STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, Petitioner, vs. SUPERIOR INSURANCE COMPANY, Respondent.	)	Case No. 03-0080

RECOMMENDED ORDER

On May 19 and 20, 2003, a formal administrative hearing in this case was held in Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: S. Marc Herskovitz, Esquire
Elenita Gomez, Esquire
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STATEMENT OF THE ISSUES

The issues in the case are whether the Respondent has failed to comply with a Final Order issued by the Petitioner or is otherwise conducting business in a manner which is hazardous or injurious to policyholders or the public, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Notice and Order to Show Cause filed November 20, 2002, the Department of Financial Services, Office of Insurance Regulation (Petitioner), alleged that Superior Insurance Company (Respondent) had failed to comply with a Final Order issued by the Petitioner. The Notice asserted that such failure was a violation of Sections 624.418(1)(b), 624.418(1)(d) and 624.418(2)(a), Florida Statutes, and constituted grounds for suspension or revocation of the Respondent's Certificate of Authority to transact business in Florida.

By Response to Order to Show Cause and Petition for Formal Hearing, the Respondent requested a formal administrative hearing. The Petitioner forwarded the request to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing the Petitioner presented the testimony of one witness and had Exhibits numbered 1 through 33 admitted into evidence. The Respondent presented the testimony of two

witnesses. The Respondent's exhibits were presented in two binders. From the "Correspondence Binder" Exhibits numbered 1, 6, 10, 13, 14, 16, 17, 20 through 22, 25, 27, 28, 31, 35, 37, 38, 40, 41, 43, 44, 48 through 50, 54, 57, and 59 were admitted into evidence. Unbound Exhibits numbered 62, 63, and 66 were also admitted. From the "Pleadings Binder" Exhibits numbered 4, 16, 22, and 24 were admitted into evidence.

The three-volume Transcript of the hearing was filed on June 4, 2003. By agreement, the parties filed Proposed Recommended Orders on July 14, 2003.

FINDINGS OF FACT

1. The Petitioner is the state agency responsible for licensure and regulation of insurance companies transacting business in Florida. The Petitioner was formerly identified as the Department of Insurance.

2. The Respondent is an insurance company licensed to transact business in Florida and holding a Certificate of Authority to engage in the domestic automobile insurance business.

3. The Respondent owns Superior American Insurance Company and Superior Guaranty Insurance Company, both of which are licensed Florida insurance companies.

4. The Respondent is wholly owned and managed by Superior Insurance Group, Inc. (SIG). SIG is owned by Goran Capital,

Inc. Douglas Symons is the President and Chief Executive Officer of Goran Capital, Inc., as well as the other aforementioned companies. SIG and its parent are not required to be licensed by, and are not regulated by, the Petitioner.

5. The Respondent was acquired by current ownership in 1996 with the consent of the Petitioner. At the time of acquisition, the Respondent entered into a management agreement with SIG (identified at that time as GGS/Superior Insurance Group, Inc.) also with the consent of the Petitioner.

6. According to the Consent Order dated April 30, 1996 (the date of the acquisition), the compensation for services provided to SIG by the Respondent was not to exceed 32 percent of gross written premium. The management agreement provided that the Respondent was to compensate SIG for payment of agent's commissions (not to exceed 15 percent) and for administrative services (at the rate of 17 percent of gross written premium).

7. In July 2000, the Petitioner filed a Notice of Intent to Issue a Cease and Desist Order against the Respondent based upon the Respondent's practice of forwarding "Finance and Service Fees" to SIG in addition to the approved compensation set forth in the management agreement.

8. "Finance and Service Fees" are fees charged by the Respondent to policyholders who choose to pay premiums by monthly installments.

9. In January 2001, the Petitioner amended the July 2000 Notice of Intent to include allegations that the Respondent had filed misleading financial statements with the Petitioner which were intended to obscure the transfer of the fees to SIG.

10. A formal administrative hearing on the allegations was conducted on February 7 and 8, 2001, and a Recommended Order was entered on June 1, 2001.

11. In the Final Order filed on August 30, 2001, the Petitioner adopted the Recommended Order's determination that the financial statements filed by the Respondent had been misleading as to disclosure of the "Finance and Service Fees" transfer to SIG.

12. In the Final Order, the Petitioner further found that the payment of "Finance and Service Fees" outside the approved management agreement "constitutes an immediate hazard to the policyholders and to the public and demonstrates a lack of fitness or trustworthiness to engage in the business of insurance" apparently because the Respondent's surplus had substantially declined during the period the fees were being forwarded to SIG.

