NPN # 34763 TN ID- 0613015

STATE OF TENNESSEE
DEPARTMENT OF COMMERCE AND INSURANCE
INSURANCE DIVISION
500 JAMES ROBERTSON PARKWAY — 4TH FLOOR
NASHVILLE, TENNESSEE 37243
615-741-2176

June 3, 2011

Luther Thomas Smith
1003 Huron Dr.
Crossville, TN 38572
(615) 254-9300

Re: ***Tennessee Insurance Division v. Luther T. Smith***

Dear Mr. Smith,

It has come to our attention that you renewed your license on April 30, 2011. I regret to inform you that your license was renewed due to a clerical error. The order issued by the Tennessee Court of Appeals on March 24, 2010 upheld the Commissioner of Commerce and Insurance's ("Commissioner") March 6, 2008 Final Order to revoke your insurance producer license. The Tennessee Court of Appeals subsequently denied your Petition to Rehear on April 30, 2010. The Supreme Court of Tennessee denied your Application for Petition to Appeal on September 22, 2010. Finally, the Supreme Court of Tennessee denied your Petition for Reconsideration on October 12, 2010.

Pursuant to U.S. Sup. Ct. Rule 13, 28 U.S.C.A.:

> Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

You had ninety (90) days from October 12, 2010, the last date the Tennessee Supreme Court entered an order denying discretionary review, to petition the United States Supreme court for a writ of certiorari. The deadline to file for a writ of certiorari was Monday January 10, 2011. However, a writ of certiorari was

never filed with the United States Supreme Court. Accordingly, your appeal rights were exhausted as of Monday January 10, 2011.

The Agreed Order to Stay Pending Appeal, that you entered with the Commissioner on May 28, 2008, stayed the effectiveness of the Final Order issued by the Commissioner on March 6, 2008 pending the outcome of the appeal. Since you were not successful in overturning the March 6, 2008 Final Order and you have exhausted all of your appeal rights, the Agreed Order to Stay Pending Appeal, by operation of the terms of the Agreed Order, the stay of the Final Order is lifted.

Your license was hereby revoked as of Monday January 10, 2011. Once your license was revoked, you no longer had an insurance producer license. As such, you no longer had a license to renew. The erroneous renewal of your previously revoked license was issued on April 30, 2011 due to a clerical error. You may request a refund of the April 30, 2011 renewal fee by sending a written request to the Agent Licensing Division of the Department of Commerce and insurance if you wish.

Thank you,

Larry C. Knight, Jr.

TDG/
Cc: Brenda Sechler, Director of Agent Licensing
Elizabeth Martin, General Counsel

State of Tennessee
Department of State
Administrative Procedures Division
312 Eighth Avenue North
8th Floor, William R. Snodgrass Tower
Nashville, Tennessee 37243
Phone: (615) 741-7008/Fax: (615) 741-4472

August 16, 2007

Commissioner Leslie Schecter Newman
TN Dept. of Commerce & Insurance
5th Floor, Davy Crockett Tower
500 James Robertson Parkway
Nashville, Tennessee 37243-5065

Dakasha Winton
Staff Attorney
Dept of Commerce & Insurance
12th Floor, Davy Crockett Tower
500 James Robertson Parkway
Nashville, TN 37243

John C. Lyell, Esq.
211 Seventh Avenue North, Suite 300
Nashville, TN 37219

RE: In the Matter of: Luther Tommy Smith Docket No. 12.01-070555J

Dear Parties:

Please find enclosed a copy of the Initial Order rendered in connection with the above-styled case.

Sincerely,

Thomas G. Stovall
Administrative Procedures Division

/ncp
Enclosure

The Department of State is an equal opportunity, equal access, affirmative action employer.

BEFORE THE COMMISSIONER OF THE TENNESSEE DEPARTMENT OF COMMERCE AND INSURANCE

IN THE MATTER OF:

LUTHER TOMMY SMITH **DOCKET NO.: 12.01-070555J**

ORDER

THIS ORDER IS AN INITIAL ORDER RENDERED BY AN ADMINISTRATIVE JUDGE WITH THE ADMINISTRATIVE PROCEDURES DIVISION.

THE INITIAL ORDER IS NOT A FINAL ORDER BUT SHALL BECOME A FINAL ORDER UNLESS:

1. THE ENROLLEE FILES A WRITTEN APPEAL, OR EITHER PARTY FILES A PETITION FOR RECONSIDERATION WITH THE ADMINISTRATIVE PROCEDURES DIVISION NO LATER THAN **August 31, 2007.**

YOU MUST FILE THE APPEAL, PETITION FOR RECONSIDERATION WITH THE ADMINISTRATIVE PROCEDURES DIVISION. THE ADDRESS OF THE ADMINISTRATIVE PROCEDURES DIVISION IS:

SECRETARY OF STATE
ADMINISTRATIVE PROCEDURES DIVISION
WILLIAM R. SNODGRASS TOWER
312 EIGHTH AVENUE NORTH, 8th FLOOR
NASHVILLE, TENNESSEE 37243-0307

IF YOU HAVE ANY FURTHER QUESTIONS, PLEASE CALL THE ADMINISTRATIVE PROCEDURES DIVISION, **615/741-7008 OR 741-5042, FAX 615/741-4472.** PLEASE CONSULT APPENDIX A AFFIXED TO THE INITIAL ORDER FOR NOTICE OF APPEAL PROCEDURES.

