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PA INSURANCE DEPARTMENT

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ADMIN HEARINGS OFFICE

BEFORE THE INSURANCE COMMISSIONER
OF THE
COMMONWEALTH OF PENNSYLVANIA

IN RE: : ALLEGED VIOLATIONS:
: :
: :
James E. Dwyer : Sections 604, 622, 633, 633.1 and 639
332 Sagamore Road : of the Insurance Department Act of
Havertown, PA 19083 : 1921, P.L. 789, No. 285, *as amended*
: (40 P.S. §§ 234, 252, 273, 273.1 and
and : 279).
: :
James & Son, Inc. : Sections 37.46, 37.47 of the Insurance
Post Office Box 1447 : Department Regulations (31 Pa. Code
Havertown, PA 19083 : §§ 37.46, 37.47)
: :
Respondents : Section 5(a)(2) of the Unfair Insurance
: Practices Act, Act of July 22, 1974,
: P.L. 589, No. 205, *as amended* (40 P.S.
: § 1171.5(a)(2))
: :
: Docket No. **SC03-07-048**

ADJUDICATION AND ORDER

AND NOW, this 14th day of September, 2004, M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania ("Commissioner"), makes the following Adjudication and Order.

PROCEDURAL HISTORY

This case began when the Pennsylvania Insurance Department ("Department") filed an Order to Show Cause ("OTSC") on September 19, 2003 directed to James E. Dwyer ("Dwyer") and James & Son, Inc. (collectively "the respondents"). The OTSC

DATE MAILED: September 14, 2004

alleged that the respondents violated the Insurance Department Act,¹ The Unfair Insurance Practices Act² and Department regulations.³

The OTSC consists of sixty-eight (68) numbered factual and legal averments, together with several exhibits, alleging that the respondents violated Insurance Department statutes and regulations in a variety of ways in late 2001 and early 2002 while attempting to secure commercial liability insurance from Penn National Insurance Company ("Penn National") for Target Building Construction ("Target").

After the OTSC was filed, a presiding officer was appointed. The respondents filed an answer to the OTSC on October 14, 2003 in accord with extensions for such filing. They admitted the majority of the factual averments and raised affirmative defenses. Following a prehearing telephone conference, a hearing was scheduled for January 14, 2004.

In addition to hearing testimony at the hearing, joint stipulations of facts and supporting documents were received into the record. [Exhibits JS-0 through JS-9]. The Department also presented the testimony of Wayne Myers, a Penn National employee. The respondents presented the testimony of James E. Dwyer. After the hearing, the parties submitted briefs pursuant to a briefing schedule as extended and this case is now ready for disposition.

¹ Act of May 17, 1921, P.L. 789, No 285, 40 P.S. § 234, 252, 273, 273.1 and 279.

² Act of July 22, 1974, P.L. 589, No. 205, *as amended*, (40 P.S. § 1171.5(a)(2)).

³ 31 Pa. Code §§ 37.46, 37.47.

FINDINGS OF FACT⁴

1. Respondent James E. Dwyer maintains a residential address of 332 Sagamore Road, Havertown, Pennsylvania 19083.

2. Respondent James & Son, Inc. maintains an address of P.O. Box 1447, Havertown, Pennsylvania 19083.

3. Respondent Dwyer is the sole qualified agent and broker for Respondent James & Son, Inc.

4. From March 11, 1972 to present Respondent Dwyer has been licensed continuously by the Department as a Pennsylvania insurance agent, holding resident agent license #43302.

5. During his more than 30 continuous years as a licensed Pennsylvania insurance agent, and excluding the instant Order to Show Cause, Respondent Dwyer never has been the subject of any disciplinary action by the Department's Bureau of Enforcement for his activities as a Pennsylvania insurance agent.

6. From December 11, 1976 to present Respondent Dwyer has been licensed continuously by the Department as a Pennsylvania resident broker, holding resident broker license #134975.

7. During his more than 25 continuous years as a licensed Pennsylvania

⁴ The findings of fact numbered 1 through 58 are based upon the Joint Stipulation executed by counsel for both parties and admitted into the record as exhibit JS-9.

resident broker, and excluding the instant Order to Show Cause, Respondent Dwyer never has been the subject of any disciplinary action by the Department's Bureau of Enforcement for his activities as a Pennsylvania resident broker.

8. From November 27, 2001 to present Respondent James & Son, Inc. has been licensed continuously by the Department as a Pennsylvania insurance agency, holding license #49935.

9. Since November 27, 2001 and excluding the instant Order to Show Cause, Respondent James & Son, Inc. never has been the subject of any disciplinary action by the Department's Bureau of Enforcement for its activities as a Pennsylvania insurance agency.

10. From October 2, 2001 to present Respondent James & Son, Inc. has been licensed continuously by the Department as a Pennsylvania insurance brokerage, holding license #49663.

11. Since October 2, 2001, and excluding the instant Order to Show Cause, Respondent James & Son, Inc. never has been the subject of any disciplinary action by the Department's Bureau of Enforcement for its activities as a Pennsylvania insurance brokerage.

12. Respondent Dwyer entered into an agency agreement with Penn National Insurance Company ("Penn National") in 1976 and Respondent James & Son, Inc. entered into an agency agreement with Penn National in 2001.

