



BEFORE THE IOWA INSURANCE COMMISSIONER

IN THE MATTER OF)	Division Case No. 100755
)	
GARY D. MARCUM,)	FINDINGS OF FACT,
NPN 0000058157,)	CONCLUSIONS OF LAW AND
DOB 07/13/XXXX,)	FINAL ORDER
)	
Respondent)	

DECISION

Respondent Gary D. Marcum (“Marcum”) is found to have violated the cease and desist order in this matter. Marcum’s resident insurance producer license is permanently revoked, effective on the date of this order. Marcum is also prohibited from selling, soliciting, negotiating insurance, transacting any business of insurance in this state, and from providing business assistance to or facilitating the insurance business of any other person transacting any business of insurance in this state. Finally, Marcum is ordered to pay \$30,000 in civil penalties for violating the orders of the commissioner entered on October 8, 2019.

On May 30, 2019, the Division filed a statement of charges against Marcum alleging that in connection with at least six different Iowa consumers Marcum engaged in various unsuitable recommendations and other unlawful, unfair and deceptive acts and practices in violation of Iowa Code chapter 507B and subjecting him to license discipline under Iowa Code chapter 522B. On October 4, 2019, Marcum consented to the entry of a disciplinary order and order to cease and desist containing 118 paragraphs of findings and legal conclusions detailing Marcum’s numerous unlawful, unfair and deceptive acts and practices in connection with at least six different Iowa consumers and in violation of Iowa Code chapters 507B and 522B. The commissioner issued orders suspending Marcum’s producer license and granting other relief on

October 8, 2109. On May 27, 2021, the Division filed a motion for show cause hearing, alleging violations of the commissioner's October 8, 2019 orders. On June 3, 2021, the commissioner issued an order to show cause. The matter was called for hearing on January 25, 2022, at the Division's office located at 1963 Bell Avenue, Des Moines, Iowa 50315. Participation in the hearing was also allowed via Webex, a videoconferencing platform. The Division was represented by Enforcement Bureau attorney Johanna Nagel. Marcum appeared by videoconference and was represented by attorney Alex Wonio of Des Moines, Iowa, who attended in person.

At the show cause hearing, the commissioner provided instructions to the parties on procedural matters, opening statements were made, and evidence was received. At the hearing, the following witnesses were called to testify by the Division: Gary Marcum; Matt Mortvedt, Fraud Investigator with the Division; and one of the consumers, R.H.. The Division also submitted documentary evidence. Marcum did not call a witness, but did submit some documentary evidence. [The names of consumers will be removed from the published order in this matter, indicated by initials, and their identities will be maintained under seal to protect their privacy.]

Following the hearing, the parties submitted briefs and written argument.

NOW THEREFORE, after reviewing the pleadings submitted in the case and the evidence received, we issue the following findings of fact, conclusions of law, and orders:

FINDINGS OF FACT

A. Parties and Jurisdiction

1. The Commissioner of Insurance, Douglas Ommen, directly and through his designees, administers and enforces Iowa Code Chapter 507B—Insurance Trade Practices, Iowa

Code Chapter 522B—Licensing of Insurance Producers, Iowa Administrative Code Chapter 15—Unfair Trade Practices, and Iowa Administrative Code Chapter 16—Replacement of Life Insurance and Annuities pursuant to Iowa Code § 505.8.

2. Gary D. Marcum (“Marcum”) is an individual who was a resident of Clive, Iowa, but now resides at 959 Hilltop Lane, Kodak, Tennessee 37764.

3. Marcum is and has been licensed in the state of Iowa as a resident insurance producer since June 23, 2000, although it was suspended on October 8, 2019. His license history is found under National Producer Number 0000058157.

4. At the time of the hearing Marcum was the chief executive officer of Retirement Solutions Group, Inc., an Iowa company. Previously, Marcum held other officer roles. At the time of the hearing, Marcum indicated that the company was being redomiciled in Tennessee.

5. Pursuant to Iowa Code § 505.28, Marcum has consented to the jurisdiction of the Commissioner by committing acts governed by chapters 507B and 522B, consistent with the terms of a cease and desist order by consent issued in this matter on October 8, 2019, Marcum remains under the jurisdiction of the commissioner.

B. Prior Orders Prohibiting Marcum from the Business of Insurance

6. On November 22, 1982, Marcum consented to a disciplinary order by the commissioner suspending his insurance producer license for one year because he was converting policy premiums to his own personal use.

7. On July 8, 1986, Marcum consented to a disciplinary order by the commissioner, surrendering his insurance producer license for a period of two years. This action related to Marcum selling insurance during his prior period of suspension, Marcum or someone under his control forging the signature of another agent, and the use of misleading advertising.

8. On May 17, 2000, Marcum applied for a new insurance producer license and did not notify the Division of his prior regulatory actions. The Division noted this failure and assessed a civil penalty of \$250 to Marcum. After payment for the civil penalty was received, the Division issued Marcum an insurance producer license on June 23, 2000, and assigned to him National Producer Number 0000058157.

9. On May 30, 2019, the Division filed a statement of charges against Marcum alleging that in connection with at least six different Iowa consumers Marcum engaged in various unsuitable recommendations and other unlawful, unfair and deceptive acts and practices in violation of Iowa Code chapter 507B and subjecting him to license discipline under Iowa Code chapter 522B.

10. On October 4, 2019, Marcum consented to the entry of a disciplinary order and order to cease and desist containing 118 paragraphs of findings and legal conclusions detailing Marcum's numerous unlawful, unfair and deceptive acts and practices in connection with at least six different Iowa consumers and in violation of Iowa Code chapters 507B and 522B.

