



CHARLES D. BAKER
GOVERNOR

KARYN E. POLITO
LIEUTENANT GOVERNOR

COMMONWEALTH OF MASSACHUSETTS

Office of Consumer Affairs and Business Regulation

DIVISION OF INSURANCE

1000 Washington Street • Suite 810 • Boston, MA 02118-6200
(617) 521-7794 • FAX (617) 521-7475
<http://www.mass.gov/doi>

JAY ASH
SECRETARY OF HOUSING AND
ECONOMIC DEVELOPMENT

JOHN C. CHAPMAN
UNDERSECRETARY

DANIEL R. JUDSON
COMMISSIONER OF INSURANCE

Division of Insurance, Petitioner
v.
John Paul Gutschlag, Respondent

Docket No. E2015-12

Decision and Order

Procedural History

The Petitioner, the Division of Insurance (“Division”), on October 20, 2015, filed an Order to Show Cause (“OTSC”) concerning the Respondent, John Paul Gutschlag (“Mr. Gutschlag”). The Division’s counsel, Scott J. Peary, Esq., mailed the OTSC and a Notice of Action (“NOA”) to Mr. Gutschlag at an address in Grand Prairie, Texas, that was not listed in the Division’s licensing records.

Service of the OTSC and NOA on Mr. Gutschlag at the Grand Prairie address was effective; he filed an Answer to the OTSC. Mr. Gutschlag’s Answer did not follow the direction of 801 CMR 1.01(6)(d)1 in that it did not contain full, direct, and specific answers to the claims made in the OTSC; and did not admit, deny, further explain, or state that Mr. Gutschlag had insufficient knowledge to answer with specificity the Division’s allegations and claims. In his Answer Mr. Gutschlag stated that the Division counsel’s “correspondence is a bit of an overreach and the accompanying documentation not completely factual and is under appeal in several jurisdictions.” No particulars were stated in support of this statement. All allegations contained in the OTSC were deemed denied because they were neither admitted nor denied in Mr. Gutschlag’s Answer. 801 CMR 1.01(6)(d)1.

The OTSC asserts 21 claims against Mr. Gutschlag under Massachusetts General Laws Chapter (“Chapter”) 175. The OTSC claims that Mr. Gutschlag violated Chapter 175, § 162V(a) (“§ 162V(a)”) nine times; when he failed to report administrative actions in Texas (First Claim), Virginia (Second Claim), Florida (Third Claim), Colorado (Fourth Claim), Idaho (Fifth Claim), Oklahoma (Sixth Claim), Vermont (Seventh Claim), North Dakota (Eighth Claim), and South Dakota (Ninth Claim). The OTSC alleges that Mr. Gutschlag also violated § 162V(a) when he failed to report a felony conviction to the Division (Twenty-first Claim). The OTSC further asserts that Mr. Gutschlag “violated” the following three subsections of Chapter 175, § 162R(a) (“§ 162R(a)”) when he engaged in a plan to defraud Virginia Polytechnic Institute and State University and its students: § 162R(a)(4) (Tenth Claim), § 162R(a)(5) (Eleventh Claim), and § 162R(a)(8) (Fourteenth Claim).¹ The OTSC in addition avers that Mr. Gutschlag “violated” § 162R(a)(6) (Twelfth Claim) and § 162R(a)(7) (Thirteenth Claim) when he admitted that he had committed an insurance unfair trade practice or fraud, and pleaded guilty and was convicted of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act.² Finally, the OTSC charges that Mr. Gutschlag “violated” § 162R(a)(9) of Chapter 175 on six occasions; when his nonresident producer licenses issued by Florida (Fifteenth Claim), Idaho (Sixteenth Claim), Oklahoma (Seventeenth Claim), Vermont (Eighteenth Claim), North Dakota (Nineteenth Claim), and South Dakota (Twentieth Claim) were surrendered or revoked.³

