

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF COMMERCE

In the Matter of Safelite Solutions, LLC

**RECOMMENDED ORDER ON
SAFELITE'S MOTION FOR
SUMMARY DISPOSITION**

This matter came before Administrative Law Judge James E. LaFave upon a Motion for Summary Disposition filed by Safelite Solutions, LLC (Safelite). The Administrative Law Judge held a hearing on Safelite's motion on January 6, 2016. The hearing record on the motion closed on that date.

Michael J. Tostengard, Assistant Attorney General, appeared on behalf of the Minnesota Department of Commerce (Department). John I. Iole, Jones Day, and Richard D. Snyder, Fredrikson & Byron, P.A., appeared on behalf of Safelite.

Based on the record, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDED ORDER

IT IS RESPECTFULLY RECOMMENDED THAT:

Safelite's Motion for Summary Disposition be **GRANTED**.

ORDER

IT IS ORDERED THAT:

1. All further proceedings in this matter are **CANCELLED**.
2. Alpine Glass, Inc. and Buyrite Auto Glass, Inc. d/b/a Rapid Glass's Motion to Quash Subpoenas is **DENIED AS MOOT**.

Dated: February 5, 2016

s/James E. LaFave

JAMES E. LAFAVE
Administrative Law Judge

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2014), the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Michael Rothman, Commissioner, Department of Commerce, Attn: Heidi Retterath, Suite 500, 85 Seventh Place East, St. Paul, MN 55101, (651) 539-1445, to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2014). In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1 (2014), the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Undisputed Facts and Procedural History

Safelite, a company based out of Columbus, Ohio, manages claims for auto-glass repair and replacement on behalf of insurance companies.¹ Safelite has entered into preferred provider agreements with several insurance companies who are seeking lower claims costs.² As part of the preferred provider agreements, Safelite operates independent call centers, and when an auto-glass claim comes into an insurance agency, it is routed to one of Safelite's call centers.³

The Department contends that "in the course of investigating auto glass claims practices in the state of Minnesota" it has "obtained evidence of numerous violations of law by Safelite Solutions in connection with administering auto glass claims."⁴

On April 21, 2014, the Department issued Safelite two Administrative Subpoenas "pursuant to the powers conferred upon the Commissioner of Commerce . . . as set

¹ Notice and Order for Prehearing Conference at 2 (Apr. 27, 2015).

² *Id.*

³ *Id.*

⁴ *Id.* at 3.

forth in Minn. Stat. § 45.027, subd. 2 (2012).”⁵ On May 28, 2014, Safelite replied by certified mail stating, in part, that it was unaware of any authority making the Department’s subpoena powers applicable to it because Safelite is not licensed by the Department.⁶ On June 5, 2014, Safelite sent an email to the Department indicating again its “concerns with the breadth, scope, and legal authority supporting the Subpoenas.”⁷ Safelite also detailed its specific objection regarding each requested document or interrogatory.⁸

On June 24, 2014, the Department issued Safelite two additional Administrative Subpoenas.⁹ Safelite responded by email on July 21, 2014, reiterating its belief that “Safelite is under no legal obligation to respond to either the April 21 Subpoenas or the June 24 Subpoenas.”¹⁰ Safelite again articulated its specific objection as to each requested document or interrogatory.¹¹

On April 27, 2015, the Department filed a Notice and Order for Prehearing Conference in this matter.¹² The Department alleges that Safelite has violated the law by (1) engaging in “unlicensed insurance adjusting activities”; (2) failing to provide fair and reasonable payments to auto-glass companies; and (3) failing to respond to Department subpoenas.

On November 6, 2015, Safelite moved for summary disposition.¹³ The Department responded on November 23, 2015.¹⁴ Safelite then filed a reply brief.¹⁵ The Administrative Law Judge held a hearing on Safelite’s summary disposition motion on January 6, 2016. The hearing record closed on that date.