13. In late 2001 and early 2002, Respondent Dwyer attempted to secure commercial liability insurance for Target Building Construction ("Target") with Penn

National.

14. Respondent Dwyer attempted to secure commercial liability insurance for Target with Penn National after Target's then insurer, Ohio Casualty, issued a notice of non-renewal to Target, effective January 1, 2002, because of Target's poor claims experience.

15. On or about November 27, 2001, Respondent Dwyer prepared an application, at Target's request, for commercial liability insurance.

16. On December 11, 2001, Respondent Dwyer submitted the Target application for commercial liability insurance with an accompanying letter to Penn National Territorial Manager, Wayne Myers.

17. A true, correct, and authentic copy of the letter dated December 11, 2001 that Respondent Dwyer submitted to Mr. Myers is attached to the Order to Show Cause as Exhibit A.

18. A true, correct, and authentic copy of the commercial liability insurance application dated November 27, 2001 that Respondent Dwyer submitted to Mr. Myers is attached to the Order to Show Cause.

19. Penn National typically did not insure general contractors but did agree to consider Target's application.

20. Between December 11 and 27, 2001, Respondent Dwyer had additional discussions with Mr. Myers regarding Target's application to Penn National.

21. On or about December 27, 2001, Target received a quote for policy

premiums from Respondent Dwyer for commercial liability insurance with Penn National.

22. On or about December 28, 2001, Mr. Myers informed Respondent Dwyer that Penn National declined Target's application for commercial liability insurance because of Penn National's discovery that Target had committed two Occupational Safety and Health Administration violations and its discovery of another situation involving Target and a "pre-engineered" (high risk) building.

23. Even though Mr. Myers informed Respondent Dwyer that Penn National declined Target's application for commercial liability insurance, between December 28, 2001 and January 1, 2002 Respondent Dwyer exercised what he believed to be his authority under Respondents' agency agreements with Penn National to bind Penn National to a contract of commercial liability insurance with Target.

24. In a letter from Respondent Dwyer to the Department dated April 29, 2002, Respondent Dwyer stated "[a]t this point in time [on or about December, 2001] I bound Penn National on the account with the hope of working things out but I have not been able to accomplish same."

25. A true, correct, and authentic copy of Respondent Dwyer's April 29, 2002 letter to the Department is attached as Exhibit C to the Order to Show Cause.

26. Target's existing commercial liability insurance coverage was scheduled to expire on December 31, 2001, or only three days after Mr. Myers informed Respondent Dwyer that Penn National had rejected Target's application.

27. Respondent Dwyer failed to inform Target that the application for

commercial liability insurance had been denied by Penn National.

28. Target made premium payments to Respondents for the commercial liability insurance policy with Penn National, pursuant to Respondent Dwyer's requests.

29. Target made a premium payment to Respondent James & Son, Inc. by check #021764 on January 3, 2002 in the amount of \$10,000 for commercial liability insurance policy with Penn National.

30. Check #021764 was deposited into Respondent James & Son, Inc. bank account (#36-1729874) on January 6, 2002 and kept there until April 19, 2002.

31. Respondents paid Target's \$10,000 premium payment to Penn National on April 19, 2002.

32. Target made another premium payment to Respondent James & Son, Inc. by check #022295 on February 7, 2002 in the amount of \$10,966 for commercial liability insurance policy with Penn National.

33. Check #022295 was deposited into Respondent James & Son, Inc. bank account (#36-1729874) on February 11, 2002 and kept there until April 19, 2002.

34. Respondents paid Target's \$10,966 premium payment to Penn National on April 19, 2002.

35. Neither Respondent Dwyer nor Respondent James & Son, Inc. retained any commissions on the premiums paid by Target on January 3 and February 7, 2002.

36. A true, correct, and authentic copy of Target's deposited/cancelled checks

#021764 and #022295 are attached as Exhibit D to the Order to Show Cause.

37. Even though Mr. Myers informed Respondent Dwyer on December 28, 2001 that Penn National declined Target's application for commercial liability insurance, Respondent Dwyer believed that Respondents' agency agreements with Penn National gave him the authority to bind Penn National to a contract of insurance with Target.

38. On or about January 8, 2002, Respondent Dwyer provided Target with an invalid Penn National "Certificate of Liability Insurance" ("Certificate"), in response to Target's request for a copy of its Penn National certificate.

39. The certificate indicated a Target policy effective date of January 1, 2002 and policy expiration date of January 1, 2003.

40. The Certificate listed #90102956 as Target's Penn National policy number.

41. #90102956 at no time was Target's Penn National policy number.

42. #90102956 was the policy number of Sharon Metals, another of Respondent Dwyer's Penn National insureds.

43. A true, correct, and authentic copy of the Certificate is attached as Exhibit E to the Order to Show Cause.

44. In March 2002, Respondent Dwyer requested additional premium payments from Target for the commercial liability insurance policy with Penn National.

45. In March 2002, Target employees informed Respondent Dwyer that they wanted assurance that Target was insured for commercial liability with Penn National.

46. On or about March 21, 2002, Respondent Dwyer visited the Target office.

47. During the March 21, 2002 visit, Respondent Dwyer assured Target employees that Target was insured with Penn National for commercial liability.