11. On October 8, 2019, pursuant to Marcum's consent, the commissioner entered the following orders:

- A. Respondent Gary D. Marcum's Iowa resident insurance producer license is suspended for a period of eighteen months, effective on the date of this Consent Order, pursuant to Iowa Code §§ 507B.7 and 522B.11;
- B. Respondent Gary D. Marcum is prohibited from selling, soliciting, negotiating, or transacting in the business of insurance in the state of Iowa during his suspension;**
- C. Respondent Gary D. Marcum is prohibited from making any false or misleading statements or representations on or relative to an application for an insurance policy recommending the sale or exchange of any annuity contract without reasonable grounds to believe the recommendation is suitable for the individual, making any undisclosed annuity replacements, engaging in any fraudulent or deceptive practice, and from engaging in the acts or practices found herein pursuant to Iowa Code §§507B.7 and 522B.17;

- D. Respondent Gary D. Marcum shall, contemporaneously with this Consent Order, pay restitution in the amount of \$20,000.00, made payable to the Iowa Insurance Division, to be credited to the Settlement Fund, pursuant to Iowa Code § 505.8;
- E. Respondent Gary D. Marcum shall, contemporaneously with this Consent Order, pay for costs of investigation and proceeding in the amount of \$2,000.00 pursuant to Iowa Code § 505.8. Payment shall be made payable to the Iowa Insurance Division, to be credited to the Iowa Enforcement Fund to provide funds for insurance enforcement and education;
- F. These orders may be enforced under Iowa Code chapters 507B and 522B, including but not limited to Iowa Code § 507B.8 and 522B.17(3), and additionally, by any collection remedies available to the State of Iowa Department of Revenue for unpaid penalties and other ordered monetary amounts.

(emphasis added.)

C. Marcum's Statements to the Division Investigator

12. The Division also offered the statements of Marcum made during Investigator Matt Mortvedt's interviews of Marcum on two different occasions on February 21, 2020; and then on February 24, 2020.

13. Marcum's statements were admitted without objection. In carefully listening to Marcum's statements, several exchanges reveal his sensitivity to certain provisions of the commissioner's October 8, 2019 orders and the commissioner's prohibition from the business of insurance.

14. As background to questioning in these interviews and relevant to the Division's case, Marcum married Deborah Christie Long, who then took the name Deborah Marcum, in the month of May, 2019. Mrs. Marcum has held an insurance producer license at least in 2019 and 2020.

15. In his interview of Marcum, Investigator Mortvedt asked, "Has [Mrs. Marcum] sold any policies?" Marcum replied that his wife would have "finished up the ones I had ... going." This question was followed by this exchange:

INVESTIGATOR: Did you attend any of those – uh – meetings where Debbi was – kind of – finishing up the – the contracts that you had pending?

MARCUM: “Huh – you know – To tell the truth – I don’t – I don’t recall. You know –

INVESTIGATOR: Okay – fair enough. Umm –

MARCUM: But she -- she definitely handled – you know – to write them and – and deal with them”

16. This interview was only a few short months following the events in question, but Marcum claimed, “I don’t – I don’t recall.” We can see from Marcum’s selective memory that he understood that his appearance at the meetings with clients was a problem under the terms on the commissioner’s orders. So, Marcum chose to not honestly describe these trips at the time of these early interviews. Even though there were only a few visits with clients and involved insurance business that was already pending, Marcum was attempting to put his wife forward as “the agent,” so that he could stay involved in the business and control compensation from the business after October 8, 2019.

D. Marcum’s Intent to Conceal His Suspension from Customers and His Business Associate to Evade the Prohibition from Business of Insurance

17. The record is replete with both direct and circumstantial evidence of Marcum’s intent to circumvent the ordered prohibition from the business of insurance on a limited number of occasions. Direct evidence of Marcum’s disdain for his own customers was shown in an email exchange with his assistant, Andie Thomson.

18. On November 5, 2019, Marcum received an email from Ms. Thomson, referencing “Equitrust” in the subject line. Ms. Thomson asked Marcum “So whats [sic] up with this letter??” Marcum responded to Ms. Thomson’s email:

We knew it was coming as I had to settle for a temporary license suspension (not revocation), due to dumbass complaints or continue to spend a fortune on attorneys so Debbi is writing everything. I've talked to Wesley about it.

“Wesley” was with Marcum’s field marketing organization. Ms. Thomson replied to Marcum

“So I assume I will not be able to call those companies and get info on clients anymore

then...hope we can go through FIG to get questions answered etc[.]” Marcum replied to Ms.

Thomson “Yes Debbi is licensed. If need be we will do agent change of record. Make a list and

we will do that on current clients as needed[.]”

19. Ms. Thomson then asked Marcum about how to explain his role to clients. She asks in her email, “Explanation to clients why changing?” Marcum then told Ms. Thomson to misrepresent to his clients the reason for the change, when he instructed Ms. Thomson to tell clients, “We are adjusting my workload for better servicing of their policies so my wife will be taking on part of the load. I can still do reviews etc.”

20. Yet, at the time of this explanation to Ms. Thomson on November 5, 2019, Marcum had already disobeyed paragraph B in the commissioner’s October 8, 2019 order.

E. Marcum Engaged in the Business of Insurance

21. In its motion for show cause, the Division alleged Marcum disobeyed paragraph B in the commissioner’s October 8, 2019 orders on various occasions in connection with transactions involving at least five of his clients.

