

1 A copy of the foregoing mailed
this 9th day of June, 2003:

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STATE OF ARIZONA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:

No. 02A-177-INS

Donald W. Kaitz,¹
ADOI License No. 835097,

Licensee.

ADMINISTRATIVE
LAW JUDGE
DECISION

HEARING: February 3, 2003 (record held open until March 28, 2003)

APPEARANCES: Licensee was present and represented by attorney Gordon E. Dudley; the State of Arizona, Department of Insurance was represented by Assistant Attorney General Mary Kosinski and Investigator Arnold Sniegowski.

ADMINISTRATIVE LAW JUDGE: Eric A. Bryant

This disciplinary action brought by the Arizona Department of Insurance ("Department") alleges that Licensee Donald W. Kaitz (1) failed to disclose, on multiple renewal applications, court actions filed against him and his firms; and (2) improperly withheld insurance premiums from an insurer. The Department submitted Exhibits 1 through 44 and 48 through 56;². Applicant submitted Exhibit A. Based upon the entire record, the Administrative Law Judge makes the following Findings of Fact, Conclusions of Law, and Decision finding that Licensee has committed violations and recommending suspension of his license for six months.

FINDINGS OF FACT

1. Licensee holds an insurance license (No. 835097) issued by the Arizona Department of Insurance that authorizes Licensee to conduct business as a property and casualty insurance agent/producer, a property and casualty broker, and a life and disability insurance agent/producer (now called "life and accidental health insurance producer"). He has held various licenses in the insurance business for more than 30

¹ At hearing, Market Access Insurance Partners, LLC, was dismissed as a party to this action.

² The Department withdrew Exhibits 45, 46, and 47, as they pertained to Market Access Insurance Partners, LLC.

1 years. Licensee's broker license expired on September 30, 2001. His producer
2 licenses expire on August 31, 2004.

3 2. Licensee was the sole shareholder and operator of Transurance Brokerage
4 Services of Arizona, Inc. ("Transurance"), an Arizona corporation that held an Arizona
5 Insurance Agency license from 1987 to 1996, when the company was dissolved (Nos.
6 629848 and 756568). Transurance was authorized to conduct business in property and
7 casualty and surplus lines as both an agent and broker at various times. (See Exhibits
8 25 through 36.)

9 3. In 1995, Licensee became President and Chief Executive Officer of New York
10 Transportation Insurance Office, Inc. ("NYTO"), an Arizona corporation that held
11 Arizona insurance license 31479 and was authorized to do business as a property and
12 casualty agent and broker, and as a surplus lines insurance broker. (See Exhibits 37
13 through 42.) Licensee was a minority shareholder in the company. NYTO filed chapter
14 11 bankruptcy in August 2001. NYTO's license expired on May 31, 2002.

15 Missing Information on License Applications

16 4. Licensee has never disclosed any court action against him on any insurance
17 renewal application that he has signed, whether for his personal license or the licenses
18 of entities with which he was associated.

19 A. The Construction Cases

20 5. In February 1993, Licensee was named as a defendant in a civil suit (No.
21 CV93-02626) filed by Oxnard Building Materials, Inc. in Maricopa County Superior
22 Court (hereinafter "the Oxnard lawsuit"). (Exhibit 1.) The suit was served on Licensee
23 and he filed an Answer in March 1993. (*Id.*)

24 6. On June 17, 1993, Licensee was named as a defendant in a civil suit (No.
25 CV93-09646) filed by Kirk Van Gieson dba Custom Homes by Van Gieson in Maricopa
26 County Superior Court (hereinafter "the Van Gieson lawsuit"). (Exhibit 2.) The Exhibits
27 submitted by the Department do not reveal the date that Licensee was served with the
28 Complaint in the matter. Licensee filed an Answer on July 8, 1993. (*Id.*)

29 7. On June 21 1993, Licensee signed a renewal application for his personal
30 license in which Question F asked, "ARE ANY criminal, administrative or other judicial

1 or quasi-judicial charges or proceedings currently pending against you IN ANY
2 jurisdiction?" (Exhibit 23; emphasis in original.) Licensee checked the answer "No" and
3 *did not disclose the Oxnard lawsuit*, though it was clearly pending. (*Id.*) The renewal
4 application was received by the Department on July 2, 1993. (*Id.*) The Exhibits do not
5 show whether or when Licensee mailed the application to the Department. Thus, the
6 evidence **does not show** that Licensee was aware of and was required to disclose the
7 Van Gieson lawsuit at the time he filed his 1993 renewal application.

8 8. In 1994, the Oxnard lawsuit went through non-binding, compulsory arbitration.
9 (Exhibit 1.) In March 1994, the Arbitrator issued an award in favor of Oxnard and
10 against Licensee (Exhibit 1b), but that award was appealed. (Exhibit 1.) Also, in March
11 1994 a judgment against Licensee was issued in the Van Gieson lawsuit. (Exhibit 2c.)
12 That judgment was satisfied in August 1996. (Exhibit 2d.)

13 9. In July 1994, Licensee filed renewal applications for his personal property and
14 casualty agent license and his broker license. (Exhibits 19a and 19b.) Question D on
15 those applications asked:

16 SINCE YOUR LAST APPLICATION OR RENEWAL
17 THEREOF, has anyone obtained a judgment or order
18 against you in any civil action (in any jurisdiction), the subject
19 of which involved fraud, misappropriation, conversion,
20 misrepresentation or the withholding of funds?

21 (*Id.*; emphasis in original.) Licensee answered "No." (*Id.*) The Department alleges that
22 he was required to answer "Yes" based on the Oxnard arbitration award and the Van
23 Gieson judgment. This tribunal finds that the arbitration award is not a "judgment or
24 order." Arbitration awards must be reduced to a court judgment by the prevailing party
25 or by failure to appeal the award. (See Rule 75(c), Arizona Rules of Civil Procedure.)
26 The Oxnard arbitration award was appealed and the case was being litigated in July
27 1994. Thus, the evidence **does not show** that Licensee was required to disclose the
28 Oxnard arbitration award as a judgment or order in response to Question D on the July
29 1994 personal license renewal application.

