

**BEFORE THE COMMISSIONER OF INSURANCE
OF THE STATE OF KANSAS**

In the Matter of the)
Kansas Resident Insurance Agent's) Docket No. 3623-SO
License of Agency X)

FINAL ORDER

On March 24, 2008, the Hearing Officer, Robert M. Tomlinson, in the above-captioned matter hereby made the following findings and enters the Order as follows:

Procedural Issues

This matter comes before the Hearing Officer as a result of the Kansas Insurance Department's issuance of a Summary Order on June 28, 2007 against Agency X for violation of K.S.A. §40-4909 and K.S.A. §40-2404. Agency X timely appealed the Summary Order and requested a hearing. Agency X and the Kansas Insurance Department each filed a Motion for Summary Judgment in this matter. The Motions for Summary Judgment comprise the basis of the Hearing Officer's decision.

Issues

1. Whether the Kansas Department of Insurance's Summary Order complied with the applicable provisions of the Kansas Administrative Procedure Act under K.S.A. §77-501 *et seq.*
2. Whether Agency X violated K.S.A. 2006 Supp. §40-4909(a)(8) by renewing Consumer's insurance policy without his approval and subsequently filing suit for his failure to pay a premium.
3. Whether Agency X misrepresented the pertinent facts in violation of K.S.A. 2006 Supp. §40-2404(9)(a).

Decision

- I. Whether the Kansas Department of Insurance's Summary Order complied with the applicable provisions of the Kansas Administrative Procedure Act under K.S.A. §77-501 et seq.

The friend of the court brief filed by Amicus Y, brought up some interesting points as to whether the Department of Insurance was in violation of the Kansas Administrative Procedure Act. They brought forth the idea that a Summary Order in and of itself removes privileges and that the Summary Order has some legal standing and the Department's Order was done without appropriate administrative procedure because the full list of charges and the opportunity to respond to those charges was not given. I do not find that to be true.

The wording of the Summary Order may, in fact, be unfortunate wording, but in and of itself does not imply the removal of administrative procedures or due process. K.S.A. §77-501 is a due process statute. The full list of charges, the opportunity for discovery, the opportunity to plead one's case, and make motions for summary judgment all were in order without removal of anything of substantive value from Agency X.

One of the most interesting points in the oral arguments was made by Amicus Y in that they indicated that one of the problems with the Summary Order was that it gave a specific period of time to respond before the Order became final. However, if the Summary Order were handled in any other way the implication would also be that there would be a time frame where due process had to begin, that a list of charges and specifications would be something that could not go on indefinitely, and that the due process proceeding had to begin.

Further, the Department of Insurance indicated that all parties have complied with the requesting of a hearing in a timely manner. Under K.S.A. §77-537 and K.S.A. §77-542; due

process has been provided in this case. Nothing of value was lost prior to this determination, and I find that the Department of Insurance has complied with K.S.A. §§7-501 in fact and in spirit.

II. Whether Agency X violated K.S.A. 2006 Supp. §40-4909(a)(8) by renewing Consumer's insurance policy without his approval and subsequently filing suit for his failure to pay a premium.

It has been the argument of Agency X that the case revolves around the renewal of a liability policy to Consumer without his specific request to do so and, in fact, subsequently, we find out, against his desire to do so and Agency X's subsequent attempt to recover monies that they put forth for the premium for the renewal.

The Amicus brief indicated that there has been and is some confusion about who renews policies and I agree absolutely with their relevant point there. Insurance companies, not agents, renew policies, and that is a clear and undisputable fact. When the Department of Insurance indicates that Agency X renewed the policy, they are inaccurate in that regard. But this policy was renewed, and it was renewed by the action of Agency X.

The Amicus brief also indicated a difference between direct billing and agency billing. Once again, I completely agree with their analysis of that. However, I wanted to make it clear that it appears to me that the difference between direct billing and agency billing is more a matter between the insurance company and the agent and not between the client and the insurance company.

It is a matter that is dealt with for convenience on the part of all concerned. The difference between direct billing and agency billing is not intended to nor will it ever remove the rights of the insured or alter those rights just by the fact that it exists or how that billing was made. The contract between the insured and the insurance company remains unaltered by the way the billing is made unless specifically outlined in the policy or a rider to that.

The point was raised that in this particular case, K.S.A. §40-2,121 requires the insurance company, in order to cancel a policy, to give sixty days written notice. That is the reason cited by Amicus Y in their Amicus brief for the need of Agency X to renew Consumer's policy. In that non-renewal of that policy without prior written consent violates K.S.A. §40-2,121.

