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INSURANCE COMMISSIONER

2013 DEC 16 A 11:00

Hearings Unit, DIC
Patricia D. Peterson
Patricia D. Peterson

In The Matter of

CHARLES D. OLIVER,

Respondent.

ORDER NO. 13-0109

OIC'S RESPONSE TO CHARLES
OLIVER'S OPPOSITION TO
MOTION TO CONSOLIDATE

Introduction:

OIC has requested consolidation based upon the fact that the alleged violations committed by both Respondents stem from the same events, which involved both Respondents. In opposing consolidation, Mr. Oliver does not dispute this, but argues only the extent of his role. He states that the efficiencies OIC believes will result from consolidation will not occur, but offers no support for this claim.

Some witnesses will need to travel to attend the hearing in person: specifically, Mr. Oliver himself (from Florida) and the consumer "FLR" (from Spokane). Mr. Oliver does not acknowledge that his desire to sever the hearings would require those witnesses to make two trips, rather than one, to tell the same story.

Mr. Oliver has similarly presented no legal argument in support of his theory that he will be prejudiced by consolidation. Rather, each case cited in his brief demonstrates that the dangers he warns of are not present in this matter. The cases are legal authority that consolidation of these hearings is appropriate.

Consolidation of matters is left to the discretion of the trial court. Before an appellate court will even consider whether a trial court has abused its discretion in deciding this issue, both federal and state case law require Respondents to show that consolidation "was so manifestly prejudicial as to require the trial judge to exercise his discretion in but one way, by ordering a separate trial." U.S. v. Tootick, 952 F.2d 1078, 1080-1081 (Ninth Cir. 1991). Mr. Oliver has failed to meet this burden; he has made no showing that he will be prejudiced by consolidation. OIC respectfully requests that its Motion for Consolidation be granted.

Argument and Authority:

Mr. Oliver correctly notes that Civil Rule 20(b) allows a court to "make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order

separate trials or make other orders to prevent delay or prejudice.” Although this rule *allows* severance, Mr. Oliver ignores longstanding Washington case law, which states that “[s]eparate trials are not favored in Washington and are granted only where a defendant demonstrates that a joint trial would be “so manifestly prejudicial as to outweigh the concern for judicial economy.” State v. Torres, 11 Wn. App. 323, 332 (2002), *citing State v. Hoffman*, 116 Wn.2d 51, 74, 804 P.2d 577 (1991). “The defendant must point to specific prejudice before a decision to consolidate will be overturned.” *Id.*, *citing State v. Kinsey*, 20 Wn. App. 299 (1978).

Mr. Oliver cites U.S. v. DeRosa, 670 F.2d 889 (9th Cir. 1982)¹ in support of his opposition. In fact, DeRosa supports consolidation. Mr. Oliver is correct that the court noted “we must carefully assess the likelihood and degree of prejudice that joinder created.” Even so, the Ninth Circuit found that this balance favored joinder, even in a case where the potential for prejudice was much greater than any potential that Mr. Oliver believes exists here.

In DeRosa, two defendants moved to have their trials severed from the trials of the other defendants accused of participating in a drug ring. The charges of RICO violations had been dismissed as to those defendants, but not the others. Thus, the two defendants argued –just as Mr. Oliver does- that they would be prejudiced by being tried along with the others. The Ninth Circuit rejected that argument and upheld the denial of the motion to sever. In DeRosa, the defendants felt they had a colorable basis for their motion because they were not charged with the same crimes as their codefendants. The Ninth Circuit still upheld denial of their request to sever the trials. Here, the violations alleged against Mr. Oliver and Mr. Minnich are the same, excepting a few violations which could not apply against the other Respondent.² There is even less (if any) reason to deny OIC’s Motion to Consolidate in this matter.