The Commissioner of Insurance (“Commissioner”) designated me to be Presiding Officer for the proceeding on the OTSC. On November 30, 2015, I issued an Order and Notice of Hearing (“Order”) that scheduled a Hearing on the OTSC for December 18, 2015 (“Hearing”). The Order advised Mr. Gutschlag that failure to appear at the Hearing could result in the entry of a summary decision or decision on the pleadings granting the relief requested in the OTSC. The Order was mailed to Mr. Gutschlag at the same Grand Prairie address to which the OTSC had

¹ The substance of the Division’s allegations of these “violations” is that actions by Mr. Gutschlag constitute causes for disciplining his pursuant to these three subsections of Chapter 175, § 162R(a). See *Division of Insurance v. Lester Williams*, Docket No. E2012-10 (The Presiding Officer observed that it was imprecise for the OTSC to allege that Williams “violated” § 162R(a)(2) because this provision is the second of 14 “causes” that are listed in Chapter 175, § 162R(a), as possible grounds for disciplining licensees.).

² The substance of these claims is that actions by Mr. Gutschlag constitute causes for disciplining him pursuant to Chapter 175, § 162R(a)(6) and § 162R(a)(7). See note 1.

³ The substance of these claims is that actions by Mr. Gutschlag constitute causes for disciplining him pursuant to Chapter 175, § 162R(a)(9). See note 1.

been mailed, and also was mailed to both his home address and his mailing/business address as shown on the Division's licensing records.

Mr. Gutschlag did not attend the Hearing.⁴ Attorney Peary at the Hearing moved for judgment on the OTSC.

Findings of Fact

On the basis of the record, consisting of the OTSC, and the Exhibits attached to it, and Mr. Gutschlag's Answer, I find the following facts:

1. Mr. Gutschlag first was licensed by the Division as a Massachusetts non-resident insurance producer on July 19, 2000.

2. At all times pertinent to this proceeding the following addresses have appeared on the Division's licensing records as Mr. Gutschlag's current home and mailing/business addresses: 6629 Rock Ridge Trail, Aubrey, TX 76227, and c/o GM-Southwest, Inc., 6946 Lebanon Road, Frisco, TX 75034-6741.

3. On May 21, 2014, Mr. Gutschlag was convicted after he pleaded guilty to Conspiracy to Violate the Racketeer Influenced and Corrupt Organizations Act, in violation of 18 U.S.C. §§ 1962(d) and 1963(a); and two counts of Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity, in violation of 18 U.S.C. § 1957 ("the federal convictions"), as set out in the Second Superseding Indictment in Case Number DVAW113CR000015-001 in the United States District Court for the Western District of Virginia ("the federal case").

⁴ Mr. Gutschlag's non-attendance perhaps was not surprising in light of his Answer, which contained this statement: "If your purpose is for my license surrender, then let that be the case, as I have no need or desire to conduct insurance business of any kind in the State [*sic*] of Massachusetts."

Section 162M(f) of Chapter 175 requires Massachusetts insurance producers and agencies to inform the Commissioner of a change of address within 30 days of the change. The envelopes containing the copies of the Order that were sent to Mr. Gutschlag's home address and to his mailing/business address as shown on the licensing records of the Division have not been returned to the Docket Clerk. See 801 CMR 1.01(4)(c) ("Notice of actions and other communications from the adjudicating Agency, or its designee, shall be presumed to be received upon the day of hand-delivery or, if mailed, three days after deposit in the U.S. mail."). The envelope containing the copy of the Order that was sent to Mr. Gutschlag's Grand Prairie address, on the other hand, was returned to the Docket Clerk. The envelope had the following label pasted on it: "RETURN TO SENDER – ATTEMPTED – NOT KNOWN -- UNABLE TO FORWARD." Mr. Gutschlag filed his Answer in response to the mailing of the OTSC to this Grand Prairie address.