30 10. **Neither does the evidence show** that the Van Gieson judgment was
required to be disclosed in response to Question D on the July 1994 personal license

1 application. Exhibit 2 shows only that the Van Gieson action arose out of a construction
2 contract dispute. Nothing shows that the subject of the Van Gieson judgment fits within
3 the parameters of Question D recited above.

4 11. Another question on the July 1994 personal renewal application asked,
5 "ARE ANY criminal, administrative or other judicial or quasi-judicial charges or
6 proceedings currently pending against you IN ANY jurisdiction?" (Exhibits 19a and 19b
7 at Question F; emphasis in original.) Licensee checked the answer "No" and *did not*
8 *disclose the Oxnard lawsuit or the Van Gieson lawsuit*, which were pending at the time.
9 (*Id.*) Licensee may have wondered whether disclosure of the Van Gieson case was
10 required, since judgment had been issued in March 1994. (Exhibit 2.) But in July 1994,
11 motions to set aside the judgment were pending, so Licensee was required to have
12 disclosed it as a pending matter. (*Id.*)

13 12. Also in July 1994, Licensee signed three renewal applications for
14 Transurance as that corporation's President. (Exhibits 25, 28, and 31.) Question D on
15 those applications asked:

16 SINCE APPLICANT'S LAST APPLICATION OR RENEWAL
17 THEREOF, has anyone obtained a judgment against the
18 applicant *or anyone designated in the license* in any civil
19 action in any jurisdiction, the subject of which involved fraud,
20 misappropriation, conversion, or misrepresentation, the
21 withholding of funds or insurance?

22 (*Id.*; italics added.) Licensee answered "No." (*Id.*) The Department alleges that he was
23 required to answer "Yes" based on the Oxnard arbitration award and the Van Gieson
24 judgment. As noted above in Finding of Fact 9, this tribunal finds that the arbitration
25 award is not a "judgment." Thus, the evidence **does not show** that Licensee was
26 required to disclose the Oxnard arbitration award in response to Question D on
27 Transurance's July 1994 renewal applications.

28 13. Furthermore, as in Finding of Fact 10 above, the evidence **does not show**
29 that the Van Gieson judgment was required to be disclosed in response to Question D
30 on Transurance's renewal applications. Exhibit 2 shows only that the Van Gieson
action arose out of a construction contract dispute. Nothing shows that the subject of

1 the Van Gieson judgment fits within the parameters of Question D recited above,
2 including the "withholding of funds" language.

3 14. The July 1994 Transurance renewal applications also asked, "ARE ANY
4 criminal, administrative OR other judicial OR quasi-judicial charges or proceedings
5 currently pending against applicant OR *anyone designated in the license?*" (Exhibits
6 25, 28, and 31 at Question F; italics added.) Licensee checked the answer "No" and
7 *did not disclose the Oxnard lawsuit or the Van Gieson lawsuit*, which were pending at
8 the time. (*Id.*) For the same reasons as stated in Finding of Fact 11, Licensee was
9 required to disclose those cases.

10 15. In October 1994, the Oxnard lawsuit was dismissed by minute entry.
11 (Exhibit 1d.) No formal judgment appears to have been issued. In the Van Gieson
12 case, the March 1994 judgment was amended in August 1994 and Licensee appealed it
13 to the Arizona Court of Appeals that same month. (Exhibit 2.) The appeal did not
14 conclude until March 1996. (*Id.*)

15 16. In June 1995, Licensee filed a renewal application for his personal license.
16 (Exhibit 22.) Question 6 on the application asked, "ARE ANY criminal, civil,
17 administrative or other judicial or quasi-judicial proceedings of any kind currently
18 pending against you IN ANY jurisdiction?" (*Id.*; emphasis in original.) Licensee
19 answered "No" and the Department alleges that he was required to answer "Yes" based
20 on the Van Gieson case. The evidence supports the allegation. Licensee's appeal was
21 pending in June 1995 and, thus, the case was still pending. The Van Gieson case was
22 *required to be disclosed* on the June 1995 renewal application.

23 17. The same analysis described in Finding of Fact 16 applies to the renewal
24 applications Licensee filed in May 1995 (Exhibits 40 and 42) and April 1996 (Exhibits
25 39, 41, and 43) on behalf of NYTO. Questions were asked about pending cases
26 against NYTO or anyone designated on the license and Licensee failed to disclose the
27 Van Gieson case that was on appeal.

28 18. In July 1997, Licensee filed a renewal application for his personal license.
29 (Exhibit 21.) Question D in Section V on the application asked:

30 Have you had any judgment, order or other determination,
including any criminal conviction issued or made against you

1 in any criminal, civil, administrative or other judicial or quasi-
2 judicial proceeding of any kind in any jurisdiction *that has not*
3 *previously been disclosed by you to this agency in a license*
4 *application based on any of the following:*

- 5 1. Misappropriation, conversion or the
6 withholding of moneys?
- 7 2. Incompetence or a source of injury and/or
8 loss to anyone?
- 9 3. Dishonesty in business or financial matters?
- 10 4. Fraud or misrepresentation?
- 11 5. Any cause arising out of an insurance
12 transaction?

13 (*Id.*; emphasis added.) Licensee answered "no" to all subparts of the question and the
14 Department alleges that he was required to answer "yes" based on the Oxnard and Van
15 Gieson cases under the first two subparts. The evidence supports the allegation with
16 respect to subpart 2 only. The record shows that the cases were based on injury or
17 loss to someone, but not misappropriation, conversion, or withholding of moneys.
18 Licensee *was required to disclose the Oxnard and Van Gieson cases* on his July 1997
19 personal license renewal application.

