



Paul R. LePage  
GOVERNOR

STATE OF MAINE  
DEPARTMENT OF PROFESSIONAL  
AND FINANCIAL REGULATION  
BUREAU OF INSURANCE  
34 STATE HOUSE STATION  
AUGUSTA, MAINE  
04333-0034

Eric A. Cioppa  
SUPERINTENDENT

**In re PAUL A. DYER**

**Maine License No. PRR12598  
National Producer No. COR 56235**

**DECISION AND ORDER  
ON REMAND**

**DOCKET NO. INS-09-217**

On March 7, 2011, the Superintendent issued a Decision and Order in this matter, finding that Paul A. Dyer had committed multiple violations of the Maine Insurance Code in his dealings with his client J.V. and with the Old Mutual insurance group, revoking his Resident Insurance Producer License and his Resident Insurance Consultant License, and ordering him to pay a civil penalty of \$5,500 and restitution, with interest, of fees and commissions.

Mr. Dyer appealed, and on January 18, 2012, the Superior Court (Cumberland County, Business and Consumer Docket) issued a decision affirming the Superintendent's findings of fact, but vacating some of the Superintendent's conclusions of law, vacating the remedies ordered, and remanding for further proceedings. *Dyer v. Superintendent of Insurance*, No. BCD-AP-11-11 (Horton, J.).

Specifically, the Court took the following actions with respect to the Superintendent's order:

- The Court affirmed the Superintendent's conclusions that Mr. Dyer committed each of the following acts, and that each of those acts constitutes a violation of the cited provision or provisions of the Insurance Code:
  1. Breaching his Consultant Agreement with J.V., by failing to make a proper evaluation of her plans and needs, in violation of 24-A M.R.S. §§ 1420-K(1)(H), and 1467;
  2. Selling J.V. an annuity product that caused her unnecessary loss, in violation of 24-A M.R.S. §§ 1420-K(1)(H), and 1467;



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3. Representing to J.V. that she would receive 6 to 7 percent interest on her SPIA, in violation of 24-A M.R.S. §§ 1420-K(1)(H), 1467, 2153, and 2155.
4. Selling J.V. an annuity product without having reasonable grounds to believe it was suitable for her and without conducting an adequate investigation to determine its suitability, in violation of 24-A M.R.S. §§ 1420-K(1)(H) and 1467;
5. Failing to provide J.V. with an adequate explanation of the SPIA, in violation of 24-A M.R.S. §§ 1420-K(1)(H), 1467, and 2155;
6. Failing to obtain assurance from J.V. that she understood her SPIA, in violation of 24-A M.R.S. §§ 1420-K(1)(H) and 1467;
7. Failing to make sure that the SPIA was properly issued and would provide appropriate earnings, in violation of 24-A M.R.S. §§ 1420-K(1)(H) and 1467;
8. Failing to keep adequate records of his alleged four-part plan, in violation of 24-A M.R.S. §§ 1420-K(1)(H);
9. Failing to cooperate with Old Mutual in its response to a regulatory investigation, in violation of 24-A M.R.S. §§ 1420-K(1)(H);
10. Falsely representing to Old Mutual that it had left him an answering machine message promising J.V. a refund of her SPIA premium payment, in violation of 24-A M.R.S. §§ 1420-K(1)(H); and
11. Falsely representing to the Bureau of Insurance that Old Mutual had left him an answering machine message promising J.V. a refund of her SPIA premium payment, in violation of 24-A M.R.S. §§ 1420-K(1)(H).

- The Court vacated the Superintendent's conclusion that the acts described in Paragraphs 1 through 6, 10, and 11 violated 24-A M.R.S. § 2152, and ordered reconsideration of the matter on remand, based only on the current hearing record without taking new evidence. The Court ordered "further findings of fact and conclusions of law regarding what constitutes a 'deceptive' or 'unfair' act under the section 2152 and how Dyer's acts qualify as 'deceptive' or 'unfair,' or both."
- The Court vacated, and did not remand, the Superintendent's conclusion that the acts described in Paragraph 8 violated 24-A M.R.S. § 1447, on the ground that the "transactions under the license" for which recordkeeping is required under that statute are limited to the placements and sales of insurance contracts referenced in 24-A M.R.S. §§ 1447(1)(A) through (F) and therefore do not include Mr. Dyer's alleged four-part financial plan.

- The Court vacated the license revocations, civil penalties, and restitution, and ordered reconsideration of the matter on remand, with penalties not to exceed those imposed initially, consistent with the Court's determination that Mr. Dyer did not violate 24-A M.R.S. § 1447 and the Superintendent's decision on remand regarding the applicability of Section 2152 to the facts of this case.