4. Mr. Gutschlag pleaded guilty and was convicted on three counts as set out in the *Second Superseding Indictment* in the federal case, but the OTSC in Exhibit 2 provides a copy only of the *Superseding Indictment* in the federal case.⁵

5. The federal convictions were felony convictions. *Notice of Revocation* issued by the Chief Financial Officer of the State of Florida, ¶ 4 (OTSC Exhibit 6); *Emergency Revocation Order and Notice of Right to be Heard* issued by the Insurance Commissioner of the State of Oklahoma, Conclusions of Law, 1st paragraph (OTSC Exhibit 9); *Final Decision* issued by the Secretary of the South Dakota Department of Labor and Regulation, Findings of Fact XIII, 3rd paragraph (OTSC Exhibit 12).

6. Mr. Gutschlag's federal convictions concerned "falsifying claims-paid reports that swindled the Virginia Tech [Virginia Polytechnic Institute and State University] students into paying inflated premiums for university-sponsored health insurance." *Emergency Revocation Order and Notice of Right to be Heard* issued by the Insurance Commissioner of the State of Oklahoma, Allegations of Fact, ¶ 2 (OTSC Exhibit 9).

7. Falsifying claims-paid reports in connection with health insurance misrepresents a principal material factor in calculating a "loss ratio," which is a critical material element in determining the amount of premium that an insurer will charge, and collect, for the health insurance coverage that it will be providing.

8. On May 27, 2014, Mr. Gutschlag voluntarily surrendered his resident producer license in Texas in connection with an enforcement action ("Texas administrative action").

9. Mr. Gutschlag did not report the Texas administrative action to the Division.

10. On May 29, 2014, Mr. Gutschlag voluntarily surrendered his Virginia nonresident producer license in lieu of a hearing before the Virginia State Corporation Commission ("Virginia administrative action").

11. Mr. Gutschlag did not report the Virginia administrative action to the Division.

12. On June 18, 2014, the Chief Financial Officer of the State of Florida revoked Mr. Gutschlag's nonresident producer license ("Florida administrative action").

⁵ Absent an opportunity to review the factual allegations in the *Second Superseding Indictment*, I decline to presume that they are identical to the factual allegations made in the *Superseding Indictment*, Exhibit 2. Findings of fact relating to Mr. Gutschlag's federal convictions therefore are based on other OTSC Exhibits.

13. Mr. Gutschlag did not report the Florida administrative action to the Division.
14. On July 5, 2014, Mr. Gutschlag voluntarily surrendered his Colorado nonresident producer license to avoid disciplinary action (“Colorado administrative action”).
15. Mr. Gutschlag did not report the Colorado administrative action to the Division.
16. On September 17, 2014, the Director of the Department of Insurance of Idaho revoked Mr. Gutschlag’s nonresident producer license (“Idaho administrative action”).
17. Mr. Gutschlag did not report the Idaho administrative action to the Division.
18. On December 9, 2014, the Insurance Commissioner of the State of Oklahoma revoked Mr. Gutschlag’s nonresident producer license (“Oklahoma administrative action”).
19. Mr. Gutschlag did not report the Oklahoma administrative action to the Division.
20. On March 5, 2015, the Commissioner of the Vermont Department of Financial Regulation revoked Mr. Gutschlag’s nonresident producer license (“Vermont administrative action”).
21. Mr. Gutschlag did not report the Vermont administrative action to the Division.
22. Mr. Gutschlag’s Massachusetts non-resident individual insurance producer license expired on March 20, 2015.
23. On April 22, 2015, the Insurance Commissioner of the State of North Dakota revoked Mr. Gutschlag’s nonresident producer license (“North Dakota administrative action”).
24. Mr. Gutschlag did not report the North Dakota administrative action to the Division.
25. On May 13, 2015, the South Dakota Department of Labor and Regulation, Division of Insurance, revoked Mr. Gutschlag’s nonresident producer license (“South Dakota administrative action”).
26. Mr. Gutschlag did not report the South Dakota administrative action to the Division.⁶

Analysis and Conclusions of Law

Chapter 175, § 162R(e), authorizes the Commissioner to enforce the provisions of the licensing statutes, and to impose remedies or penalties pursuant to those statutes and to Chapter 176D, even if a respondent’s license has lapsed by operation of law. Although Mr. Gutschlag’s

⁶ Although the OTSC alleges that the Insurance Commissioner of the State of Delaware revoked Mr. Gutschlag’s nonresident producer license, the OTSC makes no Claim based on this allegation.