20 19. The same analysis concerning the Oxnard and Van Gieson cases applies to
21 Licensee's July 1998 and July 2000 renewal applications (Exhibits 17 and 16) because
22 the same question (Question D of Section V quoted above) was asked and the same
23 answers given.

24 20. In May 1998 and July 2000, Licensee filed renewal applications on behalf of
25 NYTO. (Exhibit 38.) Question D in Part II on the applications asked:

26 Has the applicant or *any individual designated in the*
27 *application as a member, officer, director or individual who is*
28 *to exercise the powers conferred by the license had any*
29 *judgment, order or other determination issued or imposed in*
30 *any criminal, civil, administrative or other judicial or quasi-*
judicial proceeding of any kind in any jurisdiction that has not
previously been disclosed by you to this agency in a license
application based on any of the following:

1. Misappropriation, conversion or the
withholding of moneys?
2. Incompetence or a source of injury and/or
loss to anyone?
3. Dishonesty in business or financial matters?

- 1 4. Fraud or misrepresentation?
2 5. Any cause arising out of an insurance
3 transaction?

4 (*Id.*; emphasis added.) Licensee answered "no" to all on both applications and the
5 Department alleges that he was required to answer "yes" under the first two subparts of
6 the question based on the Oxnard and Van Gieson cases. Again, the evidence
7 supports the allegation with respect to subpart 2 only. The record shows that the nature
8 of the cases was injury or loss to someone, but not misappropriation, conversion, or
9 withholding of moneys. Therefore, Licensee *was required to disclose the Oxnard and*
10 *Van Gieson cases* on the May 1998 and July 2000 NYTO renewal applications.

11 B. The Texas Case

12 21. In July 1993, a Judgment was entered against Transurance in Dallas County
13 Texas. (Exhibit 4.) The Plaintiff in the case (No. JS9300073N) was Diversified
14 Insurance Services, Inc. ("Diversified"), a corporation with an office in Texas. (*Id.*) As
15 of September 1994, the Texas court noted that the Judgment had not been satisfied.
16 (*Id.*) No other information is known about the case.

17 22. In July 1994, Transurance filed renewal applications for its brokers (Exhibit
18 25), surplus lines (Exhibit 28), and property and casualty (Exhibit 31) business.
19 Licensee signed the applications as a broker and President of the company. Question
20 9D on the applications asked:

21 **SINCE APPLICANT'S LAST APPLICATION OR RENEWAL**
22 **THEREOF**, has anyone obtained a judgment against the
23 applicant or anyone designated in the license in any civil
24 action in any jurisdiction, the subject of which involved fraud,
25 misappropriation, conversion, or misrepresentation, the
26 withholding of funds or insurance?

27 (Exhibits 25, 28, and 31; emphasis in original.) Question 9F asked, "**ARE ANY** criminal,
28 administrative OR other judicial OR quasi-judicial charges or proceedings currently
29 pending against applicant OR anyone designated in the license?" (*Id.*; emphasis in
30 original.) The Department alleges that Licensee was required to answer "yes" to these
questions based on the Texas judgment in favor of Diversified. However, the record is

1 silent as to the nature of the Diversified case³ and the Department has not shown that
2 the matter was still pending. To the contrary, a judgment had been issued. Without
3 any further information, this tribunal must assume that the judgment ended the matter.
4 Thus, the evidence **does not show** that Licensee was required to disclose the
5 Diversified matter on Transurance's July 1994 renewal applications.

6 23. In January 1996, Diversified filed its Texas judgment in Maricopa County
7 Superior Court as a foreign judgment (No. CV96-01011). (Exhibit 5.) Only
8 Transurance was named as a defendant and that company dissolved in 1996 so there
9 was no 1996 renewal application for Transurance. The record shows no final
10 disposition of the court matter. The last entry in the docket is a judgment debtor's exam
11 on May 23, 1996. (*Id.*)

12 24. In January 1997, another Maricopa County Superior Court action (No.
13 CV97-00385) was filed by Diversified, this time against Transurance, NYTO, and
14 Licensee. (Exhibit 6.) The only evidence in the record before this tribunal is the docket
15 for the case, which does not reveal the nature of the matter. The case was prosecuted
16 and culminated in a judgment in January 2001. (*Id.*) The evidence does not show who
17 prevailed in the matter.

18 25. In July 2000, Licensee filed a renewal application for his personal license.
19 (Exhibit 16.) Licensee signed the application and answered "no" to all questions. (*Id.*)
20 On Part II of the application, Question E asked:

21 Are any civil, administrative, other judicial or quasi-judicial
22 proceedings of any kind, or any criminal proceedings . . .
23 currently pending against you in any jurisdiction based on
24 any of the following:

- 25 1. Misappropriation, conversion or the
26 withholding of moneys?
- 27 2. Incompetence or a source of injury and/or
28 loss to anyone?
- 29 3. Dishonesty in business or financial matters?
- 30 4. Fraud or misrepresentation?
5. Any cause arising out of an insurance
transaction?

³ However one reads Question 9D, "the subject of which involved . . . the withholding of . . . insurance" or "the subject of which involved . . . insurance," the record does not disclose the nature of the Diversified matter. Thus, the Department has failed to show that Licensee should have disclosed it.

1 (*Id.*) The Department alleges that Licensee was required to answer "yes" to some
2 unspecified subpart of Question E based on the January 1997 Diversified action.
3 However, the record is silent as to the nature of that matter. Thus, the evidence **does**
4 **not show** that Licensee was required to disclose the matter on his July 2000 renewal
5 application.