On December 23, 2015, two local auto-glass shops, Alpine Glass and Rapid Glass, requested that the Administrative Law Judge quash subpoenas served by Safelite.¹⁶ Those subpoenas requested Alpine Glass and Rapid Glass produce documents showing their billing and related materials in addition to background information showing how Alpine Glass and Rapid Glass determined their billing.¹⁷ The Administrative Law Judge held a hearing on the motion on January 25, 2016. Alpine Glass and Rapid Glass’s motion to quash is currently under advisement.

⁵ Exhibits (Exs.) 1, 2.

⁶ Ex. 3.

⁷ Ex. 4.

⁸ *Id.*

⁹ Exs. 5, 6.

¹⁰ Ex. 7.

¹¹ *Id.*

¹² Notice and Order for Prehearing Conference.

¹³ Safelite Solutions, LLC’s Notice of Motion and Motion for Summary Disposition (Nov. 6, 2015).

¹⁴ Memorandum Opposing Motion for Summary Disposition (Nov. 23, 2015).

¹⁵ Reply Memorandum in Support of Motion for Summary Disposition (Dec. 10, 2015).

¹⁶ Alpine Glass, Inc. and Buyrite Auto Glass, Inc. D/B/A Rapid Glass Motion to Quash Subpoena and for Protective Order (Dec. 23, 2015).

¹⁷ *Id.* at Exs. A and B.

Summary Disposition

Summary disposition is the administrative law equivalent of summary judgment.¹⁸ “A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to judgment as a matter of law.”¹⁹ The Office of Administrative Hearings has generally followed the summary judgment standards developed in the district courts when considering motions for summary disposition.²⁰

The party filing the motion must demonstrate that there are no genuine issues of material fact that would preclude disposition of the case as a matter of law.²¹ On a motion for summary judgment, all evidence must be viewed in a light most favorable to the nonmoving party.²² All doubts and factual inferences must be resolved against the moving party.²³ Summary judgment should not be granted if reasonable minds could draw different conclusions from the evidence.²⁴

In order to defeat an otherwise proper motion for summary judgment, the nonmoving party must show the existence of material facts that are genuinely disputed.²⁵ “A material fact is one which will affect the result or the outcome of the case depending on its resolution.”²⁶ “[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions.”²⁷

Analysis

As an initial matter, the Department argues that summary disposition is premature because “discovery has not been completed.”²⁸ The Department went on to claim “[it] anticipates that it will obtain information of multiple additional instances of unlicensed adjusting and providing short payments to insureds.”²⁹

¹⁸ *Pietsch v. Minn. Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004).

¹⁹ *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

²⁰ See Minn. R. 1400.6600 (2015).

²¹ *Theile v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

²² *Deli v. Hasselmo*, 542 N.W.2d 649, 653 (Minn. Ct. App. 1996), *review denied* (Minn. Apr. 16, 1996).

²³ *Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981).

²⁴ *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

²⁵ *Thiele*, 425 N.W.2d 583.

²⁶ *Musicland Grp., Inc. v. Ceridian Corp.*, 508 N.W.2d 524, 531 (Minn. Ct. App. 1993), *review denied* (Jan. 27, 1994).

²⁷ *DLH*, 566 N.W.2d 71.

²⁸ Memorandum Opposing Motion for Summary Disposition at 1 (November 23, 2015).

²⁹ *Id.* at 6.

