

CONSUMER PROTECTION DIVISION,
OFFICE OF THE
ATTORNEY GENERAL,

Proponent,

v.

JAMES E. MACK, *et al.*,

Respondents.

* IN THE
* CONSUMER PROTECTION DIVISION
* OF THE
* OFFICE OF THE
* ATTORNEY GENERAL
* OF MARYLAND
* CPD Case No.: 13-017-234778
* OAH Case No.: OAG-CPD-04-13-47804

Office of the Attorney General
Consumer Protection Division

FILED

SEP 24 2014

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ADMINISTRATIVE HEARING PROCESS

FINAL ORDER

1. The Consumer Protection Division of the Office of the Attorney General (the “Agency”)¹ hereby orders Respondents James E. Mack and Benefits U Earned, LLC (collectively “Respondents”), to cease and desist from violating the Consumer Protection Act, Md. Code Ann., Com. Law §§ 13-101 through 13-501, and take affirmative action pursuant to § 13-403(b)(1) of the Consumer Protection Act as described herein.

Findings of Fact and Conclusions of Law

2. The Agency hereby adopts and incorporates the Findings of Fact and Conclusions of Law that are attached hereto, as if they were fully set forth herein.

Application

3. The provisions of this Final Order shall apply to James E. Mack, and his agents, employees and assigns, and any partnership, corporation or entity in which he either currently, or

¹ The Consumer Protection Division acting in its capacity as a quasi-judicial agency is referred to herein as the “Agency,” while the Consumer Protection Division acting as the Proponent in the instant matter is referred to as “Proponent.”

in the future, has an ownership interest, has authority to control, or has the authority to establish policy.

4. The provisions of this Final Order shall apply to Benefits U Earned, LLC, and its officers, employees, agents, successors, assignees, affiliates, merged or acquired entities, parent or controlling entities, wholly owned subsidiaries, and all other persons acting in concert or in participation with Benefits U Earned, LLC.

Definition

5. “Veterans’ benefits services” shall mean any assistance with claims for benefits from the U.S. Department of Veterans Affairs (“VA”).

Cease and Desist Provisions

6. The Respondents shall immediately cease and desist from engaging in any unfair or deceptive trade practices in violation of the Maryland Consumer Protection Act in connection with the offer, sale and/or performance of Veterans’ benefits services or any other goods or services marketed to veterans.

7. The Respondents shall not make any misrepresentation that has the capacity, tendency or effect of misleading any consumer in connection with the offer, sale and/or performance of any consumer goods or services.

8. The Respondents shall not fail to state any material fact, the omission of which would deceive or tend to deceive a consumer, in connection with the offer, sale and/or performance of any consumer goods or services.

9. The Respondents shall immediately cease and desist from offering, selling, or performing any Veterans’ benefits services.

10. The Respondents shall not offer, sell or perform any Veterans' benefits services unless they first become accredited by the VA and comply with all applicable federal and state statutes, rules and regulations, including, but not limited to, the Maryland Consumer Protection Act, 38 U.S.C. §§ 5901-5905 and 38 C.F.R. §§ 14.626-14.637.

11. The Respondents shall not represent that they have a sponsorship, approval, status, affiliation, or connection that they do not have, including, but not limited to, representing that they are accredited to perform Veterans' benefits services.

12. The Respondents shall not misrepresent their experience performing services on behalf of veterans, including, but not limited to, Veterans' benefits services.

13. The Respondents shall include a copy of this Final Order with any application to become accredited by the VA in any capacity to assist with the preparation, presentation, and prosecution of claims for veterans' benefits.

14. The Respondents shall notify the Division in writing of the subject application on the same date that they submit any application referred to in paragraph 13 of this Final Order. The Respondents shall notify the Division by sending a letter to the attention of the Chief of the Consumer Protection Division that includes a copy of this Final Order and the subject application.

15. Respondents shall not solicit or accept any payments in exchange for Veterans' benefits services that do not comply with applicable federal requirements for such fees, including, but not limited to, those requirements found in 38 U.S.C. § 5904 and 38 C.F.R. § 14.636.

16. The Respondents shall not offer or sell any goods or services that they are unable or unwilling to perform or provide.