I asked for a further brief on this matter, and Amicus Y, in fact, gave me the opportunity if I so desired to rule in their favor with the court cases they cited. But as they correctly indicated they are not strictly on point, nor was the prior administrative hearing which I cited strictly on point.

There is nothing in K.S.A. §40-2,121 that indicates or should indicate a requirement to extend insurance to any party without a payment of premium. Under the laws in the State of Kansas, it is required to give notice, give the opportunity for an insurance client to find other insurance when a company has chosen to non-renew. But at no point should anyone purchasing insurance believe that insurance can be had by failure to respond to renewal notice or paying a premium. It requires the insurance company to give the appropriate notice if they're going to non-renew. It does not require them to extend coverage if a premium has not been paid.

Even if this statute required the insurance company to extend coverage, it would not require the agent to pay for it, or to make arrangements to pay for it or to stand liable for its payment because it is the insured's company that renews the policy and not the agent as we've already noted.

We cannot have it both ways. We cannot say that the agent is not responsible for renewing the policy and then make them responsible for paying the premium, or in some way of following through on the payment of a premium.

K.S.A. §40-2,121 does not require a premium to be paid by any agency and does not require the extension of coverage to someone who has chosen not to pay the premium.

III. Whether Agency X misrepresented the pertinent facts in violation of K.S.A. 2006 Supp. §40-2404(9)(a).

The argument of the Kansas Insurance Department comes forth that by indicating to Consumer that the law required the payment of this premium when the contract and the law did not required such a payment, Agency X misrepresented that point.

Agency X, in oral arguments, indicated that the criteria that he used was whether or not Consumer had been a good client and had paid properly, and therefore, he was going extend a privilege to them that he extended to other clients. That was the truth. I believe that is precisely how he decided the matter.

It is not the Department's position that such arrangements are illegal. Agencies and agents paying premiums is a long-standing policy, particularly in Kansas, where there are times that time and distance are inappropriate to have it work any other way. Agencies who have good clients should be allowed, in fact should be encouraged to have a policy that would make such payments possible.

The Department has indicated that in order for such a payment to be valid and pursued that a written verification is required. That is not true, it puts an undue burden on the part of the agent, and it is counterproductive to the reasonable conduct of business.

Agency X did not intentionally, willfully, or systematically misrepresent the law to Consumer. Agency X was attempting to follow through with what he felt was good for the client.

The second part of this inquiry is whether or not Agency X pursuing a lawsuit against Consumer is in violation of K.S.A. §40-4909(a)(8). Written notice is not required but that works both ways. It has been the position of Agency X that the agency had made multiple efforts to get

in touch with Consumer in order to try to secure a premium, and he failed to respond. It would have been reasonable and prudent for him to do so but it is not required by law. You are not compelled to respond to a renewal of a policy, and absent his response, he is not compelled to pay the premium. Absent an affirmative response with nothing else, no history to back them up, Consumer did not owe the premium, and so attempts to collect it in court are in fact in violation of K.S.A. §40-4909(a)(8).

Holding

It has been found Agency X did not misrepresent the law to Consumer in violation of K.S.A. §40-2404, accordingly, the \$2,500.00 penalty originally proposed by the Department automatically becomes \$1,500.00. The fine is further reduced from \$1,500.00 to \$500.00 and will be suspended.

Agency X may continue the action of paying the premium going forward based on whether or not they had a good customer but they cannot pursue in Court a client who has given them no affirmative response whatsoever.

All other findings and conclusions of law stated by the Hearing Officer on the record on March 24, 2008 are herein incorporated as if fully set forth in this Final Order.

IT IS SO ORDERED THIS 15th DAY OF APRIL, 2008 IN THE CITY OF TOPEKA, COUNTY OF SHAWNEE, STATE OF KANSAS.



/s/ Robert M. Tomlinson
Robert M. Tomlinson
Hearing Officer

NOTICE OF RIGHTS

Pursuant to K.S.A. §77-601 *et seq.*, Agency X is entitled to judicial review of this Final Order.

The petition for judicial review must be filed within thirty (30) days of service of this Final Order (plus three (3) days for service by mail pursuant to K.S.A. §77-531). In the event, Agency X files a petition for judicial review pursuant to K.S.A. §77-613(e), the Agency Officer to be served on behalf of the Kansas Insurance Department is:

John W. Campbell, General Counsel
Kansas Insurance Department
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