BEFORE THE COMMISSIONER OF THE
TENNESSEE DEPARTMENT OF COMMERCE & INSURANCE

IN THE MATTER OF:	]	
	]	
TENNESSEE INSURANCE DIVISION,	]	
Petitioner,	]	
vs.	]	**Docket # 12.01-070555J**
	]	
LUTHER THOMAS SMITH,	]	
Respondent.	]	

ORDER ASSESSING SANCTIONS

On April 2, 2007, an Order was entered in this case, granting partial summary judgment in favor of the Petitioner. Thereafter, on June 25, 2007, a hearing was convened to consider oral arguments on the Petitioner's request for the imposition of sanctions against the Respondent. Throughout these proceedings, the Petitioner was represented by Ms. Dakasha K. Winton, Staff Attorney for the Tennessee Insurance Division; and the Respondent was represented by his legal counsel, Mr. John C. Lyell, Jr. Upon full consideration of the evidence filed, the Findings of Fact and Conclusions of Law contained in the April 2, 2007 Order, and oral arguments, it is concluded that the Respondent's Insurance Producer License should be revoked, and he should be assessed a civil penalty in the total amount of Thirty Thousand Dollars ($30,000.00).

As more fully described in the April 2, 2007 Order, the Respondent engaged in an insurance policy rebating scheme over several years, involving multiple insurance companies, and multiple clients. The Notice of Charges in this case only charged the Respondent with conduct related to his representation of Ohio National Life Insurance Company ("Ohio National"). He sold thirty (30) policies on behalf of Ohio National, employing his rebating scheme, and to the detriment of Ohio National.

TENN. CODE ANN. § 56-6-155 provides that the Commissioner of the Department of Commerce and Insurance may revoke or suspend the license of any agent who violates the terms of that Code section. It also provides that, in addition to revocation of a license, the Commissioner may assess a civil penalty of between one hundred dollars ($100.00)

and one thousand dollars ($1,000.00). Based on the April 2, 2007 determination that the Respondent violated the terms of TENN. CODE ANN. § 56-6-155(a)(8), he is subject to the penalty provisions of § 56-6-155(a) and (b). Each policy sold is a separate violation.

It is concluded that this case requires an enhanced sanction, based on the facts that the Respondent's license was previously revoked and reinstated by the Commissioner, that the Respondent has failed to make any restitution for the significant losses suffered as a result of his actions,[1] and that his scheme continued over multiple years and involved fraudulent intent and actions by the Respondent.

ACCORDINGLY, It Is Therefore Ordered that Insurance Producer License No. 613015, issued to the Respondent, Luther T. Smith, is hereby Revoked;

It Is Further Ordered that the Respondent is assessed a Civil Penalty in the amount of One Thousand Dollars ($1,000.00) for each of the thirty (30) violations of TENN. CODE ANN. § 56-6-155(a), for a total Civil Penalty of Thirty Thousand Dollars ($30,000.00).

This Order is entered and effective this 16 day of August 2007.

J. Randall LaFevor, Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 16 day of August 2007.

Thomas G. Stovall, Director
Administrative Procedures Division

[1] *See* Exhibit #1 [Re: Motion to Reconsider] Order Granting Nondischargeable Partial Summary Judgment, *Ohio National Life Insurance Company v. Luther T. Smith, Jr.*, U.S. Bkrcy Court, M.D. Tenn; 05-14283-MH3-11; ADV.No. 306-00078A.

APPENDIX A TO INITIAL ORDER
NOTICE OF APPEAL PROCEDURES

Review of Initial Order

This Initial Order shall become a Final Order (reviewable as set forth below) fifteen (15) days after the entry date of this Initial Order, unless either or both of the following actions are taken:

(1) A party files a petition for appeal to the agency, stating the basis of the appeal, or the agency on its own motion gives written notice of its intention to review the Initial Order, within fifteen (15) days after the entry date of the Initial Order. If either of these actions occurs, there is no Final Order until review by the agency and entry of a new Final Order or adoption and entry of the Initial Order, in whole or in part, as the Final Order. A petition for appeal to the agency must be filed within the proper time period with the Administrative Procedures Division of the Office of the Secretary of State, 8th Floor, William R. Snodgrass Tower, 312 Eighth Avenue N., Nashville, Tennessee, 37243. (Telephone No. (615) 741-7008). See Tennessee Code Annotated, Section (T.C.A. §) 4-5-315, on review of initial orders by the agency.