17. The Respondents shall perform all services that they sell to consumers.

18. The Respondents shall notify the Division in writing prior to offering, selling or performing any good or service that is marketed specifically to veterans. The Respondents shall notify the Division by sending a letter to the attention of the Chief of the Consumer Protection Division that includes a copy of this Final Order and a description of any good or service being offered, sold or performed.

19. For at least five (5) years from the date of this Final Order, the Respondents shall maintain copies of all advertisements, contracts, payments from consumers, and correspondence with any consumer or with the VA reflecting their offer, sale or performance of any service marketed specifically to veterans, including, but not limited to, Veterans' benefits services. The Respondents shall produce this information to the Division upon request.

20. For at least five (5) years from the date of this Final Order, the Respondents shall provide the Division, on a quarterly basis, with a list reflecting their offer, sale and performance of any service marketed specifically to veterans, including, but not limited to, Veterans' benefits services. The list required by this paragraph shall include the following information for each consumer to whom the service was offered, sold, or on whose behalf the service was performed: (i) the consumer's name; (ii) the consumer's address; (iii) the consumer's telephone number; (iv) a description sufficient to determine any service offered to the consumer; (v) a description sufficient to determine any service promised to the consumer; (vi) a description sufficient to determine any services provided to the consumer; and (viii) the amount and date of any payment received from the consumer in exchange for the service.

Restitution

21. Consumers were harmed as a result of the Respondents' unfair and deceptive trade practices in connection with their offer and sale of Veterans' benefits services. The Respondents shall pay restitution to the Division equal to the sum of all monies they collected from consumers for assistance with claims for veterans' benefits. Consumers are entitled to receive restitution under this Final Order if they paid the Respondents for Veterans' benefits services.

22. Within thirty (30) days of the date of this Final Order, the Respondents shall make an initial payment to the Agency in the amount of Seventy-Three Thousand Seventy-Five Dollars (\$73,075.00) for payment of restitution to consumers (the "Restitution Account").

23. The Restitution Account shall be maintained by the Agency. The Proponent shall make disbursements from the Restitution Account to pay restitution to eligible consumers and to pay the costs of the claims process.

24. The Proponent shall perform a claims process that will be conducted by a person or persons appointed by the Agency (hereinafter the "Claims Administrator"). The Claims Administrator may be an employee of the Agency or an independent claims processor.

25. The claims process shall consist of identifying and locating each consumer who is eligible to receive restitution pursuant to this Final Order, gathering all information necessary to determine the amounts of restitution due to each consumer who is eligible to receive restitution, and the mailing by the Claims Administrator of restitution payments to all such consumers and any other mailings necessary to the claims process.

26. The Claims Administrator shall perform the tasks necessary to ensure a thorough and efficient determination of consumers' claims pursuant to the terms of this Final Order.

27. The Claims Administrator shall perform the above duties under the supervision and control of the Proponent.

28. The Respondents shall give the Claims Administrator complete access to all records, data, and personnel necessary for the Claims Administrator to complete his or her duties.

29. The Respondents shall be liable for the costs of conducting the claims process, including the payment provided for under paragraph 42 of this Final Order. The Claims Administrator shall notify the parties of all costs incurred in connection with the claims process.

30. If, at any stage of the claims process, it is determined that the Restitution Account will require additional payments to satisfy all consumer restitution due under this Final Order and to pay the costs of the claims process, the Respondents shall deposit additional money in the amount specified by the Proponent within thirty (30) days of being notified by the Proponent of the additional amount.

31. If there are insufficient funds collected to provide full restitution to each victim, benefits shall be distributed to consumers on a *pro rata* basis.

Civil Penalties

32. The Agency found that the Respondents violated the CPA every day that they offered and sold veterans' benefits services to consumers, for a total of 1,086 days. Based on that finding, the Respondents committed at least 1,086 violations of the Consumer Protection Act. Not included in this number are the additional violations of the Consumer Protection Act that could not be identified because the Respondents failed to cooperate in discovery.

33. The factors to be considered by the Agency pursuant to Md. Code Ann., Com. Law § 13-410 in setting the amount of a civil penalty are:

- (i) The severity of the violation for which the penalty is assessed;
- (ii) The good faith of the violator;
- (iii) Any history of prior violations;
- (iv) Whether the amount of the penalty will achieve the desired deterrent purpose; and
- (v) Whether the issuance of a cease and desist order, including restitution, is insufficient for the protection of consumers.

