SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1686-22

MARLENE CARIDE,
NEW JERSEY DEPARTMENT
OF BANKING AND INSURANCE,

Petitioner-Respondent,

v.

ROBERT LAPINSKI, and DOLLAR
BAIL BONDS, INC., d/b/a DOLLAR
BAIL BONDS,

Respondents-Respondents/
Cross-Appellants,

and

CUTTING EDGE BAIL BONDS, LLC,

Respondents-Appellants/
Cross-Respondents.

MARLENE CARIDE,
NEW JERSEY DEPARTMENT
OF BANKING AND INSURANCE,

Petitioner-Respondent,

v.

ROBERT LAPINSKI and DOLLAR BAIL BONDS, INC., d/b/a DOLLAR BAIL BONDS,

Respondents-Respondents/ Cross-Appellants,

and

ROBERT JOHN CARTER and JEFFREY BERNARD NESMITH,

Respondents,

and

STEVEN KRAUSS and CUTTING EDGE BAIL BONDS, LLC,

Respondents-Appellants/ Cross-Respondents.

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Argued May 20, 2024 – Decided May 31, 2024

Before Judges Mawla, Marczyk, and Vinci.

On appeal from the New Jersey Department of Banking and Insurance.

Ted M. Rosenberg argued the cause for appellants/cross-respondents Steven Krauss and Cutting Edge Bail Bonds.

Michael T. Warshaw argued the cause for respondents/cross-appellants Robert Lapinski and

Dollar Bail Bonds, Inc. (Zager Fuchs, PC, and Law Office of Justin Lee Klein, attorneys; Michael T. Warshaw, of counsel and on the briefs; Justin Lee Klein, on the briefs).

Richard E. Wegryn, Deputy Attorney General, argued the cause for respondents Marlene Caride, New Jersey Department of Banking and Insurance (Matthew J. Platkin, Attorney General, attorney; Richard E. Wegryn, on the brief).

PER CURIAM

Appellants Cutting Edge Bail Bonds, LLC and Steven Krauss, and cross-appellants Dollar Bail Bonds, Inc. and Robert Lapinski, appeal from a January 4, 2023 final agency decision by the New Jersey Department of Banking and Insurance (DOBI), finding Cutting Edge, Krauss, and Lapinski violated multiple subsections of N.J.S.A. 17:22A-40, revoking their licenses as insurance producers, and imposing fines. We affirm.

The salient facts were adduced at a hearing before an administrative law judge (ALJ). In February 2009, James Graves of Richmond, California, was arrested and charged in Secaucus Municipal Court with various criminal offenses. Under the then-existing cash bail system, bail was set at $150,000. Graves's mother, Shonda Dilliehunt, traveled to New Jersey and met with representatives of Dollar Bail to post a bond for Graves's release pending trial. She did not sign any of the bond application documents.

On February 6, 2009, Graves, his brother Brandon Graves, and his fiancé Rosia Maxwell executed a surety bail bond application and agreement with Cutting Edge. Handwritten at the bottom of the application was Deanna Graves's name, home address, and phone number. The handwritten note also indicated Deanna[1] was Dilliehunt's mother. Deanna did not sign this document.

The same day, Maxwell, Graves, and Brandon executed the surety bail bond agreement. Additionally, Maxwell, Brandon, and Kania Marie Crumby executed a premium finance agreement to finance the bail bond. The total premium was $15,030, and the agreement required a downpayment of $5,000, and payment of the $10,030 balance in twelve monthly installments. Lapinski countersigned the finance agreement and certified he "filled in the blanks on the form in his office in New Jersey" once he received them by fax from the family in California.

There was also a second premium finance agreement and bond agreement bearing Deanna's signature, dated February 6, 2009. Deanna denied signing these documents. The address on the finance agreement had the name of a fictitious California city.

[1] We utilize Deanna's and Brandon's first names for convenience and because they share a surname. We intend no disrespect.