Massachusetts non-resident individual insurance producer license expired on March 20, 2015, the Commissioner nevertheless can impose discipline for actions taken, or not taken, when he was a licensed Massachusetts insurance producer.

1. Claims based on non-reporting of administrative actions, § 162V(a)

Section 162V(a) requires an insurance producer to report to the Division any administrative action taken against the producer in another jurisdiction within 30 days of the final disposition of the matter. Voluntarily surrendering an insurance license in connection with a regulatory enforcement action in another state constitutes an administrative action that must be reported to the Division. *Division of Insurance v. Adolphus Nolan, Jr.*, Docket No. E2013-08 (producer violated § 162V(a) when he did not report the surrender of his Utah insurance license in lieu of further administrative action by the Utah Insurance Department).

Mr. Gutschlag violated the reporting requirement of § 162V(a) seven times; when he failed to report to the Division final administrative actions in Texas (First Claim), Virginia (Second Claim), Florida (Third Claim), Colorado (Fourth Claim), Idaho (Fifth Claim), Oklahoma (Sixth Claim), and Vermont (Seventh Claim).

Mr. Gutschlag's Massachusetts non-resident individual insurance producer license had expired prior to the administrative actions taken by North Dakota (April 22, 2015) and South Dakota (May 13, 2015). Mr. Gutschlag therefore was not required to report these administrative actions to the Commissioner. *See* § 162V(a) ("A producer shall report ..."). Consequently, the Eighth Claim (North Dakota) and Ninth Claim (South Dakota) of the OTSC are denied.

The OTSC asserts that Mr. Gutschlag is subject to discipline pursuant to § 162V(a) because he failed to report a felony conviction to the Division (Twenty-first Claim). Section 162V(a) requires an insurance producer to report administrative actions; not felony convictions.⁷ Accordingly, the Twenty-first Claim is denied.

2. Claims based on Mr. Gutschlag's actions concerning health insurance

Mr. Gutschlag in the federal case was ordered to pay restitution of \$1.2 million to Virginia Polytechnic Institute and State University. Inasmuch as restitution was ordered, it is reasonable to

⁷ Chapter 175, § 162V(b) requires an insurance producer to report to the Commissioner any criminal prosecution of the producer taken in any jurisdiction within 30 days of the initial pretrial hearing date.

conclude that Mr. Gutschlag either improperly withheld, misappropriated, or converted monies received in the course of conducting his health insurance business, and he therefore is subject to discipline pursuant to § 162R(a)(4) (Tenth Claim).

When Mr. Gutschlag falsified claims-paid reports in connection with health insurance, this meant that a false loss ratio was used in determining the premium to be charged, and collected, for the health insurance coverage that was to be provided. This constituted the intentional misrepresenting of a central material term of a proposed insurance contract or application for insurance, and Mr. Gutschlag therefore is subject to discipline pursuant to § 162R(a)(5) (Eleventh Claim).

Mr. Gutschlag fraudulently induced Virginia Polytechnic Institute and State University to pay to him money in the form of inflated insurance premiums, ostensibly as the requisite premium amount for health insurance, which exceeded the amount of money than truly was required to pay for the insurance, if the true claims-paid data had been reported to the insurer. Mr. Gutschlag therefore is subject to discipline pursuant to § 162R(a)(8) (Fourteenth Claim) for using fraudulent and dishonest practices and showing untrustworthiness in the conduct of business.

