Portland OR 97239-4142</p> <p>Judith Anderson AAG<br/>General Counsel Division<br/>Assistant Attorney General, DOJ<br/>1162 Court Street NE<br/>Salem OR 97301-4096</p> |  |
|--|--|

VIA ELECTRONIC MAIL:

Mitchel Curzon  
Chief Enforcement Officer  
Insurance Division  
Department of Consumer and Business Services

  
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Charles J Ramsey  
Hearing Coordinator