



COMMONWEALTH OF MASSACHUSETTS
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DIVISION OF INSURANCE

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COMMISSIONER OF INSURANCE

Division of Insurance, Petitioner
v.
Frederick V. McMenimen, III, Respondent
Docket No. E2011-03

Decision and Order

I. Introduction and Procedural History

On March 1, 2011 the Division of Insurance (“Division”) filed an order to show cause (“OTSC”) against Frederick V. McMenimen, III (“McMenimen”), a licensed Massachusetts insurance producer. In the OTSC the Division alleges that from 1997 through 2004 McMenimen, in connection with the sale of life insurance to his uncle, Samuel Pietropaolo (“Pietropaolo”) committed unfair and deceptive practices prohibited by G.L. Chapter 176D (hereafter, “Chapter 176D”) and engaged in conduct that supports revocation of his producer license pursuant to G.L. Chapter 175 (hereafter, “Chapter 175”), §162R (a)(2), (a)(5), (a)(7) and (a)(8).

Those sections, respectively, authorize disciplinary actions if a licensee has: 1) violated any insurance law; 2) intentionally misrepresented the terms of an actual or proposed insurance contract; 3) admitted or been found to have committed any insurance unfair trade practice or fraud; and 4) used fraudulent, coercive or dishonest practices, or demonstrated incompetence, untrustworthiness or financial irresponsibility in the conduct of business in the commonwealth or elsewhere. The Division further alleges that McMenimen failed to report to it a disciplinary action taken against him by the state of New Hampshire in 2009, a violation of Chapter 175, §162V (a). The Division seeks

revocation of McMenemy's producer license, a cease and desist order, imposition of fines, and orders prohibiting him from engaging in the insurance business in Massachusetts in any capacity.

A Notice of Procedure ("Notice") was issued on March 1, 2011, scheduling a prehearing conference for April 5, 2011 and a hearing for April 26, 2011. On April 1, McMenemy moved to stay the proceedings on the grounds that issues of law relevant to this proceeding were under consideration in two cases then pending before the Massachusetts Supreme Judicial Court.¹ The Division did not object to a limited stay. At an April 12, 2011 prehearing conference, I allowed McMenemy's motion and ordered him to file his answer ten days after the court issued its decision in *Anawan*. On April 29, 2011, the date of the *Anawan* decision, McMenemy was ordered to file his answer by May 10.

McMenemy moved to enlarge the time to answer and for an enlargement of time to file a motion to dismiss the OTSC on the grounds that the Division's claims were time-barred. By order dated May 5, 2011 his motion to enlarge the time to answer was denied and he was directed to file his motion on the statute of limitations by May 16, 2011. On May 9, 2011 McMenemy filed a motion to dismiss for a different reason: that Chapter 175, §162R had not been enacted at the time the alleged misconduct underlying the OTSC occurred (the "First Motion to Dismiss"). The Division filed its opposition to McMenemy's motion on May 12, 2011; the First Motion to Dismiss was denied by order dated May 23, 2011. McMenemy's motion to reconsider that order was denied on July 1, 2011.

McMenemy filed his answer to the OTSC on May 10, 2011, raising two affirmative defenses: that the OTSC was time-barred under the applicable statute of limitations and laches. On May 16, he filed a Second Motion to Dismiss, arguing that the OTSC was time-barred because the Division should have known of McMenemy's alleged misconduct more than four years before March 1, 2011. The Division opposed the motion. On July 15, 2011 a decision issued denying the Second Motion to Dismiss.

¹ The two cases were *Anawan Insurance Agency, Inc. v. Division of Insurance*, 459 Mass. 592 (2011) ("*Anawan*") and *Passatempo, et al., v. McMenemy, et al.*, 461 Mass 279 (2012) ("*Passatempo et al.*"). The *Anawan* decision was issued on April 29, 2011.

The Supreme Judicial Court issued its decision in *Passatempo, et al.* on January 12, 2012. On January 17, 2012 the Division moved to amend the OTSC to reflect changes in McMenimen's licensing status occasioned by his requests to cancel his Massachusetts non-resident and New Hampshire producer licenses.² McMenimen was ordered to file any response to that motion to amend by January 27, 2012, but failed to do so. On January 19, 2012 the Division moved for summary decision. McMenimen filed his opposition to that motion on February 2, 2012. On February 6, 2012 the parties moved jointly to stay the proceeding until the Supreme Judicial Court ruled on McMenimen's petition for rehearing in *Passatempo, et al.* The motion was allowed, with the condition that McMenimen notify the Division of the ruling on his petition within seven days after it was issued. The Court denied McMenimen's petition on March 5, 2012; on March 30 the parties were ordered to appear for a status conference on April 13, 2012.³ McMenimen did not appear at the conference, and did not request a continuance.

