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 Craig A. Ferguson
(the "Agent")

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

This case involved an allegation pursuant to ss. 480(1)(a) and 509(1)(a) of the Act. Specifically, it is alleged that the Agent signed an application for life insurance completed on his client's (the "Client's") behalf, as the advisor and witness to all signatures, when he in fact did not witness the signatures of the Client's. Therefore, it is alleged that he made a misrepresentation as contemplated in s. 480(1)(a) of the Act. Alternatively, it is alleged that representations to the effect that the Agent witnessed signatures when he did not, in fact, do so constituted false or misleading representations as contemplated in s. 509(1)(a) of the Act.

Facts and Evidence

This matter proceeded by way of a written Report to Council dated June 4, 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 June 12, 2013 and did not adduce any further evidence. As such, the facts set out in the Report are relatively clear.

The Agent has been licensed since October 19, 2010 for Life and Accident and Sickness ("A&S") insurance. On December 19, 2012, the Alberta Insurance Council ("AIC") received a letter and accompanying attachments dated December 13, 2012 from Empire Life to the Superintendent of Insurance. The letter from Empire Life alleged that the Agent made misrepresentations to Empire Life by signing a document as a witness to Client signatures when he did not, in fact, witness the signatures. The attachments included an Empire Life internal memo, a letter from Empire Life's compliance department to the Agent, and a partial copy of the life insurance application in question dated August 24, 2011.

On January 11, 2013, the an AIC investigator spoke with Empire Life officials. One of these ("IB") stated that the Agent confirmed he was not present during the sale and did not witness the signatures. The Investigator asked IB how the Agent confirmed this. IB advised that the Agent sent an e-mail to this effect to the Agent's managing general agency ("MGA"). IB provided further information (including the email) under cover of letter dated January 16, 2013.

In a further email to IB the Agent advised: "This was one of the first applications that I had done that was not face-to-face, and I was not certain how to complete the witness section of the application under the circumstances, and later altered the signature section to suit the circumstances." The Agent further advised, "You are correct, I had signed as agent on that page."

On March 15, 2013, the investigator spoke with the Agent and advised of the complaint received from Empire Life. The Agent advised he made a mistake by signing the application as a witness to the Client's signatures. The Agent also stated that he works out of Ontario and receives referral leads for Alberta residents. As to the process that he used for these, the Agent stated that he mails applications to prospective clients and includes a detailed instruction sheet to guide the applicant on how to complete the application. The Agent stated that he realized the Empire Life application was a problem as it required that he sign the Advisor section as witness to all signatures. The Agent admitted that he subsequently altered that section by crossing out witness signature and that he eventually found out Empire Life would no longer accept applications unless they were completed in a face-to-face meeting. The Agent advised that Empire Life only expressed a concern about the Client's application almost two years after it was completed. The Agent stated that during the application process the medical underwriter verified the Client's identity to Empire Life.

The Report also contained an undated letter with attachments from the Agent. The Agent provided comments in relation to the issue of "non face-to-face" business and how insurers accommodate agents and brokers who conduct business this way. The Agent also advised: "The Empire Life application is not geared to the online market, and it could be argued that I should have discussed how to complete it with them, I agree. But, to this day, there are no clear guidelines as to who signs where, and who witnesses where (sic) on their application, despite them allowing non face-to-face transactions. This leaves the agent in a precarious position at best." The Agent further advised: "I did not witness the signature of the [Clients] but I

did sign as agent. It was an error of interpretation of the application that was not clear to me (i.e. 'Signature of Agent (as witness to the signatures). I knew that the Clients would be seen by the nurse who would witness their signatures and confirm their ID on her visit, so I was convinced it was a safe transaction as a result."

Included in the attachments was a copy of an Empire Life "Information Circular" dated March 11, 2013 entitled, "Procedure for dealing with existing clients that have relocated". The information circular indicated, "The sale of Empire Life insurance products is done on a face-to-face basis with the client. While we do not currently accept non face-to-face sales, we are looking into the option of accepting them in the future." The information circular goes on to explain the process for a situation where an existing client has moved away such that it is no longer feasible to meet them in person, and in such situations, sales could be approved if made over the phone for those clients, subject to certain requirements. Also included in the attachments was a copy of section 9 of the application in question and a sample copy of the instruction sheet the Agent includes with the Empire Life application in non-face-to-face sales.

Discussion

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 required to maintain his securities license was applicable to his insurance agent requirements. 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 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).
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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)

In applying this test to the case before us, it is clear that the Agent signed the application forms of the Client's as having witnessed the signatures when he did not, in fact, witness them. This is objectively false.

As to the Agent's intent, he states that "The Empire Life application is not geared to the online market, and it could be argued that I should have discussed how to complete it with them, I agree … I did not witness the signature of the [Clients] but I did sign as agent. It was an error of interpretation of the application that was not clear to me (i.e. 'Signature of Agent (as witness to the signatures)."

In our view, the Agent clearly knew that he was signing the form as a "Witness" when he was not actually the witness of the signatures on the form. While the reason for this was that he was not sure how he should deal with a situation in which he was not personally meeting with the Clients, he chose to

sign as a witness when that was not the case. Therefore, we are prepared to find that the Agent made a misrepresentation as contemplated under s. 480(1)(a) of the Act and as alleged in the Report.

As to the appropriate sanction for this conduct, we have the ability to levy civil penalties in an amount up to $5,000.00 for offences pursuant to s. 480(1)(a) and 13(1)(a) of the *Certificate Expiry, Penalties and Fees Regulation*, A.R. 125/2001. We also have the ability to order that his certificate of authority be revoked for one year or suspended for a period of time. In this case, the Agent is a relatively junior agent and has no disciplinary history and the Clients were not harmed in the circumstances. This, amongst other factors, would suggest that a revocation or suspension is not warranted. However, the Agent's misrepresentation exposed Empire Life to risks if there were any subsequent questions raised as to the validity of the Clients' signatures on the applications. Given this, we believe that a civil penalty is appropriate in the circumstances and order that a civil penalty in the amount of $750.00 be levied against the Agent pursuant to ss. 480(1)(a) of the Act and 13(1)(a) of the *Certificate Expiry, Penalties and Fees Regulation*, A.R. 125/2001.

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 certificate 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.

Date: September 23, 2013

Original signed by:
Ken 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