ALBERTA INSURANCE COUNCIL
(the "AIC")

In the Matter of the *Insurance Act*, R.S.A. 2000 Chapter I-3
(the "Act")

And

In the Matter of Thomas Golany
(the "Agent")

DECISION
OF
The Life Insurance Council
(the "Council")

This case involves allegations pursuant to s. 480(1)(a) of the Act. Specifically, it is alleged that the Agent falsely told his client (the "Client") that the Client and the Client's wife had insurance when that was not the case. It is also alleged that the Agent retained premiums that the Client paid rather than remitting them to the insurer Industrial Alliance Insurance and Financial Services Inc. ("Industrial"). In executing such a scheme, it is alleged that the Agent acted in an untrustworthy or dishonest manner. In the alternative, it is alleged that the Agent's actions were unfair market practices pursuant to s. 509 of the Act.

Facts and Evidence

This matter proceeded by way of a written Report to Council dated June 6, 2017 (the "Report"). The Report was forwarded to the Agent for his review and to allow the Agent to provide the Council with any further evidence or submissions by way of Addendum. The Agent responded and provided his version of the events.

The Agent is the former holder of certificates of authority that authorized him to act in the capacity of a life and accident & sickness ("A&S") insurance. He has held these certificates since at least 1994 and they were ultimately terminated on January 5, 2017. The Agent also holds a general insurance Designated Representative ("DR") certificate of authority that authorizes him to sell general insurance and he is the agent responsible for the management and supervision of a general insurance agency.

On February 7, 2017 Industrial notified the AIC that they had terminated the Agent because the Agent allegedly collected premiums from the Client but failed to remit those premiums to Industrial. Having paid the premiums to the Agent, the Clients were left with the impression that IA issued their policies.

The Client first dealt with the Agent in 2011 when he approached the Agent for professional liability and vehicle insurance. The Client found the Agent very informative and helpful and in 2014 he met with the Agent to discuss life insurance. At that time, the Agent proposed that the Client purchase two life insurance policies and a critical illness policy for himself and one life insurance policy on his wife. The Client agreed to proceed in this manner and completed application forms for the insurance. He also paid the Agent the premium.

The following year, the Client requested documentation relating to the policies that the Agent had allegedly sold to the Client. Eventually the Agent sent invoices to the Client by email dated December 4, 2015. These invoices included amounts said to be due and owing for the policies that were never issued. The invoices were on the Agent's letterhead for his agency.

In 2016, when the Agent again delayed in providing the Client with the status of his policies, the Client contacted Industrial directly. At that time the Client learned that three of the policies for which he had paid were never issued.

In response to the AIC's investigation, in a March 8, 2017 email the Agent, in part, wrote:

> A combination of a variety of events resulted in policies being terminated by [Industrial] and over a period of time tried to get them back on line and then after some time resulted in procrastinating and could not face the client and collected premium to be sent to [Industrial] which some was and you will see a summary of funds sent back to client and more than was collected.
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> This has certainly been affecting my state of mind and the stress of aloof this has been extremely difficult to deal with and that has what has just caused me to freeze and not take the proper action as I should have from the beginning

The Agent ultimately paid the Client the sum of $16,645.00 which represented the premiums wrongfully charged and collected and interest.

Discussion

The first allegation in the Report is that the Agent acted in a dishonest or untrustworthy manner pursuant to s. 480(1)(a) of the Act when she falsified the Client's signature. The applicable legal test in determining whether the Agent is guilty of this offence was set out in *Roy* v. *Alberta (Insurance Councils Appeal Board)*, 2008 ABQB 572 (hereinafter "*Roy*"). In *Roy*, the Life Insurance Council found that an agent committed an offence pursuant to s. 480(1)(a) of the Act when he attested to completing his required continuing education when this was not, in fact, the case. The Insurance Councils Appeal Board also found the agent guilty of an offence and the agent appealed to the Court of Queen's Bench. In reasons for judgment dismissing the appeal, Mr. Justice Marceau wrote as follows at paragraphs 24 to 26:

> [24] The Long case, albeit a charge under the Criminal Code of Canada where the onus of proof is beyond a reasonable doubt (not on a preponderance of evidence as in this case), correctly sets out the two step approach, namely the court or tribunal must first decide whether objectively one or more of the disjunctive elements have been proven. If so, the tribunal should then consider whether the mental element required has been proved. While the Appeal Board said it was applying the Long decision, it did not make a finding as to whether step 1 had been proved with respect to each of the disjunctive elements. Rather it immediately went into a step 2 analysis and found that the mental element required for untrustworthiness might be less than the mental element required for fraud (as a given example).
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> [25] I am of the view that statement was in error if it was made to convey a sliding scale of mens rea or intent depending on which of the constituent elements was being considered. In my view, the difference between the disjunctive elements may be found in an objective analysis of the definition of each and certainly, as demonstrated by the Long case, what constitutes fraud objectively may be somewhat different from untrustworthiness. However once the objective test has been met, one must turn to the mental element. Here to decide the mental element the Appeal Board was entitled, as it did, to find the mental element was satisfied by the recklessness of the Applicant.
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> [26] While the language used by the Appeal Board may be characterized as unfortunate, on this review on the motion of the Applicant I need not decide whether the Appeal Board reasonably could acquit the Applicant on four of the disjunctive elements. Rather, the only matter I must decide is whether the Appeal Board acting reasonably could conclude, as they did, that the Applicant's false answer together with his recklessness justified a finding of "untrustworthiness". (emphasis added)