48. However, during the visit, Respondent Dwyer informed Target employees that Penn National was canceling Target's commercial liability insurance policy as of March 31, 2002.

49. On or after March 21, 2002, Richard Goodman, President of Target, requested from Respondent Dwyer a copy of the policy declaration page for Target's commercial liability insurance policy with Penn National.

50. Respondent Dwyer failed to supply Mr. Goodman at any time with a copy of the policy declaration page for Target's commercial liability insurance policy with Penn National.

51. On or about April 1, 2002, Respondent Dwyer submitted a letter to Mr. Myers, Penn National Territorial Manager.

52. The April 1, 2002 letter from Respondent Dwyer to Mr. Myers indicated that prior to Penn National declining coverage Respondent Dwyer had provided Target with estimates for "sizeable premiums" for commercial liability insurance that would run from January 1, 2002 to January 1, 2003.

53. A true, correct, and authentic copy of the April 1, 2002 letter from Respondent Dwyer to Mr. Myers of Penn National is attached as Exhibit F to the Order to Show Cause.

54. On or about April 11, 2002, Penn National informed Respondents by letter that their agency company agreement with Penn National was being terminated "for fraud and dishonesty."

55. In the same April 11, 2002 letter, Penn National enclosed a Limited Agency Agreement under which Respondents Dwyer and James & Son, Inc. have been allowed to continue to service Penn National policies previously written by Respondents for the sole purpose of providing continued service to Respondents' existing Penn National policy holders and causing as little disruption as possible to them.

56. A true, correct, and authentic copy of Penn National's April 11, 2002 termination letter to Respondents is attached as Exhibit G to the Order to Show Cause.

57. A true, correct and authentic copy of the Limited Agency Agreement between Penn National and Respondent James & Son, Inc. is attached as Appendix "A" to Respondents' Answer and New Matter.

58. Even though Mr. Myers informed Respondent Dwyer on December 28, 2001 that Penn National declined Target's application for commercial liability insurance, Target was covered by an enforceable commercial liability insurance policy throughout the period of events described in the Order to Show Cause because Respondent Dwyer bound Penn National to the policy.

59. Other factual findings set forth in the Discussion section of this adjudication are incorporated herein.

60. Should any of the foregoing factual findings be deemed conclusions of law, the ones so found are incorporated therein.

DISCUSSION

The facts in this case are undisputed. At issue is what, if any, remedial action should be taken against this agent and his agency given all of the surrounding circumstances and applicable law.

A. Applicable Law

The Insurance Department Act of 1921⁵ authorizes the issuance of a certificate of qualification for an insurance agent when the Insurance Department “is satisfied that the applicant is worthy” of such certification. Furthermore, “[o]nce a certificate is issued, the certificate holder is presumed worthy to secure additional specific lines of authority under the certificate unless the department files an action to suspend or revoke or refuse to renew the certificate pursuant to section 639.” 40 P.S. § 234.

Section 639 (40 P.S. § 279) provides for the imposition of various penalties “upon satisfactory evidence of such conduct that would disqualify the agent or broker from initial issuance of a certificate of qualification under section 604 . . .” 40 P.S. § 279(a). In other words, the penalties may be imposed if the agent or broker is determined to be untrustworthy or professionally unfit. The possible penalties include suspension or revocation of the certificate of qualification or license of the offending party and imposition of a civil penalty for each violation. 40 P.S. § 279(a)(1), (2).

These statutory provisions are implemented and clarified by Department

⁵ Act of May 17, 1921, P.L. 789, *as amended* Section 604 (40 P.S. § 234). The Insurance Department Act was amended by the Act of December 3, 2002, P.L. 1183, No. 147 § 1 (effective in 180 days). However, because the Act did not become effective until after the conduct at issue in this case took place, all references and citations are made to the act as it existed prior to the passage of the 2002 amendments. Likewise the respondents’ actions will be examined under the language of the statute as it was written prior to the passage of the 2002 amendments.

regulations. The Department may revoke or suspend a certificate or license upon finding that an agent or a broker has engaged in conduct which would disqualify him from initial issuance of a certificate or a license, including the conduct recited in 31 Pa. Code § 37.46.

31 Pa. Code § 37.47. Section 37.46 provides that:

[t]he Department may deny an application for a certificate or license upon finding after a hearing or upon failure of the applicant to appear at the hearing that:

(7) The applicant does not possess the professional competence and general fitness required to engage in the business of insurance. Determination will be made after thorough examination of the pertinent information and documents available to the Department which pertain to the honesty, reliability, efficiency, educational training and business experience and reputation of the applicant. . . .

31 Pa. Code § 37.46. Conduct evidencing unworthiness to hold an insurance license allows the Commissioner to impose sanctions pursuant to 40 P.S. § 279, including revocation of an existing license. *In re Friedman*, 457 A.2d 983 (Pa. Cmwlth. 1983). In the present case, the Department seeks sanctions for Dwyer's and his agency's conduct relative to the Target policy as demonstrating their unworthiness to hold insurance licenses.

In addition to seeking sanctions for conduct evidencing unworthiness, the Department also seeks sanctions for three other aspects of Dwyer's conduct. The Department has alleged that Dwyer's actions constituted larceny, breach of fiduciary duty and unfair insurance practices. Each of these three activities is proscribed by statute.