22. Several of these transactions occurred before Marcum’s November 5, 2019, email exchange with Ms. Thomson.

C.H.

23. The Division’s investigator, Matt Mortvedt, testified concerning an application for an annuity to be issued by Elco Mutual Life and Annuity with a premium of \$255,000 and an

owner named [REDACTED] C.H. [REDACTED] an 83-year-old Des Moines resident. The application received into evidence indicated that Ms. [REDACTED] C.H. [REDACTED] signed the document and it was received by Elco Mutual on October 22, 2019.

24. On October 31, 2019, Mr. Richard Leach, senior vice president and corporate secretary of Elco Mutual Life and Annuity, called the Division to notify the agency that Marcum had submitted Ms. [REDACTED] C.H. [REDACTED]'s annuity application in violation of the commissioner's October 8, 2019 orders.

25. Our review of the handwriting on application and consideration of Marcum's and Mortvedt's related testimony lead us to conclude that Marcum had filled out the application prior to October 8, 2019, and that Marcum had asked Ms. [REDACTED] C.H. [REDACTED] to sign the application prior to that date.

26. The evidence was inconclusive on whether Marcum signed his own name or authorized Ms. Thomson to apply his signature. Marcum violated the commissioner's prohibition in either case. While the Division did not offer testimony from Ms. Thomson, we find based on Marcum's testimony that Ms. Thomson applied the dates to signatures and submitted the application after Marcum's license suspension began on October 8, 2019. We also find that Ms. Thomson applied the later dates and submitted to the insurer the required replacement notice after Marcum's license suspension began on October 8, 2019.

27. We further find that Marcum had previously authorized Ms. Thomson to apply dates and submit the application as Marcum's agent. From the email communications on November 5, 2019, and his own testimony, we find Marcum did not withdraw his authorization of Ms. Thomson to act on his behalf, and in fact, knowingly failed to do so, despite the commissioner's order prohibiting Marcum from the business of insurance.

28. We find that Marcum, knowingly acting through Ms. Thomson, disobeyed paragraph B in the commissioner's October 8, 2019 orders when his authorized agent, Ms. Thomson, wrote in the date of October 18, 2019, and then submitted the application for an annuity and related documents to Elco Mutual Life and Annuity on October 22, 2019.

T.H. & D.H.

29. Investigator Mortvedt also testified concerning a Great American Life Insurance Company annuity with a premium of \$250,000 issued to T.H. & D.H. 82-year-old retired Iowa farmers. The Division also offered the statements of Mrs. D.H. made during the investigator's interviews of Mrs. D.H. on two different occasions on February 18, 2020; and then on February 19, 2020.

30. The recorded out-of-court statements of Mrs. D.H. were admitted as exhibits and received into evidence. At the commencement of the hearing when Marcum's counsel waived any objection as to foundation for admission of the exhibits, he did reserve any hearsay objections. Counsel then generally suggested the commissioner may receive the hearsay evidence, but that "any shortcomings...will go to the weight of those exhibits." Mrs. D.H.'s statements were undoubtedly hearsay as she did not appear to testify and her statements were not subject to cross-examination. Yet, we received her statements for all purposes including for truth of the matters asserted. Listening carefully several times to these interviews, considering the circumstances of the statements made, and her content and delivery, we find Mrs. D.H.'s statements to be very credible. Without further objection from Marcum as to these statements, any objections as to hearsay have been waived.

31. Mrs. D.H. initially stated during the first interview that Marcum sold the annuity to her. As the sales discussions bridged the October 8, 2019, date of the commissioner's order,

we need to delve further into the circumstances. Mrs. **D.H.** had previously attended a sales seminar offered by Retirement Solutions at a restaurant in June or July of 2019. It was at the seminar that **T.H. & D.H.** met both Marcum and his wife, Mrs. Marcum.

32. Working together, both Marcum and Mrs. Marcum met with **T.H. & D.H.** several times in their home near Knoxville, Iowa to discuss an annuity. The first sales visit was September 26, 2019. The second sales visit was on October 22, 2019, following the commissioner's order prohibiting Marcum from the business of insurance. Marcum then delivered the annuity policy to **T.H. & D.H.** on November 15, 2019.

33. Mrs. **D.H.** unequivocally stated to investigators that both Marcum and Mrs. Marcum discussed the annuity with **T.H. & D.H.** during the sales calls. Mrs. **D.H.** stated that Marcum was giving advice on the policy. The application on the annuity was dated October 22, 2019. The application, the Client Financial Disclosure Information, and Confidential Client Analysis and the Financial Inventory Worksheet all contain the handwriting of Marcum.

34. In his own testimony, Marcum sought to minimize his involvement in the Mr. and Mrs. **D.H.** transaction, but we find Marcum's testimony to not be credible. The Division's counsel directly asked Marcum about his presence at the sales meetings with **T.H. & D.H.** **██████████**. While one of these meetings was before Marcum's suspension and one was after the commissioner's order, Marcum responded "Sometimes I drove her simply because I usually drive and sometimes she has migraines, so it would make sense that I drove her from Des Moines to wherever." In response to a question about his role in the sales presentation, Marcum testified that his role was "[t]o walk around with Thomas in his shop and look at all of his tractors and look at his toys he had and his cars and his miniature farm collection. He came

outside with me, and we talked, and he showed me trees that were being trimmed, and what have you.”