On February 7, 2009, a bond issued for Graves, and he was released from custody. The forms setting forth the bail were signed by Lapinski. The bond was not secured by collateral. The same day, Maxwell and Brandon signed a fugitive recovery agreement with Dollar Bail.

On March 1, 2009, the family defaulted on the finance agreement by failing to make the monthly installments. In April 2009, Dollar Bail contacted Deanna to obtain collateral for the bond.

Lapinski testified it was "imperative" that collateral be posted for the bond as soon as possible and Dollar Bail "didn't have time to . . . mail the documents" to California. So, he sent Robert Carter, a Cutting Edge employee, to California to get Deanna's signature on the documents. On April 28, 2009, Deanna signed an original promissory note secured by a deed of trust, which put a lien on her home as collateral in the amount of $150,000 in favor of Cutting Edge. Carter did not have a DOBI license when he obtained Deanna's signature.

Graves did not appear for his criminal trial. A warrant issued for his arrest, and Carter and Lapinski flew to California to apprehend him. On December 1, 2009, Carter and Lapinski surrendered Graves to the Secaucus Police Department. A Secaucus investigation report issued that day noted Lapinski and Carter were "[r]epresentatives of Dollar Bail." The same day,

Lapinski wrote to the Secaucus Municipal Court on behalf of Dollar Bail and requested to have the bond discharged. On December 21, 2009, the court discharged the bond.

On November 12, 2013, Cutting Edge sued Deanna, Brandon, and other unnamed family members for breach of contract in California. Lapinski executed an assignment of contract, assigning Dollar Bail's rights in the lawsuit to Cutting Edge, including the right to sue Graves and Dilliehunt under the finance agreement. Lapinski certified he was told to execute the assignment because Cutting Edge needed it for the California litigation. The assignment made no mention of Deanna, and the date and notary fields on the form were empty.

Deanna and Carter were the only witnesses in the California trial. Deanna admitted signing the deed of trust in April 2009, but denied signing any of the other bond documents that were executed in February 2009. She claimed Cutting Edge took advantage of her age and led her to believe the lien on her home would be vacated once the bond was discharged.

The California court found no evidence Deanna had any contact with any representatives from Dollar Bail or Cutting Edge before April 2009. Also, there was no evidence that any of the family member signatories who initiated the

original bond application in February 2009 had any communication with Deanna at the time the bond was issued. The court concluded Deanna was not liable for the bond or premium because Cutting Edge was "attempting to enforce a promise for which it did not give any consideration."

The California court also found Cutting Edge's claim was defective because the assignment, which did not include Deanna, assigned Dollar Bail's rights to collect the premium only from Crumby, Maxwell, Brandon, Graves, and Dilliehunt. Further, Cutting Edge's claim for compensation under the recovery agreement lacked merit because the only parties to that agreement were Maxwell, Brandon, and Dollar Bail.

On January 14, 2015, the California court dismissed the case against Deanna. On November 5, 2015, it granted Deanna a judgment for counsel fees and costs against Cutting Edge totaling $28,355.03. The court reasoned Deanna was entitled to fees under California's fee shifting law because the finance and recovery agreements were "invalid, inapplicable, unenforceable or nonexistent" as to Deanna.

Jon Webster, Esq. was Deanna's attorney in the California lawsuit. On December 13, 2015, he wrote to the Office of Consumer Protection Services at DOBI to inform it of the California litigation and that Cutting Edge had not

satisfied the California judgment. Cutting Edge's attorney told Webster that Cutting Edge was "unwilling to pay [Deanna's] attorneys' fees and costs under any circumstance or condition."

On February 2, 2016, DOBI wrote to Cutting Edge, in care of Lapinski, requesting documentation relating to the attorney fee order. On April 19, 2018, DOBI issued its first order to show cause alleging that Cutting Edge, Lapinski, and Dollar Bail violated N.J.S.A. 17:22A-40 and its associated regulations by seeking collateral, premiums, and recovery costs from Deanna. Lapinski and Dollar Bail denied the charges and the matter was transmitted as a contested case to the Office of Administrative Law (OAL).