Larceny by an agent is proscribed by the Insurance Department Act. An agent "who embezzles or fraudulently converts to his own use, or who, with intent to use or embezzle, takes, secretes, or otherwise disposes of, or fraudulently withholds, appropriates, lends, invests, or otherwise uses or applies, any money or substitutes for

money received by him as such agent or broker, contrary to the instructions or without the consent of the company, association, or exchange for or on account of which the same was received by him, shall be guilty of larceny.” 40 P.S. § 273. The conduct is subject to the sanctions of 40 P.S. § 279(a). The Department alleges Dwyer committed larceny by fraudulently misappropriating and withholding Target’s premium funds when he accepted and deposited the money into the agency account without the knowledge or consent of Penn National.

Also subject to the sanctions of 40 P.S. § 279(a) is conduct which breaches a fiduciary duty. An agent is “responsible in a fiduciary capacity for all funds received or collected as insurance agent or broker and shall not, without the express consent of his or its principal, mingle any such funds with his or its own funds or with funds held by him or it in any other capacity.” 40 P.S. § 273.1. The Department alleges that Dwyer breached a fiduciary duty owed to Target by accepting and depositing the premium payments into the James & Son agency account without the knowledge or consent of Penn National.

Finally, certain activities by agents constitute unfair insurance practices, and one such activity is making untrue or deceptive statements with respect to the agent’s business. An agent commits an unfair insurance practice by making a “statement containing any representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business which is untrue, deceptive or misleading.” 40 P.S. § 1171.5(a)(2). The Commissioner may order that such practice cease and desist, and in addition may suspend or revoke the agent’s license for such conduct. 40 P.S. § 1171.9. The Department asserts that Dwyer committed unfair insurance practices by informing Target that insurance coverage existed with Penn National when Penn National had specifically declined coverage, requesting and

collecting premium payments from Target for a policy which Penn National had specifically declined, informing Target that Penn National was canceling coverage for a policy it had not at the time accepted and providing Target with a fraudulent certificate of liability insurance.

In short, the Department alleges that Dwyer and James & Son: 1) demonstrated unworthiness to hold an insurance license; 2) committed larceny; 3) breached a fiduciary duty; and 4) made untrue, deceptive and misleading statements. The only activities at issue are those actions surrounding the commercial policy Dwyer attempted to secure for Target.

B. Facts

James E. Dwyer has been a successful, licensed insurance agent since 1972 and a broker since 1976. [N.T. 60, 61; JS-9, ¶¶ 4-7]. However, in late 2001 and early 2002, in the course of attempting to secure a commercial insurance policy for a longtime client, Target, Dwyer and his agency, James & Son, Inc. (collectively "respondents") violated a number of Insurance statutes and regulations.

Throughout his more than 30 continuous years of business Dwyer serviced over 10,000 policy holders, worked with approximately 500 carriers and handled over \$300 million dollars of premium money. [N.T. 60, 61]. He was never subject to client complaints or Department discipline. [*Id.*]. James & Son, Inc. has been licensed as a Pennsylvania insurance brokerage since October 2, 2001 and as an agency since November 27, 2001. [JS-9, ¶¶ 8-10]. Dwyer is the sole qualified agent and broker for James & Son, Inc. [JS-9, ¶4]. Prior to the filing of the Order to show cause in this case, James & Son, Inc. has not been the subject of any client complaints or Department

discipline. [JS-9 ¶¶10, 11].

Dwyer entered into an agency agreement with Penn National in 1976. [JS-9, ¶12]. James & Son Inc. entered into an agency agreement with Penn National in 2001. [*Id.*]. Dwyer's history with Penn National was that of a reputable businessman. [N.T. 31].

That reputation led Penn National, in late 2001, to consider coverage for Dwyer's client, Target. At that time Ohio Casualty sent a nonrenewal notice to Target because of its poor claims record. [JS-9, ¶14]. The nonrenewal was effective January 1, 2002. [*Id.*]. At Target's request, on or about November 27, 2001, Dwyer prepared an application for commercial liability insurance and submitted it to Penn National. [JS-9, ¶¶15, 16]. With the application, Dwyer sent a letter requesting review of the submission and detailing the premium value of the potential policy. [JS-1, JS-2, JS-9, ¶¶ 11-13; Exhibits A, B].

Although Penn National did not usually insure general contractors, it agreed to consider the Target application [JS-9, ¶19]. During December 2001 Dwyer and Penn National had several discussions about the Target application. [JS-9, ¶20]. Dwyer gave Target a quote for policy premiums on December 27, 2001 but on December 28, 2001 Penn National informed Dwyer that the company was declining the application because of Target's business history. [JS-9, ¶¶21, 22]. The Target policy was scheduled to terminate three days later, on December 31, 2001. [JS-9, ¶26].

Instead of telling Target that Penn National had declined the application, Dwyer bound Penn National to the Target policy. [JS-9, ¶37]. He then began collecting premium payments without authorization from Penn National or any other insurer. [JS-9, ¶¶ 22-24, 27]. Target paid a premium of \$10,000.00 in January and \$10,966 in February. [JS-9, ¶¶ 31, 32]. The premium payments were deposited into the James & Son, Inc.

agency account. [JS-9, ¶¶27-33]. Dwyer also requested a premium payment in March. [JS-9, ¶44]. He provided Target with an invalid Penn National Certificate of Liability Insurance showing coverage from January 1, 2002 to January 1, 2003 and containing the policy number of another client. [JS-9, ¶¶38-43].