(2) A party files a petition for reconsideration of this Initial Order, stating the specific reasons why the Initial Order was in error within fifteen (15) days after the entry date of the Initial Order. This petition must be filed with the Administrative Procedures Division at the above address. A petition for reconsideration is deemed denied if no action is taken within twenty (20) days of filing. A new fifteen (15) day period for the filing of an appeal to the agency (as set forth in paragraph (1) above) starts to run from the entry date of an order disposing of a petition for reconsideration, or from the twentieth day after filing of the petition, if no order is issued. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Initial Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

Review of Final Order

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YOU WILL NOT RECEIVE FURTHER NOTICE OF THE INITIAL ORDER BECOMING A FINAL ORDER

A person who is aggrieved by a final decision in a contested case may seek judicial review of the Final Order by filing a petition for review in a Chancery Court having jurisdiction (generally, Davidson County Chancery Court) within sixty (60) days after the entry date of a Final Order or, if a petition for reconsideration is granted, within sixty (60) days of the entry date of the Final Order disposing of the petition. (However, the filing of a petition for reconsideration does not itself act to extend the sixty day period, if the petition is not granted.) A reviewing court also may order a stay of the Final Order upon appropriate terms. See T.C.A. §4-5-322 and §4-5-317.

State of Tennessee
Department of State
Administrative Procedures Division
312 Eighth Avenue North
8th Floor, William R. Snodgrass Tower
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Phone: (615) 741-7008/Fax: (615) 741-4472

August 16, 2007

Commissioner Leslie Schecter Newman
TN Dept. of Commerce & Insurance
5th Floor, Davy Crockett Tower
500 James Robertson Parkway
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Dakasha Winton
Staff Attorney
Dept of Commerce & Insurance
12th Floor, Davy Crockett Tower
500 James Robertson Parkway
Nashville, TN 37243

John C. Lyell, Esq.
211 Seventh Avenue North, Suite 300
Nashville, TN 37219

RE: In the Matter of: Luther Tommy Smith Docket No. 12.01-070555J

Dear Parties:

Please find enclosed a copy of the Initial Order rendered in connection with the above-styled case.

Sincerely,

Thomas G. Stovall
Administrative Procedures Division

/ncp
Enclosure

The Department of State is an equal opportunity, equal access, affirmative action employer.

BEFORE THE COMMISSIONER OF THE TENNESSEE
DEPARTMENT OF COMMERCE AND INSURANCE

IN THE MATTER OF:

LUTHER TOMMY SMITH **DOCKET NO.: 12.01-070555J**

ORDER

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SECRETARY OF STATE
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BEFORE THE COMMISSIONER OF THE
TENNESSEE DEPARTMENT OF COMMERCE & INSURANCE

IN THE MATTER OF:	]	
	]	
TENNESSEE INSURANCE DIVISION,	]	
Petitioner,	]	
vs.	]	**Docket # 12.01-070555J**
	]	
LUTHER THOMAS SMITH,	]	
Respondent.	]	

ORDER ASSESSING SANCTIONS

On April 2, 2007, an Order was entered in this case, granting partial summary judgment in favor of the Petitioner. Thereafter, on June 25, 2007, a hearing was convened to consider oral arguments on the Petitioner's request for the imposition of sanctions against the Respondent. Throughout these proceedings, the Petitioner was represented by Ms. Dakasha K. Winton, Staff Attorney for the Tennessee Insurance Division; and the Respondent was represented by his legal counsel, Mr. John C. Lyell, Jr. Upon full consideration of the evidence filed, the Findings of Fact and Conclusions of Law contained in the April 2, 2007 Order, and oral arguments, it is concluded that the Respondent's Insurance Producer License should be revoked, and he should be assessed a civil penalty in the total amount of Thirty Thousand Dollars ($30,000.00).

As more fully described in the April 2, 2007 Order, the Respondent engaged in an insurance policy rebating scheme over several years, involving multiple insurance companies, and multiple clients. The Notice of Charges in this case only charged the Respondent with conduct related to his representation of Ohio National Life Insurance Company ("Ohio National"). He sold thirty (30) policies on behalf of Ohio National, employing his rebating scheme, and to the detriment of Ohio National.

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and one thousand dollars ($1,000.00). Based on the April 2, 2007 determination that the Respondent violated the terms of TENN. CODE ANN. § 56-6-155(a)(8), he is subject to the penalty provisions of § 56-6-155(a) and (b). Each policy sold is a separate violation.

It is concluded that this case requires an enhanced sanction, based on the facts that the Respondent's license was previously revoked and reinstated by the Commissioner, that the Respondent has failed to make any restitution for the significant losses suffered as a result of his actions,[1] and that his scheme continued over multiple years and involved fraudulent intent and actions by the Respondent.

ACCORDINGLY, It Is Therefore Ordered that Insurance Producer License No. 613015, issued to the Respondent, Luther T. Smith, is hereby Revoked;

It Is Further Ordered that the Respondent is assessed a Civil Penalty in the amount of One Thousand Dollars ($1,000.00) for each of the thirty (30) violations of TENN. CODE ANN. § 56-6-155(a), for a total Civil Penalty of Thirty Thousand Dollars ($30,000.00).