II. Motion for Summary Decision

Actions to revoke occupational licenses are governed under G.L. Chapter 30A, §13, and the provision in the Code of Massachusetts Regulation generally applicable to adjudicatory proceedings, 801 CMR 1.01. 801 CMR 1.01 (7)(h) allows a party, when he or she is of the opinion that there is no genuine issue of fact relating to a claim, and that he or she is entitled to prevail as a matter of law, to file a motion for summary decision, with or without supporting affidavits.

The Division bases its motion for summary decision in this matter on the jury findings, the trial judge's findings of fact, rulings of law and order on the Chapter 93A claim, and the amended final judgment entered in the Superior Court proceeding underlying *Passatempo, et al.*, as well as the consent order and settlement agreement that McMenimen entered into with the New Hampshire Insurance Department.

The Division notes that: 1) the relevant documents were attached as exhibits to the OTSC; 2) McMenimen admitted to each document in his answer; and 3) the Supreme

² The OTSC filed on March 1, 2011 stated that McMenimen held an active Massachusetts producer license. On November 28, 2011, he submitted a written request to the Division to cancel his Massachusetts license; the Division did so on December 5, 2011. The amendment to the OTSC reflects the change in McMenimen's status and cites the statute specifically giving the Division jurisdiction over former licensees.

³ Although he had been ordered to do so, McMenimen did not report the denial of his motion to the Division.

Judicial Court affirmed the Trial Court's judgment against McMenemy. The principle of issue preclusion, the Division argues, prevents McMenemy from now contesting the facts, found in the Superior Court proceeding, that support the Division's claims that he violated the insurance laws. Further, the Division notes, McMenemy has not contested the disciplinary proceeding at the New Hampshire Insurance Department or the allegation that he failed to report it to the Division.

McMenemy opposes the Division's motion for summary decision on the ground that the factors that permit application of the doctrine of issue preclusion have not been met. He asserts that the Supreme Judicial Court's January 2012 decision would not be final, at the earliest, until February 9, 2012, and that the petitions for rehearing before the Court might change the outcome. Therefore, he argues, the Division's motion is premature. McMenemy asserts that the Division has not established that the issues on which it seeks summary disposition are identical to those adjudicated in the civil proceedings. He contends that the Supreme Judicial Court did not determine whether he violated Chapter 176D, §3, but focused instead on Chapter 93A.

McMenemy argues that the Division also failed to specify which of the issues in the prior adjudication were essential to the earlier judgment. He asserts that the Division may not rely on issue preclusion but is obligated to prove its allegations on their merits. McMenemy also notes that he has already voluntarily surrendered his Massachusetts producer license.

McMenemy's arguments are not persuasive. Any argument that the motion for summary decision is premature is now moot. The Supreme Judicial Court declined to hear the petitions for rehearing and its decision, fully affirming the trial court's decision, is final. McMenemy's reliance on the discussion of issue preclusion in *Kobrin v. Board of Registration in Medicine*, 444 Mass. 837 (2005), is misplaced. That case addressed whether a disciplinary action initiated by the Board of Registration based on Kobrin's convictions for Medicaid fraud was barred because an earlier disciplinary action had resulted in a decision in his favor. The Court determined that the first action, because it did not arise from the fraud convictions, did not preclude the second, even though both actions included claims based on Kobrin's treatment of two of the same patients.

In contrast, in this proceeding, the Division's claims alleging that McMenemy's conduct supports revocation of his license pursuant to Chapter 175, §162R is firmly grounded on the facts and findings in the civil proceeding. The court's decision in *Passatempo, et al.* affirmed the trial court's findings, which included determinations that McMenemy had violated Chapter 176D, §3.

The standard for determining when a motion for summary decision is appropriate is whether any material facts are in dispute. Although licensees are entitled to an opportunity for a hearing before a license is revoked, a hearing is not required if the material facts are not disputed. *See Kobrin*, 444 Mass., at 844-847. The material facts on which the Division bases its motion for summary decision in this administrative proceeding are those found in the trial court, and incorporated into the *Passatempo, et al.* decision, that describe McMenemy's conduct in connection with insurance transactions between him and Samuel Pietropaolo and/or his representatives.