Dwyer continued trying to work out things between Penn National and Target. [JS-9, ¶24]. However, Dwyer was unable to purchase a policy for Target by March 2002 when Target requested assurance that it had commercial liability coverage with Penn National. [JS-9, ¶45]. Dwyer assured Target employees that Penn National was insuring Target but that the policy would be canceled as of March 31, 2002. [JS-9, ¶¶44-48]. When Target's president requested a copy of the commercial liability insurance policy declaration page Dwyer did not supply it. [JS-9, ¶¶49, 50]. Target's president then called Wayne Myers, the Penn National Territorial Manager, and inquired about his policy. [N.T. 33]. Myers immediately contacted Dwyer who assured him that the call was a mistake, Target's president was confused and nothing was wrong. [*Id.*].

After meeting with Dwyer to discuss the account, Penn National on or about April 4, 2002 requested payment for the policy that Dwyer had bound for Target. [N.T. 17]. Dwyer paid all Target's premium payments to Penn National on April 19, 2002. [JS-9, ¶34]. Neither he nor the agency retained any commission on the policy premium. [JS-9, ¶35]. Penn National honored the policy to which Dwyer had bound it and provided coverage for the time period covered by the premium payments. [JS-9, ¶58].

However, as a result of this transaction, Penn National terminated its contract with Dwyer "for fraud and dishonesty." [JS-9, ¶54]. Although it could have elected immediately to sever all ties to the respondents, Penn National entered into a limited agency agreement with James & Son, Inc. in order to serve the existing Penn National

policies. [JS-9, ¶55; N.T. 42, 43]. Under the limited agency agreement, neither the agency nor Dwyer were permitted to bind Penn National to any new policies. [JS-9, ¶¶56, 57]. By the time of the hearing all contractual relationships between Penn National and the respondents had ended. [N.T. 63].

During the hearing, Dwyer testified simply that his behavior in the Target situation was inappropriate and he was sorry. [N.T. 62]. He acknowledged the need for punishment. [*Id.*]. He has lost his contract with Penn National, stopped seeking new customers and has experienced a general disruption in his family and business life. [N.T. 62, 63]. He made no excuses for his behavior.

Each of the four counts brought by the Department will be evaluated in light of these and the other established facts.

C. Liability

COUNT I—Agent Worthiness (40 P.S. §§ 234, 279 and 31 Pa. Code §§ 37.46, 37.47)

In order to be worthy of licensure, agents are required to act with diligence and care toward the public they serve. The Insurance Department Act allows for denial, suspension or revocation of a license, as well as other sanctions, for unworthiness. *Jones v. Foster*, 611 A.2d 332 (Pa. Cmwlth. 1992); *Termini v. Department of Insurance*, 612 A.2d 1094 (Pa. Cmwlth 1992). In some cases, unworthiness is demonstrated by a disregard of insurance statutes. *Jones, supra* (violation of statutes proscribing solicitation for unlicensed insurance company). In other cases, unworthiness may be established by conduct showing a lack of honesty or other characteristic necessary properly to serve the insurance buying public. *Termini, supra* (dual exclusive employment activity showing a

lack of honesty).

In all events, the overriding consideration is protection of the insurance consumer, industry and profession. "The Commissioner has the duty to protect the public from unworthy agents and also to maintain the appearance of worthiness among agents." *Romano v. Pennsylvania Insurance Commissioner*, 404 A.2d 758, 760 (Pa. Cmwlth. 1979).

In this case, Dwyer seemed to possess all the qualities of a good agent and broker until late 2001 and early 2002. During that time Dwyer took the following actions:

- Bound Penn National to an insurance policy after it had denied the application,
- Failed to notify Target that its commercial liability insurance application had been denied by Penn National,
- Assured Target that it had insurance coverage from Penn National even though Penn National had refused the application,
- Requested three premium payments on the policy to which Dwyer had bound Penn National without its authorization,
- Collected two premiums from Target for the Penn National policy without the knowledge or consent of Penn National,
- Held the two premiums in the James & Son, Inc. bank account without the knowledge or consent of Penn National,
- Waited to remit the two premiums until three months and four months respectively from the time of receipt and after Penn National requested the premiums,
- Provided Target with a false certificate of liability insurance,
- Had an agency agreement with Penn National terminated for fraud and

dishonesty.

All of these actions evidence a lack of honesty and integrity necessary in the business of insurance. Target trusted the respondents to obtain a policy for the company. Penn National trusted the respondents to abide by its agency agreement and refrain from binding it to policies it had declined. Pennsylvania law holds agents to a high degree of professionalism and must exercise good judgment. *See Pennsylvania Insurance Department v. Ciervo*, 353 A.2d 900 (Pa. Cmwlth. 1976). As an agent with 30 years of experience, Dwyer knew or should have known of the need for honesty and integrity during his dealing with Target and Penn National. Instead he exercised deception and showed a lack of integrity.