3. Claims based on Mr. Gutschlag's admission that he had committed an insurance unfair trade practice or fraud, and his pleading of guilty and conviction of a felony

The federal convictions to which Mr. Gutschlag pleaded guilty concerned falsifying claims-paid reports in connection with health insurance, an insurance fraud. Mr. Gutschlag therefore is subject to discipline pursuant to § 162R(a)(7) (Thirteenth Claim).

Mr. Gutschlag is subject to discipline pursuant to § 162R(a)(6) (Twelfth Claim) because his federal convictions were felony convictions.

4. Claims based on revocations of insurance licenses, § 162R(a)(9)

The revocations of Mr. Gutschlag's nonresident producer licenses issued by Florida (Fifteenth Claim), Idaho (Sixteenth Claim), Oklahoma (Seventeenth Claim), Vermont (Eighteenth Claim), North Dakota (Nineteenth Claim), and South Dakota (Twentieth Claim) constitute six causes that subject Mr. Gutschlag to discipline pursuant to § 162R(a)(9).

Discipline

1. Discipline based on non-reporting of administrative actions, § 162V(a)

Mr. Gutschlag violated the reporting requirement in § 162V(a) on seven occasions. Each one of Mr. Gutschlag's violations of § 162V was a particularly serious offense because it involved insurance license revocation or license surrender in connection with an enforcement event. His non-reporting, therefore, unlike the reporting of less significant matters, drastically affects his eligibility and qualifications for a Massachusetts producer license. The maximum civil penalty of \$500 is appropriate for each one of his seven violations of § 162V(a). Chapter 175, § 194.⁸

2. Discipline based on Mr. Gutschlag's actions concerning health insurance

Section 162R(a) authorizes the Commissioner to place an insurance producer on probation, to suspend or revoke a producer's license, or to levy on him a civil penalty in accordance with Chapter 176D, § 7 ("§ 7"), or to take any combination of these actions, for 14 enumerated causes. Mr. Gutschlag committed three distinct improper acts concerning health insurance. It is appropriate to impose separate discipline for each cause.

For Mr. Gutschlag's improper withholding, misappropriating, or converting monies received in the course of doing insurance business (Tenth Claim) it is appropriate to revoke his Massachusetts insurance licenses pursuant to § 162R(a)(4) and to impose the maximum civil penalty under § 7 of \$1,000.

For Mr. Gutschlag's intentional misrepresenting of the terms of an actual or proposed insurance contract (Eleventh Claim) it is appropriate to revoke his Massachusetts insurance licenses pursuant to § 162R(a)(5) and to impose the maximum civil penalty under § 7 of \$1,000.

For Mr. Gutschlag's use of fraudulent and dishonest practices and untrustworthiness in the conduct of business (Fourteenth Claim) it is appropriate to revoke his Massachusetts insurance licenses pursuant to § 162R(a)(8) and to impose the maximum civil penalty under § 7 of \$1,000.

⁸ Penalties pursuant to § 162V(a) are limited to no more than \$500. Chapter 175, § 194 ("Whoever violates any provision of this chapter, the penalty whereof is not specifically provided for herein, shall be punished by a fine of not more than five hundred dollars."). The OTSC did not seek penalties pursuant to § 162R(a)(2) for violation of an insurance law. Discipline pursuant to § 162R(a)(2) may include license revocation and a fine of up to \$1,000 pursuant to Chapter 176D, § 7.

3. Discipline based on Mr. Gutschlag's admission that he had committed an insurance unfair trade practice or fraud, and his pleading of guilty and conviction of a felony

I decline to impose fines pursuant to § 162R(a)(6) and § 162R(a)(7). Each of these causes, however, is a sufficient reason to revoke Mr. Gutschlag's Massachusetts insurance licenses. *See generally Division of Insurance v. Russell*, Docket No. E2015-09.⁹