35. It is believable that at some point during the three visits to their home Marcum did enjoy accompanying Mr. **D.H.** on a tour of the farm. After all, **T.H. & D.H.** likely devoted much of their 82 years of life working on their farm. But Marcum’s misdirection in this testimony is not credible. We conclude that Mrs. **D.H.** is not mistaken in her repeated statements to investigators that Marcum also gave advice concerning the annuity. We find that Marcum recommended the purchase of the annuity to **T.H. & D.H.** with his active participation in the document preparation and in the sales presentations.

36. While we expect, given his regulatory history, Marcum might consider his strategy to shield his participation in the business of insurance behind his wife’s license as compliance with the commissioner’s order prohibiting from the business of insurance, we find Marcum’s motivated, but unsuccessful attempt to circumvent the commissioner’s orders of suspension and prohibition from the insurance business with his “driver story” to be unconvincing.

37. As appropriately described by Missouri Court of Appeals Judge James Smart in a prosecution a number of years ago, we conclude that Marcum was also no “bumpkin who just got off the hay wagon.” See *State v. Dumke*, 901 S.W.2d 100, 104 (Mo.App.W.D.1995). But neither is the commissioner uninformed about Marcum’s prior conduct that led to the commissioner’s October 8, 2019 orders and the regulatory issues dating back to 1982. In light of all of the evidence, we find that Marcum’s testimony concerning his involvement with **T.H. & D.H.** **[REDACTED]** to be disingenuous.

38. We find that Marcum disobeyed paragraph B in the commissioner’s October 8, 2019 orders when Marcum was present, and directly and indirectly participated with his wife, Mrs. Marcum, in recommending to [REDACTED] T.H. & D.H. that they purchase an annuity on October 22, 2019, and again when Marcum delivered the annuity policy to [REDACTED] T.H. & D.H. on November 15, 2019.

39. While we also find the conflict between Mrs. Marcum’s professional obligations and her personal and financial loyalties as Marcum’s spouse to be understandable, we find her knowing participation as a licensed producer in Marcum’s scheme to circumvent the commissioner’s October 8, 2019 prohibitions to be very concerning.

[REDACTED] R.H.

40. The Division called [REDACTED] R.H. to testify about his purchase of an EquitTrust annuity with a premium of \$12,158. Mr. [REDACTED] R.H. is a 62-year-old resident of Pella, who works as a fork lift mechanic for an Iowa based manufacturer.

41. Mr. [REDACTED] R.H. first met Marcum and Mrs. Marcum at a sales seminar offered by Retirement Solutions at a restaurant in 2019.

42. Following one of several discussions concerning an annuity transaction involving Mr. [REDACTED] R.H.’s parents in late summer or early fall of 2019, Marcum and Mrs. Marcum asked Mr. [REDACTED] R.H. to join them in a separate office where they solicited Mr. [REDACTED] R.H.’s interest in “some investments.”

43. During this meeting in Des Moines, Marcum made the following misleading representations to Mr. [REDACTED] R.H.:

“I can do better than that [6%]. I can get you a straight 7 percent where you can use it just like a bank, where you can put money in, take money out; and you

know, I can get you an 8 percent interest, but it has to be locked in to every three months.

44. Mr. R.H. testified that he gave Marcum a check for “12,000 – something” that was “going to go to the 7 percent straight interest.”

45. Ms. Thomson sent on October 16, 2019, an email to Marcum asking if Mr. R.H. “could move over the \$12,000 he is able to take now??”

46. After an exchange, Marcum replied, “Yes he can. Will work on it Monday.”

47. Then on Monday, October 21, 2019, Marcum sent an email to Ms. Thomson directing her “NEED A EQUITRUST MARKET 10 bonus KIT PUT IN HIS FILE.” The email subject line read as: “Re: 2nd Appt R.H.”

48. On October 24, 2019, Marcum met Mr. R.H. at his home in Pella. Mr. R.H. testified at hearing that Marcum “didn’t have the 7 percent interest – straight interest booklet with him. He had this annuity, and I says ‘I didn’t want an annuity.’”

49. Mr. R.H. then testified that Marcum made statements at this meeting on October 24, 2019, statements that we can know from the evidence are false and misleading:

He says, “Oh, that’s okay. We can just put that money in there, and then when you pull the rest of the money out of the 401(k), I can pull that out of there with no penalties.”

So I kind of proceeded to go along with him and then there was a place where it showed the interest – or the years to stay in there. I said, “This says it’s got to stay in six to 10 years.”

And then he reassured me again, “Oh, don’t worry about it. I can get it out of it. This is the way I set it up.”

50. In his own testimony, Marcum admitted to driving Mrs. Marcum to consumers’ homes and making introductions, but generally denied participation “in the sales process.” His defense also included a claim that Mrs. Marcum routinely responded from Marcum’s email. We

do not find any of this testimony to be credible. Mr. [REDACTED] testified unequivocally Marcum was the person at his home on October 24, 2019, recommending the annuity. Mr. [REDACTED] withstood a cross-examination by Marcum's counsel on this very point. We also found that Mr. [REDACTED]'s prior statements to Investigator Mortvedt strengthened the credibility of Mr. [REDACTED]'s testimony at the hearing. Finally, despite Mrs. Marcum's personal and financial loyalties to Marcum as his wife, we conclude that as a licensed producer, Mrs. Marcum must have understood the serious risks to her own license if she were to transact insurance business in her husband's name or using his email address, since she knew Marcum had been prohibited by the commissioner from transacting the business of insurance.