In contrast, the Donaway case cited by Mr. Oliver illustrates a situation where prejudice did exist that required severance of trials. There, nine defendants were charged in connection with a gambling operation involving five fixed horse races. U. S. v. Donaway, 447 F.2d 940 (Ninth Cir. 1971). Donaway objected to joinder because his role was solely to place a bet on one of the races. He was acquitted of a conspiracy count involving all defendants, and timely moved for severance. *Id.*, at 942. Donaway argued, successfully, that joinder was prejudicial because conspiracy was the only charge binding his case to that of the other defendants, and that charge had been dismissed. This prejudiced him because the allegations against the other defendants involved the handling and “doping” of horses, none of which he was involved in. He was merely charged with having made an illegal bet. *Id.*, at 943. In fact, the Ninth Circuit notes that the trial transcript showed the government’s case in chief covered over 2,300 pages of transcript, of which less than 50 pages were relevant to Donaway. *Id.*, at 943.

Mr. Oliver’s role in the matter at issue is very different. OIC alleges that Mr. Oliver participated in the solicitation and sale of the insurance products at issue to FLR via phone, internet, webinar, and mail. OIC alleges that Mr. Oliver was attempting to integrate Mr. Minnich

¹ The Bertman and DeSantis cases cited by Mr. Oliver were simply denials of certiorari by the U.S. Supreme Court.

² For example, violations are alleged against Mr. Oliver based upon his lack of a Washington Insurance Producer’s license. Such a violation could not be asserted against Mr. Minnich, who was duly licensed. There is thus no potential for “guilt by association.”

in to “the Chuck Oliver Team,” a sales organization designed to market insurance products as retirement vehicles using what he called the “Max Funded” concept. This is not an allegation of “conspiracy.” It is merely a set of facts, evidence, and witnesses common to both cases. All of these must necessarily be set forth in a hearing regarding Mr. Minnich’s alleged violations, just as they must be in a hearing of Mr. Oliver’s. Each Producer’s actions were his own, and the violations alleged against him stand or fall based solely on what actions the ALJ finds he took. But it would be wasteful to present the same testimony and evidence twice. Denial of consolidation would require that.

Mr. Oliver, for the first time in his Opposition to Consolidation, has alleged that “he did not have direct contact with FLR.” Oliver’s Opposition to the Insurance Commissioner’s Motion to Consolidate (“Opposition to Consolidation”) at Pg. 2, Line 14. This new claim solidifies the need for testimony by Mr. Minnich and FLR at Mr. Oliver’s hearing. The ALJ will be required to determine whether Mr. Oliver participated in conference calls and webinars with Mr. Minnich and FLR, as alleged by OIC. This finding will necessarily require the testimony of both Mr. Minnich and FLR at Mr. Oliver’s hearing. Both witnesses will likewise be crucial to Mr. Minnich’s hearing. Rather than weighing against consolidation, this new claim weighs in favor of it.

The Donaway court noted that, “[t]he court must weigh, case by case, the advantage and economy of a joint trial to the administration of justice against possible prejudice to a defendant. It need not exercise its discretion by ordering separate trials unless a joint trial is manifestly prejudicial. Whether there is an abuse of discretion depends on the facts in each case.” Donaway, 447 F.2d at 943 (internal citations omitted).

Mr. Oliver alleges that he is prejudiced by the possibility that he and Mr. Minnich may attempt to “point the finger” at one another. This possibility, of course, exists whether or not the hearings are consolidated. Moreover, his argument is otherwise flawed and unsupported by his cited authority.

Mr. Oliver argues that he and Mr. Minnich may present “antagonistic defenses.” “Antagonistic defenses are those that acceptance of one will make it harder to accept the other.” Opposition to Consolidation at pg. 2, line 11. He argues that “It is quite possible [] that Mr. Minnich chooses to point the finger at Mr. Oliver, while Mr. Oliver’s position has consistently been and will continue to be that he did not have direct contact with FLR and did nothing in violation of RCW 48. [SIC] Those positions cannot both be accepted.” *Id.*, at lines 12-15.