On December 23, 2019, DOBI issued a second order to show cause, which added Jeffrey Bernard Nesmith,[2] Krauss, and Carter as respondents. DOBI was unable to serve Carter, and Nesmith had died several years earlier. The ALJ consolidated both orders to show cause. Count one alleged Carter, Nesmith, Krauss, Lapinski, Cutting Edge, and Dollar Bail made misrepresentations to Deanna in obtaining the Deed of Trust in violation of N.J.S.A. 17:22A-40(a)(2), (5), (8), (16), N.J.A.C. 11:17A-1.6(c), and N.J.A.C. 11:17A-4.10. Count two alleged Carter, Nesmith, Krauss, Lapinski, Cutting Edge, and Dollar Bail forged

[2] Nesmith was a co-owner of Cutting Edge.

and backdated Deanna's signatures on the Surety Agreement. Count three alleged Carter, Lapinski, and Dollar Bail forged and backdated Deanna's signatures on the finance agreement. Count four alleged Carter conducted insurance business without a license when he explained the surety agreement and finance agreement to Deanna and induced her to sign the promissory note as collateral. Count five alleged Nesmith, Krauss, Lapinski, and Cutting Edge violated N.J.S.A. 17:22A-40(a)(2) and (8), N.J.A.C. 11:17A-1.6(c), and N.J.A.C. 11:17A-4.10 when they failed to satisfy the California judgment.

The ALJ conducted a five-day hearing. DOBI called the following witnesses: Webster; Carter; DOBI supervising investigator Matthew Gervasio; Dollar Bail employees Michael Anthony Falco and Joe Bossi; Secaucus Police Officer Peter Garass; DOBI insurance regulator Joseph McDougal; and Lapinski. The ALJ ruled DOBI had not met the burden of proof and dismissed the order to show cause.

DOBI filed exceptions to the ALJ's decision. On January 4, 2023, the DOBI Commissioner issued a final decision adopting the ALJ's findings that DOBI had not met the burden of proof on counts two, three, and four, but overruled the ALJ on counts one and five.

On count one, the Commissioner found Cutting Edge violated N.J.S.A. 17:22A-40 when its agent, Carter, secured the deed on Deanna's home. Because the deed, which was dated April 28, 2009, listed the identification number for the bond that was issued in February 2009, in which Deanna was not involved, it misrepresented that Deanna had posted her home as collateral as part of the original bond transaction. Further, the Commissioner found Carter acted as a bail bond agent when he traveled to California on Cutting Edge's behalf, despite not having a license. Carter needed an insurance license to engage in insurance related conduct; namely to explain what the deed was, what it meant to execute it, and answer Deanna's questions. The Commissioner assessed a $5,000 civil penalty against Cutting Edge.

The Commissioner also found DOBI met its burden on count five. She held the attorney fee order resulted from insurance related conduct because it was entered in the lawsuit filed by Cutting Edge against Deanna for defaulting on the finance agreement. The California litigation was also part of the same insurance related course of conduct in which Cutting Edge procured the deed from Deanna to perfect a lien on her home.

The Commissioner found Lapinski was responsible because he was the designated responsible licensed producer (DRLP) of Cutting Edge when the

attorney fee order was entered on November 5, 2015. Krauss was also liable because he was the president of Cutting Edge at the time. Therefore, Lapinski and Krauss were liable for failing to pay the attorney fee award pursuant to N.J.A.C. 11:17A-1.6(c).

The Commissioner concluded Cutting Edge, Lapinski, and Krauss demonstrated financial irresponsibility under N.J.S.A. 17:22A-40(a)(8) and (2). She revoked Cutting Edge, Krauss, and Lapinski's insurance producer licenses, and jointly and severally assessed $5,000 in civil penalties and $3,584.50 in investigation costs against them.

I.