This Order is entered and effective this 16 day of August 2007.

J. Randall LaFevor, Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 16 day of August 2007.

Thomas G. Stovall, Director
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[1] *See* Exhibit #1 [Re: Motion to Reconsider] Order Granting Nondischargeable Partial Summary Judgment, *Ohio National Life Insurance Company v. Luther T. Smith, Jr.*, U.S. Bkrcy Court, M.D. Tenn; 05-14283-MH3-11; ADV.No. 306-00078A.

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State of Tennessee
Department of State
Administrative Procedures Division
312 Eighth Avenue North
8th Floor, William R. Snodgrass Tower
Nashville, Tennessee 37243
Phone: (615) 741-7008/Fax: (615) 741-4472

April 02, 2007

Dakasha K. Winton
Staff Attorney
Department of Commerce and Insurance
Office of Legal Counsel
500 James Robertson Pkwy, 12th Floor
Nashville, Tennessee 37243

John C. Lyell, Esq.
211 Seventh Avenue North,
Suite 300
Nashville, TN 37219

Dear Parties:

RE: In the Matter of: Luther Tommy Smith Docket No. 12.01-070555J

Please find enclosed a copy of an order rendered in the above-styled cause of action.

Sincerely,

Charles C. Sullivan, II
Administrative Procedures Division

/ncp
Enclosure

The Department of State is an equal opportunity, equal access, affirmative action employer

BEFORE THE COMMISSIONER OF THE
TENNESSEE DEPARTMENT OF COMMERCE & INSURANCE

IN THE MATTER OF:	]	
	]	
TENNESSEE INSURANCE DIVISION,	]	**Docket # 12.01-070555J**
Petitioner,	]	
vs.	]	**ORAL ARGUMENT NOT REQUESTED**
	]	
LUTHER THOMAS SMITH,	]	
Respondent.	]	

ORDER PARTIALLY GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT,
And DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

This matter was considered without oral argument by J. Randall LaFevor, Administrative Judge, assigned by the Secretary of State, and sitting for the Commissioner of the Tennessee Department of Commerce and Insurance, upon Motions for Summary Judgment filed by both the Petitioner and the Respondent. The Petitioner was represented by Ms. Dakasha K. Winton, Staff Attorney for the Tennessee Insurance Division. The Respondent was represented by his legal counsel, Mr. John C. Lyell, Jr.

Upon consideration of the parties' Motions, Statements of Undisputed Facts, attached exhibits, and the existing record, it is concluded that the Petitioner's Motion for Summary Judgment should be Partially Granted, and that the Respondent's Motion for Summary Judgment should be Denied. These determinations are supported by the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT[1]

1. The Respondent ("Smith") is currently licensed to sell insurance in the State of Tennessee.[2] (The Respondent's license to sell insurance was revoked by the Tennessee Department of Commerce and Insurance in 1980, but was reinstated in 1987.)[3]

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[1] Both parties asserted in their motions that there existed no genuine issues of material fact in this case. These "Findings of Fact" were taken primarily from the parties' Statements of Undisputed Facts. Where the parties' proposed facts were contradicted by the other party, the existing record was consulted to resolve the conflict.

2. The Respondent sold insurance on behalf of Ohio National Life Insurance Company ("Ohio" or "Ohio National") from April 1999 through February 2003.[4] When Smith contracted to sell insurance for Ohio, he agreed to abide by its Business Practices Guide, which prohibits premium rebating in all states.[5]

3. As compensation for selling its policies, Ohio paid Smith first-year commissions in the amount of 105% of the amount of the annual premium, plus overrides and enhanced bonuses.[6] Smith also sold insurance polices for two other companies (National Western Life Insurance Company and Shenandoah Life Insurance Company), and received commissions of up to 130% of the first-year premiums from those companies.[7] Commissions were paid by the insurance companies directly to Smith, who then distributed those funds, as he deemed appropriate, to his own accounts for personal and business use, and to his business entities. [8]

4. Smith sold approximately thirty (30) Ohio whole-life insurance policies, generally to individuals with a net worth in excess of one million dollars ($1,000,000.00). Under their agreement, Ohio paid Smith nearly two and one-half million dollars (specifically $2,470,414.00) in commissions from April 1999 through February 2003.[9] During the same time frame, Smith also sold policies from other companies to many of the same individuals to whom he sold Ohio policies. Sales of policies from those other insurance companies earned Smith additional commissions of over $600,000.00.[10]

5. When he sold policies for Ohio, Smith financed the first year's premiums through a company or companies that he either owned or controlled. Under that practice, Smith's

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[2] Stipulated by both parties.
[3] Department of Commerce and Insurance Initial Order, April 30, 1987.
[4] Affidavit of Molly Akin, Ohio National Life Insurance Co.
[5] Affidavit of Molly Akin, Ohio National Life Insurance Co.
[6] Affidavit of Molly Akin, Ohio National Life Insurance Co.
[7] Affidavits of Jo Nell Morris, National Western Life Insurance Co.; and Donna Musselwhite & Linda Brickey, Shenandoah Life Insurance Co. Smith said in his deposition that his first-year commissions were as high as 140%.
[8] Deposition of Luther T. Smith, October 11, 2006
[9] Affidavit of Molly Akin, Ohio National Life Insurance Co.
[10] Affidavits of Jo Nell Morris, National Western Life Insurance Co.; and Donna Musselwhite & Linda Brickey, Shenandoah Life Insurance Co.