51. Whether or not Mrs. Marcum was also present at Marcum's meeting with Mr. [REDACTED] on October 24, 2019, has very little bearing on the strength of Mr. [REDACTED]'s testimony that Marcum was recommending the purchase of an annuity to Mr. [REDACTED] after the commissioner's order prohibiting Marcum from "selling, soliciting, negotiating, or transacting in the business of insurance in the state of Iowa." Based on all the evidence, we find that either Mrs. Marcum wasn't present or Mr. [REDACTED] did not remember that she was present, but either finding equally underscores the fact that Marcum was knowingly and intentionally disobeying the clear prohibition of the commissioner's order. Using his wife's insurance producer license, her presence at clients' homes, or her signature on documents were simply optional parts of Marcum's ruse to circumvent the commissioner's order.

52. We find that Marcum disobeyed paragraph B in the commissioner's October 8, 2019 orders when Marcum participated in recommending to Mr. [REDACTED] that he purchase an annuity on October 24, 2019.

53. Investigator Mortvedt also testified concerning several insurance transactions and related discussions involving [REDACTED] K.W. & P. W. residents of Carroll. The Division also offered the statement of Mr. [REDACTED] K.W. made during the investigator's interviews of Mr. [REDACTED] K.W. on January 30, 2020.

54. Of the insurance business transactions that the Division proved Marcum engaged in, we find that Marcum's explanations of the documentary evidence of his communications with Mr. [REDACTED] K.W. to be the most absurd, and least credible.

55. Mr. [REDACTED] K.W.'s statements during the interview did not prove Marcum disobeyed the commissioner's October 8, 2019 orders. But neither did the statements vindicate Marcum. It was the documentary evidence of Marcum's communications that convicted Marcum in connection with this transaction.

56. Working together, Marcum and Mrs. Marcum sold Protective Life Insurance Company universal life policies to each [REDACTED] K.W. & P. W. on July 16, 2019. Mrs. [REDACTED] P.W.'s premium was to be \$635.35 per month and Mr. [REDACTED] K.W.'s premium was to be \$884 per month for these policies. In each case, the policies were sold as replacement policies as a "1035 exchange" for other life policies that had been purchased in 2015 or before with other insurance companies and through a different insurance producer.

57. Mr. [REDACTED] K.W. sent an email on October 24, 2019, addressed to Marcum expressing concerns that his Knights of Columbus representative had raised regarding the transactions.

58. On October 24, 2019, Marcum responded to Mr. [REDACTED] K.W. by email stating:

[REDACTED] K. it is as we said it would be. No Worries. As per our planning we plan for the worst and hope for the best. In the here and now this lowers your premiums significantly. We as well as our Charlotte staff are working to get this completed. Unfortunately this timeline isn't out of the ordinary when dealing with some

companies. Debbi and I are monitoring this closely and are working diligently to get this case issued. We have some old companies transfers in place in your new policies. My cell is 515 681 5124 if you've any questions. Thanks, Gary

59. Under direct examination by the Division's counsel, Marcum testified that:

Debbi could have answered that. I know I wouldn't have gave insurance advice because I didn't want to pay any more fines or have any more problems. I just wanted to get it done and get my license back.

60. We note that Marcum did not testify that Debbi did answer the email "as Gary," but only that she "could have." Marcum's testimony is simply not believable. It references coordination with Debbi and the email is signed as "Gary." Marcum did not call Debbi as a witness to explain his defense. Further, despite his presumed loyalty to his wife, it is absurd that Marcum's best defense would be that his wife was lying about her own identity to a client, which, if true, would subject her to license discipline. We simply do not find Marcum's testimony on this point to be credible. Further, even if Mrs. Marcum did type it on Marcum's device or computer while they were together, she did it with Marcum's authority and since they were acting together, Marcum disobeyed paragraph B in the commissioner's October 8, 2019 orders.

61. Marcum called the Knights of Columbus representative on October 29, 2019, to communicate on behalf of Mr. **K.W.** his desire to move forward with the 1035 exchange.

62. On November 6, 2019, Mr. **K.W.** sent another email to Marcum and Ms. Thomson asking questions about the 1035 exchange and the terms of the universal life policies that Marcum and Mrs. Marcum had recommended. Marcum replied twenty minutes later, stating: "**K.** please call me when you can. 515 681 5124. Thanks Gary[.]"

63. Marcum's explanation of this communication is equally disingenuous and his sarcasm during an important line of question displayed his disregard for the importance of this proceeding:

COUNSEL: And what was your response, Mr. Marcum?

MARCUM: **K.W.** please call me when you can. 515 681 5124, which is my cell number. I put "Thanks, Gary," as far as the e-mail goes. But again, we was out of the state, so it could have very well been Debbi responding, so –

COUNSEL: Was she responding on your behalf?

MARCUM: No, because I wasn't licensed at that time.

COUNSEL: Then, Mr. Marcum, why would you or your wife tell **K.W.** to call that person at your cell phone number and sign it "Thanks, Gary," if it was not you he was supposed to contact?

MARCUM: Because, again, many times, Debbi did not have phone coverage out of state, especially in the mountains.

COUNSEL: Mr. Marcum, this email does not say "call Debbi." It says "call me," and the e-mail is from your address, correct?

MARCUM: Oh, yeah. You got me there. That's what it says, but I just told you what the circumstances were as far as that goes.

64. For the reasons discussed earlier, we find Marcum lacked credibility in this testimony. But his own statements reveal his motivation to cover-up his violations. Marcum's refusal to accept the responsibility for his participation in the insurance business in the weeks following the commissioner's order, and the absurdity of his testimony attributing his insurance business activity to his wife have only made matters worse.