The Division's burden is to demonstrate that the facts that were found to support the decisions against McMenemy in the civil litigation and appellate proceeding also support disciplinary action pursuant to Chapter 175, §162R (a). In his answer to the OTSC, McMenemy admitted to the findings by the jury in the Superior Court case, to the Findings of Fact, Rulings of Law and Order by the trial court on the plaintiffs' Chapter 93A claim, and to the trial court's final judgment, but argued that they did not bind him or have any probative value in this proceeding until the Supreme Judicial Court affirmed the judgment. Because that event has now occurred, his argument is moot. McMenemy has cited no authority in support of his position that, despite his concession that those documents have probative value and are now binding on him, the Division is obligated to relitigate the facts found by the jury and the trial judge.

That McMenemy voluntarily cancelled his Massachusetts insurance producer's license in December 2011 does not preclude the Division from seeking revocation of that license or other relief permitted under the applicable statutes. Chapter 175, §162R (e) specifically states that the Commissioner of Insurance ("Commissioner") retains the authority to enforce the provisions of and to impose penalties or remedies authorized by Chapter 175, §§162H through 162X, and Chapter 176D even if the person's license has been surrendered or lapsed by operation of law.

III. Findings of Fact

The following findings of fact are based on allegations in the initial and amended OTSC, statements in the exhibits attached to them, and McMenemy's answer.

1. The Division first licensed McMenemy as an insurance agent on or about August 8, 1990. His Massachusetts insurance agent licenses were cancelled and converted to an insurance producer license on May 16, 2003.
2. On December 2, 2011, the Division's Producer Licensing Section received McMenemy's written request, dated November 28, 2011, to cancel his Massachusetts insurance producer license. The Division cancelled his license on December 5, 2011.
3. In 2006, litigation initiated by Ronald Passatempo, trustee of the Samuel Pietropaolo Irrevocable Trust *et al.* against McMenemy, *et al.*, originally filed in Middlesex Superior Court on July 1, 2004, was transferred to the Business Litigation Session of the Suffolk Superior Court (the "*Passatempo* Litigation").⁴
4. In 2009, a Superior Court jury found in the *Passatempo* Litigation that, from July 1998 through July 1, 2001, McMenemy had fraudulently concealed from the plaintiffs the fact that they did not have an insurance policy [from the Provident Mutual Life Insurance Company ("Provident Mutual")] with a \$500,000 death benefit, and that the plaintiffs did not have actual knowledge before July 1, 2001 that the Provident [Mutual] policy did not have such a benefit.
5. In 2009, a Superior Court jury found in the *Passatempo* Litigation that McMenemy had made an intentional misrepresentation to the plaintiffs about the \$500,000 death benefit.
6. In 2009, a Superior Court jury found in the *Passatempo* Litigation that McMenemy was negligent with regard to obtaining a life insurance policy on Samuel Pietropaolo with a \$500,000 death benefit.

⁴ The full caption of the trial court proceeding is Ronald P. Passatempo, trustee, Patricia D. Pietropaolo and Samuel Pietropaolo, Jr., executor of the estate of Samuel Pietropaolo, v. Frederick V. McMenemy, III, Barry G. Armstrong, New England Advisory Group, LLC, Nationwide Life Insurance Company of America, Nationwide Securities, LLC, and Nationwide Financial Services, Inc. The last of these is the successor in interest to 1717 Capital Management Company. The insurance coverage at issue was an asset of an irrevocable trust that Pietropaolo had established.

7. On February 2, 2010, the trial judge in the *Passatempo* Litigation issued findings of fact, rulings of law and an order on the plaintiffs' claim that McMenimen had violated Chapter 93A.
8. The trial judge adopted the jury findings on intentional misrepresentation and fraud.
9. The trial judge found that in 1997 Pietropaolo sought advice about his retirement benefits options from McMenimen, an experienced insurance agent and broker who held himself out as knowledgeable in the field of pension maximization.
10. McMenimen advised Pietropaolo to select a particular option under his retirement plan and to purchase life insurance with \$500,000 in death benefits.
11. At the time, Pietropaolo had policies from the John Hancock Life Insurance Company ("John Hancock") providing \$147,000 in death benefits; he applied, through McMenimen, for additional insurance from Mutual of New York ("MONY"), which issued a policy to him on December 19, 1997.
12. McMenimen was employed by MONY until February 18, 1998, when he resigned; as of February 23, 1998, he became employed by Provident Mutual.
13. After joining Provident Mutual, McMenimen attempted to place Pietropaolo with that company, applying on March 5, 1998 for a policy with a \$500,000 death benefit. McMenimen told the Pietropaolos that he applied to Provident Mutual to get them a better deal.
14. Provident Mutual declined Pietropaolo's application by May 1, 1998.
15. McMenimen did not advise Pietropaolo to retain the John Hancock and MONY policies but falsely told him that Provident Mutual had approved his application for a \$500,000 life insurance policy.
16. At the end of May 1998, Pietropaolo's son received a letter from Provident Mutual stating that it had declined Pietropaolo's application. He called McMenimen, who told him that the letter was a "mistake," that he had "fixed" it and that the Provident Mutual policy had been "restructured" into two components, one providing a \$200,000 death benefit and the other "in back" for a total guaranteed benefit of \$500,000.