premium-financing company (Eagle Financial Group, Inc.) loaned the value of the premium to the insured, who signed a promissory note for the amount of the loan.[11] (Several of the promissory notes are designated as non-recourse notes.)[12] The insured then used the proceeds of the loan to pay the insurance policy's first-year premium to Ohio. Smith did not reveal this premium-financing practice to Ohio, nor was it reflected in the terms of the policies that he wrote on Ohio's behalf.[13]

6. When Ohio's auditors reviewed the performance of Smith's block of policies, they observed several anomalies, including an elevated number of policies with reduced values. They noted a pattern of second-year premiums paid by a combination of loans, dividends and a small amount of cash. Additionally, they discovered an unusually large number of policies (28 of 30 policies) that had lapsed within their first three years. As a result of this activity, Ohio derived no profit from the policies sold by Smith.[14] The policies Smith sold for other insurance companies also lapsed within three years.[15]

7. On October 11, 2006, Smith was deposed for this proceeding.[16] At the request of the Petitioner, Smith produced more than a dozen premium-financing promissory notes and loan agreements,[17] but stated that he had actually financed nearly all of the first-year premiums for the policies that he sold for the three insurance companies.[18] As of the date of that deposition, all except one[19] of the notes he produced were past due, but partial payments had been received on only two of them. (Only $39,351.00 had been repaid on loans totaling $509,075.21.) There was a similar pattern of failure to repay loans by individuals to whom Smith sold policies from other life insurance companies.[20] Smith

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[11] Deposition of Luther T. Smith, October 11, 2006.
[12] Exhibit 6 to Petitioner's Motion for Summary Judgment: Notes/Agreements for B. Hodde, J. Dahlgren, P. Sharpe, R. Finnegan (3), and D. Finnegan.
[13] Affidavit of Molly Akin, Ohio National Life Insurance Co., and Deposition of Luther T. Smith, October 11, 2006.
[14] Affidavit of Molly Akin, Ohio National Life Insurance Co.
[15] Affidavits of Jo Nell Morris, National Western Life Insurance Co.; and Donna Musselwhite, Shenandoah Life Insurance Co.
[16] Deposition of Luther T. Smith, October 11, 2006.
[17] Exhibit 6 to Petitioner's Motion for Summary Judgment:
[18] Deposition of Luther T. Smith, October 11, 2006.
[19] The remaining note became due less than two months after the deposition. The Respondent filed nothing following the deposition indicating that the note was paid when due.
[20] Deposition of Luther T. Smith, October 11, 2006.

testified that neither he nor his business entities had taken any legal action to collect the remaining indebtedness.[21]

8. On July 6, 1994, the Commissioner of the Tennessee Department of Commerce and Insurance issued a Bulletin to "All Insurers Doing Business in Tennessee," addressing his concerns about a practice that he labeled "leased life insurance" or "insurance leasing." The Bulletin described the practice, and the basis for his concerns:

> . . . the consumer receives coverage for a limited period of time at a greatly reduced premium because the agent is using his commission to fund the contract, which constitutes an illegal inducement or rebate."
>
> The Department is very concerned that the payment by some companies of agent commissions in excess of 100% of the first year's premium creates the climate in which such illegal practices thrive. In most of these cases the insurance company loses money since the consumer often has no intention of ever paying the full premium. Consequently, the policies typically lapse at the end of the leasing arrangement.

The Bulletin concluded by stating that "Any insurance agent found to be engaging in the described activity <u>or any similar scheme</u> will be subject to administrative action that could include revocation of the agent's license."[22] [Emphasis added.]

CONCLUSIONS OF LAW

1. Both the Petitioner and Respondent filed Motions for Summary Judgment pursuant to Rule 56, TENN R. CIV. P. A Motion for Summary Judgment asserts that there are no genuine issues of material fact to be determined by hearing, and seeks judgment in the moving party's favor as a matter of law. Such a procedure is designed to provide a quick, inexpensive means of concluding cases where no factual disputes exist, and should not be regarded as a substitute for trial of disputed factual issues. Summary judgment is to be rendered only when the moving party establishes that there is no genuine issue as to any material fact. Rule 56, TENN R. CIV. P.; *Taylor v. Nashville Banner Publishing Co.*,

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[21] It is difficult to derive exact figures from the record, but it is clear that Smith's business entities financed well over two million dollars ($2,000,000.00) worth of first-year premiums, and that less than two hundred, fifty thousand ($250,000.00) had been repaid.

[22] Department of Commerce and Insurance BULLETIN, July 6, 1994; Allan S. Curtis to All Insurers Doing Business in Tennessee.