65. Then on November 12, 2019, Mr. **K.W.** sent an email to and received by Marcum stating that he did not want to "transfer" the Knights of Columbus policy and would not be exchanging them for the policies being recommended by Marcum and Mrs. Marcum.

66. In response to Mr. [K.W.]’s email, Marcum sent an email on November 12, 2019, to Andrew Ball who was with FIG (Financial Independence Group) Marketing, a marketing organization that often provides other assistance to independent insurance producers. Marcum asked for an analysis of how not including the Knights of Columbus policies in the exchange would compare to including them. Mr. Ball replied to Marcum with his analysis later that day in an email to Marcum’s address and directed to Marcum. We find that Marcum received the analysis.

67. On November 15, 2019, Marcum and Mrs. Marcum met with Mr. and Mrs. [K.W. & P.W.] in their home in Carroll, Iowa. Mr. [K.W.] told Investigator Mortvedt in his interview that both Marcum and Mrs. Marcum were present at his home and both gave Mr. and Mrs. [K.W. & P.W.] advice regarding the surrender of their Knights of Columbus policies. We find both Marcum and Mrs. Marcum participated in the recommendation to move forward with including the Knights of Columbus policies and surrendering them in the 1035 exchange and the purchase of the Protective Life Insurance Company universal life policies. Mr. and Mrs. [K.W. & P.W.] following the Marcums’ recommendation, agreed to move forward with the transaction. [K.W. & P.W.] signed Knights of Columbus life insurance policy surrender requests at this meeting and Marcum signed the documents as a witness.

68. We find that Marcum disobeyed paragraph B in the commissioner’s October 8, 2019 orders when Marcum was present, and directly participated with his wife, Mrs. Marcum, in recommending to [K.W. & P.W.] that they surrender several existing insurance policies and purchase insurance policies on November 15, 2019, and on other occasions in communications with Mr. [K.W.] and Mr. Ball in the days prior to November 15, 2019.

CONCLUSIONS OF LAW

69. Iowa Code § 522B.1(15) defines “sell” as “to exchange a contract of insurance by any means, for money or its equivalent, on behalf of an insurer.” Marcum violated paragraph B in the commissioner’s October 8, 2019, orders when Marcum, directly and indirectly with and through other persons, sold contracts of insurance.

70. Iowa Code § 522B.1(16) defines “solicit” as “attempting to sell insurance or asking or urging a person to apply for a particular kind of insurance from a particular company.” Marcum violated paragraph B in the commissioner’s October 8, 2019 orders, when Marcum, directly and indirectly with and through other persons, solicited contracts of insurance.

71. Iowa Code § 522B.1(11) defines “negotiate” as “conferring directly with or offering advice directly to a purchaser or prospective purchaser of a particular contract of insurance concerning any of the substantive benefits, terms, or conditions of the contract, provided that the person engaged in that act either sells insurance or obtains insurance from insurers for purchasers. Marcum violated paragraph B in the commissioner’s October 8, 2019 orders when Marcum, directly and indirectly with and through other persons, negotiated contracts of insurance.

72. The commissioner’s prohibition of conduct in paragraph B in the commissioner’s October 8, 2019 orders is expansive to also prohibit “transacting in the business of insurance in the state of Iowa.”

73. Iowa Code chapter 507A—Iowa Unauthorized Insurers Act, prohibits a person from directly or indirectly performing any act of doing an insurance business. Iowa Code § 507A.5. “Doing an insurance business,” as defined by Iowa Code § 507A.3, includes the following acts, effected by mail or otherwise:

- a.* The making of or proposing to make, as an insurer, an insurance contract;
- b.* The taking or receiving of any application for insurance;
- c.* The receiving or collection of any premiums, membership fees, assessments, dues or other considerations for any insurance;
- d.* The issuance or delivery of contracts of insurance to residents of this state or to corporations or persons authorized to do business in this state;
- e.* The doing of any kind of insurance business specifically recognized as constituting the doing of an insurance business within the meaning of the statutes relating to insurance;
- f.* The doing or proposing to do any insurance business in substance equivalent to any of the foregoing in a manner designed to evade the provisions of the insurance laws of this state; or
- g.* Any other transactions of business relating directly to insurance in this state by an insurer.

74. Iowa Code chapter 507B—Insurance Trade Practices Act, prohibits a person from using any trade practice which is defined or determined to be an unfair method of competition or an unfair or deceptive act or practice in the “business of insurance.” Iowa Code § 507B.3. A “person” means “any individual, corporation, association, partnership, reciprocal exchange, interinsurer, fraternal beneficiary association, and any other legal entity engaged in the business of insurance, including insurance producers and adjusters.” Iowa Code § 507B.2. Iowa Code § 507B.4(3) defines certain acts or practices as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance, including but not limited to: misrepresentations and false advertising of insurance policies; misrepresentation on or relative to an application for insurance, and failing to identify the individual who actually solicited the insurance policy on the insurance application. It is clear from the commissioner’s regulatory authority that the “business of insurance” is expansive indeed covering many activities that could be engaged in by individuals and entities that are not required to become licensed as producers, insurers, or adjusters. Nonetheless, advertising and filling out applications are regulated as the business of insurance. Although not directly applicable to the facts of this case, 18 U.S.C.A. § 1033 can provide additional guidance regarding the meaning of engaging in the business of

insurance. 18 U.S.C.A. § 1033 is a federal law which prevents individuals convicted of certain felonies from engaging in the business of insurance in Iowa unless they obtain consent from the commissioner. 18 U.S.C.A. § 1033 (West); Iowa Code § 522B.16B. As used in the federal law, “business of insurance” is defined as “(a) the writing of insurance, or (b) the reinsuring of risks, by an insurer, including all acts necessary or incidental to such writing or reinsuring and the activities of persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons.” 18 U.S.C.A. § 1033(f)(1) (West). Marcum violated paragraph B in the commissioner’s October 8, 2019, orders when Marcum, directly and indirectly, with and through his assistant and his wife, transacted in the business of insurance.

