

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 Nicholas (Nick) John Felgate
(the "Agent")

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

This case involves matters related to alleged contraventions of the *Replacement of Life Insurance Contracts Regulation* (the "Regulation") and the *Insurance Act*. First, it is alleged that the Agent failed to complete a declaration statement as required by s. 5 of the Regulation and that, in so doing, he breached a section of the regulations as contemplated in s. 480(1)(b) of the Act. Further, it is alleged that the Agent failed to obtain the client's signature on a questionnaire as required by the insurer and that this failure, coupled with the fact that he submitted the questionnaire on the client's behalf, constituted untrustworthy conduct pursuant to s. 480(1)(a) of the Act. In addition (or in the alternative) it is alleged that this failure constituted incompetence as set out in s. 480(1)(e) of the Act.

Facts and Evidence

This matter proceeded by way of a written Report to Council dated February 7, 2013 (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 signed the Report on February 28, 2013 and submitted a one page Addendum.

The Agent has been licensed since July 18, 2002 to act in the capacity of an accident & sickness ("A&S") insurance agent. Since February 10, 2003, he has been similarly licensed as a World Financial Group ("WFG") life insurance agent. He was also licensed as a general insurance agent between March 10, 2005 and October 31, 2010 when this certificate expired and was not renewed.

On April 4, 2012, the Alberta Insurance Council (“AIC”) received a letter from an insurance agent (“DS”) dated March 30, 2012. In his complaint letter, DS indicated that one of his clients (“ES”) requested that a policy be cancelled and that it did not appear that the required Life Insurance Replacement Disclosure was sent to the existing insurer. DS further advised that he was concerned that the Agent was “churning” policies to the detriment of the client. Churning describes an unethical practice in the insurance industry whereby existing policies are needlessly cancelled and replaced with new insurance policies so as to enable a replacing agent to earn commissions.

On May 14, 2012, the AIC investigator spoke with DS and acknowledged receipt of his complaint letter. During this conversation, the investigator advised DS that given recent amendments to the Regulation, replacing agents were no longer required to supply a replacement document to the existing insurance company. However, the investigator advised that he would look into the matter and asked DS to forward any information and documentation in relation to the old policy. DS emailed the investigator on May 16, 2012 and provided details as to ES’ life insurance policy and also enclosed a copy of the above-noted cancellation letter dated March 5, 2012.

On August 16, 2012, the investigator spoke with the Agent and advised him of DS’ complaint. During the telephone call, the investigator asked the Agent if he had replaced any life insurance coverage on ES. The Agent advised that he did replace a Co-operators Life Insurance Company (“Co-operators”) policy with a Transamerica policy and that he completed a Life Insurance Replacement Disclosure (“LIRD”) form which he then submitted to his WFG office. The investigator asked if the Agent provided ES with a copy of the written explanation of the advantages and disadvantages of replacing the old life insurance with a new policy. The Agent advised that he did not think he had provided a written explanation as he believed he was just required to review the questions on the LIRD form with the insured. The investigator told the Agent that he would be sending him a written request for further information and documentation. The investigator did this by letter dated August 17, 2012.

On September 21, 2012, the Investigator received three undated letters with attached documents from the Agent wherein the Agent provided responses to the investigator’s questions. Amongst the documents that the Agent sent was a copy of the application for proposed coverage with Transamerica that was signed and dated by ES on December 7, 2011. The application disclosed existing life insurance coverage and critical illness insurance coverage and that the proposed coverage was intended to replace existing coverage. The

Agent also provided a copy of the alcohol use questionnaire dated December 28, 2011. The Agent signed this form as the witness. The Agent also sent the investigator a copy of the LIRD dated December 28, 2011 and the Agent signed this form as agent or broker of record.

A portion of the questionnaire read as follows: "I hereby declare that I have read all the questions and answers in this questionnaire and the statements and answers given above are true, complete and correctly recorded to the best of my knowledge and belief. I understand that this questionnaire shall form part of my Life Insurance Application to Transamerica Life Canada." In terms of the client's signature, there are handwritten notations on both the Questionnaire and LIRD form that indicate the client agreed to the contents "As Per Phone".

On September 27, 2012, the investigator wrote to a Transamerica official ("EH") and requested information and documentation in regard to ES' transaction. On October 12, 2012, EH responded by email and advised that the "Advisor completed the Alcohol questionnaire over the phone and the underwriter did not find any discrepancy between disclosed alcohol history by client on the signed insurance application and the questionnaire. Secondly, all given history was benign for our risk assessment purposes, hence there was no need for any further action by underwriting department."

On September 27, 2012, the Investigator wrote to the Agent and requested additional information and documentation. On October 14, 2012, the Investigator received an e-mail from the Agent in response to his additional request for information and documentation. The Agent advised, "The alcohol (sic) questionnaire and LIRD were faxed to [ES] from Calgary Staples Location and a phone call took place while I was in Calgary. I received the LIRD after the application from WFG manager and the alcohol (sic) questionnaire was requested after application sent to underwriter." The Agent further advised, "I realize after talking with you that I did not follow proper procedure. I do stand by the replacement and have regular contact with client as him and I are very good friends."