The Department initiated this action by issuing a Notice and Order for Hearing on April 27, 2015.³⁰ Safelite filed its Motion for Summary Disposition on November 9, 2015,³¹ prior to the close of discovery, January 4, 2016.³² The Department, however, had over six months to conduct discovery prior to Safelite's motion for summary disposition. Further, the Department has not attempted to supplement the record with additional facts supporting its position or submit a cross motion for summary disposition since the close of discovery.³³

The Department cited *U.S. Bank Assoc. v. Angeion Grp.*³⁴ for the proposition that "summary judgement is premature where non-moving party had not received full discovery,"³⁵ but the Department's reliance is misplaced. In that case, the Minnesota Court of Appeals stated that "when the nonmoving party has been allowed only minimal discovery and the information that the party needs to survive summary judgment is in the moving party's sole possession, summary judgment *may* be premature."³⁶ The court did not state unequivocally that summary judgment is premature prior to the close of discovery. Moreover, in that case, the responding party was seeking to avoid summary judgment. It makes practical sense that the party being sued might need additional time for discovery. Here, the Department initiated the action. Presumably, the Department would have sufficient evidence to support its position before filing its case.³⁷

The Department ultimately had the entire discovery period in which to develop its case. Under the circumstances, its claim it will find additional facts or information to buttress its case is speculative. The Administrative Law Judge therefore concludes that this motion is not premature and will consider whether disputed material facts exist as to each count.

Count 1

The Department alleges that "[b]y *negotiating* the settlement of insurance claims in the state of Minnesota, Respondent has engaged in unlicensed insurance adjusting

³⁰ Notice and Order for Hearing (April 27, 2015).

³¹ Safelite Solutions, LLC's Notice of Motion and Motion for Summary Disposition (November 6, 2015), filed with the Office of Administrative Hearings November 9, 2015.

³² First Prehearing Order (June 19, 2015). On February 3, 2016, nearly a month after the close of the discovery period, the parties stipulated to extend the discovery period to March 18, 2016. (See Letter to the Honorable James LaFave from Michael J. Tostengard, Assistant Attorney General (Feb. 3, 2016)).

³³ See Memorandum Opposing Motion for Summary Disposition, at 1, 6 (stating that "after discovery the Department anticipates that summary disposition for the Department, not Safelite, will be appropriate" and that "[t]he Department intends to bring a motion for summary disposition as to all of its counts after it receives adequate discovery from Safelite").

³⁴ *U.S. Bank Assoc. v. Angeion Grp.*, 615 N.W.2d 425 (Minn. Ct. App. 2000).

³⁵ Memorandum Opposing Summary Disposition at 6.

³⁶ *U.S. Bank*, 615 N.W.2d at 433-34 (emphasis added).

³⁷ See *Roberts v. Whitaker*, 287 Minn. 452, 464, 178 N.W.2d 869, 877 (1970) ("[A] government agency is not licensed to engage in a general fishing expedition into the affairs of private parties on the mere hope that some useful information will be disclosed.").

activities in violation of Minn. Stat. § 72B.03 (2014).”³⁸ Respondent contends that it is merely a third-party administrator for insurance companies and has “zero authority to negotiate pricing, negotiate whether a claim should be paid, or negotiate terms of a payment.”³⁹

Minnesota law states that “[a] person shall not act or hold out as an independent adjuster or public adjuster unless the person is licensed as an independent adjuster or public adjuster in accordance with this chapter.”⁴⁰ “Adjuster” means a person who on behalf of an insurer or an insured . . . investigates and evaluates claims arising under insurance contracts and negotiates the settlement of such claims.”⁴¹ The definition of “adjuster” does not include “a person employed solely to obtain facts surrounding a claim or to furnish technical assistance to a licensed adjuster” or “a person who solely performs executive, administrative, managerial, or clerical duties or any combination of these duties and who does not investigate, negotiate, or settle claims with policyholders, claimants, or their legal representative.”⁴² “Negotiation” is defined as “[a] consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. Negotiation usually involves complete autonomy for the parties involved, without the intervention of third parties.”⁴³

The Department submitted copies of several telephone call transcripts between Safelite representatives and insureds.⁴⁴ The parties do not dispute the content of those recordings. The Department, however, contends that the transcripts demonstrate that Safelite engaged in negotiation, whereas Safelite asserts that its representatives were merely reading off a script, with no authority to deviate from the prepared text. Because the facts documenting the actions of Safelite’s employees are undisputed,⁴⁵ whether those facts establish that Safelite’s employees engaged in “negotiations,” thereby making them “adjusters” under Minnesota law, is a legal question.⁴⁶

The transcripts establish that Safelite’s representatives do not engage in negotiations. Safelite’s representatives request certain information from the insured: name; phone number; e-mail address; zip code; when the damage occurred; in what state the damage occurred; how the damage occurred; the size of the damage; whether

³⁸ Notice and Order for Prehearing Conference at 4 (emphasis added).