Undoubtedly Target presented a significant challenge to Dwyer. Dwyer had serviced policies for Target for many years. Its commercial policy was scheduled to cancel within a few weeks of the time Target contacted Dwyer about securing coverage. Dwyer could not find coverage because of Target's claims record. Penn National, after considering the application during December, denied it only three days before the effective cancellation date of Target's policy. Target and the respondents were facing an insurance crisis.

Such a crisis presents a test of true professionalism for an agent or agency. The respondents failed the test. Even though Dwyer's only intent was to ensure that Target had uninterrupted coverage, this good motive did not justify his methods. The deception and fraud exercised by the respondents during the Target transaction were unworthy of licensed insurance professionals.

COUNT II— Larceny (40 P.S. §§ 273, 279)

In its order to show cause the Department also alleges that Dwyer committed larceny when he accepted premium funds from Target for a non-existent policy without the knowledge or consent of Target or Penn National and when he deposited the premium funds into the James & Son, Inc. agency account without the knowledge or consent of either Target or Penn National. Larceny is committed by an agent who:

acts in negotiating a contract of insurance for an insurance company, association, or exchange lawfully doing business in this Commonwealth, and who embezzles or fraudulently converts to his own use, or who, with intent to use or embezzle, takes, secretes, or otherwise disposes of, or fraudulently withholds, appropriates, lends, invests or otherwise uses or applies, any money or substitutes for money received by him as such agent or company, association, or exchange for or on account of which the same was received by him. . .

40 P.S. § 273. This section requires personal use or specific intent to use the proceeds: the agent must embezzle or fraudulently convert to his own use, or intend to use or embezzle, money or a money substitute. Without Penn National's authorization, Dwyer bound the company to a commercial policy for Target. Without Penn National's consent or knowledge, he took premium money from Target. Without telling Target that Penn National had refused coverage, he placed premium funds in the James & Son, Inc. agency account. He kept the funds for over three months without informing Target of the true status of its coverage or without paying Penn National.

Dwyer's stated purpose for collecting and depositing premium funds was to pay for the Penn National policy, or for another policy, in the event that he could not convince Penn National to accept the risk. However, his deceptions during the time he collected and retained the funds evidence a serious lapse in judgment. Compounding his error, Dwyer supplied Target with an invalid Penn National Certificate of Liability

Insurance with a false policy number while allegedly collecting premiums from Target for a Penn National policy. Even more troubling is that Dwyer did not present the premium funds to either Penn National or another insurance company until after Penn National requested it. If Dwyer in fact believed he had authority to bind Penn National to the Target policy he knew or should have known that the premiums had to be sent to Penn National within the time specified in his contract. He did not pay any premiums to Penn National until Target contacted the company about its concerns. Instead he kept the funds for over three months. These actions constitute larceny.

COUNT III—Violation of Fiduciary Capacity (40 P.S. § 273.1, 279)

The respondents' actions also constitute violations of fiduciary capacity. 40 P.S. § 273.1 holds responsible every insurance agent:

In a fiduciary capacity for all funds received or collected as insurance agent or broker and shall not, without the express consent of his or its principal, mingle any such funds with his or its own funds or with funds held by him or it in any other capacity. Nothing herein contained shall be deemed to require any such agent or broker to maintain a separate bank deposit for the funds of each such principal, if and as long as the funds so held for each such principal are reasonably ascertainable from the books of account and records of such agent or broker.
40 P.S. § 273.1

The monies collected by Dwyer from Target did not belong to him or his agency, but rather were received from a policyholder on behalf of an insurance company. Neither Penn National, nor any other insurer, authorized or consented to the respondents' collecting premium payments from Target. Although the respondents treated the premium funds as they would have handled any others, they did so without the consent of Penn National. They also did so without informing their client of the true circumstances

surrounding their false certificate of insurance. The elements of 40 P.S. § 273.1 are met in this case and the respondents are subject to the sanctions of 40 P.S. § 279.

COUNT IV—Unfair Insurance Practices (40 P.S. § 1171.5(a)(2)) (UIPA)

An agent commits an unfair insurance practice by making a “statement containing any representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business which is untrue, deceptive or misleading. 40 P.S. § 1171.5(a)(2). The Department asserts that the following actions by respondents represent unfair insurance practices:

- Informing Target that insurance coverage existed with Penn National when in fact Penn National had specifically declined coverage,
- Requesting on three occasions and collecting on two occasions premium checks from Target for a policy which Penn National had specifically declined,
- Informing Target that Penn National was canceling coverage when in fact Target specifically declined the original application,
- Providing Target with a fraudulent certificate of liability insurance.

Although the parties agreed during these proceedings that Target was covered by an enforceable commercial liability insurance policy because Dwyer bound Penn National to the policy, Dwyer’s assurances to Target in early 2002 were misleading. He knew that the enforceability of the policy was questionable because Penn National had declined the application. He knowingly collected premium for a policy after Penn National had rejected the application. He provided a certificate of liability insurance with a wrong policy number. At the time he informed Target that the policy would be canceled, Penn National had not yet agreed to accept the risk. No premium funds had been paid to Penn National. These deceptive statements not only created a risk that

Target would be denied coverage should a loss occur during the first three months of 2002, but also subjected Penn National to a potential \$2,000,000 payout for coverage it had not agreed to furnish.