6 26. The same Question E was asked on NYTO's May 1998 and May 2000
7 renewal applications (Exhibits 37 and 38), except that there is added language applying
8 the question to corporate officers and others "on the license." The May 1998 and May
9 2000 applications were signed by Licensee as broker and President of the company.
10 For the same reason as stated in Finding of Fact 25 above (that is, the lack of evidence
11 about the subject matter of the suit), the evidence **does not show** that Licensee was
12 required to disclose the January 1997 Diversified action on the May 1998 and May
13 2000 NYTO renewal applications.

14 C. The Domestic Relations Case

15 27. In September 1992, a domestic relations matter (No. M-1103-80, hereinafter
16 "the New Jersey domestic relations matter") was filed against Licensee in New Jersey
17 Superior Court, Chancery Division, seeking child support payments and arrearages.
18 (Exhibit 3.) This resulted in an April 1993 consent order from the New Jersey court in
19 which Licensee was required to pay overdue child support. (Exhibit 3a.) That order
20 was a final judgment in the New Jersey matter. (*Id.*) It was filed as a foreign judgment
21 in Arizona in November 1993 (hereinafter "the Arizona domestic relations matter"). (*Id.*)
22 However, the incomplete record before this tribunal shows that the earliest Licensee
23 was served with any document from the Arizona domestic relations matter was January
24 1996. (Exhibit 3.) Writs of Garnishment were issued against Licensee in February
25 1996, naming Transurance as garnishee. (Exhibits 3b and 3c.) A Satisfaction of
26 Judgment was filed in March 1996. (Exhibit 3d.) The Arizona matter was vacated and
27 the foreign judgment expunged from the Arizona record in April 1996. (Exhibit 3e.)

28 28. Licensee's July 1993 personal license renewal application asked Question
29 F, "ARE ANY criminal, administrative or other judicial or quasi-judicial charges or
30 proceedings currently pending against you IN ANY jurisdiction?" (Exhibit 23; emphasis

1 in original.) Licensee checked the answer "No" and did not disclose the New Jersey
2 domestic relations matter. (*Id.*). The Department alleges that he was required to
3 disclose it as a pending matter. However, it appears that since a final judgment had
4 issued, the matter was not pending. The evidence **does not show** that Licensee was
5 required to disclose the New Jersey domestic relations matter in response to Question
6 F on the July 1993 personal license renewal application.

7 29. On Licensee's July 1994 (Exhibits 19a and 19b) and June 1995 (Exhibit 22)
8 personal license renewal applications, as well as Transurance's July 1994 (Exhibits 25,
9 28, and 31) and NYTO's May 1995 (Exhibits 40, 42, and 44) renewal applications, the
10 same question about pending cases as Question F on the July 1993 application
11 (quoted above in Finding of Fact 28) was asked. Licensee checked the answer "No" on
12 all applications. The Department alleges that Licensee was required to disclose the
13 Arizona domestic relations matter. However, as noted above, Licensee was not served
14 with the Arizona matter until January 1996. Thus, the evidence **does not show** that
15 Licensee was required to disclose the Arizona domestic relations matter until after
16 January 1996.

17 30. In April 1996, NYTO filed renewal applications for its brokers (Exhibit 41),
18 surplus lines (Exhibit 39), and property and casualty (Exhibit 43) business. Licensee
19 signed the applications as President of the company. Question E in Section V on the
20 applications asked:

21 SINCE APPLICANT'S LAST APPLICATION OR RENEWAL,
22 has any judgment, order or other determination been issued
23 or made against the applicant or anyone designated in the
24 application in any civil action in any jurisdiction based on any
25 of the following:

- 26 1. Misappropriation, conversion or the
27 withholding of moneys?
- 28 2. Incompetence or a source of injury and/or
29 loss to anyone?
- 30 3. Dishonesty in business or financial matters?
- 31 4. Fraud or misrepresentation?
- 32 5. Any cause arising out of an insurance
33 transaction?
- 34 6. Any other reason?

1 (Exhibits 39, 41, and 43; emphasis in original.) The Department alleges that Licensee
2 was required to answer "yes" to subparts 1 and 6 of Question E based on the Arizona
3 domestic relations matter, specifically the writs of garnishment that were entered. The
4 record shows that the writs were issued against Licensee during the prior renewal
5 period and that the question encompassed all court matters. Therefore, Licensee was
6 *required to disclose the Arizona domestic relations matter* on the April 1996 NYTO
7 renewal applications.

8 31. The April 1996 NYTO renewal applications (Exhibits 39, 41, and 43) also
9 asked, "ARE ANY criminal, civil, administrative or judicial or quasi-judicial proceedings
10 of any kind currently pending against applicant or anyone designated in the
11 application?" (*Id.* at Question G, Section V; emphasis in original.) The Department
12 alleges that Licensee was required to answer "yes" to these questions based on the
13 Arizona domestic relations matter. But this was the same time that the matter was
14 concluding. Because Licensee signed the applications as President of NYTO on March
15 26, 1996, the record shows that the Arizona domestic relations matter was not yet
16 concluded, but was nearly concluded when Licensee signed the applications.
17 Therefore, Licensee *was required to disclose the Arizona domestic relations matter*
18 under Question G on the April 1996 NYTO renewal applications.

19 32. In July 1996, Licensee filed renewal applications for his personal broker and
20 agent licenses. (Exhibits 18a and 18b.) Question E in Section IV of the applications
21 asked:

22 SINCE YOUR LAST APPLICATION OR RENEWAL, has
23 any judgment, order or other determination been issued or
24 made against you in any criminal, civil, administrative or
25 other judicial or quasi-judicial proceeding of any kind in any
26 jurisdiction based on any of the following:

- 27 1. Misappropriation, conversion or the
28 withholding of moneys?
- 29 2. Incompetence or a source of injury and/or
30 loss to anyone?
3. Dishonesty in business or financial matters?
4. Fraud or misrepresentation?
5. Any cause arising out of an insurance
transaction?
6. Any other reason?