³⁹ Motion at 13.

⁴⁰ Minn. Stat. § 72B.03, subd. 1(a).

⁴¹ Minn. Stat. § 72B.02, subd. 4 (2014).

⁴² Minn. Stat. § 72B.03, subd. 1(b).

⁴³ *Black’s Law Dictionary* 1136 (9th ed. 2009).

⁴⁴ See Exs. B-H.

⁴⁵ The Department does not contend that whether Respondent engaged in negotiation is a disputed material fact. In fact, as discussed above, the Department also intended to move for summary disposition at the close of discovery.

⁴⁶ Generally, whether Respondent engaged in negotiation would be a fact question. But “it becomes a question of law and may be disposed of by summary judgment where reasonable minds can arrive at only one conclusion.” See *Curtis v. Klausler*, 802 N.W.2d 790, 793 (Minn. Ct. App. 2011) (quotation omitted), *review denied* (Minn. Oct. 18, 2011); cf. *DLH*, 566 N.W.2d 60, (Minn. 1997) (stating that summary judgment is not appropriate when reasonable persons might draw different conclusions from the evidence presented).

this is the first time the insured has reported the glass damage; and the year, make, and model of the vehicle.⁴⁷

In addition, if a glass shop agent is on the phone, the representative asks the shop if it is willing to accept the quoted rate.⁴⁸ The glass shop agent commonly rejects that rate, but bargaining does not ensue.⁴⁹ Rather, in such a case, the representative informs the insured that if the job exceeds the quoted price, he or she may be required to pay the difference out-of-pocket.⁵⁰ The representative also offers to assist the insured with finding a preferred shop that has agreed to the established pricing.⁵¹ The Safelite representative never changes the rate offered to the glass shop, and the shop never requests a different level of reimbursement.⁵² The parties do not engage in bargaining or attempt to reach an agreement on any dispute over price.

The transcripts document that Safelite's representatives are reading from a script. In fact, in one call, the glass shop agent informs the insured that despite the representative's assertions, he will not be required to pay the difference in price, stating, "It's just that scripting that we talked about. They'll keep reading this until we actually end the call, unfortunately."⁵³ In another call, the glass shop agent rejects the price, and the representative states, "Okay, ma'am, there are a couple of things I need to read to you."⁵⁴ Thereafter, the glass shop agent informs the insured that "she's going to keep reading this in different ways. This is the third time that they've said that. I'm going to report this to my manager as well. This is getting ridiculous."⁵⁵ In another call, the glass shop agent informs the insured that they will be contacting a third-party network who "are paid and required to read a script."⁵⁶ The agent further states that despite "any kind of scripting they may be reading, it does not apply to you when you're working with" this particular glass shop.⁵⁷

The record evidence belies the Department's assertion that Safelite "is negotiating and settling on behalf of its insurer clients, who have no part in the process of auto glass claims settlement."⁵⁸ Safelite representatives are reading from a script and are not acting with any autonomy. Disputes over prices are resolved by other parties, not Safelite personnel. Reasonable minds could not differ as to this conclusion. Therefore, because the Administrative Law Judge concludes that Safelite does not engage in negotiation, Safelite likewise does not act as an adjuster, as that term is statutorily defined. Count 1, therefore, should be dismissed.

⁴⁷ Exs. B-H.

⁴⁸ Exs. B-H.