17. Following McMenemy's advice, Pietropaolo cancelled his John Hancock policies and used their cash surrender value to pay premium on the Provident Mutual policy.
18. Provident Mutual, in October 1998, sent a "final notice" to McMenemy requiring a signed application for the \$200,000 policy. McMenemy took the signature line from the March 5, 1998 application, transposed it on a new application for a \$200,000 policy, and sent the document to Provident Mutual.
19. McMenemy fraudulently concealed from the plaintiffs in the *Passatempo* Litigation that there was no \$500,000 death benefit.
20. Around April 2003, Pietropaolo learned from another insurance agent that the Provident Mutual policy had only a \$200,000 death benefit.
21. After Pietropaolo's son informed McMenemy of this information, McMenemy prepared forms which, he falsely claimed, increased the death benefit on Pietropaolo's policy to \$489,000.
22. To support his statement that the death benefit had been increased to \$489,000, McMenemy, in July and August, 2004, fabricated e-mail communications that he purportedly received from another insurance agent confirming the increase.
23. In 2004 McMenemy fabricated and gave to Pietropaolo's son a policy schedule that indicated a \$500,000 death benefit.
24. After reviewing the record and the parties' arguments, the trial court judge ruled in favor of the plaintiffs on their claim pursuant to Chapter 93A, finding that McMenemy had repeatedly misrepresented the terms and conditions of Pietropaolo's policy, in violation of Chapter 176D, §3(1) (a) and had made those misrepresentations with the intent to induce conversion of a policy, a violation of Chapter 176D, §3(1) (f).
25. The trial court judge further found that McMenemy's repeated violations of Chapter 93A were willful and knowing and therefore awarded the plaintiffs treble damages and reasonable attorneys' fees.

26. The Supreme Judicial Court, on appeal of the Superior Court decision, upheld in its entirety those portions relating to McMenimen.⁵
27. On or about December 9, 2009, McMenimen, then a licensed insurance producer in New Hampshire, entered into a consent order and agreement with the New Hampshire Insurance Department to resolve its determination that his actions relating to the sale of insurance to four New Hampshire consumers violated New Hampshire law.
28. McMenimen misrepresented to the consumers that certain annuity products paid a certain guaranteed interest rate and subsequently offered to pay the consumers the difference between that rate and the interest rate actually paid, an unfair trade practice under New Hampshire law.
29. McMenimen failed to notify the Division of the New Hampshire consent order within 30 days of its execution.

IV. Discussion and Analysis

Chapter 175, §§162G through 162X set out, among other things, the requirements for obtaining and maintaining a Massachusetts insurance producer's license. Chapter 175, §162R (a) specifies fourteen grounds on which the Commissioner may suspend or revoke a producer's license, or deny a license application. The Division identifies three of those grounds, set out in subsections §162R (a)(5), (a)(7) and (a)(8) as bases for revoking McMenimen's license. It also asserts that his actions violate Chapter 176D.

The record amply supports the Division's claims. Chapter 175, §162R (a)(5) permits disciplinary action if a licensee has intentionally misrepresented the terms of an actual or proposed insurance contract. The jury in the *Passatempo* Litigation found that McMenimen had intentionally misrepresented the terms of Pietropaolo's life insurance policy, a finding that the trial judge adopted in her ruling on the plaintiffs' Chapter 93A claims. The facts found by the trial judge demonstrate that the misrepresentations were made both orally and in documentary form.

⁵ The Supreme Judicial Court took direct review of the trial court's decision because of the prior history of the matter. McMenimen moved to dismiss the Superior Court litigation on the ground that Chapter 175, §181 barred suit against him for any alleged misrepresentation in connection with the sale of the policy to Pietropaolo. When his motions were denied, he twice filed interlocutory appeals that the Supreme Judicial Court denied, but stated that it would hear the question directly once the merits were determined by the trial court.

Chapter 175, §162R (a)(7) permits disciplinary action if the licensee has admitted or been found to have committed any insurance unfair trade practice or fraud. Findings by the trial judge provide ample evidence that McMenimen committed unfair trade practices in the business of insurance. Chapter 176D prohibits engaging in acts or practices that are defined as unfair or deceptive under §3 of the statute. The trial judge specifically found that McMenimen's misrepresentations about the terms of Pietropaolo's insurance were an practice prohibited under Chapter 176D, §3 (1)(a) and that he made misrepresentations for the purpose of inducing the lapse, forfeiture, exchange, conversion or surrender of an insurance policy, a violation of Chapter 176D, §3 (1)(f).