These false representations are part of the course of conduct which make the respondents liable under the UIPA. *In re Crimboli*, SC99-04-015 (1999); *In re Jennings*, SC99-10-001 (2001). Respondents' choices to practice deceit for over three months is particularly troubling, because it evidences a dishonesty that strikes at the very heart of their obligations to both the insurer and the policyholder. Both policyholders and insurers must be able to trust the insurance producer. Respondents violated that trust. Respondents are liable for the penalties contained in the UIPA.

D. Penalties

The respondents are liable for sanctions under both the Insurance Department Act and the UIPA. Under the Insurance Department Act, the Commissioner has the authority to revoke an individual's license and to impose a fine of up to \$5,000 for each violation. 40 P.S. § 279. Under the UIPA, the Commissioner may order that the individual cease and desist from the misconduct, and in addition may suspend or revoke the agent's license. 40 P.S. § 1171.9.

The Commissioner has the discretion under 40 P.S. § 279 to consider mitigating factors even if a *prima facie* case of unfitness has been established. The Commonwealth Court has held that 40 P.S. § 279 "expressly provides for the consideration of mitigating circumstances" even if a *prima facie* case of unfitness has been established. *In re Friedman*, 457 A.2d 983, 989 (Pa. Cmwlth. 1983); *See also Romano v. Pennsylvania Insurance Commissioner*, 404 A.2d 758, 759-60 (Pa. Cmwlth. 1979) ("[40 P.S. § 279]

does permit the Commissioner discretion” to consider her responsibilities as well as the agent’s circumstances.). The Commissioner similarly has discretion in imposing sanctions under the UIPA. *See Termini v. Department of Insurance*, 612 A.2d 1094 (Pa. Cmwlth. 1992); *Judson v. Insurance Department*, 665 A.2d 523 (Pa. Cmwlth. 1995).

The Department in its Order to Show Cause and briefs requested imposition of a cease and desist order and revocation of the respondents’ certificate of qualification under each count. In addition, the Department requested a civil penalty of \$5,000 for each of the Insurance Department Act counts for a total penalty of \$190,000.00.⁶

The respondents’ conduct was serious. Although Dwyer only intended to make sure that Target remained insured through his agency, he attempted to achieve his goal by improper means. Serendipity prevented actual harm to anyone but Penn National was forced to accept a \$2 million risk it had declined. Target was lulled into a false sense of security that it had coverage when in fact the true nature of the policy remained uncertain until Penn National accepted the risk in late March. The fact that no one experienced any actual harm does not mitigate the seriousness of the respondents’ conduct.

However, even though the Department argues that Dwyer has presented no mitigating factors, some evidence in this case mitigates the seriousness of the respondents’ conduct. Dwyer has acknowledged his complete responsibility for his behavior, recognized the seriousness of his actions, exhibited appropriate remorse for his actions, and made no excuses for his behavior. He fully accepted the need for

⁶ In its brief the Department asserts that Dwyer’s behavior involved “12+” incidents of inappropriate behavior during the course of the Target transaction. Although the brief lists 9 discrete types of behavior, it is clear that the department included in its calculations each separate solicitation and collection of premium. Without minimizing the serious nature of each action, these behaviors all occurred within the process of obtaining one commercial policy for one client. Dwyer’s actions do not constitute a “continuous pattern of misconduct” in the context of his entire career.

punishment. He exhibited understanding of the serious nature of his conduct. Whether an individual accepts responsibility for actions is relevant to determining the harshness of the penalty imposed. See *In re Gottfried*, SC98-06-009 (1999); *In re Moraski*, SC98-06-032 (2000).

Furthermore, stipulated evidence in this case confirms that the Target transaction was an aberration for Dwyer and his agency. Dwyer was an agent in good standing with both the Department and Penn National for approximately 30 years. Penn National confirmed the company's long and positive relationship with Dwyer. This isolated circumstance, while serious, is the only stain coming to light in an otherwise very long and unblemished tenure in the insurance profession. In addition, although Dwyer did not reveal his actions to Penn National until Target requested policy information from the company, Dwyer has paid Penn National all the premiums he collected, without retaining any commission. Penn National agreed to provide coverage for the months covered by the premium. Thus no restitution is owed to anyone.

Furthermore, the respondents have already experienced punishment for their actions. Penn National terminated its valuable agency contract with the respondents. Dwyer has been unable to continue seeking new customers and his business and family life have been impacted significantly.

Nevertheless, what is certain in this case is that the respondents' actions potentially jeopardized the financial well being of Target and betrayed the trust of Penn National. Dwyer's falsification of a certificate of liability insurance and his numerous deceptive actions towards both Target and Penn National for over three months are most disturbing. This conduct merits a period of license suspension and supervision by the Department as well as a monetary penalty. However, in fashioning the penalty all of the

mitigating factors have been considered and have resulted in the lessening of what could have been a substantially greater civil penalty. In light of all the foregoing, the Commissioner enters the order which follows.

