

FILED

BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

2015 MAR -4 P 12:34

In the Matter of)
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CHARLES D. OLIVER and AMERICAN)
EQUITY ADVISORY GROUP, LLC)
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Docket No. 14-0229
ORDER ON INSURANCE
COMMISSIONER'S MOTION
TO DISMISS

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AnnaLisa Gellermann, Deputy Commissioner, Legal Affairs Division
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Office of the Insurance Commissioner
PO Box 40255
Olympia, WA 98504-0255

Charles D. Oliver and American Equity Advisory Group, LLC (collectively, "Oliver") submitted a Demand for Hearing ("Demand"), filed December 3, 2014, requesting removal of a blog post of the Office of Insurance Commissioner ("OIC") related to an Order to Cease and Desist ("C&D Order") previously issued against Oliver.

This case comes before me on the Insurance Commissioner's Motion to Dismiss the Demand as a matter of law. I have considered the Motion, filed February 6, 2015, Charles Oliver and American Equity's Response, filed February 20, 2015, and the Insurance Commissioner's Reply, filed February 27, 2015, as well as the attachments to such submissions.

Discussion.

1. The C&D Order was issued on April 4, 2013, against Oliver and "the Chuck Oliver Team" (collectively, "Respondents"). A few minutes later, the OIC posted a message on the OIC Blog, wainsurance.blogspot.com, entitled: "Cease and desist order issued to Charles D. Oliver, American Equity Advisory Group, and the 'Chuck Oliver team.'" The post excerpts and summarizes the transactions set forth in the C&D Order, stating that such order "alleges" that such transactions included nearly a dozen violations of Washington state law, among them, selling insurance without a license, selling an unapproved policy, taking a commission without being licensed, describing the plan in a way that could be misleading, engaging in unfair or deceptive practices, and knowingly making, publishing or disseminating false, deceptive or misleading representations of an insurance transaction. The post notes that the Respondents may demand a hearing on the OIC's allegations.

2. In March 2014, the parties entered into a consent order superseding and replacing the C&D Order. The consent order levied a fine of \$5,000 (\$2,500 suspended on conditions), based on violations of the Insurance Code that did not include fraudulent, deceptive, or misleading conduct.

3. The OIC left the blog post on its website after the consent order was filed, despite Oliver's later request that it be removed.

4. Oliver's present Demand asserts: 1) the blog post contains false statements; 2) the C&D Order has been superseded by an agreement between Oliver and the OIC, and the blog post contains a dead link to the superseded C&D Order; 3) maintaining the blog is an *ultra vires* action by the OIC; 4) the C&D Order was false at the time it was issued without an opportunity for prior response or rebuttal; 5) the blog post is causing out-of-state individuals to cease doing business with or refrain from doing business with Oliver; 6) the blog post has been picked up by out-of-state individuals who now rely on it to falsely disparage Oliver, thereby causing business harm; 7) the blog does not serve any legitimate purpose of the state of Washington or its citizens, and instead is being used to further punish Oliver.

5. In *Gold Seal Chinchillas, Inc. v. State of Washington*, 69 Wn.2d 828 (1966), the Washington State Attorney General ("AG") had filed a complaint charging Gold Seal and other defendants with violations of the Consumer Protection Act ("CPA"). On the same date, the AG issued a press release detailing the allegations of the complaint including, *inter alia*, that defendants had made material false and deceptive statements. After the State Auditor denied the defendants' claim for damages based on the AG's allegedly defamatory conduct in filing the complaint and issuing the press release, they filed suit for damages.

6. The Court quickly disposed of the allegations of defamation in the complaint – statements in the course of a judicial proceeding are absolutely privileged if pertinent or material to the redress or relief sought. *Id.* at 830 (citations omitted).

7. The Court then noted that the major portion of the press release referred to alleged violations of the CPA, which the AG did not purport to present as judicially established. The Court stated that determining whether to consider the press release or similar acts to be

absolutely privileged requires consideration of two public interests: 1) Protection of individuals and business entities from attacks upon their reputations in relation to their business activities. 2) A counterbalancing interest of the public in the “free and uninhibited dissemination of information about government activities.”

8. The Court sided with the “overwhelming majority of cases” from other jurisdictions striking the balance of interests in favor of encouraging public officials to speak “with complete candor and without fear of legal recourse.” The Court noted that the AG is charged by statute with the administration and enforcement of the CPA and antitrust laws and that public knowledge of the initiation of actions pursuant to such laws would seem to be of paramount importance to make the public aware 1) that the laws were being enforced; and 2) that the AG was adequately performing the duties of his office and meeting his responsibilities to the electorate.

9. The Court held that no statutory delineation of the AG’s responsibilities was necessary because, as an elected officer of cabinet rank in state government, he (or she) has “an implicit duty by virtue of his position to inform the people of the state of Washington of actions taken in his official capacity.” While the AG has an absolute privilege, the alleged defamatory conduct must have “some relation to the general matters committed by law to the control or supervision of the particular state official.” *Id.* at 832-34 (citations omitted).