75. Iowa courts have long held that statutes regulating insurance are remedial in nature with the understanding that the insurance business is entrusted with a public interest and is a business that is peculiarly subject to supervision and control. *Bankers Life & Cas. Co. v. Alexander*, 242 Iowa 364, 263-264 (1950). To this end, Iowa law grants wide discretion to the commissioner as the licensing authority and the Iowa Supreme Court has described this regulatory authority as “extremely broad.” *In the matter of Diamond*, Division Case No. 96975, 2019 WL 5677529, at 35 (Iowa Ins. Div., Oct. 23, 2019); *Burns v. Bd. of Nursing of State of Iowa*, 528 N.W.2d 602, 604 (Iowa 1995). As the purpose of statutory licensing schemes is to protect the public health, safety, and welfare of the people of Iowa, the licensing statutes should be liberally construed. *Id.*

76. The Supreme Court of the United States held that the business of insurance was not limited to the execution of insurance contracts, but it also encompassed all of the “negotiations and events prior to the execution of the contracts and the innumerable transactions

necessary to the performance of the contracts.” *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533, at 537 (1944), *superseded by statute*, McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, as stated in *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25 (1996).

77. Although the exact scope of “business of insurance” has not been specifically addressed by the Iowa Supreme Court (outside the context of reverse preemption under McCarran-Ferguson Act), a few other courts have attempted to confront this issue. The United States District Court for the Southern District of Ohio, in *Beamer v. NETCO Inc.*, construed the phrase “business of insurance” under 18 U.S.C. § 1033 broadly and held that Beamer engaged in the business of insurance when he developed a software program to produce insurance forms, set up relationships when his employer expanded the business into other states, participated in management meetings, and participated in operational aspects of the business. *Beamer v. NETCO Inc.*, 411 F. Supp. 2d 882, 889 (S.D. Ohio 2005). See also *Oriska Ins. Co. v. Avalon Gardens Rehab. & Health Care Ctr., LLC*, No. 618CV1030DNHDEP, 2018 WL 6074693, at 8 (N.D.N.Y. Nov. 21, 2018), holding that “business of insurance” is purposefully defined broadly so that it includes all acts necessary or incidental and therefore, an attorney’s representation of a property and casualty insurer in an action constituted the attorney engaging in the business of insurance. The Ninth Circuit found that an owner and operator of an insurance agency was engaged in the business of insurance because he engaged in the following actions “necessary or incidental” to the writing of insurance: marketed and sold insurance policies; underwrote insurance applications; collected premiums on behalf of insurance carriers; and reported claims to an insurer. *U.S. v. Renzi*, 769 F.3d 731, 754 (9th Cir. 2014).

78. Although the entirety of the evidence supports the conclusion that Marcum had ceased efforts to generate new business in the state of Iowa, but was working with and through

his assistant and wife to “finish up” pending business, this conduct violated paragraph B in the commissioner’s October 8, 2019 orders. Marcum’s financial motivation was clear. Marcum testified that, after suspended, he received, and continues to receive, monthly compensation from his insurance agency Retirement Solutions Group for “case planning.” This, by his own admission, included answering questions from his wife in her role as an insurance producer, and providing his opinion to his wife on what specific insurance product would be appropriate for a specific client. Marcum also explained that his “case planning” included researching insurance product options and recommending specific insurance products that he believed would be suitable for specific clients. We conclude that this conduct constitutes “transacting in the business of insurance” in violation of the commissioner’s October 8, 2019, orders. Our findings, and the record as a whole, provides substantial evidence of Marcum, directly and indirectly through his assistant and his wife, transacting in the business of insurance after he was prohibited from doing so. Marcum violated paragraph B in the commissioner’s October 8, 2019, orders by transacting in the business of insurance.

79. Iowa Code § 507B.7(4) authorizes the commissioner, after notice and hearing, to impose a monetary penalty and suspend or revoke a person’s insurance producer license if a person violates an order of the commissioner. Unlike other penalty sections found in Iowa’s insurance code, Iowa Code § 507B.7(4) does not contain language requiring willfulness or which permits increased penalty amounts for acts an individual knew or should have known were a violation of Iowa insurance law.¹

¹ Iowa Code §§ 507A.10(3) and (4) provide criminal penalties for “willful” violations. Iowa Code § 522C.6(2) states a public adjuster who willfully violates any provision of the chapter, rule adopted, or order issued is guilty of a serious misdemeanor. Iowa Code §§ 507B(7)(1)(a), 505.7A, and Iowa Administrative Code Rule 191—58.16(4) contain separate maximum civil penalties depending upon whether the violation was unknowing/technical or if the person “knew or reasonably should have known” the person was in violation of the subtitle. Iowa Code § 515F contains separate maximum civil penalties depending upon whether the violation was “willful” or not.