⁴⁹ Exs. B-H.

⁵⁰ Exs. B-H.

⁵¹ Exs. B-H.

⁵² Exs. B-H.

⁵³ Ex. C at 12.

⁵⁴ Ex. D at 5.

⁵⁵ *Id.* at 6.

⁵⁶ Ex. E at 2.

⁵⁷ *Id.*

⁵⁸ Memorandum Opposing Motion for Summary Disposition, at 7.

Count 2

The Department next alleges that “[b]y failing to provide payment, based on a competitive price that is fair and reasonable within the applicable geographic areas, to the insureds of its insurer-clients [or] their glass vendors of choice having obtained valid assignments of benefits, Safelite violated Minn. Stat. § 72A.201, subd. 6(14) (2014).”⁵⁹ Safelite contends that the insurance companies “make the payments, not Safelite” and that it “is not an obligor to any policyholder claimant and has not contractual, statutory or other payment obligation to policyholders.”⁶⁰

According to Minnesota law, an insurer or adjuster engages in unfair settlement practices, if “an automobile policy provides for the adjustment or settlement of an automobile loss due to damaged window glass,” and the insurer or adjuster fails “to provide payment to the insured's chosen vendor based on a competitive price that is fair and reasonable within the local industry at large.”⁶¹

The Department’s argument is not supported by the facts. The record lacks evidence that Safelite “provide[d] payment” to vendors. As discussed above, Safelite is not an adjuster and the Department’s own evidence states that Safelite’s “insurer-clients have been found to have underpaid numerous claims by not providing a reasonable level of reimbursement appropriate for the geographical area”⁶² not Safelite. Also, the arbitration cases cited by the Department further support this conclusion⁶³ because the insurer, not Safelite, is the named party in each of those cases.⁶⁴

In addition, the Department alleges that Safelite violated the statute because Safelite’s “insurer-clients rely entirely on [it] for price determinations.”⁶⁵ But the statute simply does not reference “pricing reliance.” Therefore, even assuming this contention is true, Safelite does not violate the statute by providing pricing information to its insurer-clients.

In sum, there are no material facts in dispute regarding this charge, and the Administrative Law Judge concludes that, as a matter of law, Safelite has not violated Minn. Stat. § 72A.201, subd. 6(14). Count 2 should therefore be dismissed.

Count 3

⁵⁹ Notice and Order for Prehearing Conference at 4-5.

⁶⁰ Memorandum in Support of Motion for Summary Disposition, at 16 (Nov. 6, 2015).

⁶¹ Minn. Stat. § 72A.201, subd. 6(14).

⁶² Notice and Order for Prehearing Conference at 3.

⁶³ See Memorandum Opposing Motion for Summary Disposition at 8 (stating that “the Department has evidence of numerous arbitrations in which the arbitrator found that Safelite, acting on behalf of its insurer clients, failed to offer or provide a fair and reasonable payment given the particular geographic area of the insured”).

⁶⁴ See Ex. A.

⁶⁵ *Id.* at 4.

The Department also alleges that “[b]y failing to respond to the Department’s subpoenas, Safelite violated Minn. Stat. § 45.027, subds. 1 and 1a (2014).” Safelite contends that it responded to the subpoenas with objections, and, moreover, “an alleged failure to comply with an administrative subpoena is not enforceable via statement of charges and, in fact, is not a violation of law in any respect.”⁶⁶

Minn. Stat. § 45.027, subd. 1 sets forth the Commissioner’s general powers relating to investigations and subpoenas. Section 45.027, subdivision 1a, states, in relevant part:

An applicant, registrant, certificate holder, licensee, or other person subject to the jurisdiction of the commissioner shall comply with requests for information, documents, or other requests from the department within the time specified in the request, or, if no time is specified, within 30 days of the mailing of the request by the department.