13. As set forth in the Final Order:

> Surplus as to policyholders is the source of funds used when claims payments exceed established reserves, or when expenses otherwise exceed anticipated amounts. The insurer's surplus is a statutorily mandated

> cushion to assure that insurers have adequate funds to perform their obligations. It must be noted, however, that it is not just the policyholders who have a stake in making sure the Respondent can pay its claims, but also all members of the public who may become involved in an automobile accident with these policyholders.

14. By Final Order, the Petitioner directed the Respondent to "immediately cease and desist from making any such payments until such time as it had filed all required documentation seeking, and has received from the Department in writing, approval for these payments."

15. The Final Order also required that the Respondent obtain "the immediate repayment of the net amount of approximately $15 million that was paid from 1997 through 1999, and any additional Finance and Service Fees paid thereafter." In the alternative, the Final Order provided that in lieu of immediate repayment the Respondent could request Department approval of a repayment schedule. The Final Order stated that "[i]f the Department determines in its sole discretion that the repayment schedule is in the best interests of policyholders and the public, such repayment schedule for the total amount of Finance and Service Fees that have been paid shall be implemented by the Respondent and the Respondent shall collect all such amounts from GGS/Superior in accordance therewith."

16. Because the Respondent and SIG were owned and controlled by the same parties, the Petitioner's Final Order essentially required that the owners of the Respondent obtain the repayment of the fees from themselves.

17. On September 28, 2001, the Respondent filed a Notice of Appeal of the Final Order with the District Court of Appeal, State of Florida, First District. The filing of the Notice of Appeal did not stay the Final Order.

18. Despite the Final Order's prohibition on transfer of the fees, the Respondent continued to forward the "Finance and Service Fees" to SIG.

19. On March 4, 2002, the Petitioner filed a Petition to Enforce Agency Action in the Leon County Circuit Court, Case No. 02-CA-602, seeking to enforce the prohibition on the fee forwarding arrangement.

20. On March 14, 2002, the Respondent filed a Motion both with the Petitioner and with the First District Court seeking to stay enforcement of the Final Order. On March 20, 2002, the First District Court denied the request for the stay on the basis that the Petitioner was the appropriate entity to address the request.

21. On April 5, 2002, the Petitioner entered an Order Conditionally Granting Stay Pending Appeal, granting a stay as to the repayment of the $15 million and requiring in lieu

thereof, that the Respondent post a $15 million bond. The Petitioner's Order denied the Respondent's request to stay the Final Order's prohibition against forwarding "Finance and Service Fees" to SIG.

22. The Respondent filed an appeal of the Order Conditionally Granting Stay Pending Appeal with the First District Court on May 6, 2002. By Order of June 19, 2002, the First District Court issued an Order vacating the obligation to post a $15 million bond. The First District Court's Order did not modify the Petitioner's denial of the Respondent's request for stay regarding the prohibited payment of "Finance and Service Fees" to SIG.

23. The District Court of Appeal affirmed the Petitioner's Final Order by per curium opinion entered on September 26, 2002. The Respondent discontinued the practice of forwarding "Finance and Service Fees" to SIG at that time.

24. From September 2001 through September 2002 (the period of time between issuance and affirmation of the Final Order, the Respondent forwarded to SIG a net total of $4,442,079 in "Finance and Service Fees" in direct contravention of the Final Order. The net total reflects gross fees of $8,392,079 with an offset allowed for capital contributions and retained management fees totaling $3,950,000.

25. As of the May 2003 administrative hearing, the Respondent had not obtained repayment from SIG of the approximately $15 million that was paid from 1997 through 1999.

26. The Respondent's sole apparent attempt to obtain repayment of the $15 million was a letter dated October 21, 2002, from Ginger Darrough (Controller and Treasurer for the Respondent) to Douglas Symons as President of SIG demanding repayment of the $15 million.

27. Ms. Darrough is the Treasurer of SIG. As stated herein, Mr. Symons is the President/CEO of the Respondent.

28. In response to the Darrough letter, Mr. Symons proposed a repayment plan by letter dated October 31, 2002. The repayment schedule proposed by the Respondent was to repay installments of one million dollars on January 1, 2003, on October 1, 2003, on April 1, 2004, and on October 1, 2004, followed by the "balance as agreed" on April 1, 2005.

29. The Department determined that the proposed repayment schedule was not acceptable. The evidence fails to establish that the Department's rejection of the proposed repayment plan was inappropriate.