Appellate review of an administrative agency's decision is limited. Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 9 (2009). A reviewing court "does not substitute its judgment of the facts for that of an administrative agency." Campbell v. N.J. Racing Comm'n, 169 N.J. 579, 587 (2001). Rather, we "defer to matters that lie within the special competence" of the administrative agency. Balagun v. N.J. Dep't of Corr., 361 N.J. Super. 199, 202 (App. Div. 2003).

We will "reverse the decision of the administrative agency only if it is arbitrary, capricious[,] or unreasonable[,] or it is not supported by substantial

credible evidence in the record as a whole." Mejia v. N.J. Dep't of Corr., 446 N.J. Super. 369, 376 (App. Div. 2016) (quoting Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980)). An agency decision is arbitrary and capricious if it: is unconstitutional; violates legislative policies; is unsupported by substantial evidence in the record; or could not reasonably have been made on a showing of the relevant factors. A.B. v. Div. of Med. Assistance & Health Servs., 407 N.J. Super. 330, 339 (App. Div. 2009).

We likewise defer to an agency's interpretation of its governing statutes and regulations. Wnuck v. N.J. Div. of Motor Vehicles, 337 N.J. Super. 52, 56 (App. Div. 2001). "Where . . . the [agency's] determination is founded upon sufficient credible evidence seen from the totality of the record and on that record[,] findings have been made and conclusions reached involving agency expertise, the agency decision should be sustained." Gerba v. Bd. of Trs. of Pub. Emps.' Ret. Sys., 83 N.J. 174, 189 (1980). "[T]he test is not whether an appellate court would come to the same conclusion if the original determination was its to make, but rather whether the factfinder could reasonably so conclude upon the proofs." Brady v. Bd. of Rev., 152 N.J. 197, 210 (1997) (quoting Charatan v. Bd. of Rev., 200 N.J. Super. 74, 79 (App. Div. 1985)). However, we are "in no way bound by [an] agency's interpretation of a statute or its determination of

a strictly legal issue." Dep't of Child. & Fams., Div. of Youth & Fam. Servs. v. T.B., 207 N.J. 294, 302 (2011) (alteration in original) (quoting Mayflower Sec. Co. v. Div. of Consumer Affairs of Dep't of Law & Public Safety, 64 N.J. 85, 93 (1973)).

II.

Krauss challenges the Commissioner's factfinding. He contends there was no competent or credible evidence showing Carter misrepresented anything when he spoke to Deanna in April 2009. He argues the Commissioner misconstrued clerical errors in the deed Deanna signed as misrepresentations. Krauss also claims the Commissioner incorrectly concluded the fact there is no Administrative Office of the Court's (AOC) record of a bond dated in April 2009 was evidence of a misrepresentation, when it could have been the result of faulty record keeping.

Krauss argues he cannot be held vicariously liable for any acts or omissions prior to December 2009, and therefore is not liable for Carter getting Deanna to sign the deed. He contends the Commissioner's finding the refusal to pay the attorney fee was a violation of N.J.S.A. 17:22A-40(a)(2) and (8) was erroneous. Further, the Commissioner could not find him vicariously liable as the president of Cutting Edge because it was incorporated as a limited liability

company, and "there is no such thing as a president of a limited liability company." He asserts the Commissioner erred as a matter of law because the failure to pay an attorney fee judgment is not insurance related conduct governed by DOBI regulations. Moreover, N.J.A.C.11:17A-1.6(c) and N.J.S.A. 17:22A-40(a)(8) are unconstitutionally vague because no reasonable person would understand that a failure to pay a debt owed to an attorney would constitute "financial irresponsibility."

On cross-appeal, Lapinski argues because the Commissioner agreed with the ALJ there was no violation of N.J.A.C. 11:17A-4.10, she could not find Cutting Edge was financially irresponsible by ignoring the counsel fee award as a matter of law. Lapinski also contends the failure to pay the attorney fees is not insurance related conduct and N.J.S.A. 17:22A-40(a)(8) is unconstitutionally vague, which is demonstrated by the fact the ALJ and Commissioner had differing interpretations of the statute. He argues the Commissioner also misinterpreted the plain language of N.J.S.A. 17:22A-40(a)(8), which provides essential limiting language, specifying that financial irresponsibility must be in the conduct of insurance business, as opposed to conduct that could generally be considered financially irresponsible.