1 (*Id.*; emphasis in original.) The Department alleges that Licensee was required to
2 answer "yes" to subparts 1 and 6 of Question E based on the Arizona domestic
3 relations matter, specifically the writs of garnishment that were entered. For the same
4 reasons as stated in Finding of Fact 30, Licensee *was required to disclose the Arizona*
5 *domestic relations matter* on the July 1996 personal license renewal applications.

6 33. Licensee signed and filed personal license renewal applications in July 1997
7 (Exhibit 21), July 1998 (Exhibit 17), and July 2000 (Exhibit 16) that asked this question:

8 Have you had any judgment, order or other determination,
9 including any conviction issued or made against you in any
10 criminal, civil, administrative or other judicial or quasi-judicial
11 proceeding of any kind in any jurisdiction *that has not*
12 *previously been disclosed by you to this agency in a license*
13 *application* based on any of the following:

- 14 1. Misappropriation, conversion or the
15 withholding of moneys?
- 16 2. Incompetence or a source of injury and/or
17 loss to anyone?
- 18 3. Dishonesty in business or financial matters?
- 19 4. Fraud or misrepresentation?
- 20 5. Any cause arising out of an insurance
21 transaction?

22 (Exhibits 16 and 17 at Question D of Part II; Exhibit 21 at Question E of Section V;
23 emphasis added.) Licensee answered "no" to all subparts of the question on all
24 applications and the Department alleges that he was required to answer "yes" based on
25 the New Jersey or Arizona domestic relations cases under the first two subparts of the
26 question because they had not been disclosed on earlier applications. The evidence
27 supports the allegations. Licensee *was required to disclose the New Jersey or Arizona*
28 *domestic relations cases* on either his July 1997, July 1998, or July 2000 personal
29 license renewal applications.

30 34. Licensee signed and filed license renewal applications for NYTO in May
1998 (Exhibit 38) and May 2000 (Exhibit 37) that asked:

Has the applicant or *any individual designated in the*
application as a member, officer, director or individual who is
to exercise the powers conferred by the license had any
judgment, order or other determination issued or imposed in

1 any criminal, civil, administrative or other judicial or quasi-
2 judicial proceeding of any kind in any jurisdiction *that has not*
3 *previously been disclosed by you to this agency in a license*
4 *application based on any of the following:*

- 5 1. Misappropriation, conversion or the
- 6 withholding of moneys?
- 7 2. Incompetence or a source of injury and/or
- 8 loss to anyone?
- 9 3. Dishonesty in business or financial matters?
- 10 4. Fraud or misrepresentation?
- 11 5. Any cause arising out of an insurance
- 12 transaction?

13 (Exhibits 37 and 38 at Part II, Question D; emphasis added.) Licensee answered "no"
14 to all on both applications and the Department alleges that he was required to answer
15 "yes" under the first two subparts of the question based on the Arizona domestic
16 relations matter, specifically the February 1996 garnishments. The evidence supports
17 the allegation. Licensee *was required to disclose the Arizona domestic relations matter*
18 *on NYTO's May 1998 and July 2000 renewal applications.*

19 D. The Insurance Cases

20 35. In March 2000, a civil action was filed against NYTO⁴ in the Supreme Court
21 of the State of New York by Fulcrum Insurance Company ("Fulcrum") and Sorema
22 North America Reinsurance Company ("Sorema"). (Exhibit 7a.) The action sought a
23 preliminary injunction and arose from NYTO's alleged breach of insurance broker and
24 agency agreements. (*Id.*) A preliminary injunction issued on March 28, 2000. (Exhibit
25 7b.) The record is not clear regarding when NYTO was served with the New York
26 action. The only fact that is clear is that NYTO, and therefore Licensee, had notice of
27 the New York action at least by October 2000, as evidenced in Exhibit 7d.

28 36. In April 2000, the same breach of agreement action was filed by Fulcrum
29 and Sorema, this time against NYTO and Licensee, in Maricopa County Superior Court.
30 (Exhibit 8.) Fulcrum and Sorema sought a temporary restraining order ("TRO") that
would "freeze" certain funds in NYTO's bank account that Fulcrum and Sorema alleged
were premiums owed to them. (Exhibit 8a.) NYTO had notice of the action by April 20,
2000. (Exhibit 1.) The Arizona court awarded the TRO. (Exhibits 8b and 8c.) In May

1 2000, the TRO was upgraded to a preliminary injunction. (Exhibit 8d.) The New York
2 court also issued an injunctive order against NYTO in November 2000. (Exhibit 7d.) In
3 February 2001, that order was docketed as a judgment in the New York case. (Exhibits
4 7e and 7f.)

5 37. Licensee filed a license renewal application for NYTO in May 2000 (Exhibit
6 37) that asked:

7 Has the applicant or *any individual designated in the*
8 *application as a member, officer, director or individual who is*
9 *to exercise the powers conferred by the license had any*
10 *judgment, order or other determination issued or imposed in*
11 *any criminal, civil, administrative or other judicial or quasi-*
12 *judicial proceeding of any kind in any jurisdiction that has not*
13 *previously been disclosed by you to this agency in a license*
14 *application based on any of the following:*

- 15 1. Misappropriation, conversion or the
- 16 withholding of moneys?
- 17 2. Incompetence or a source of injury and/or
- 18 loss to anyone?
- 19 3. Dishonesty in business or financial matters?
- 20 4. Fraud or misrepresentation?
- 21 5. Any cause arising out of an insurance
- 22 transaction?