CONCLUSIONS OF LAW

1. The Commissioner has jurisdiction over the parties and subject matter of these proceedings.
2. The Department may revoke or suspend a certificate or license upon finding that an agent or a broker has engaged in conduct which would disqualify him from initial issuance of a certificate or a license.
3. If unworthiness is established, the Commissioner may exercise discretion to impose remedial action in light of the agent's conduct as well as mitigating and aggravating factors.
4. Agents are held to a high degree of professionalism and must exercise good judgment.
6. Agents on the front line dealing with the insurance-buying public must avoid conduct demonstrating a disregard for regulations which protect those consumers.
7. James E. Dwyer and James & Son, Inc. by their conduct demonstrate current unworthiness to hold insurance licenses.
8. An agent who commingles a policyholder's funds with his own or fails to apply the funds to the intended purpose violates 40 P.S. § 273.1.
9. James E. Dwyer and James & Son, Inc. commingled a policyholder's funds with their own and violated their fiduciary obligation to a client.

10. James E. Dwyer and James & Son, Inc. committed unfair insurance practices by making false, deceptive and misleading statements in the business of insurance.

11. The mitigating circumstances in the present case justify imposing less than the maximum civil penalty but do not negate the current unworthiness of the respondents to hold insurance licenses.

12. James E. Dwyer's and James & Son, Inc.'s actions, considering aggravating and mitigating factors, merit the sanctions imposed in the accompanying order.

13. If any of the foregoing Conclusions of Law should be held to constitute Findings of Fact, the ones so found are incorporated therein by reference.

BEFORE THE INSURANCE COMMISSIONER
OF THE
COMMONWEALTH OF PENNSYLVANIA

IN RE:	: ALLEGED VIOLATIONS:
	:
James E. Dwyer	: Sections 604, 622, 633, 633.1 and
332 Sagamore Road	: 639 of the Insurance Department
Havertown, PA 19083	: Act of 1921, P.L. 789, No. 285, <i>as</i>
	: <i>amended</i> (40 P.S. §§ 234, 252,
and	: 273, 273.1 and 279).
	:
James & Son, Inc.	: Sections 37.46, 37.47 of the
Post Office Box 1447	: Insurance Department
Havertown, PA 19083	: Regulations (31 Pa. Code §§
	: 37.46, 37.47)
Respondents	:
	: Section 5(a)(2) of the Unfair
	: Insurance Practices Act, Act of
	: July 22, 1974, P.L. 589, No. 205,
	: <i>as amended</i> (40 P.S. §
	: 1171.5(a)(2))
	:
	: Docket No. SC03-07-048

ORDER

AND NOW, based upon the foregoing findings of fact, discussion and conclusions of law, it is **ORDERED** as follows:

1. James E. Dwyer and James & Son, Inc. shall **CEASE AND DESIST** from the prohibited conduct described in the adjudication.
2. All of the insurance licenses or certificates of qualification of James E. Dwyer and James & Son, Inc. **ARE SUSPENDED** for eight (8) months pursuant to 40

P.S. § 279 for each of Counts I, II and III, with these suspensions to run **consecutively** with each other. All of the insurance licenses or certificates of qualification of James E. Dwyer and James & Son, Inc. **ARE SUSPENDED** for two (2) years pursuant to 40 P.S. § 1171.9 for Count IV with this suspension to run **concurrently** to the other three suspensions for a total suspension of **two years** beginning on the **thirtieth day after issuance of this order and ending on the two year anniversary of the suspension.**

3. For a time of no more than five (5) years after reinstatement of the insurance licenses or certificates of qualification of James E. Dwyer and James and Son, Inc. said licenses or certificates of qualification shall be subject to immediate suspension by the Department following its investigation and determination that (i) the penalty has not been fully paid; (ii) any other term of this order has not been complied with; or (iii) any complaint against the respondent is accurate and a statute or regulation has been violated.

4. James E. Dwyer and James and Son, Inc. shall have no right to prior notice of a suspension imposed pursuant to paragraph 3 of this order, but will be entitled to a hearing upon written request received by the Department no later than thirty (30) days after the date the Department mailed to the respondent by certified mail, return receipt requested, notification of the suspension, which hearing shall be scheduled for a date within sixty (60) days of the Department's receipt of the respondent's written request.

5. At the hearing described in paragraph 4 of this order, the respondents shall have the burden of establishing that they are worthy of licensure

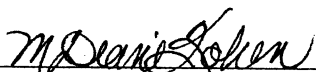
6. In the event that the respondents' certificates and licenses are suspended pursuant to paragraph 3 of this order, and the respondents either fail to request a hearing within thirty (30) days or at the hearing fail to establish that they are worthy of licensure, the respondents' suspended certificates and licenses shall be revoked.

7. James E. Dwyer and James & Son, Inc. shall pay a civil penalty to the Commonwealth of Pennsylvania within **thirty (30) days** of this Order as follows:

- a. Count one: \$9,000.00
- b. Count two: \$18,000.00
- c. Count three: \$9,000.00

for a total of thirty-six thousand Dollars (\$36,000.00). Payment shall be made by certified check or money order, payable to the Commonwealth of Pennsylvania, directed to: Sharon Harbert, Administrative Assistant, Bureau of Enforcement, 1321 Strawberry Square, Harrisburg, Pennsylvania 17120. No certificate of qualification or other insurance license may be issued or renewed until the said civil penalty is paid in full.

8. This order is effective immediately.



M. Diane Koken
Insurance Commissioner