Lapinski argues N.J.A.C. 11:17A-1.6(c) only imposes vicarious liability on "partners, officers, directors, and owners of [ten percent] or more in a company," which did not apply in his case vis-à-vis Cutting Edge because he certified he was never an owner and had no authority or responsibility for Cutting Edge. Moreover, because N.J.S.A. 17:22A-40(a)(2) and (8) do not have a vicarious liability provision, they do not apply to him.

Lapinski argues he never knew that Krauss designated him the DRLP for Cutting Edge, DOBI never contacted him to confirm he was the DRLP, and he never signed a form designating himself as the DRLP. Even assuming his DRLP status in 2014 made him liable for Cutting Edge's actions, it did not retroactively apply to its conduct in 2009, which formed the basis of the claim in count one. Therefore, the Commissioner conflated counts one and five because DOBI argued the violation of count five warranted a license revocation, while Lapinski was only found liable under count one.

A.

Count one of the order to show cause alleged Carter, Nesmith, Krauss, Lapinski, Cutting Edge, and Dollar Bail misrepresented or were responsible for the misrepresentation of the terms of an insurance agreement with Deanna by having her post collateral for a bail bond after it was already written and

executed. DOBI alleged this conduct violated N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16), as well as N.J.A.C. 11:17A-1.6(c) and N.J.A.C. 11:17A-4.10.

N.J.S.A. 17:22A-40(a) states:

> The commissioner may place on probation, suspend, revoke or refuse to issue or renew an insurance producer's license or may levy a civil penalty . . . for any one or more of the following causes:
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> . . . .
>
> (2) Violating any insurance laws, or violating any regulation, subpoena or order of the commissioner or of another state's insurance regulator;
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> . . . .
>
> (5) Intentionally misrepresenting the terms of an actual or proposed insurance contract, policy or application for insurance;
>
> . . . .
>
> (8) Using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of insurance business in this State or elsewhere; [or]
>
> . . . .
>
> (16) Committing any fraudulent act[.]

N.J.A.C. 11:17A-4.10 states "[a]n insurance producer acts in a fiduciary capacity in the conduct of [their] insurance business." N.J.A.C. 11:17A-1.6(c)

provides: "Licensed partners, officers and directors, and all owners with an ownership interest of [ten] percent or more in the organization shall be held responsible for all insurance related conduct of the organization licensee, any of its branch offices, its other licensed officers or partners, and its employees."

At the OAL hearing, DOBI attempted to introduce Webster's testimony about the California litigation and an affidavit from Deanna to prove the misrepresentation. The ALJ barred the evidence because it was hearsay and DOBI did not establish "a residuum of legal and competent evidence" to corroborate the hearsay. See Weston v. State, 60 N.J. 36, 51 (1972) (holding hearsay is admissible in administrative proceedings to "corroborate competent proof," but a final decision affecting substantial rights cannot rest on hearsay alone).

The Commissioner rejected the ALJ's reasoning, noting the terms of the deed alone demonstrated a misrepresentation. The deed

> name[d] Deanna . . . as the [t]rustor and Cutting Edge as the [t]rustee and [b]eneficiary. . . . [It] states, "this [deed] secured payment of all indebt[ed]ness, fees and expenses incurred by way of a [bond agreement] executed by the undersigned on or about the date thereof in favor of the above detailed defendant and bond number." The [d]eed . . . is dated April 28, 2009; lists . . . Graves . . . as the defendant; and . . . lists the bond power number as FCS500-375788. The AOC does not have a record of a bail bond with power

> number FCS500-375788 issued in April of 2009, only in February of 2009. . . . The [d]eed . . . misrepresents when the bail bond was issued.
>
> [(Citations omitted).]

The Commissioner further found Carter acted as Cutting Edge's bail bond agent when he traveled to California to procure Deanna's signature on the deed and did not have a producer license. She noted "[a] producer license would also be necessary to discuss what a deed of trust is, what it means, and to answer any questions."