23 (Exhibit 37 at Part II, Question D; emphasis added.) Licensee answered "no" to all
24 subparts. (*Id.*) In addition, Question E on Part II of the application asked:

25 Are any civil, administrative, other judicial or quasi-judicial
26 proceedings of any kind, or any criminal proceedings . . .
27 naming the applicant or any individual designated in the
28 application as a member, officer, director or individual who is
29 to exercise the powers conferred by the license, as
30 defendant, currently pending in any jurisdiction that has not
previously been disclosed by you to this agency in a license
application based on any of the following:

1. Misappropriation, conversion or the
withholding of moneys?
2. Incompetence or a source of injury and/or
loss to anyone?
3. Dishonesty in business or financial matters?
4. Fraud or misrepresentation?

⁴ The action named other defendants, but not Licensee in his individual capacity.

1 5. Any cause arising out of an insurance
2 transaction?

3 (Exhibit 37.) Licensee again answered "no" to all subparts. (*Id.*) Licensee signed the
4 application on April 12, 2000. (*Id.*)

5 38. The Department alleges that Licensee was required to answer "yes" under
6 several subparts of the questions above based on the New York and Arizona Fulcrum
7 and Sorema court actions. The evidence **does not support** the allegation. The record
8 does not show that either NYTO or Licensee were aware of the New York or Arizona
9 actions on April 12, 2000, when Licensee submitted NYTO's 2000 renewal application.

10 39. Licensee filed a renewal application for his personal license in July 2000.
11 (Exhibit 16.) Licensee answered "no" to all subparts of Question E in Part II of the
12 application, which asked:

13 Are any civil, administrative, other judicial or quasi-judicial
14 proceedings of any kind, or any criminal proceedings . . .
15 naming you as defendant, currently pending against you in
16 any jurisdiction based on any of the following:

- 17 1. Misappropriation, conversion or the
18 withholding of moneys?
- 19 2. Incompetence or a source of injury and/or
20 loss to anyone?
3. Dishonesty in business or financial matters?
4. Fraud or misrepresentation?
5. Any cause arising out of an insurance
 transaction?

21 (*Id.*) The Department alleges that Licensee was required to answer "yes" to several
22 subparts of Question E based on the New York and Arizona Fulcrum and Sorema court
23 actions. The evidence clearly supports the allegation with regard to the Arizona action
24 because Licensee was a named defendant, while he was not a named defendant in the
25 New York action. Licensee *was required to disclose the Arizona Fulcrum and Sorema*
26 *court actions* on July 2000 personal license renewal application.

27 E. Residential Address

28 40. For many years, Licensee has received mail at "7127 East Becker Lane
29 #81" (hereinafter "the Becker Lane address"). (Testimony of Licensee.) The Becker
30

1 Lane address is a commercial venture called "The General Store" at which Licensee
2 rents a post office box. (*Id.*; Exhibits 49 and 51.)

3 41. On his July 1997 personal license renewal application, under a space for
4 "Physical Address of Your Home," Licensee gave the Becker Lane address. (Exhibit
5 21, Section IV(E).) Under the "Business Information" section of the application,
6 Licensee gave a business address for NYTO. (Exhibit 21, Section I(H).) Also in the
7 business information section was a line for "Mailing Address (Optional)." (Exhibit 21,
8 Section I(I).) Licensee left that line blank. There is no line labeled "Mailing Address" in
9 the "Personal Information" section of the application, only the "Physical Address of Your
10 Home" line.

11 42. The Department alleges that Licensee misrepresented his address on the
12 July 1997 personal license renewal application because the Becker Lane address was
13 not the physical address of his home. There can be no doubt that the application
14 requests a physical address for the applicant's residence. While it is true that the
15 Becker Lane address was not the physical address of Licensee's home, it was a valid
16 mailing address and the Department had a valid physical address for Licensee's
17 business. The Department has failed to show both the significance of having a physical
18 address for Licensee's residence and that the erroneously characterized information⁵
19 submitted by Licensee was a material misrepresentation. This tribunal finds, based on
20 the record before it, that any misrepresentation was not a material misrepresentation.

21 43. On his July 1998 personal license renewal application, Licensee again gave
22 the address for NYTO as his business address. (Exhibit 17, Part I(A).) Licensee also
23 gave the NYTO address as his current mailing address. (Exhibit 17, Part I(B).) In an
24 area labeled "Household Address" Licensee gave the Becker Lane address. (Exhibit
25 17, Part I(F).) The Department alleges that this was a misrepresentation.

26 44. Again, the Department has not shown the significance of the "Household
27 Address" information. Is it for a purpose other than sending mail? Also, the materiality
28 of the erroneous information has not been shown. The Department would not have had

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30 ⁵ Licensee did not provide erroneous information (the address was a valid address), he mischaracterized it
as a household address.

1 any trouble contacting Licensee at either the business address or the Becker Lane
2 address.

3 45. The July 2000 personal license renewal application is virtually identical to
4 the July 1998 application and Licensee gave the same information. (Exhibit 16.) The
5 area where Licensee listed the Becker Lane address had been re-labeled to
6 "Residence." (Exhibit 16, Part I(F).) This tribunal's reasoning as stated above holds
7 true for the July 2000 application.

8 46. The Department has not shown material misrepresentations by Licensee in
9 his mischaracterization of the Becker Lane address as his physical, household
10 residence.

11 Withholding of Premiums

12 47. The action against NYTO by Fulcrum and Sorema continues to be litigated,
13 each side claiming that the other breached the written agreements, and has been
14 moved to bankruptcy court as a "core" proceeding in NYTO's Chapter 11 bankruptcy.
15 (Exhibit A.) The only judicial determinations against Licensee individually are the
16 Arizona TRO and preliminary injunction that arose from the Arizona Fulcrum and
17 Sorema court action. (Exhibits 8c and 8d.) Those determinations are not conclusive,
18 however, because they are not based on fully adjudicated facts; they are temporary in
19 nature and handled on an expedited basis. The April 20, 2000, TRO, for example,
20 declares only that there are "reasonable grounds" to conclude wrongful conduct.
21 (Exhibit 8b at 2.) It does not make substantial factual findings, or findings specific to
22 Licensee, upon which this tribunal can rely.