Discussion

From the evidence in the Report, it is not in dispute that a replacement of the existing policy was intended. As such, pursuant to s. 5 of the Regulation, the Agent was required to complete a replacement declaration for the client prior to taking the application and he failed to do so in contravention of the Regulation. This particular form is prescribed under the Regulation and agents are required to obtain a

client's signature on it prior to taking an application for insurance. The form prompts clients to ask their agent questions relating to replacing their existing insurance. We also note that while the Regulation does not explicitly require a written explanation as to the advantages and disadvantages of the new policy, the prescribed form clearly contemplates a written summary because, in signing the form, the client agrees that he received such a summary.

Given the fact that the Agent did not obtain ES' signature on the LIRD and instead simply wrote that ES agreed by phone, we are satisfied that he contravened a section of the Regulation as contemplated in s. 480(1)(b) of the Act as alleged in the Report.

As to the applicable sanctions, we have the ability to levy civil penalties in an amount not exceeding \$1,000.00 pursuant to s. 13(1)(b) of the *Certificate Expiry, Penalties and Fees Regulation*, A.R. 125/2001. We also have the ability to suspend or revoke the Agent's certificate of authority to act as an insurance agent. The Agent has no prior disciplinary history with the AIC and appears to have cooperated with the investigator during the course of the investigation. Given all of the facts, we order that a civil penalty in the amount of \$500.00 be levied against the Agent. We do not feel that a license suspension or revocation would be appropriate here.

As to the second set of allegations, in order to conclude that the Agent has committed an offence pursuant to s. 480(1)(a) of the Act, the Report must prove, on the basis of clear and cogent evidence, that it is more likely than not that the Agent committed the act as alleged. The requirement of clear and cogent evidence reflects the fact that our findings can dramatically impact an insurance agent's ability to remain in the industry.

Additionally, the elements of s. 480(1)(a) offences have been discussed by the Alberta Court of Queen's Bench in *Roy v. Alberta (Insurance Councils Appeal Board)*, 2008 ABQB 572 (hereinafter "*Roy*"). In *Roy*, the Council found that an Agent committed an offence pursuant to s. 480(1)(a) of the Act when he attested to completing the applicable CE when he did not, in fact, have the required CE. The Agent also held a securities license and stated that he believed that the CE he required to maintain his securities license was applicable to his insurance agent requirements. The Insurance Councils Appeal Board found the Agent guilty of an offence and the Agent appealed to the Court of Queen's Bench. In his reasons for judgment, Mr. Justice Marceau reviewed the requisite test to find that an offence pursuant to

s. 480(1)(a) of the Act has been made out and expressed it 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).

[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.

[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)

In order to find that the Agent demonstrated incompetence to act as an insurance agent, as is alternatively or additionally alleged, we are of the view that we must be able to conclude that the Agent's conduct toward the client was a marked departure from the standard to be expected of similar agents in similar circumstances. While an isolated error could prove incompetence, it is our view that the concept of incompetence generally speaks to an agent's overall abilities and standards.

In applying these tests to the facts before us, the Council is not satisfied that the Agent's conduct rises to the level of untrustworthiness as set out in s. 480(1)(a) of the Act. In this case, the Agent did not forge or otherwise sign ES' signature. There is also no evidence that this was done surreptitiously or without the client's knowledge or consent. The insurer also provided evidence that the Agent's completion and

submission of the questionnaire did not negatively impact the client as the information that was disclosed corresponded to that set out in the application.

While we do not condone the Agent's conduct in this case and, in fact, strongly discourage other agents from adopting these practices, it is our conclusion that there is not sufficient clear and cogent evidence to substantiate the more severe charge of untrustworthiness.

As to the alternative or additional allegation of incompetence, we are similarly not convinced that the lack of judgment the Agent displayed in this case proves that the Agent was incompetent to act as an insurance agent. The Agent's conduct here appears to have arisen out of an exceptional series of circumstances and the Agent recognized that he did not utilize appropriate practices to complete the questionnaire and the LIRD. These isolated errors do not, in our view, prove overall incompetence. This might not; however, be the case if the Agent engaged in such conduct in the future.

Conclusion

In summary, the Council has found that the Agent contravened a section of the regulations and ordered that a civil penalty in the amount of \$500.00 be levied pursuant to ss. 480(1)(b) of the Act and 13(1)(b) of the *Certificate Expiry, Penalties and Fees Regulation*, A.R. 125/2001. We find the Agent not guilty of the alternative and additional charges. 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, the Agent's certificates of authority will be automatically suspended pursuant to s. 480(4) of the Act. 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 Life Insurance Council. The motion was duly recorded in the minutes of that meeting.

May 17, 2013

Original signed by Doug Curtis
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