On remand, for the reasons discussed below, I conclude that the question whether Mr. Dyer violated 24-A M.R.S. § 2152 is not material to the nature and degree of his culpability, nor to the factual or legal basis for the remedies imposed. I therefore withdraw the conclusions that eight of Mr. Dyer's wrongful acts violated 24-A M.R.S. § 2152, and I reaffirm the remedies previously ordered.

*Violations of 24-A M.R.S. § 2152*

The Decision and Order found that eight of Mr. Dyer's eleven wrongful acts violated 24-A M.R.S. § 2152, which states:

No person shall engage in this State in any trade practice which is defined in this chapter, as, or determined pursuant to this chapter, to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance. No resident of this State shall engage in any other state in any trade practice which is defined in this chapter as, or determined pursuant to this chapter to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

"This chapter" refers to Chapter 23 of the Maine Insurance Code, Trade Practices and Frauds, 24-A M.R.S. Ch. 23 (§§ 2151 through 2187). The Superior Court affirmed the Superintendent's conclusions in Paragraphs 3 and 5 that Mr. Dyer violated 24-A M.R.S. §§ 2153 (prohibiting misrepresentations and false advertising) and 2155 (prohibiting "twisting"; *i.e.*, unfair comparisons). Those statutory provisions appear in Chapter 23 and enumerate specific acts and practices that could thus be regarded as having been "determined pursuant to this chapter, to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance" within the meaning of Section 2152. However, by that reasoning, to say that an act "violated both Sections 2152 and 2153" would mean exactly the same as saying that it "violated Section 2153," and likewise for Section 2155. Therefore, with respect to the wrongful acts described in Paragraphs 3 and 5, the violations of Section 2152 are duplicative and have no independent significance.

The wrongful acts described in Paragraphs 1, 2, 4, 6, 10, and 11 raise different issues, because the Superintendent's conclusions that Mr. Dyer violated Section 2152 were not based on any other nexus with Chapter 23. However, as the Superior Court affirmed the Superintendent's conclusions, and all of the factual findings and analysis supporting those conclusions, that each of those wrongful acts violated, at a minimum, the law prohibiting "Using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business," 24-A M.R.S. § 1420-K(1)(H). Even if many of those acts were merely incompetent or irresponsible, they would still be reprehensible, and the harm they caused would be the same. As discussed further below, the Decision and Order in this matter determined Mr. Dyer's culpability and the appropriate remedies based not on the number

of statutes violated by Mr. Dyer, but rather based on the nature and character of the eleven illegal acts Mr. Dyer was found to have committed. In light of the Superior Court's affirmation that each of these acts violated the Insurance Code, and constituted a fraudulent, coercive or dishonest practice or demonstrated incompetence, untrustworthiness or financial irresponsibility in the conduct of business, the question of whether each act was also, as a matter of law, "unfair" "deceptive," or both would have no effect on my determination of the appropriate remedies in this case.

Therefore, I hereby strike the summary of Section 2152 in the final sentence of Page 8 of the Decision and Order and the eight citations to Section 2152 in the list of violations on Page 9. The description on Page 6 of "a pattern of deception designed to persuade Old Mutual to compensate J.V. so that Mr. Dyer would not be responsible for her losses" is a factual finding and is not affected by this ruling.

In light of this determination, it is unnecessary to make additional findings of fact and conclusions of law regarding the meaning and application of "unfair or deceptive" with regard to some other hypothetical case in which it might be a material issue.

#### *Recalculation of Remedies*

As directed by the Court, I have carefully considered whether the withdrawal of the conclusions that Mr. Dyer violated 24-A M.R.S. §§ 1447 and 2152 should have any effect on the remedies ordered. The findings, conclusions, and analysis in the first eight pages of the Decision and Order, with the omission of the single sentence summarizing Section 2152, stand on their own and are entirely consistent with both the decision of the Superior Court and with my own assessment of the record. The penalties and restitution that are warranted depend on the nature, extent, and variety of the wrongful acts, their cumulative impact on the victim, and the consistency and duration of the pattern of misconduct, not on the number of different provisions of the Insurance Code that could be cited as prohibiting each of the wrongful acts in question.