Therefore, pursuant to N.J.A.C. 11:17-2.10(b)(4), the Commissioner found Cutting Edge liable for Carter's conduct. As a result, "Cutting Edge violated N.J.S.A. 17:22A-40(a)(2) (violating any insurance law or regulation), (5) (intentionally misrepresenting the terms of an insurance contract, policy, or application), (8) (fraudulent coercive or dishonest practices, demonstrating incompetence, unworthiness, or financial irresponsibility), (16) (any fraudulent act), and N.J.A.C. 11:17A-4.10 (failing to act as a fiduciary)."

Krauss's argument that the dates relating to the bond power number in the AOC database and the deed were mere clerical errors lacks merit. There is no dispute Graves was released in February 2009 and was not arrested again in April 2009, requiring another bond and collateral. Also undisputed is Bossi's

testimony that no collateral was taken at the time the bond was issued in February. Lapinski's testimony confirmed he sent Carter to California because it was "imperative" collateral be posted for the February bond. Nor does Krauss argue that Carter was qualified to act as a fiduciary.

Therefore, the Commissioner's finding that DOBI proved the allegations in count one is supported by the sufficient credible evidence in the record as a whole. R. 2:11-3(e)(1)(D). We decline to disturb these findings and affirm for the reasons expressed in the Commissioner's opinion.

B.

The Commissioner found DOBI proved the allegations in count five because Nesmith, Krauss, Lapinski and Cutting Edge violated N.J.S.A. 17:22A-40(a)(2), and (8), N.J.A.C. 11:17A-1.6(c), and N.J.A.C. 11:17A-4.10, by not honoring the California judgment. She reasoned as follows:

> The [r]espondents are derelict in ignoring a [c]ourt ordered attorney fee award in a lawsuit pursued in the conduct of their insurance business. If Cutting Edge disagreed with the outcome of the lawsuit, they had other recourse, such as filing an appeal. Rather, Cutting Edge chose to simply ignore the [a]ttorney [f]ee [o]rder. This shows financial irresponsibility under N.J.[S.A.] 17:22A-40(a)(8). Lapinski is also responsible for this conduct because he was the DRLP of Cutting Edge at the time the [a]ttorney [f]ee [a]ward was entered. . . . Krauss is also liable because he was the president of Cutting Edge at the time the [a]ttorney [f]ee [a]ward

> was entered. . . . The [a]ttorney [f]ee [o]rder was entered on November 5, 2015, which is within the ten[-]year statute of limitations under N.J.S.A. 2A:14-1.2(a). Failing to pay the [a]ttorney [f]ee [a]ward is insurance related because the award stemmed from a lawsuit that Cutting Edge filed against Deanna . . . to perfect a lien on her home. Accordingly, I find that Cutting Edge[,] Lapinski, and Krauss demonstrated financial irresponsibility under N.J.S.A. 17:22A-40(a)(8). By doing so, they also violated N.J.S.A. 17:22A-40(a)(2).

N.J.A.C. 11:17-1.2(b) states "'insurance related conduct' includes selling, soliciting, negotiating or binding policies of insurance; all communication with insureds concerning any term or condition of a policy of insurance; office management policies affecting insureds; processing claims; and transmitting funds between insureds, producers, premium finance companies and insurance companies." Cutting Edge's California lawsuit demanded $45,030 in damages, consisting of the $10,030 premium due for the bond and $35,000 in fees and costs for the apprehension and return of Graves. The complaint filed in California was an attempt to enforce the insurance related agreements between Deanna and Cutting Edge. The California court found Cutting Edge's claims against Deanna Graves "invalid, inapplicable, unenforceable or nonexistent" and awarded Deanna attorney's fees for Cutting Edge's failed insurance related

complaint. This conduct clearly fell within the scope of N.J.S.A. 17:22A-40(a)(8).