573 S.W.2d 476 (Tenn. Ct. App. 1978). A disputed fact is "material" for summary judgment purposes if it must be decided in order to resolve the substantive claim at which the summary judgment motion is directed. All other facts are rendered immaterial. *Byrd v. Hall*, 847 S.W.2d 215 (Tenn. 1993).

2. In reviewing the provisions of Rule 56, TENN R. CIV. P., and the circumstances under which a summary judgment may be granted, the Tennessee Court of Appeals observed in *Slaughter v. Duck River Electric Membership Corporation*, 102 S.W.3d 612, 615 (Tenn. Ct. App. 2002):

> A summary judgment should be granted only when the undisputed facts and the inferences reasonably drawn from the undisputed facts support the sole conclusion that the party seeking the summary judgment is entitled to judgment as a matter of law. *Webber v. State Farm Mut. Auto. Ins. Co.*, 49 S.W.3d 265(269) (Tenn. 2001). *Brown v. Birman Managed Care, Inc.*, 42 S.W.3d 62 (Tenn. 2001). [Emphasis added.]

3. The Petitioner alleges that Smith engaged in prohibited business practices in violation of TENN. CODE ANN. §§ 56-8-104(7)(A) & 56-6-155(a)(8). Those statutes provide:

> **56-8-104. Unfair methods of competition and unfair or deceptive acts or practices defined, --** The following are hereby specifically defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:
> * * *
> (7) REBATES. (A) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of insurance or agreement as to such contract other than as plainly expressed in the insurance contract issued thereon, or paying or allowing, or giving or offering to pay, allow or give, directly or indirectly, as inducement to such insurance, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatsoever not specified in the contract; or giving, or selling or purchasing or offering to give, sell, or purchase as inducement to such insurance contract or in connection therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract. [Emphasis added.]

And,

56-6-155. Grounds for suspension, etc. – Civil penalty. – (a) The commissioner may suspend, revoke, or refuse to issue or renew any license under this part for any one (1) or more of the following causes:
* * *
(8) Using, in the conduct of affairs under such license, fraudulent, coercive, or dishonest practices.

4. THE RESPONDENT ENGAGED IN PREMIUM REBATING

4a. The Petitioner contends that Smith engaged in a rebate scheme disguised as a premium-financing transaction. That is a fair characterization of his actions. When he sold policies to individuals, Smith knew that he would receive a commission from the insurance companies in an amount equal to 105% to 130%[23] of the first year's premium. Through his company, Eagle Financial Group, Smith loaned the insured an amount based on the first year's premium, and received a promissory note or loan agreement in return. The insured used the loan proceeds to pay the first-year's premium on the policy. In many cases, when the second-year's premium came due, the insured paid it through a combination of loans against the value of the policy, dividends and a small amount of cash, resulting in little or no net income to the company. Before their third anniversary, the vast majority of the policies written by Smith had either lapsed, been terminated, or were surrendered. Because of the large commissions paid to Smith, and the short lifespan of the policies, the insurance company realized no profit from those policies.

4b. When he received his commissions from the insurance companies, Smith transferred a portion of the proceeds to his premium financing company, Eagle Financial Group, Inc., to fund future premium-financing transactions. Between 1999 and 2003, Smith wrote a lot of high-value policies to large-net-worth individuals, generating huge commissions for himself. And, he sold multiple policies issued by more than one company to the same small group of individuals, using the same financing scheme for each sale. Curiously, even though these individuals owed his company millions of dollars as a result of those loans, he collected only a fraction of the amount they owed.[24]

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[23] According to Smith's Deposition, that figure was as high as 140%.
[24] He actually collected less than $250,000 on loans of more than $2,000,000, or approximately 12% of the debts, exclusive of interest.

Even more curiously, neither Smith nor his premium financing company took any legal action to recover the unpaid debts.

4c. Although there may be legitimate business reasons for such inaction by a creditor under these circumstances, none come readily to mind, and none appear in the record. On the other hand, if the funds advanced by Smith to the individuals buying the policies represent something other than "loans," the Respondent's failure to pursue collection of those "debts" makes perfect sense.

4d. Drawing reasonable inferences (See Paragraph 2, *supra*) from the facts of this case, it is clear that Smith sold high-value life insurance policies to well-qualified individuals; then, through his premium financing company, he advanced to them sums of money equal to their policies' first-year premiums, with no expectation that the "loan" would be repaid. Once the insured used that advance to pay the premium, the insurance company paid a commission to Smith in an amount that was between 5% and 30%[25] more than the amount of the premium.[26] Even after reimbursing his premium financing company for the amount advanced to the insured, Smith derived a considerable profit from each of these transactions. Additionally, since Smith did not seek repayment of the money advanced to the policy holders, they received the benefit of a large-value insurance policy for which they paid an extremely reduced premium, or no premium at all. This is the very essence of premium-rebating.