In addition to practices defined as unfair and deceptive under Chapter 176D, the Commissioner may also, pursuant to Chapter 176D, §§2 and 6, determine that other practices are unfair or deceptive. The Division has determined that the submission of false documents relating to an insurance policy is a violation of Chapter 176D, §2. *See Division of Insurance v. Laroque*, Docket No. E2000-02 (September 14, 2000). It has also found that signing a consumer's name to an application without authorization is an unfair and deceptive act. *See Division of Insurance, v. Burbridge*, Docket No. E95-05 (1995). The facts found by the trial judge support a conclusion that McMenimen, by fabricating documents such as e-mails and a policy schedule, and submitting an application for insurance to which he had, without permission, affixed Pietropaolo's signature, engaged in practices that have been found to violate Chapter 176D, §2.

Chapter 175, §162R (a)(8) permits disciplinary action if the licensee has used fraudulent, coercive or dishonest practices, or demonstrated incompetence, untrustworthiness or financial irresponsibility in the conduct of business in the commonwealth or elsewhere. The trial judge's findings in the *Passatempo* Litigation equally support conclusions that McMenimen engaged in dishonest practices in connection with the Pietropaolo insurance transactions and that those practices demonstrate untrustworthiness. Those conclusions provide ample basis for disciplinary action pursuant to Chapter 175, §162R (a)(8).

The precise number of occasions on which McMenimen made misrepresentations to Pietropaolo or his representatives cannot be determined from the record in this matter. It is evident, however, that the deceptive practices began early in 1998, shortly after

McMenimen left MONY for employment with Provident Mutual, and continued for several years. The breadth and scope of his acts fully supports revocation of his license.⁶ On this record I find, as well, that McMenemy should be prohibited from transacting any insurance business, directly or indirectly, in Massachusetts, and should be required to dispose of any interest he may have in any insurance business in Massachusetts.

Chapter 175, § 162R (d) permits the Commissioner, in addition to revoking a license, to impose civil fines as permitted under Chapter 176D, §7. The maximum amount permitted under that section is \$1,000 per violation. The facts found by the trial judge, as set out in Paragraphs 15, 16, 18, 19, 21, 22 and 23 above, identify eight separate events that unquestionably constitute unfair or deceptive acts or practices, for each of which I will impose the maximum fine of \$1,000.

Chapter 175, §162V (a) requires a Massachusetts licensed producer to report to the Commissioner any administrative action taken by another state within 30 days of the final disposition. The above findings of fact indicate that McMenemy failed to report the action by the New Hampshire Insurance Department to the Division within 30 days of final disposition. His failure to do so violates Massachusetts law. That violation of Chapter 175, §162V (a) is an additional ground for revocation of McMenemy's license pursuant to Chapter 175, §162R (a)(2) and for imposition of an additional fine.

V. ORDERS

Accordingly, after due notice, hearing and consideration it is

ORDERED that any and all insurance producer licenses issued to Frederick V. McMenemy, III by the Division are hereby revoked; and it is

FURTHER ORDERED that Frederick V. McMenemy, III shall return to the Division any licenses in his possession, custody or control; and it is

FURTHER ORDERED that Frederick V. McMenemy, III is, from the date of this order, prohibited from directly or indirectly transacting any insurance business or acquiring, in any capacity whatsoever, any insurance business in the Commonwealth of Massachusetts; and it is

FURTHER ORDERED that Frederick V. McMenemy, III shall comply with the provisions of Chapter 175, §166B and dispose of any and all interests in Massachusetts as

⁶ The trial judge, in determining the appropriate remedy under Chapter 93A, observed that McMenemy gradually shifted from failing to disclose the truth about the policy to the insured or his representatives to blatantly misrepresenting the terms of the policy.

proprietor, partner, stockholder, officer or employee of any licensed insurance producer;
and it is

FURTHER ORDERED that Frederick V. McMenimen, III shall cease and
desist from the conduct complained of in the Order to Show Cause; and it is

FURTHER ORDERED that Frederick V. McMenimen, III shall pay a fine of
Nine Thousand Dollars (\$9,000) to the Division within 30 days of the entry of this order.

This decision has been filed this 24th day of July 2012, in the office of the Commissioner
of Insurance.

Jean F. Farrington
Presiding Officer

Pursuant to G.L. c. 26, §7, this decision may be appealed to the Commissioner of
Insurance.