We reject the argument N.J.S.A. 17:22A-40(a)(8) is unconstitutionally vague. "To be vague 'as applied,' the law must not clearly prohibit the conduct on which the particular charges were based." State v. Saunders, 302 N.J. Super. 509, 521 (App. Div. 1997). "The question ultimately is one of fairness, given the statute and its provisions, and given the situation of the defendant. Should [they] have understood that [their] conduct was proscribed, should [they] have understood that the penalty about to be imposed was the sanction intended by the Legislature?" In re DeMarco, 83 N.J. 25, 37 (1980).

Here, the question was: Given the situation, would it be reasonable to conclude that appellants and cross-appellants acted in a financially irresponsible manner by refusing to honor a court order, which emanated from them losing a lawsuit they initiated to enforce a bond agreement? At the outset, Lapinski's argument the law is impermissibly vague because the Commissioner and ALJ reached different determinations lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). Substantively, we have no difficulty answering the preceding question affirmatively. Neither appellants nor cross-appellants argue they could not have understood failing to comply with a court

order arising from litigation relating to an insurance transaction initiated by them was proscribed conduct. Rather, the arguments raised on the appeal and cross-appeal contest whether the conduct was insurance related. The conduct clearly was insurance related, and the Commissioner's findings were amply supported by the record and are unassailable.

We find no merit to Krauss's argument that he could not be liable because Cutting Edge did not have a president as an officer. Krauss was Cutting Edge's registered agent during the California litigation. He co-owned Cutting Edge since its formation in 2003 and acted as its general agent beginning in February 2007. The only other owner was Nesmith. Therefore, Krauss clearly fell within the definition of an owner under N.J.A.C. 11:17A-1.6(c).

We likewise reject Lapinski's argument he was unaware that he was Cutting Edge's DRLP. McDougal testified that "[b]efore a DRLP is added, [DOBI has] to have their signature or some type of verification that they want to accept the responsibilities." He explained the process of designating a DRLP involves submitting a form to the National Insurance Producer Registry website. He stated: "[I]f the form is not signed by [the designee, DOBI] will contact them to make sure that they understand the responsibilities of the DRLP" and DOBI will then "make the change after verifying." McDougal added that DOBI

"always contact[s the designee] if they haven't signed the form . . . . So[,] either they sign the form which tells us that they know about it[,] or we try to reach out to them. If they're being added, we definitely reach out to them." (Emphasis added). McDougal's testimony supports the Commissioner's finding that Lapinski was responsible as DRLP of Cutting Edge.

III.

Krauss argues the penalties imposed on Cutting Edge were excessive and the license revocation was draconian. He asserts the Commissioner misapplied the Kimmelman[3] factors because: there was no evidence he acted in bad faith; he did not have an opportunity to argue an inability to pay; there was no finding he engaged in wrongful conduct other than the failure to pay the attorney fee, which was conduct that did not yield a profit; he did not derive a profit from the misconduct; his conduct did not harm the public; the failure to pay the judgment was neither the product of a "duration of conduct" nor "an ongoing scheme or artifice"; there was no criminal prosecution; and this was his first offense.

[3] Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123, 137-39 (1987) established that an agency assessing civil penalties should consider the following seven factors: good faith or bad faith; the ability to pay; the amount of profits obtained from the illegal activity; injury to the public; duration of the illegal activity or conspiracy; existence of criminal actions; and past violations.

Lapinski asserts the revocation of his license for a vicarious first offense was excessive, and the Commissioner failed to consider mitigating factors. The imposition of the maximum fine was arbitrary and unreasonable. He claims the Kimmelman factors weigh in his favor because: he could not have acted in bad faith given he had no involvement in the California litigation; there was no evidence he had the ability to pay the fine; he did not profit from his conduct; the public was not harmed; he did not affirmatively ignore the attorney fee award; and there was no criminal conduct and no history of prior violations.