30. The evidence establishes that as of the May 2003 administrative hearing, the Respondent is unable to meet the repayment schedule it proposed in the October 31 letter.

31. The Final Order required that in addition to the $15 million, the Respondent obtain repayment of "Finance and Service Fees" forwarded by the Respondent for subsequent periods.

32. For years 2000 through 2002, the Respondent forwarded net "Finance and Service Fees" totaling $18,467,418 to SIG. The net total reflects gross "Finance and Service Fees" forwarded to SIG totaling $26,318,081 for the three-year period (including $10,981,082 in calendar year 2000, $9,937,400 in calendar year 2001, and $5,399,536 in calendar year 2002) and credits the Respondent for $5,500,600 in paid-in capital (2001) and retained management fees of $950,000 (2001) and $1,350,000 (2002).

33. The Respondent has not obtained repayment of the additional "Finance and Service Fees" paid between 2000 and 2002.

34. The net "Finance and Service Fees" improperly forwarded between 1997 and 2002 by the Respondent to SIG total $33,467,418.

35. During the time the fees have been forwarded by the Petitioner to the parent company, the Petitioner suffered a precipitous decline in surplus. The Respondent had a surplus of approximately $57 million at the end of 1998. By the end of 2002, the surplus had declined to approximately $10 million.

36. The Respondent asserts that discussions and correspondence with the Petitioner regarding compliance with the

requirements of the Final Order suggested that a resolution outside the terms of the Final Order was possible and supports the Respondent's lack of compliance. The evidence fails to support the assertion.

CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. Section 120.57(1), Florida Statutes.

38. Because the Petitioner is seeking to suspend or revoke the Certificate of Authority of the Respondent to conduct business in Florida, the Petitioner has the burden of establishing by clear and convincing evidence the allegations against the Respondent. Department of Banking and Finance v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

39. In this case, the evidence clearly and convincingly establishes that the Respondent failed to comply with a lawful Final Order of the Petitioner by failing to immediately cease forwarding "Finance and Service Fees" as required by the Final Order issued on August 30, 2001. The requirement that such fee transfers immediately cease was never stayed or postponed in any manner by any action of the Petitioner or appellate court. Although the Respondent asserts that they believed the transfers

could continue while the Final Order was appealed, there is no credible evidence to support the assertion.

40. The evidence further clearly and convincingly establishes that the Respondent has failed to obtain repayment of $15,000,000 in improperly forwarded "Finance and Service Fees" as required by the Final Order. The evidence fails to establish that the Respondent has made any credible effort to obtain the funds from the parent company. The October 21, 2002, letter (written after the Final Order had been affirmed by the appellate court) from Ms. Darrough to Mr. Symons (her employer and owner of both companies) is insufficient to establish that there was any legitimate effort on the part of the Respondent to comply with the repayment requirements of the Final Order.

41. As set forth in the Notice and Order to Show Cause, Section 624.418, Florida Statutes, in relevant part provides as follows:

> 624.418 Suspension, revocation of certificate of authority for violations and special grounds.--
>
> (1) The department shall suspend or revoke an insurer's certificate of authority if it finds that the insurer:
>
> * * *
>
> (b) Is using such methods and practices in the conduct of its business as to render its further transaction of insurance in this state hazardous or injurious to its policyholders or to the public.

* * *

(d) No longer meets the requirements for the authority originally granted.

(2) The department may, in its discretion, suspend or revoke the certificate of authority of an insurer if it finds that the insurer:
(a) Has violated any lawful order or rule of the department or any provision of this code.

42. In the Petitioner's Proposed Recommended Order, the Petitioner asserts that the Respondent's failure to comply with the Final Order requires suspension or revocation of the Respondent's Certificate of Authority under Section 624.418(1)(b), Florida Statutes, because it "is using such methods and practices in the conduct of its business as to render its further transaction of insurance in this state hazardous or injurious to its policyholders or to the public."

43. The failure of an insurer to comply with an order issued by the Petitioner is specifically addressed at Section 624.418(2)(a), Florida Statutes. The cited Section does not require that the insurer's Certificate of Authority must be suspended or revoked, but provides that such penalty may be imposed at the discretion of the Petitioner. In this case, given the continuing failure of the Respondent to comply with the Final Order entered by the Petitioner as set forth herein, the Department's exercise of that discretion is warranted.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Financial Services, Office of Insurance Regulation enter a Final Order suspending the Respondent's Certificate of Authority to transact business in the State of Florida.

DONE AND ENTERED this 6th day of August, 2003, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
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Filed with the Clerk of the
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this 6th day of August, 2003.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.