23 48. The New York order issued in November 2000 requires NYTO to remit funds
24 to Fulcrum and Sorema. (Exhibit 7d.) These funds were premiums that Fulcrum and
25 Sorema claimed they were owed. As noted, that action named only NYTO, not
26 Licensee. Thus, additional facts showing Licensee's conduct in the withholding of the
27 premiums are necessary to determine any violations by Licensee arising out of the
28 Fulcrum and Sorema actions.⁶

29
30 ⁶ Licensee and NYTO are distinct entities with distinct licenses. Note the distinction between insurance
producer's licenses and business entity licenses in A.R.S. § 20-295(A) and (B).

1 49. Deborah Brady, who was Sorema's Senior Vice President of Operations and
2 Control in early 2000, testified about the actions taken against NYTO. Her testimony
3 shows that Licensee was involved in the dispute about the breach of agreements and
4 NYTO's withholding of premiums. Thus, the record supports a finding that Licensee
5 was personally involved in the withholding of premiums that resulted in the final order of
6 the New York court against NYTO. This is sufficient to show that Licensee participated
7 in withholding money due another, but nothing more.

8 50. The evidence of record shows that the legal dispute between
9 Fulcrum/Sorema and NYTO, currently being litigated, is a contractual dispute whose
10 outcome is uncertain. It is complicated by NYTO's bankruptcy proceeding. Because of
11 these factors, no factual conclusions about Licensee's conduct, other than those noted
12 above, or whether Licensee owes any money to Fulcrum or Sorema can be reached at
13 this time.

14 CONCLUSIONS OF LAW

15 1. The Department bears the burden of showing, by a preponderance of the
16 evidence, that a licensee has violated the statutes regulating the licensee's practice.
17 *Culpepper v. State*, 187 Ariz. 431, 437, 930 P.2d 508, 514 (Ct. App. 1996). The
18 Department has met its burden as to some, but not all, of the alleged violations.

19 Violations

20 2. The facts show that Licensee failed to disclose required information, in
21 numerous instances, on various application renewal forms. The Department alleges
22 that these instances are violations of former A.R.S. § 20-316(A)(3), which prohibited
23 misrepresentation in obtaining or attempting to obtain a license.⁷ As noted in the
24 Findings of Fact, the misrepresentations regarding court actions support the
25 Department's allegations. Even though Licensee was not required to disclose some of
26 the actions on some of the renewal applications, the fact that Licensee never disclosed
27 even one court action shows that Licensee failed to take seriously the renewal

28 ⁷ A.R.S. § 20-316 was repealed by Laws 2001, Ch. 205, § 11, which became effective October 1, 2001.
29 Grounds for disciplinary actions against insurance licensees are now listed in § 20-295. None of the
30 application misrepresentations occurred after the effective date of the repeal. Therefore, under standard
rules of law, the substantive provisions that were in place at the time of the conduct are applicable and this
decision applies the former statute to the application misrepresentation allegations.

1 application questions and his obligation to be candid with the Department. It may be
2 true that the information, had it been disclosed, would not have resulted in denial of any
3 of the renewal applications, but that decision is for the Department to make. Licensee's
4 obligation was to answer the questions accurately, which he did not do. Therefore, the
5 misrepresentation violations, regarding failure to disclose court actions, are significant
6 violations of Licensee's obligations as a licensed insurance producer.

7 3. The alleged misrepresentation violation concerning the inaccurately listed
8 residential address is a different matter. It can be viewed in two ways. One way to view
9 it is that the provision cited, former A.R.S. § 20-316, implies an element of materiality.
10 In other words, only material misrepresentations on an application are violative of the
11 statute. For example, an erroneous number in an address (i.e., wrong zip code) would
12 likely be considered immaterial and not a violation of the statute. In that regard, this
13 tribunal has found that the erroneously identified addresses on Licensee's renewal
14 applications were not material misrepresentations.

15 4. Another way to view the alleged residential address misrepresentations is
16 with a "strict liability" view of the statutory provision. Under this view, any inaccuracy in
17 an application is a violation, but some violations are inconsequential and do not warrant
18 any disciplinary action. Under this view, Licensee misrepresented the addresses, but
19 the misrepresented addresses are of no consequence and do not warrant further action
20 by the Department. This is because Licensee gave other, accurate addresses by which
21 he was available. This analysis assumes that the reason the Department requires
22 disclosure of the residential address of a licensee is to be able to contact the licensee.
23 Since the Department did not reveal the reason for requiring a licensee's residential
24 address, that assumption has not been shown to be unwarranted.⁸

25 5. The Department's allegation that Licensee committed misrepresentation
26 violations by inaccurately disclosing his residential addresses is not supported.

27 6. The Department relies on the litigation between Fulcrum/Sorema and NYTO
28 to support its other allegations. The Department alleges that Licensee withheld money

29 ⁸ A third construction of the statutory language is also possible; namely, that "misrepresentation" requires
30 an intent to deceive. With regard to the residential addresses, there is no evidence that Licensee intended
to deceive the Department.

1 from Fulcrum and Sorema in violation of former A.R.S. § 20-316(A)(4), which prohibited
2 "Misappropriation or conversion or illegal withholding of monies belonging to
3 policyholders, insurers, beneficiaries or others and received in or during the conduct of
4 business under the license or through its use."⁹

5 7. The Department also alleges that Licensee's conduct in the dispute between
6 Fulcrum/Sorema and NYTO violated former A.R.S. § 20-316(A)(7), which prohibits
7 "Conduct of affairs under the license showing the licensee to be incompetent or a
8 source of injury and loss to, or repeated complaint by, the public or any insurer."