“[T]he commissioner may impose a civil penalty not to exceed \$10,000 per violation upon a person who violates any law, rule, or order related to the duties and responsibilities entrusted to the commissioner unless a different penalty is specified.”⁶⁷ Thus, the Department has authority to impose a civil penalty for failure to comply with a request for information. But that result is inappropriate here because Safelite did not violate subdivision 1a.

The Department materially misstates the law by asserting that “Minnesota law authorizes the Commissioner to request information from any person as part of its regulatory authority.”⁶⁸ The plain statutory language indicates that the Department has the authority to request information from applicants, registrants, certificate holders, licensees, or other persons subject to the jurisdiction of the commissioner.⁶⁹ It is undisputed that Safelite is not an applicant, registrant, certificate holder, or licensee. But, even assuming Safelite is a “person subject to the jurisdiction of the commissioner,” the Department did not request information from Safelite under subdivision 1a; rather, it issued subpoenas under subdivision 2 (2014). This is an important distinction.

Subdivision 2 reads:

For the purpose of any investigation, hearing, proceeding, or inquiry related to the duties and responsibilities entrusted to the commissioner, the commissioner or a designated representative may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of books, papers, correspondence,

⁶⁶ Memorandum in Support of Motion for Summary Disposition at 17-18.

⁶⁷ Minn. Stat. § 45.027, subd. 6 (2014).

⁶⁸ Memorandum Opposing Motion for Summary Disposition at 9.

⁶⁹ Minn. Stat. § 45.027, subd. 1a.

memoranda, agreements, or other documents or records that the commissioner considers relevant or material to the inquiry.⁷⁰

If the recipient refuses to obey a subpoena, “the district court, upon application by the commissioner, may issue to any person an order directing that person to appear before the commissioner, or the officer designated by the commissioner, there to produce documentary evidence if so ordered or to give evidence relating to the matter under investigation or in question.”⁷¹ “[F]ailure to obey the order of the court may be punished by the court as contempt of court.”⁷²

The subpoenas sent to Safelite indicate that they were issued under subdivision 2, not 1a.⁷³ Therefore, in order to compel compliance, the Department was required to obtain a court order from the district court.⁷⁴ In fact, the subpoenas themselves indicate as much:

Failure to comply with this subpoena may result in legal action being taken against Safelite to compel compliance pursuant to Minn. Stat. § 45.027, subd. 2 (2012) or other laws. Any failure to obey a court order compelling compliance with this Administrative Subpoena is punishable as a contempt of court. In addition, pursuant to Minn. Stat. § 45.027, subd. 6 (2012), any person who violates an order relating to the duties and responsibilities entrusted to the Commissioner may be subjected to civil penalties of up to \$10,000 per violation.⁷⁵

The Department failed to obtain a court order requiring Safelite to comply with the subpoenas. The record does not include evidence that Safelite violated any “law, rule, or order.” The Department has no basis to impose a civil penalty against Safelite for failing to comply with the subpoenas.

To the extent that the Department argues that a subpoena is nothing more than a request for information, its argument is misplaced. The statute provides the Department with two distinctly different methods to obtain information, with differing enforcement methods. Subdivision 1a requires certain individuals—applicants, registrants, certificate holders, licensees, and other persons subject to the Department’s jurisdiction—to comply with a request for information or face civil penalties. The statute regarding subpoenas does not compel immediate compliance, but rather requires the Department to first seek a court order; only after a violation of that court order can civil penalties be imposed. The Department must choose the method it wishes to use to gain information. They are not the same.

⁷⁰ *Id.*, subd. 2.

⁷¹ *Id.*, subd. 3 (2014).

⁷² *Id.*

⁷³ Exs. 2, 3, 5, 6.

⁷⁴ Minn. Stat. § 45.027, subd. 3.

⁷⁵ Exs. 2, 3, 5, 6.

In sum, and based on the foregoing reasons, the Administrative Law Judge recommends that the Commissioner grant Safelite's Motion for Summary Disposition.

J. E. L.