80. The history of the National Association of Insurance Commissioners (“NAIC”) adoption of and revisions to the model unfair trade practices act support the conclusion that a specific intent standard is not required for violations of cease and desist orders. In the 1971 revision to the model, an advisory committee recommended that penalties for violating a cease and desist order should only be imposed if the violation was “willful” or in the alternative, that a commissioner must, at a minimum, determine that a person “knew or reasonably should have known” that he was violating the cease and desist order. *Annual Meeting, Nat’l Ass’n Ins. Comm’rs 1972 Proc. II*, 510. It was the advisory committee’s opinion that “willful” is a stricter test than “knew or reasonably should have known.” *Id.* at 508. Neither “willful” nor “knew or reasonably should have known” was included in section 11 of the model authorizing the commissioner to impose penalties for violations of cease and desist orders.

81. In 1971, Iowa’s trade practices law did not require that a violation of a commissioner’s order be willful, however, it did allow for a heightened penalty to be imposed if the violation was found to be willful. Iowa Code § 507B.11 (1971). Moreover, after a series of amendments to the Unfair Trade Practices Act and due consideration, in 1972 the Iowa legislature decided to remove “willful” as well as the distinction in penalty amounts from the subsection addressing penalties for violations of a commissioner’s order (formerly Iowa Code § 507B.11, currently Iowa Code § 507B.7(4)). H.B. 1141, 64th Gen. Assemb., Second Sess. (Iowa 1972), available at <https://www.legis.iowa.gov/legislation/BillBook?ga=64&ba=HF%201141>; Iowa Code § 507B.11 (1973).

82. Iowa Code § 507B.7(4) does not include a requirement that the person “willfully” violate the commissioner’s order. The language of Iowa Code § 507B.7(4) provides the commissioner with discretion to impose civil penalties and license suspension or revocation if an

individual fails to comply with an order issued by the commissioner. The history of both the NAIC proceedings and Iowa’s legislative history demonstrate that the issue of whether an individual is required to have acted “willfully” in order to find that the individual violated a commissioner’s order, and for which a civil penalty may be imposed, was duly considered by the legislature and found not to be a required element. Even if the current statute explicitly included a “willfulness” standard, or if one was inferred, it would not require demonstrating that the violator acted with the specific intent to violate the order.

83. Notwithstanding the conclusion that willfulness is not a required element for a violation and Marcum’s intent may be irrelevant to support a finding of a violation, we do find that Marcum willfully violated paragraph B in the commissioner’s October 8, 2019 orders.

FINAL ORDERS

IT IS THEREFORE ORDERED, pursuant to the powers granted to the Commissioner of Insurance by Iowa Code chapters 507B and 522B:

- A. Marcum has disobeyed and violated the commissioner’s October 8, 2019 orders on thirteen separate occasions;
- B. Marcum’s Iowa resident insurance producer license is permanently revoked, effective on the date of this order, pursuant to Iowa Code §§ 507B.7 and 522B.11;
- C. Marcum is permanently prohibited from:
 - a. selling, soliciting, negotiating insurance in the state of Iowa;
 - b. transacting any business of insurance in the state of Iowa; and
 - c. participating with, acting with, facilitating, advising or assisting Mrs. Deborah Marcum, any insurer, any producer, or any other person who is transacting the

business of insurance in the state of Iowa, except in handling Marcum's own personal insurance coverage.

- D. While the maximum civil penalty authorized by statute is \$10,000.00 for each violation committed for total range of \$130,000, Marcum shall pay a civil penalty in the amount of \$30,000 because he violated the commissioner's October 8, 2019 orders. Penalty payments shall be made payable to the Iowa Insurance Division, to be credited to the Iowa Enforcement Fund, to provide funds for insurance enforcement and education pursuant to Iowa Code §§ 505.8, 507B.7, 522B.11, and 522B.17;
- E. The parties shall bear their own costs of investigation and prosecution;
- F. Except as modified herein, the commissioner's order of October 8, 2019 shall remain in full force and effect; and
- G. These orders may be enforced under Iowa Code chapters 507B and 522B, including but not limited to Iowa Code § 507B.8 and 522B.17(3), and additionally, by any collection remedies available to the State of Iowa Department of Revenue for unpaid penalties and other ordered monetary amount.

SO ORDERED on the 24th day of March, 2022.



DOUGLAS M. OMMEN
Iowa Insurance Commissioner

NOTICE OF PENALTIES FOR WILLFUL VIOLATION OF THIS ORDER

YOU ARE NOTIFIED that acting as an insurance producer, as defined in Iowa Code chapter 522B, in violation of this Order, is a felony under Iowa Code § 507A.10, subjecting you to punishment of imprisonment, jail, fines, or any combination of custody and fines.

YOU ARE ALSO NOTIFIED that if you violate this Order, you may be subject to administrative and civil penalties pursuant to Iowa Code § 522B.17(3). The Commissioner may petition the district court to hold a hearing to enforce the order as certified by the Commissioner. The district court may assess a civil penalty against you in an amount not less than three thousand dollars but not greater than ten thousand dollars for each violation, and may issue further orders as it deems appropriate.

NOTICE OF FINAL ORDER IMPACT

A final order of license probation, suspension, or revocation or a cease and desist order may adversely affect other existing business or professional licenses and may result in license revocation or disciplinary action.

A final order in an administrative action does not resolve any potential criminal or civil violations or causes of action that might arise from the same or similar conduct that is the subject of this contested case. It may result in criminal law enforcement authorities, including the fraud bureau of the Iowa Insurance Division, pursuing a criminal investigation or prosecution of potential criminal law violations.

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