Mr. Oliver is mistaken. Both positions *can* be accepted. In fact, the ALJ may accept both, one, or neither of the Respondents’ positions. She has the authority to find that one, both, or neither of the Respondents in this matter have violated the Insurance Code. Both Respondents are free to argue the facts as they believe them to be, including taking either (or no) position on whether the other engaged in wrongdoing. Neither Respondent would be trapped or, indeed, hindered in any defense they may choose to raise, should the ALJ consolidate their cases.

In support of his argument, Mr. Oliver relies upon U.S. v. Tootick, 952 F.2d 1078 (Ninth Cir. 1991). Tootick, however, demonstrates the fatal flaw in his argument. In explaining the doctrine of “antagonistic” or “mutually exclusive defenses,” the case illustrates that this situation exists only where the trier of fact *must* find that one or the other defendant is guilty of a particular crime. That is not the situation here.

In that case, Mr. Tootick and another man had been convicted for assault resulting in serious bodily injury. Both defendants had moved for severance of their trials. They argued that their defenses were mutually exclusive, because the principal defense for each was that the other had committed the assault, and the acquittal of one necessitated the conviction of the other (since it was undisputed that the assault had occurred and one of them was the assailant). The trial court denied the motions. The Ninth Circuit reversed, finding that joinder had resulted in prejudice against the defendants.

We review a denial of severance for abuse of discretion. Defendants must meet a heavy burden to show such an abuse, and the trial judge's decision will seldom be disturbed. Merely showing that a comparative advantage would result from separate trials will not satisfy this burden. In deciding whether reversal is required, the defendant must show that joinder “was so manifestly prejudicial as to require the trial judge to exercise his discretion in but one way, by ordering a separate trial.”

Tootick, at 1080-1081 (internal citations omitted).

The Ninth Circuit noted that mutually exclusive defenses are a unique situation, and “mere inconsistency in defense positions is insufficient to find codefendants’ positions antagonistic. Inconsistency, alone, seldom produces the type of prejudice that warrants reversal. The probability of reversible prejudice increases as the defenses move beyond the merely inconsistent to the antagonistic.” *Id.*, at 1081.

Tootick does not stand for the proposition that consolidation is inappropriate where the defenses are not entirely mutual. In fact, the Ninth Circuit explicitly found that joinder may be appropriate even in criminal cases with mutually exclusive defenses. *Id.*, at 1083. That court reversed the convictions not on the basis of the inherent prejudice of the mutually exclusive defenses, but on the basis that the trial court had failed to correct several prejudicial incidents with instructions to the jury. *Id.*³ While nicely illustrative of what this matter is not, Tootick cannot be analogized to this case.

All of Mr. Oliver’s cited cases involve criminal conspiracy charges, which necessarily involve findings that the defendants worked together to create the criminal

³ This included an opening statement by Mr. Tootick’s lawyer that included approximately 97 explicit and detailed allegations against the other defendant, very few of which was substantiated by evidence during the trial. The Ninth Circuit found error because, although the trial court had instructed the jury that the other defendant’s counsel’s opening statement was not evidence, the court failed to make this instruction prior to the opening statement for Tootick. *Id.*, at 1084. In fact, the opinion describes an entire trial rife with such wildly inappropriate actions, which went unchecked by the trial court. See, e.g., Tootick, 952 F. 2d at 1084-1085.

enterprise. Here, there is no such allegation. Each respondent may be found in violation of the Insurance Code solely as a result of his own actions. A finding that one respondent violated the Insurance Code does not necessitate a finding that the other one did. In contrast, one defendant cannot be found guilty of conspiracy - there must be at least one other defendant with whom he conspired. OIC does not allege any violation that may be analogized to conspiracy. OIC alleges that Mr. Oliver's actions, in themselves, violated the Insurance Code. Nothing Mr. Minnich did or did not do constitutes, enhances, or mitigates any violation by Mr. Oliver.