4e. As indicated in TENN. CODE ANN. § 56-8-104(7)(A), such a scheme is prohibited conduct by persons licensed to sell insurance in the State of Tennessee. According to that Code section, any insurance policy that includes the rebating of policy premiums, or provides any other "valuable consideration or inducement whatsoever" that is not spelled out in the insurance policy contract, constitutes "unfair methods of competition and unfair or deceptive acts or practices in the business of insurance."

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[25] Or, between 5% and 40%, according to Smith's deposition.

[26] Due to the large face values of the policies being issued, some of these policies generated commissions in excess of $100,000.00. See Commission sheets attached to Insurance Companies' affidavits, and amounts listed in promissory notes and loan agreements.

4f. Additionally, the Respondent's rebating scheme falls squarely within the prohibition announced by the Commissioner of Commerce and Insurance in his July 6, 1994 Bulletin [See, Findings of Fact, Paragraph 8, above]. After describing a straightforward scheme of rebating premiums from agents' commissions, the Commissioner declared that, "Any insurance agent found to be engaging in the described activity or any similar scheme will be subject to administrative action that could include revocation of the agent's license." Smith was a licensed insurance agent in Tennessee when that Bulletin was issued, and is charged with knowledge of its contents. Therefore, he knew, or in the ordinary course of conducting his business, should have known, that his actions could result in administrative action, including revocation of his license.

4g. The Respondent argues that he could not have engaged in premium rebating because he did not receive his commissions from the insurance company until weeks after the premium was paid. He reasons, therefore, that the money advanced to the insured could not have been rebated from his commissions. While imaginative, that argument is clearly specious. The statutory definition of "rebate," found in TENN. CODE ANN. § 56-8-104(7)(A), does not hinge on such artificial distinctions. Under that Code section, even an offer to provide undisclosed inducements to enter into an insurance contract is sufficient to constitute a "rebate." There is nothing in the definition that requires that the "rebate" be in cash – only that it must be valuable consideration; nor is it required that anything provided as a "rebate" must come directly from a commission received by the selling agent. The Respondent's argument is without merit.

5. THE RESPONDENT ENGAGED IN DISHONEST PRACTICES

5a. The Petitioner further contends that the Respondent is subject to administrative action by the Commissioner because he engaged in dishonest practices by failing to inform Ohio National Insurance Company of the premium financing arrangements described above.

5b. Ohio had a policy, described in its Business Policies Guide, prohibiting rebating of insurance policy premiums. Had Smith informed Ohio of his rebating practice, Ohio

would have had the option of (1) not issuing policies when it determined that rebates were involved, or (2) terminating its relationship with Smith, to protect its business interests. Because he concealed his prohibited activities from them, however, Ohio was unable to protect itself from the resulting negative consequences of his acts.

5c. As previously described, both Smith and the individuals to whom he sold policies benefited from those transactions: Smith benefited from substantial commissions received from Ohio and other insurance companies, and the insured individuals benefited by receiving high-value insurance policies they did not have to pay for. The only party to the transactions that did not benefit was the insurance company. Because of the high commissions being paid to Smith, and the fact that the policies lapsed within a short time, the insurance company realized no profit from those policies. Additionally, the insurance companies bore the risk that, should a claim be made on one of those policies before it lapsed, the company would suffer a serious financial loss.

5d. By initiating an insurance policy premium rebating scheme, and concealing it from, and to the detriment of, Ohio National, the Respondent engaged in dishonest practices, as contemplated by TENN. CODE ANN. § 56-6-155(a)(8).

Therefore, having found that the record in this matter contains sufficient evidence to resolve all potential issues of material fact, as set out in the Findings of Fact; and having resolved all legal issues in favor of the Petitioner, as set out in the Conclusions of Law, it is concluded that the Petitioner is entitled to a partial summary judgment, as a matter of law.

Accordingly, it is hereby Ordered that the Claimant's Motion for Summary Judgment is Granted, in part, as set out above.[27] The sole remaining issue, the determination of the appropriate sanction(s) to be imposed in this case shall be deferred,

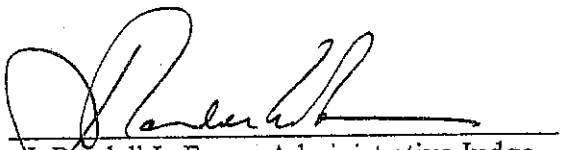
[27] Partial Summary Judgment may be rendered in appropriate cases. Rule 56.05, TENN. R CIV. P. The issue of sanctions to be imposed as a result of these Findings and Conclusions is not resolved by this Order.

pending argument on that issue by the parties. The Petition filed in this case includes a prayer for relief seeking: (1) revocation of the Respondent's license, and (2) civil penalties in the amount of $30,000.00. **Within fifteen (15) days following entry of this Order, each party's attorney shall advise the Administrative Judge whether he/she prefers to submit his/her argument on sanctions orally or in written form.** If both parties elect the same method of argument, that method will be adopted by the Judge. If there is a disagreement, oral arguments shall be scheduled.[28]

In light of the Findings of Fact and Conclusions of Law set out above, it is Further Ordered that the Respondent's Motion for Summary Judgment is respectfully Denied.