10. I recognize that *Gold Seal* was a defamation case, not the present request that a state agency be directed to remove a blog post or rescind other public communications. However, I believe the principles that the Court set forth in *Gold Seal* are applicable herein.

11. As in *Gold Seal*, where the press release referred to alleged violations of the CPA, the OIC's blog post here refers to *alleged*, not judicially established, violations of Washington insurance law, which the post notes are subject to hearing at Oliver's request.

12. Just as the AG was charged by statute with the administration and enforcement of the CPA, so the Commissioner is charged here with the administration and enforcement of the Insurance Code. Public knowledge of the Commissioner's initiation of actions pursuant to the Insurance Code – as was his issuance of the C&D Order – is of paramount importance to make the public aware 1) that the Insurance Code is being enforced; and 2) that the Commissioner is adequately performing the duties of his office and meeting his responsibilities to the electorate.

13. Just as the AG's responsibilities to inform the public did not need to be statutorily delineated, so the Commissioner's similar responsibilities to inform the public here did not need to be statutorily delineated: As an elected officer, the Commissioner has “an implicit duty by virtue of his position to inform the people of the state of Washington of actions taken in his official capacity.” The actions of the Commissioner – describing the C&D Order, including its underlying allegations, in the blog post – were taken in his official capacity. Such actions had more than “some relation” to the matters statutorily committed to the Commissioner – the Commissioner's actions as described in the post were at the core of the matters statutorily committed to him.

14. Even assuming that explicit statutory delineation of the Commissioner's responsibility to inform the public were required, the Commissioner's “Special duties” under RCW 48.01.160 include disseminating information concerning the insurance laws of Washington

State. This section provides statutory authority and direction for the Commissioner to disseminate information about enforcement actions, including C&D orders.

15. Although I recognize that the blog post may be painful for Oliver, the post was not and is not false – the C&D Order was issued and included the allegations set out in the post. The C&D Order was not demonstrated to have been unlawful. The post is not *ultra vires* or without legitimate purpose (for the reasons discussed in *Gold Seal* and above -- public awareness of Insurance Code enforcement and showing that the Commissioner is meeting his responsibilities). The possible adverse business impacts of a lawful post (which I assume for purposes of this Order to exist) do not render the post unlawful or require its removal.

16. Further, directed removal of the blog post would undermine the public's interest in free access to accurate information concerning the OIC's actions, including its communications, and would risk compromise of agency transparency as well as public oversight.

17. However, the blog post can and should be supplemented by an addendum reflecting the consent order that superseded the C&D Order (if Oliver requests such relief). Such supplementation would further Oliver's legitimate interest in protection from attacks upon his business reputation without compromising the public interest in the free and uninhibited dissemination of information about government activities.

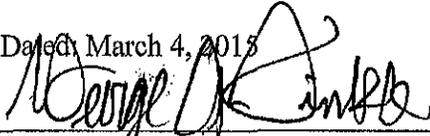
Order.

The Motion to Dismiss the Demand is granted. *Except that*, within one week of Oliver's written request, communicated to the OIC not later than March 13, 2015, the OIC shall supplement the archived blog post with the following addendum in type size equal to the original: "[Date of update]. In March 2014, the cease and desist order was superseded and

replaced by a consent order levying a fine of \$5,000 (\$2,500 suspended on conditions), based on violations of the Insurance Code that did not include fraudulent, deceptive, or misleading conduct.” The supplementation shall include a link to the consent order.

The ordered form of supplementation may be modified by agreement.

Dated: March 4, 2015



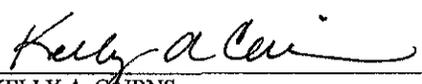
JUDGE GEORGE FINKLE (Ret.)
Presiding Officer

Pursuant to RCW 34.05.461(3), the parties are advised that they may seek reconsideration of this order by filing a request for reconsideration under RCW 34.05.470 with the undersigned within 10 days of the date of service (date of mailing) of this order. Further, the parties are advised that, pursuant to RCW 34.05.514 and 34.05.542, this order may be appealed to Superior Court by, within 30 days after date of service (date of mailing) of this order, 1) filing a petition in the Superior Court, at the petitioner's option, for (a) Thurston County or (b) the county of the petitioner's residence or principal place of business; and 2) delivery of a copy of the petition to the Office of the Insurance Commissioner; and 3) depositing copies of the petition upon all other parties of record and the Office of the Attorney General.

Declaration of Mailing

I declare under penalty of perjury under the laws of the State of Washington that on the date listed below, I mailed or caused delivery through normal office mailing custom, a true copy of this document to the following people at their addresses listed above: Gulliver Swenson, Marta DeLeon, Mike Kreidler, James T. Odiorne, J.D., CPA, Steve Valandra and AnnaLisa Gellermann.

DATED this 4th day of March, 2015.



KELLY A. CAIRNS

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