Regarding the evidence in these types of cases and the concept of "clear and cogent" evidence, Chairperson Hopkins dealt with this issue in *The Matter of the Appeal of Arney Falconer* (http://decisions.abcouncil.ab.ca/abic/icaba/en/111052/1/document.do) wherein she wrote:

> The Life Insurance Council stated in the Decision that there is a requirement "for 'clear and cogent evidence' because our findings can dramatically impact an insurance agent's ability to remain in the industry". However, the requirement for clear and cogent evidence does not mean that the evidence is to be scrutinized any differently than it should be in any other civil case. In all civil cases evidence must be sufficiently clear, convincing and cogent to satisfy the balance of probabilities. In *F.H.v. McDougall* 2008 SCC) (sic); [2008] 3 S.C.R. 41 the Supreme Court of Canada states:
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> > [45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.
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> > [46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

The evidence in the Report clearly proves that the Agent took the premiums from the client but failed to pay them to Industrial and have the appropriate policies issued. Additionally, the Agent then issued invoices to the Client for policies and directly accepted payment of those premiums notwithstanding the fact that the policies were not issued. He states that these invoices were somehow issued in error. However, this explanation is problematic given the fact that life insurance premiums are never paid by way of cheque directly to an agent or an agency because that practice is prohibited by s. 502(2) of the Act. Given the Agent's admissions and the evidence before us, we are of the view that the objective and subjective elements of the applicable legal test under s. 480(1)(a) are met. This was intentional conduct and it is obviously dishonest and untrustworthy as contemplated pursuant to s. 480(1)(a) of the Act and

we find him guilty of the offence as alleged in the Report. As a result of this finding it is unnecessary for us to consider the alternative charge levelled pursuant to s. 509(1)(a).

Pursuant to s. 13(1)(a) of the *Certificate Expiry, Penalties and Fees Regulation*, we have the jurisdiction to levy civil penalties in an amount not exceeding $5,000.00 in relation to our finding that the Agent acted in a dishonest or untrustworthy manner. Were the Agent presently licensed we would also have the jurisdiction to suspend his certificate of authority to act as a general insurance agent for a period of up to 12 months or we could order that it be revoked for one year.

In our view, a substantial civil penalty is warranted in these circumstances. While we are cognizant of the fact that the Agent made full restitution to the clients (including 5% interest) the potential consequences to the clients in this case could have been catastrophic. The Clients thought that they were purchasing insurance to protect their finances and the Agent's actions robbed them of that protection. Honesty and transparency are the hallmarks of any Agent's conduct, especially when client funds are involved. When an Agent fails to act in this manner, it does more than simply expose a client to possible loss. The Agent's actions deprived the Clients of the knowledge and information needed to make choices to protect their family. We therefore order that a civil penalty in the amount of $5,000.00 be levied against the Agent. As the Agent no longer holds a life or A&S certificate of authority we cannot order the suspension or revocation of her certificate.

The civil penalty must be paid within thirty (30) days of receiving this notice. In the event that the penalty is not paid within thirty (30) days, interest will begin to accrue. Pursuant to s. 482 of the Act (copy enclosed), the Agent has thirty (30) days in which to appeal this decision by filing a notice of appeal with the Office of the Superintendent of Insurance.

This Decision was made by way of a motion made and carried at a properly conducted meeting of the General Insurance Council. The motion was duly recorded in the minutes of that meeting.

Date: August 29, 2017

Kenneth Doll
Kenneth Doll, Chair

Life Insurance Council

Extract from the *Insurance Act*, Chapter I-3

Appeal

482 A decision of the Minister under this Part to refuse to issue, renew or reinstate a certificate of authority, to impose terms and conditions on a certificate of authority, to revoke or suspend a certificate of authority or to impose a penalty on the holder or former holder of a certificate of authority may be appealed in accordance with the regulations.

Extract from the *Insurance Councils Regulation*, Alberta Regulation 126/2001

Notice of appeal

16(1) A person who is adversely affected by a decision of a council may appeal the decision by submitting a notice of appeal to the Superintendent within 30 days after the council has mailed the written notice of the decision to the person.

(2) The notice of appeal must contain the following:

a) a copy of the written notice of the decision being appealed;

b) a description of the relief requested by the appellant;

c) the signature of the appellant or the appellant's lawyer;

d) an address for service in Alberta for the appellant;

e) an appeal fee of $200 payable to the Provincial Treasurer.

(3) The Superintendent must notify the Minister and provide a copy of the notice of appeal to the council whose decision is being appealed when a notice of appeal has been submitted.

(4) If the appeal involves a suspension or revocation of a certificate of authority or a levy of a penalty, the council's decision is suspended until after the disposition of the appeal by a panel of the Appeal Board.

Address for Superintendent of Insurance:

Superintendent of Insurance
Alberta Finance
402 Terrace Building
9515-107 Street
Edmonton, Alberta T5K 2C3