Each of these factors is considered below.

34. The Respondents' violations were severe. The Respondents' conduct occurred over the course of nearly three years. The Proponent was able to identify 118 consumers who paid the Respondents at least \$73,075 in fees for services that the Respondents could not lawfully perform and for which they could not charge any fees. (Findings of Fact ¶ 38). Moreover, the Respondents charged consumers substantial fees; often \$1,500 and even up to \$2,000. (*Id.* ¶¶ 35–36). Because the Respondents did not cooperate in discovery, these consumers are likely only a portion of the veterans who were victimized by the Respondents. (*See id.* ¶ 39). The consumers who paid the Respondents often received few or no services from the Respondents, which substantially delayed the processing of their claims for benefits. (*See id.* ¶¶ 41–45).

35. The Respondents acted in bad faith. Respondent Mack knew that he was required to be accredited in order to assist with the preparation, presentation, and prosecution of claims for veterans' benefits. (*See id.* ¶ 24). The Respondents knowingly disregarded the accreditation regime and restrictions on fees for initial claims assistance by charging consumers fees as high as \$2,000 for services for which they could not actually charge any fees. (*See id.* ¶¶ 34-36, 40, 52). Finally, in many cases the Respondents promised assistance to veterans' that they never provided or never completed. (*See id.* ¶¶ 41–45, 53).

36. Although the Respondents have not been previously found to have committed prior violations, Respondent Mack has a history of deceiving consumers. Respondent Mack was

terminated by a prior employer for diverting clients to his personal business so that he could charge them fees for services they otherwise would have received at no cost. (*See id.* ¶ 11).

37. Injunctive provisions and an order to pay restitution alone will likely not deter the Respondents from continuing the same course of illegal conduct. Rather, a significant penalty is necessary to deter the Respondents and those similarly situated from engaging in this or a similar type of illegal conduct in the future.

38. Section 13-410(a) of the Consumer Protection Act provides that a merchant who engages in a violation of the Act is subject to a fine of not more than \$1,000 for each violation.

39. Following consideration of the number of violations committed by the Respondents and the factors set forth in Md. Code Ann., Com. Law § 13-410(d), the Agency has determined that the Respondents should pay civil penalties totaling Three Hundred Twenty Five Thousand Eight Hundred Dollars (\$325,800) which reflects a penalty of Three Hundred Dollars (\$300) per violation. Accordingly, the Respondents shall, no later than thirty (30) days from the date of this Final Order, pay that amount to the State of Maryland.

40. If there are insufficient funds received by the Agency to cover full restitution for consumers and the civil penalty, the funds received shall be credited first toward restitution and shall only be credited toward the civil penalty after all restitution claims are satisfied.

Costs

41. Within thirty (30) days from the date of this Final Order, the Respondents shall pay the Agency Nineteen Thousand Eight Hundred and Fourteen Dollars and Eighty-Two Cents (\$19,814.82) for the Proponent's costs incurred in investigating and prosecuting this matter.

42. Within thirty (30) days after being notified pursuant to paragraph 29 of costs incurred during the claims process, the Respondents shall pay the Agency the costs incurred in administering the claims procedure provided under this Final Order.

Resolution of Disputes

43. The Chief of the Agency or his designee shall resolve any disputes regarding this Final Order and enter any supplemental orders needed to effectuate its purpose.

Notice to Respondents

44. Pursuant to Md. Code Ann., Com. Law § 13-403(b), the Respondents are hereby notified that if the Agency determines that the Respondents have failed to comply with this Final Order within thirty (30) days following service of this Final Order, the Consumer Protection Division may proceed with enforcement of the Final Order pursuant to Title 13 of the Commercial Law Article.

Appeal Rights

45. A party aggrieved by the Findings of Fact and Conclusions of Law or this Final Order is entitled to judicial review of the decision as provided by § 10-222 of the State Government Article of the Annotated Code of Maryland. Generally, a petition for judicial review must be filed within thirty (30) days after the date of the order from which relief is sought. The time for filing a petition is regulated by Rule 7-203 of the Maryland Rules and the

rules regulating judicial review of administrative agency decisions as set forth in Rules 7-201 to 7-210 of the Maryland Rules.

CONSUMER PROTECTION DIVISION
OFFICE OF THE ATTORNEY GENERAL

Date: September 24, 2014

By: 
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