9 8. The evidence shows that Licensee took part in withholding premiums that
10 resulted in injury and loss to Fulcrum and Sorema. It does not show anything else. The
11 dispute between Fulcrum/Sorema and NYTO is a contractual dispute that has not yet
12 been finally litigated. Licensee's conduct in regards to the allegations in that matter are
13 largely unclear. On the record before this tribunal, the only facts shown by a
14 preponderance of the evidence are that Licensee participated in the withholding of
15 premiums that were later judicially determined to belong to Fulcrum and Sorema.

16 9. Licensee has committed numerous misrepresentations on renewal
17 applications by failing to disclose various court actions against him in response to
18 questions on the applications. He has not violated former A.R.S. § 20-316 by failing to
19 accurately disclose his residential address. Licensee, in his capacity as President of
20 NYTO, has also participated in conduct of affairs that resulted in injury and loss to an
21 insurer. These violations are grounds for imposing disciplinary sanctions.

22 Sanction

23 10. The disciplinary sanctions available to the Director in this matter are
24 revocation of the license, refusal to renew the license, suspension of the license for not
25 more than 12 months, imposition of a civil penalty, and an award of restitution to any
26
27
28

29 ⁹ Again, the conduct occurred in February 2000, before the effective date of § 20-295. Therefore, the
30 former statutes set the applicable standard of conduct. Licensee did not raise any objection regarding the
Department's use of the language of the current statute against him.

1 party injured by a licensee. A.R.S. § 20-295(A) and (F).¹⁰ The Department requests
2 revocation and a restitution award to Fulcrum and Sorema.

3 11. Taking the request for restitution first, an award of restitution is within the
4 discretion of the Director; there is no entitlement to it. A.R.S. § 20-295(F)(3) (“ . . . the
5 director *may* . . . order the license to provide restitution” (emphasis added)).
6 NYTO has already paid some of the premiums owed to Fulcrum and Sorema. See
7 Exhibit 7e at 2.) What is left is an amount stated in the New York order (Exhibit 7e) and
8 a new amount disclosed for the first time at the hearing in this matter. The Department
9 asks that both the judicially ordered amount and the newly calculated amount be
10 awarded to Fulcrum and Sorema. There are several fatal problems, however, with the
11 Department's request.

12 12. First, during the hearing, Licensee made continued objection to the new
13 restitution calculations because they had not been identified in the Notice of Hearing for
14 this matter. The only reference to restitution in the Notice of Hearing is generic
15 language at the end of the Notice. The Administrative Law Judge took the objection
16 under advisement and now sustains it.

17 13. At the hearing, the Department presented detailed and complicated financial
18 accounting evidence through Deborah Brady regarding the proper amount of restitution
19 in addition to the amount judicially determined. Reference to that financial and
20 accounting evidence is not present in the Notice of Hearing. The first disclosure of that
21 part of the Department's claim was in mid-January 2003, approximately two weeks
22 before the hearing, when the Department issued its list of witnesses and exhibits. Even
23 then it was just a listing of and exchange of documents, not a notice of the grounds and
24 accounting for the Department's restitution request. This tribunal finds such notice to
25 be inadequate and, due to the lack of adequate notice, finds the Department's request
26 for restitution of the non-judicially determined amount to be unfair and a violation of
27 fundamental due process. Thus, the request is precluded.

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29

¹⁰ Unlike the substantive law regarding the standard of conduct of a licensee, the law providing various
30 methods of sanction is procedural in nature and, thus, the current statutes may be applied to the
“sentencing phase” of this case.

1 14. With respect to the judicially-determined amount that the Department
2 requests be awarded as restitution, there are additional problems. The New York order
3 is against NYTO only, not Licensee. While this tribunal has found that Licensee
4 participated in the withholding of premiums from Fulcrum and Sorema, Licensee's
5 actions are within the context of a larger legal dispute between Fulcrum/Sorema and
6 NYTO in which there are claims and cross-claims and no final disposition. The extent
7 of Licensee's participation in the overall matter, and the outcome of the matter, is
8 uncertain and gives pause as to whether restitution is an appropriate remedy in this
9 disciplinary matter. Further complicating the question is NYTO's bankruptcy
10 proceeding, of which the contractual dispute is a part. Such uncertainty and complexity
11 militates against awarding restitution in this matter.

12 15. Finally, the question is what is an appropriate sanction for Licensee's
13 violations? Licensee's long history of licensure without prior disciplinary action must be
14 viewed as mitigation. Also, the application violations caused no harm to anyone.
15 Those violations are not to be taken lightly, however, as they show Licensee's pattern
16 of a nonchalant attitude toward the application questions that reflects adversely on his
17 character. In addition, Licensee participated in withholding premiums due an insurer,
18 albeit within the context of a contractual business dispute.

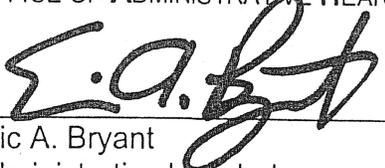
19 16. Taking all these factors into consideration, this tribunal determines that the
20 appropriate sanction is a six-month suspension of the license.

21 **DECISION**

22 IT IS RECOMMENDED that the Director of the Arizona Department of Insurance
23 suspend insurance producer license 835079, held by Donald W. Kaitz, for a term of six
24 months.

25 Done this 2nd day of May 2003.

26 OFFICE OF ADMINISTRATIVE HEARINGS

27 
28 _____
29 Eric A. Bryant
30 Administrative Law Judge

1 Original mailed this 5 day of May 2003, to:

2 Charles R. Cohen, Director
3 Arizona Department of Insurance
4 ATTN: Kathy Linder
5 2910 N. 44th Street, Suite 210
6 Phoenix, AZ 85018

7 By Rosella Rodriguez
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