The Commissioner assessed each Kimmelman factor. Pursuant to her finding that DOBI proved counts one and five, she concluded Cutting Edge, Lapinski, and Krauss acted in bad faith by misrepresenting the deed to Deanna and ignoring the attorney fee order. The Commissioner did not ignore the ability to pay, but instead gave the factor neutral weight because there was no evidence presented about it. Regardless, given the Commissioner's finding of bad faith and the weight she accorded the other Kimmelman factors, we are unconvinced a finding under the ability to pay factor would have led to a different outcome, or that the findings she made under this factor led to an unjust result warranting our intervention. R. 2:10-2.

The Commissioner found "Cutting Edge stood to gain a significant profit" because it could have acquired Deanna's home by having her sign the deed "with a misrepresentation." Moreover, "Cutting Edge, Krauss, and Lapinski . . . continued to profit by ignoring the [a]ttorney [f]ee [o]rder." She found this favored a higher penalty.

The Commissioner found DOBI proved the misconduct involving the deed transaction and ignoring a court order to pay Webster for over five years constituted an injury to the public and warranted a higher penalty. A greater civil penalty was also warranted because there was no criminal prosecution and the California award was not to punish the misconduct, but was instead a fee shifting penalty.

In mitigation, the Commissioner considered that Cutting Edge, Krauss, and Lapinski had no prior violations. She concluded this favored a lesser penalty.

The Kimmelman factors supported the license revocation and fines imposed here. The Commissioner aptly noted her decision was driven by the "duty to protect the public welfare and to instill public confidence in both insurance producers and the industry as a whole." We discern no reversible error.

IV.

Krauss and Cutting Edge challenge the procedure that allows the Commissioner to simultaneously be a party to a case brought by DOBI and the ultimate decision-maker. They claim this violates their rights to due process and fundamental fairness. Additionally, they argue the Attorney General's role as counsel for the Commissioner is equally problematic because it represents the decision-maker rather than a party.

Lapinski joins in the arguments, challenging the role of the Commissioner as both prosecutor and arbiter. He also argues the Commissioner's finding he was responsible for Cutting Edge as its DRLP, despite the fact there was no evidence presented that he knew of the designation, violated due process and fundamental fairness.

A.

Long ago we held the "combination of investigative and adjudicative functions does not, without more, constitute a due process violation." Del Tufo v. J.N., 268 N.J. Super. 291, 300 (App. Div. 1993) (quoting Withrow v. Larkin, 421 U.S. 35, 58 (1975)). Rather, a court must determine if "special facts and circumstances [are] present in the case before it that the risk of unfairness is intolerably high." Withrow, 421 U.S. at 58. "[P]roof of actual bias is necessary

to overturn administrative actions" when the agency serves in both prosecutorial and adjudicatory capacities. In re Petition for Rev. of Op. No. 583 of Advisory Comm. on Prof'l Ethics, 107 N.J. 230, 236 (1987).

Pursuant to these principles, we reject the challenges to the adjudicatory process, and the Commissioner and the Attorney General's roles, because there is no evidence of either unfairness or actual bias to enable us to question the process. Cutting Edge, Krauss, and Lapinski were accorded due process and a fair trial.

B.

"The essential components of due process are notice and an opportunity to be heard. Thus, a party's due process rights are not violated if it is held liable for a judgment arising out of an action in which it participated or had the opportunity to be heard." Mettinger v. Globe Slicing Mach. Co., 153 N.J. 371, 389 (1998) (citations omitted).

Lapinski played a key role in the operation of Cutting Edge and operated like an officer or director pursuant to N.J.A.C. 11:17A-1.6(c). Pursuant to N.J.A.C. 11:17-2.12(d), Cutting Edge could not operate without a DRLP, and DOBI presented testimony that, as a matter of course, it either obtained the DRLP's signature or contacted the DRLP to ensure the designation. Lapinski

attempted to refute this evidence through his testimony, which the Commissioner rejected when she decided otherwise. Because the Commissioner's decision is based on the credible evidence in the record, we decline to second-guess her findings.

V.

Finally, to the extent we have not addressed an issue raised on either the appeal or the cross-appeal, it is because it lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed on the appeal and affirmed on the cross-appeal.