

BEFORE THE ADMINISTRATIVE HEARING COMMISSION
STATE OF MISSOURI

FILED

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ADMINISTRATIVE HEARING
COMMISSION

DIRECTOR, DEPARTMENT OF INSURANCE,
FINANCIAL INSTITUTIONS AND
PROFESSIONAL REGISTRATION
STATE OF MISSOURI,

Petitioner,

vs.

JAMES A. THURMAN,

PHOENIX TITLE, INC.,
d/b/a Phoenix Title,

and

PHOENIX TITLE COMPANY,
d/b/a Phoenix Title,

Respondents.

Serve:

James A. Thurman, Reg. No. 31937-044
USP Marion
U.S. Penitentiary
P.O. Box 1000
Marion, IL 62959
Ph: 618-964-1441

Phoenix Title, Inc.,
Phoenix Title Company,
Phoenix Title
c/o James A. Thurman, Reg. No. 31937-044
USP Marion
U.S. Penitentiary
P.O. Box 1000
Marion, IL 62959
Ph: 618-964-1441

Case No.:

COMPLAINT

JOHN M. HUFF, Director of the Missouri Department of Insurance, Financial Institutions and Professional Registration, through counsel, complains and requests the Administrative Hearing Commission find that cause exists for disciplinary action against the individual insurance producer license of Respondent James A. Thurman and the business entity insurance producer licenses of Phoenix Title, Inc. (d/b/a Phoenix Title), and Phoenix Title Company (also d/b/a Phoenix Title), and in support, states and alleges as follows::

INFORMATION RELEVANT TO ALL COUNTS

1. Petitioner is the Director (“Director”) of the Missouri Department of Insurance, Financial Institutions and Professional Registration, whose duties include, pursuant to chapters 374 and 375, RSMo, the regulation, supervision, and discipline of insurance producers.
2. The Department originally issued Respondent James A. Thurman an insurance producer license (No. 219079) on April 9, 1992. The license was renewed and remained active until April 9, 2006, at which time the license was not renewed and expired.
3. The Department issued Respondent Phoenix Title, Inc. a business entity producer license (No. 11211) on April 10, 1996. Such license was renewed and remained active until April 10, 1996, when such license was not renewed and expired.
4. The Department issued Respondent Phoenix Title Company a business entity producer license (No. 8013621) on November 30, 2001. Such license was renewed and remained active until November 30, 2005, when such license was not renewed and expired.
5. As authorized by § 375.141.4, “[t]he director may also revoke or suspend pursuant to subsection 1 of this section any license issued by the director where the licensee has failed to renew or has surrendered such license.”

6. The Commission has jurisdiction over this Complaint pursuant to § 621.045 RSMo (Supp. 2008).

COUNT I

7. Section 375.141.1(6) RSMo (Supp. 2008) states the Director may suspend, revoke, refuse to issue or refuse to renew an insurance producer license for having been convicted of a felony or a crime involving moral turpitude.

8. Respondent Thurman was convicted of a felony and a crime of moral turpitude, which are grounds for discipline of Respondent Thurman's insurance producer license pursuant to §375.141.1(6) RSMo (Supp. 2008).

9. The facts are as follows:

- a. On August 26, 2005, Respondent Thurman pleaded guilty in federal court to one count of felony wire fraud, in violation of 18 U.S.C. § 1343, in *United States v. Thurman*, E.D.Mo., No. 4:05CR282 CDP.
- b. In the "Plea Agreement, Guidelines, Recommendations and Stipulations" for the felony guilty plea, Respondent Thurman admitted that he voluntarily and intentionally devised a scheme to defraud another out of money or property by means of materially false representations or promises; he did so with the intent to defraud; and the interstate wire facilities were used in furtherance of some essential step in this scheme. Respondent's wire fraud conviction arose from his misuse and misappropriation of money paid to him and Phoenix Title (the fictitious name of both Respondents Phoenix Title Inc. and Phoenix Title Company) by consumers for real estate closings.
- c. Phoenix Title, Inc. was a Missouri corporation created on April 5, 1996 through the Missouri Secretary of State, which agency administratively dissolved Phoenix Title,

Inc. on August 29, 2006 for failure to file an annual report. Respondent Thurman was the president and secretary of Respondent Phoenix Title, Inc. and on its board of directors. Phoenix Title Company and Phoenix Title are registered fictitious names of Phoenix Title, Inc., both registered with the Missouri Secretary of State by Respondent Thurman on August 2, 1996.