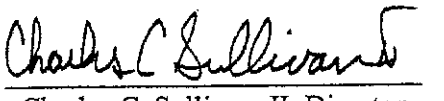
IT IS SO ORDERED.

This Order is entered and effective this 2 day of April 2007.



J. Randall LaFevor, Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 2 day of April 2007.



Charles C. Sullivan, II, Director
Administrative Procedures Division

[28] Counsel may wish to attempt to resolve the issue of sanctions between themselves. If that effort fails, counsel may wish to agree upon the method of argument, and submit their agreement to the Judge.

BEFORE THE COMMISSIONER OF COMMERCE AND INSURANCE OF THE STATE OF TENNESSEE

TENNESSEE INSURANCE DIVISION	)	
Petitioner,	)	
	)	**No. 12.01-07055J**
vs.	)	
	)	
LUTHER THOMAS SMITH	)	
Respondent.	)	

FINAL ORDER

The Respondent, Luther Thomas (Tommy) Smith, initiated this appeal of the two Initial Orders entered by J. Randall LaFevor, Administrative Law Judge within the Department of State, Administrative Procedures Division on August 16, 2007. The Initial Order Denying Respondent's Motion for Reconsideration of the April 2, 2007 Order Partially Granting Petitioner's Motion for Summary Judgment, and Denying Respondent's Motion for Summary Judgment held that the Respondent had failed to demonstrate that the Findings of Fact or the Conclusions of Law in the April 2, 2007 Order are flawed in any material respect, and that he had failed to establish that reconsideration is warranted.

The April 2, 2007 Order held that the Tennessee Insurance Division was entitled to a partial summary judgment as a matter of law and that the record contained sufficient evidence to resolve all legal issues in favor of the Division. The Administrative Law Judge found that the Respondent had engaged in prohibited business practices by rebating premiums, prohibited by TENN. CODE ANN. § 56-8-104(7)(A) and TENN. CODE ANN. § 56-6-155(a)(8), and had engaged in dishonest practices by initiating an insurance policy

premium rebating scheme, and concealing it from, and to the detriment of, Ohio National Life Insurance Company, prohibited by TENN. CODE ANN. § 56-6-155(a)(8).

The Initial Order Assessing Sanctions held that the Respondent's insurance producer license should be revoked and that he should be assessed a civil penalty in the amount of thirty thousand ($30,000.00) dollars. Respondent appealed the two Initial Orders to the Commissioner of Commerce and Insurance on August 29, 2007. In accordance with a Scheduling Order entered on October 8, 2007, the parties submitted briefs in support of, and in opposition to, this appeal. In fulfillment of the request of the Respondent, oral arguments were made on February 21, 2008.

Upon careful review of the record in this matter and due consideration of the briefs filed by the parties and the oral arguments, the Commissioner hereby affirms the two Initial Orders.

WHEREFORE, it is hereby **ORDERED AND ADJUDGED** the two Initial Orders entered on August 16, 2007 by Administrative Law Judge J. Randall LaFevor are **AFFIRMED** and expressly incorporated herein by reference. This Final Order is made pursuant to TENN. CODE ANN. §4-5-313 and marks the disposition of this matter.

NOTICE OF RECONSIDERATION AND APPEAL PROCEDURES

Within fifteen (15) days after the Final Order is entered, a party may file a Petition for Reconsideration of the Final Order, in which the Petitioner shall state the specific reasons why the Final Order was in error. If no action is taken within twenty (20) days of filing of the Petition for Reconsideration, the Petitioner is deemed denied. TENN. CODE ANN. § 4-5-317.

A party who is aggrieved by a final decision in a contested case may seek judicial review of the Final Order by filing a petition for review in Davidson County Chancery Court within sixty (60) days after the entry of the Final Order, or if a Petition for Reconsideration is granted, within sixty (60) days of the entry date of the Final Order disposing of the Petition for Reconsideration. The filing of a Petition for Reconsideration does not itself act to extend the sixty (60) day period, if the petition is not granted. A reviewing court also may order a stay of the Final Order upon appropriate terms. TENN. CODE ANN. §§ 4-5-322 and 4-5-317.

IT IS SO ORDERED.

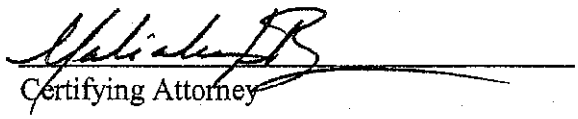
This 6th **day of** March, **2008.**

Leslie A. Newman

Leslie A. Newman, Commissioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Final Order has been filed in the Administrative Procedures Division, Department of State, and sent via hand delivery to Dakasha Winton, the attorney for the Department of Commerce & Insurance and via Certified, Return Receipt Requested and by United States Mail, First Class, Postage Prepaid, to John C. Lyell II, Attorney for the Respondent, 211 Seventh Avenue North, Suite 300, Nashville, Tennessee 37219 on this 7th day of March, 2008.



Certifying Attorney