4. Discipline based on revocations of insurance licenses; § 162R(a)(9)

The revocations of Mr. Gutschlag's nonresident producer licenses issued by Florida (Fifteenth Claim), Idaho (Sixteenth Claim), Oklahoma (Seventeenth Claim), Vermont (Eighteenth Claim), North Dakota (Nineteenth Claim), and South Dakota (Twentieth Claim) constitute six causes, each of which is a sufficient reason to revoke his Massachusetts insurance licenses pursuant to § 162R(a)(9). No civil penalties are levied for these causes. *See Division of Insurance v. Russell, supra.*

ORDERS

After due notice, hearing and consideration, it is hereby ORDERED:

1. That John Paul Gutschlag shall cease and desist from the conduct complained of in the Order to Show Cause filed on October 20, 2015;
2. That any and all insurance licenses issued to John Paul Gutschlag by the Massachusetts Division of Insurance are hereby revoked;
3. That John Paul Gutschlag shall return to the Massachusetts Division of Insurance any licenses in his possession, custody or control;

⁹ In her *Decision on Petitioner's Motion For Summary Decision in Division of Insurance v. Russell*, the Presiding Officer *inter alia* reached the following conclusions:

Section 162R (a) also permits the Commissioner to levy a civil penalty in accordance with Chapter 176D, §7 for the reasons that permit disciplinary action under §162R (a). Of the 14 statutory reasons for disciplining a licensee, 12 are based on actions that a licensee or applicant has affirmatively taken; the other two reasons permit disciplinary action based on actions taken against the license, either conviction of a felony (a)(6) or revocation, suspension or denial of a license by another jurisdiction (a)(9). It is reasonable to consider imposing a fine when the disciplinary action arises from the respondent's personal actions. I am not, however, persuaded that a fine is reasonable if the disciplinary action is based on an action taken elsewhere against the respondent. For that reason, I conclude that while the record fully supports revocation of Russell's license under (a)(6) and (a)(9), no fine should be imposed.

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4. That John Paul Gutschlag is, from the date of this order and decision, prohibited from directly or indirectly transacting any insurance business or acquiring, in any capacity whatsoever, any insurance business in the Commonwealth of Massachusetts;

5. That John Paul Gutschlag shall comply with the provisions of Chapter 175, § 166B, and dispose of any and all interests in Massachusetts as proprietor, partner, stockholder, officer or employee of any licensed insurance producer; and

6. That John Paul Gutschlag shall pay to the Massachusetts Division of Insurance **within 30 days of the entry of this Order and Decision** a civil penalty of **Six Thousand Five Hundred Dollars (\$6,500.00)** pursuant to Chapter 175, §§ 162R(a), 162V(a), and 194; and Chapter 176D, § 7.

A copy of this *Decision and Order* shall be sent by the Docket Clerk by regular first class mail, postage paid, to John Paul Gutschlag at the addresses appear on the records of the Commissioner as his current home and mailing/business addresses: 6629 Rock Ridge Trail, Aubrey, Texas 76227, and c/o GM-Southwest, Inc., 6946 Lebanon Road, Frisco, Texas 75034-6741. A copy of this *Decision and Order* also shall be sent by the Docket Clerk by regular first class mail, postage paid, to John Paul Gutschlag, Prisoner Number 17308-084, RRM Dallas, 344 Marine Forces Drive, Grand Prairie, Texas 75051.

Filed: May 27, 2016

Stephen M. Sumner
Presiding Officer

This decision may be appealed to the Commissioner of Insurance pursuant to Massachusetts General Laws Chapter 26, § 7.

Scott J. Peary, Esq.
Chief Enforcement Counsel
Division of Insurance
1000 Washington St., Suite 810
Boston, MA 02118

John Paul Gutschlag
6629 Rock Ridge Trail
Aubrey, TX 76227

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John Paul Gutschlag
c/o GM-Southwest, Inc.
6946 Lebanon Road
Frisco, TX 75034-6741

John Paul Gutschlag
Prisoner Number 17308-084
RRM Dallas
344 Marine Forces Drive
Grand Prairie, TX 75051