- d. Respondent James Thurman formed James Andrews Properties on December 13, 2001, which went by the registered fictitious name of James Andrew GMAC Real Estate ("JAGMAC"). Respondent Thurman was the president of JAGMAC and on its board of directors.
- e. Between March 1, 2002 and December 2, 2004, Thurman transferred approximately \$3,590,000 of customers' escrow deposits from Phoenix Title to JAGMAC and \$15,000 from customers' escrow deposits to his personal account. (During October, 2003, Thurman reimbursed \$150,000 to the customer escrow account with money he borrowed from a friend.) At the time of these transfers, Thurman was well aware that he should not use customers' escrow deposits for purposes other than funding their transactions.
- f. In June, 2004, Thurman moved \$215,536.91 of escrow money from Phoenix Title to the real estate company by disguising a check to JAGMAC as a loan payoff check. On June 30, 2004, Phoenix Title issued a routine check in the amount of \$215,536.91 to pay off a refinancing customer's first mortgage. The check was made payable to the customer's first lender and contained the notation, "Payoff First Mortgage 060911517." On January 11, 2005, Thurman caused Phoenix Title to issue another check in the amount of \$215,536.91 with the same notation, but made the check payable to JAGMAC, and deposited the check in the real estate company's account.

- g. During January 2005, when Phoenix began to face the real possibility of not being able to fund its customers' loan payoffs or home purchases, Thurman directed Phoenix Title employees to delay the delivery of customers' escrow funds for ten days. This ten day delay created an artificial float in the escrow accounts, allowing Phoenix Title to continue to meet its obligations, but also cause increased and otherwise unnecessary interest expenses for Phoenix Title.
- h. During February, 2005, Thurman reimbursed \$225,000 of the customers' escrow funds with money he borrowed from a friend.
- i. Another title company involved in a loan closing with Phoenix Title received a check from Phoenix Title that was approximately ten days late because of the delay implemented by Thurman. During February, 2005, this other title company notified Phoenix Title's underwriter at the time, Fidelity National Title Insurance Company, that Phoenix Title was "slow pay." On February 28, 2005, Fidelity scheduled an audit of Phoenix Title to begin on March 25, 2005.
- j. On March 17, 2005, Thurman repaid a total of \$1,900,000, borrowed from his parents, to the customers' escrow account at Phoenix Title.
- k. Throughout this time period, Thurman realized from his experience in the title industry that Fidelity would likely withdraw as Phoenix Title's underwriter once it realized Thurman had diverted customers' escrow deposits to his real estate company. In anticipation of this problem, Thurman sought out and engaged Guarantee Title Insurance Company as another underwriter for Phoenix Title. Thurman failed to disclose to Guarantee the problems with Phoenix Title's escrow deposits.
- l. During March and April, 2005, Thurman caused Phoenix Title to continue to accept escrow deposits from customers seeking to purchase or build a home, or to refinance

their mortgage, while knowingly and willfully omitting the material fact that Phoenix Title had a large deficit in its escrow funds.

- m. Respondent Thurman was sentenced to 63 months federal incarceration with three years supervised release. The federal court further ordered \$2,032,019.43 in restitution to be paid by Respondent Thurman.
10. Wire fraud is a federal felony and a crime involving moral turpitude. Moral turpitude has been defined as “an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellowman or to society in general, contrary to the accepted and customary rule of right and duty between man and man; everything ‘done contrary to justice, honesty, modesty, and good morals’.” *In Re Frick*, 694 S.W.2d 473, 479 (Mo. 1985). Crimes which involve moral turpitude include crimes involving fraud, false pretenses, and theft. *Id.*
11. Sufficient grounds exist for disciplining Respondent Thurman’s insurance producer license pursuant to §375.141.1(6) RSMo (Supp. 2008).

COUNT II

12. Respondents Thurman, Phoenix Title, Inc. and Phoenix Title Company have used fraudulent, coercive or dishonest practices, or demonstrated incompetence, untrustworthiness or financial irresponsibility in this state or elsewhere, a ground for discipline under § 375.141.1(8) RSMo (Supp. 2008), or alternatively, § 375.141.1(4) RSMo 2000.¹
13. The facts are as follows:
- a. Petitioner incorporates the allegations in Count I as though set forth herein.

¹ The Missouri Legislature amended § 375.141 RSMo effective January 1, 2003. As Thurman committed unlawful acts before and after the amendment, both statutory references have been included.

14. Section 375.141.1(8) RSMo (Supp. 2008) states the Director may suspend, revoke, refuse to issue or refuse to renew an insurance producer license for “using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere.”

15. Section 375.141.1(4) RSMo 2000 states that the Director may revoke or suspend any license of an insurance agent if it is determined that the licensee has “demonstrated lack of trustworthiness or competence.”