Specifically, the remedies included a civil penalty of \$500 for each of the eleven acts enumerated, the maximum that the Superintendent may impose on an individual under the authority of 24-A M.R.S.A. § 12-A. For the reasons discussed above, the appropriateness of this penalty does not depend in any way on whether one or more of those acts violated 24-A M.R.S. § 2152. The Superintendent expressly cited Mr. Dyer's "incompetence and untrustworthiness," terms found in Section 1420-K and not in Section 2152, when characterizing the seriousness of his violations of the law. Therefore, the \$500 penalty is reaffirmed for each of the eight wrongful acts described in Paragraphs 1 through 6, 10, and 11. Furthermore, I also reaffirm the \$500 penalty for the wrongful act described in Paragraph 8: "Failing to keep adequate records of his alleged four-part plan." Although the Superior Court determined that, "While best practice would be to document plans and keep them for future reference and inspection," these records were not within the scope of 24-A M.R.S. § 1447, the Superior Court also expressly affirmed the Superintendent's conclusion that Mr. Dyer's failure to keep adequate records did violate 24-A M.R.S. § 1420-K(1)(H). In light of the Superintendent's finding that "the concerns over J.V.'s possible cognitive impairment make it especially troubling that Mr. Dyer consistently failed to explain his plans to J.V. in writing or to maintain adequate records of his planning activities and his conversations," I conclude that no reduction of the penalty is called for.

Likewise, the cumulative impact of the acts in question continues to demonstrate Mr. Dyer's unfitness to act as an insurance professional. The Superintendent concluded that "Mr. Dyer has committed serious violations of the Insurance Code, which demonstrate incompetence and untrustworthiness and warrant the revocation of his producer and consultant licenses." The violations of the law were just as serious, shed the same light on Mr. Dyer's character, and caused the same harm, regardless of whether the list of statutes cited for those violations includes 24 A M.R.S. §§ 1447 and 2152. The license revocations are therefore reaffirmed.

Finally, I reaffirm the order of restitution, pursuant to 24-A M.R.S. § 12-A(6), because it is remedial rather than punitive in nature. It is based entirely on the Superintendent's factual finding, affirmed by the Superior Court, that "J.V.'s losses as a result of Mr. Dyer's misconduct significantly exceeded any commissions and fees earned," and is not tied to the specific statutes he violated in order to earn those commissions and fees. In addition, on March 14, 2011, the Bureau Staff filed a Request for Clarification of the Decision and Order with regard to the restitution order. Mr. Dyer did not file a response. While the motion was pending, after the time for responding had elapsed pursuant to Bureau of Insurance Rule 350, § 7(C), Mr. Dyer appealed, terminating the Superintendent's jurisdiction to amend the Decision and Order. Specifically, the Staff has asked for clarification that the principal amount is \$1,350 and that the pre-judgment interest rate referenced is the rate specified in 14 M.R.S. § 1602-B(3), and for the designation of a specific individual or division of the Bureau of Insurance to receive the payment. These requests are reasonable, have not been objected to by Mr. Dyer, and therefore are granted.

#### **Order on Remand**

It is therefore **ORDERED**:

1. The Decision and Order is amended to STRIKE the final sentence on Page 8, summarizing 24-A M.R.S. § 2152, the conclusions on Page 9 that Mr. Dyer violated 24-A M.R.S. § 2152 with regard to the first through sixth, tenth, and eleventh wrongful acts listed, and the conclusions on Page 9 that Mr. Dyer violated 24-A M.R.S. § 1447 with regard to the eighth wrongful act listed, and as so amended the Decision and Order is REAFFIRMED.
2. Mr. Dyer's privileges to act as an insurance producer and insurance consultant are REVOKED, effective immediately.
3. Mr. Dyer shall pay a civil penalty of \$5,500.
4. Mr. Dyer shall pay to the Treasurer of State, for the benefit of J.V., restitution in the amount \$1,350, plus interest accruing at the same rate as specified for civil actions in 14 M.R.S. § 1602-B(3).
5. All payments shall be made by check payable to "Treasurer, State of Maine," and shall be sent to the attention of Brenda Cadwallader at the Maine Bureau of Insurance, 34 State House Station, Augusta ME 04333. All payments are due no later than the close of business on Monday, March 5, 2012, unless otherwise agreed to by the Superintendent or his designee.

*Notice of Appeal Rights*

This Decision and Order is a final agency action of the Superintendent of Insurance within the meaning of the Maine Administrative Procedure Act. It is appealable to the Superior Court in the manner provided in 24-A M.R.S. § 236 and M.R. Civ. P. 80C. Any party to the hearing may initiate an appeal within thirty days after receiving this notice. Any aggrieved non-party whose interests are substantially and directly affected by this Decision and Order may initiate an appeal on or before March 13, 2012. There is no automatic stay pending appeal; application for stay may be made in the manner provided in 5 M.R.S. § 11004.

**PER ORDER OF THE SUPERINTENDENT OF INSURANCE**

**FEBRUARY 2, 2012**

A handwritten signature in black ink, appearing to read 'R. Alan Wake', is written over a horizontal line.

**ROBERT ALAN WAKE  
DESIGNATED HEARING OFFICER**