The Mardian case cited by Mr. Oliver was a case involving one of the Watergate conspirators, who had been marginally involved, and only for a short time after the burglary. U.S. v. Mardian, 546 F.2d 973 (D.C. Cir., 1976). Of the 45 overt acts alleged in the conspiracy charges, only 5 involved Mardian. Almost all occurred well after he terminated his involvement as counsel for the Committee to Re-Elect the President with respect to the civil suits growing out of the Watergate scandal. *Id.*, at 977-978. ("It is accepted, then, that if Mardian was a conspirator he, unlike the other convicted conspirators, was active only for a few weeks." *Id.*, at 978.) Mardian wished his case severed from those of H.R. Haldeman, John D. Erlichman, and John N. Mitchell. The court's opinion illustrates the difference between the instant matter and a case where a conspiracy charge makes consolidation unfair.

A motion for severance is addressed to the sound discretion of the trial court, and a ruling denying severance will not be reversed unless there is shown an abuse of that discretion. In applying this well established rule, however, courts have always kept in mind the problems inherent in trial of conspiracy cases involving numerous defendants. The Supreme Court has long recognized that in such cases the liberal rules of evidence and the wide latitude accorded the prosecutor may, and sometimes do, operate unfairly against an individual defendant. The dangers of transference of guilt are such that a court should use every safeguard to individualize each defendant in his relation to the mass.

Particularly where there is a great disparity in the weight of the evidence, strongly establishing the guilt of some defendants, the danger persists that that guilt will improperly "rub off" on the others. In *Kelly* the Court of Appeals for the Second Circuit emphasized that severance is among the most important safeguards available to minimize the risk of prejudice, and it ordered a new separate trial for the one alleged co-conspirator who was disadvantaged by the disproportion in the evidence. This court has often expressed its acceptance of the rule announced in *Kelly*, requiring severance when the evidence against one or more defendants is "far more damaging" than the evidence against the moving party.

U.S. v. Mardian, 546 F. 2d 973, 977.

The case at issue does not present such dangers. It is simply not analogous to a conspiracy case. The facts establish that the Respondents made these sales together, but the violations would be the same even if each Respondent had done what he did in the absence of any other participant. The only exceptions are violations that necessarily could not apply to the

other Respondent. That is the crucial difference that eliminates any danger of guilt “rubbing off” from one Respondent to the other.

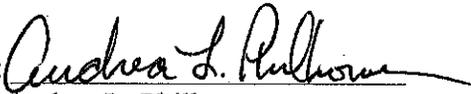
Mr. Oliver’s arguments might have more substance were this, like the authorities he cites in his brief, a jury trial. Lay jurors cannot be expected easily to separate the charges and evidence among defendants, or readily to appreciate the legal distinctions between evidence that is admissible as to one but not to another defendant. Here, the issues will be before a very experienced Administrative Law Judge with a deep knowledge of the Insurance Code. Moreover, here there are only two Respondents, not several as in the cases cited by Mr. Oliver. OIC does not give weight to the suggestion that the Hearing Officer may be confused, swayed by emotion, or otherwise compromised in her deliberations by the fact that there are two Respondents.

Conclusion:

The arguments, issues, evidence and witnesses in this matter all flow from one continuous course of action that involved both Mr. Oliver and Mr. Minnich. They are essentially identical as to each. Consolidation will allow each witness to appear only once, and only one set of evidence to be presented. The judicial (and financial) economies are readily apparent. Because severance is disfavored under Washington law, a strong presumption exists that consolidation is appropriate. Mr. Oliver has not overcome that presumption, which would require a showing of “manifest prejudice” caused to him by consolidation. Therefore, OIC respectfully requests that its Motion for Consolidation be granted.

SIGNED this 16th day of **December, 2013**.

MIKE KREIDLER
Insurance Commissioner

By: 
Andrea L. Philhower
Staff Attorney
Legal Affairs Division

CERTIFICATE OF MAILING

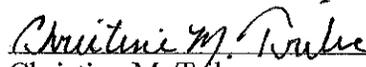
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing OIC'S RESPONSE TO CHARLES OLIVER'S OPPOSITION TO MOTION TO CONSOLIDATE on the following individuals via US Mail -mail at the below indicated addresses:

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SIGNED this 16th day of **December, 2013**, at Tumwater, Washington.


Christine M. Tribe