16. Fraud is an intentional perversion of the truth to induce another, in reliance on it, to part with some valuable thing belonging to him. *State ex rel. Williams v. Purl*, 128 S.W. 196, 201 (Mo. 1910). Deception is the act of causing someone to accept as true what is not true. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY at 322 (11th ed. 2004). Dishonesty is a lack of integrity, a disposition to defraud or deceive. It includes actions that reflect adversely on trustworthiness. Dishonesty is always a component of fraud. *Director of Insurance v. Gregory Lee Fetters*, No. 07-0162 DI (Mo. Admin. Hrg. Comm'n December 6, 2007). Incompetence, when referring to an occupation, relates to the failure to use “the actual ability of a person to perform in that occupation” or the general lack of “disposition to use an otherwise sufficient professional ability.” The definition of “trustworthy” is “worthy of confidence” or “dependable.” Irresponsible means not based on sound, reasoned considerations. *Id.*

17. Sufficient grounds exist for disciplining Respondent Thurman's insurance producer license and the business entity insurance producer licenses of Respondent's Phoenix Title, Inc. and Phoenix Title Company pursuant to §375.141.1(8) RSMo (Supp. 2008), or alternatively, § 375.141.1(4) RSMo 2000.

COUNT III

18. Respondents Thurman, Phoenix Title, Inc. and Phoenix Title Company have improperly withheld, misappropriated or converted money or property received in the course of doing insurance business, a ground for discipline under § 375.141.1(4) RSMo (Supp. 2008), or alternatively, § 375.141.1(5) RSMo 2000.

19. The facts are as follows:

a. Petitioner incorporates the allegations in Count I as though set forth herein.

20. Section 375.141.1(4) RSMo (Supp. 2008) states the Director may suspend, revoke, refuse to issue or refuse to renew an insurance producer license for “Improperly withholding, misappropriating or converting any moneys or properties received in the course of doing insurance business.”

21. Section 375.141.1(5) RSMo 2000 states, in part, that the Director may revoke or suspend any license of an insurance agent if it is determined that the licensee has “misappropriated or converted to his, her or its own use or illegally withheld money belonging to an insurance company, its agent, or to an insured or beneficiary or prospective insurance buyer.”

22. Misappropriation is “[t]he unauthorized, improper, or unlawful use of funds or other property for [a] purpose other than that for which intended.” *Monia v. Melahn*, 867 S.W.2d 709, 713 (Mo. App. E.D. 1994).

23. Sufficient grounds exist for disciplining Respondent Thurman’s insurance producer license and the business entity insurance producer licenses of Respondent’s Phoenix Title, Inc. and Phoenix Title Company pursuant to §375.141.1(4) RSMo (Supp. 2008), or alternatively, § 375.141.1(5) RSMo 2000.

COUNT IV

24. Respondent Thurman Phoenix Title, Inc.’s and Respondent Phoenix Title Company’s partners, officers or managers knew or should have known of Respondent Thurman’s violations

as specified in Count I through Count III and neither reported those violations to the Director nor took corrective action, a ground for discipline under § 375.141.3 RSMo (Supp. 2008).

25. The facts are as follows:

- a. Petitioner incorporates the allegations in Count I through III as though set forth herein.
- b. Respondent Thurman was, at all times mentioned herein, the sole officer, owner and operator of Respondents Phoenix Title, Inc. and Phoenix Title Company and was, at all times mentioned herein, acting on behalf of Respondents Phoenix Title, Inc. and Phoenix Title Company.
- c. Respondent Thurman's actions set forth in Counts I through III were not reported to the Director and no corrective action was taken by Respondents Phoenix Title, Inc. and Phoenix Title Company.

26. Section 375.141.3 RSMo (Supp. 2008), states that a business entity licensed as an insurance producer may be disciplined by the Director if "the director finds that a violation by an individual insurance producer was known or should have been known by one or more of the partners, officers or managers acting on behalf of the business entity and the violation was neither reported to the director nor corrective action taken."

27. Sufficient grounds exist for disciplining the business entity insurance producer licenses of Respondents Phoenix Title, Inc. and Phoenix Title Company pursuant to § 375.141.3 RSMo (Supp. 2008).

WHEREFORE, based on the foregoing, Petitioner respectfully requests the Commission make findings of fact and conclusions of law stating that Petitioner has established cause to discipline Respondent James A. Thurman's insurance producer license pursuant to § 375.141.1(4), (6) and (8), RSMo (Supp. 2008), or alternatively pursuant to § 375.141.1(5) and

(8) RSMo 2000, and to discipline the business entity insurance producer licenses of Respondents Phoenix Title, Inc. and Phoenix Title Company pursuant to § 375.141.1(4) and (8), RSMo (Supp. 2008), § 375.141.3 RSMo (Supp. 2008), or alternatively pursuant to § 375.141.1(5) and (8) RSMo 2000.

Respectfully submitted,



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