

BEFORE THE STATE OF WASHINGTON  
OFFICE OF INSURANCE COMMISSIONER

In the Matter of:

**REGAN BAIL BONDS, INC.**

**and**

**DAVID A. REGAN,**

Respondents

Docket No. 19-0370

**FINAL ORDER ON CROSS  
MOTIONS FOR SUMMARY  
JUDGMENT**

**ISSUES**

1. Whether the Initial Order Denying OIC's Motion for Summary Judgment and Granting Respondents' Motion for Summary Judgment ("Initial Order") should be affirmed?
2. Whether the Order Granting Respondent's Motion for Protective Order ("Protective Order") should be affirmed?
3. Whether the bail bonds at issue are insurance transactions?
4. Whether the Office of the Insurance Commissioner has jurisdiction over those transactions?
5. Did the Respondents engage in the transaction of insurance without a certificate of authority in violation of RCW 48.05.030?
6. Did Respondents solicit or transact insurance business as unauthorized insurers in violation of RCW 48.15.020(1)?
7. Did Respondents fail to meet the requirements of a surety insurer as provided in RCW 48.28.010?
8. Did Respondents knowingly accept insurance business from an unlicensed person in apparent violation of RCW 48.17.530(1)?

## **ORDER SUMMARY**

1. The Initial Order should be affirmed.
2. The Protective Order regarding discovery was lawful.
3. The bail bonds at issue are not insurance transactions.
4. The OIC does not have jurisdiction over bail bonds that are not secured by a corporate surety insurer. The OIC does not have jurisdiction over bail bonds where the bail bond company does not act as a corporate surety insurer.
5. Regan did not engage in insurance without the required certificate of authority.
6. Regan did not solicit or transact insurance in violation of RCW 48.15.020(1).
7. Regan did not fail to meet the requirements of a surety insurer under RCW 48.28.010, as it did not act as a surety insurer.
8. Regan did not knowingly accept insurance business from an unlicensed person in violation of RCW 48.17.530(1).

## **BACKGROUND**

1. On July 30, 2019, the Office of the Insurance Commissioner (“OIC”) issued Order to Cease and Desist No. 19-0370. On the same day, OIC issued Amended Order to Cease and Desist No. 19-0370.
2. On August 9, 2020, the Respondents filed a Demand for Hearing (“Demand”) with the OIC’s Hearings Unit to contest the Amended Order to Cease and Desist. The case was transferred to the Office of Administrative Hearings (“OAH”) for assignment of an Administrative Law Judge (“ALJ”) and further administrative proceedings.
3. On February 5, 2020, ALJ Schuh issued the Initial Order Denying OIC’s Motion for Summary Judgment and Granting Respondents’ Motion for Summary Judgment. The matter was transferred back to the OIC Hearings Unit for review by the presiding officer.
4. OIC filed OIC’s Petition for Review, and Respondents filed Respondent’s Reply to OIC Petition for Review. Both of these have been reviewed prior to issuing a decision in this matter.
5. The record from OAH has been reviewed and considered under the summary judgment standard articulated in WAC 10-08-135, applicable to adjudicative proceedings before the OIC per WAC 284-02-070(2)(a).

## FACTS FOR PURPOSES OF SUMMARY JUDGMENT

I adopt the Findings of Facts for Purpose of Summary Judgment, with the following amendments and/or additions:

### *Jurisdiction*

I adopt 4.1 – 4.2.

### *Summary Judgment*

I adopt 4.3 – 4.5, and add:

4.5A On March 6, 2020, OIC filed OIC’s Petition for Review.

4.5B On March 17, 2020, Respondents filed Respondents’ Reply to OIC’s Petition for Review.

### *The Respondents posted the bonds at issue here*

I adopt 4.6 – 4.17, and amend the following:

4.18 Regan sometimes posts bonds without the backing of an insurance company. In these instances, Regan posts the bonds and guarantees the obligation to pay with the assets of Regan and Mr. Regan, specifically real property. Declaration of David Regan In Support of Regan Bail Bonds, Inc. and David A. Regan’s Motion for Summary Judgment (“Regan Decl.”).

4.19 When Regan posts a bond without the backing of an insurance company, the defendant is charged a fee, usually a percentage of the value of the bond. Regan posts the bond, and promises to return the defendant to court. Regan Decl., p. 3, paragraph (“par”) 14.

4.20 Bail bonds posted by Regan are subject to the approval and acceptance of each individual court where they are posted. Regan Decl. p. 3 para. 15-16.

4.21 Regan admits that it posted 325 bonds listing Regan as the surety, without the backing of an insurance company, and that 142 of them were posted in Clark County Superior Court. Regan Decl., p. 3 para. 18.

4.22 In each of these instances Regan guaranteed its own promise to perform and pay. Regan Decl. p.3 para 19.

4.23 Regan admits that it posted 258 bonds that utilized a power of attorney. Regan Decl. p. 3, para 20-21.

4.24 In each of these instances, Regan guaranteed its own promise to perform and pay. Regan Decl., p. 3, para 21.

*Complaint and investigation*

I adopt 4.25 – 4.28

4.28A Respondents do not dispute that they were the sole guarantor of the bonds posted as described by OIC, and they do not dispute that the same bonds did not have any specific real or personal property identified or attached. Regan Decl. p. 2-3.

I add the following:

*Order Granting Respondents' Motion for Protective Order*

4.29 The OIC sought discovery in addition to the 325 bail bonds provided in this matter. First Bulling Decl., Ex. 35, "OIC's Interrogatories and Requests for Production of Documents." After considering motions from both the parties, ALJ Schuh granted Respondent's Motion for a Protective Order, and Respondents did not have to answer a number of OIC's interrogatories and requests for production. Order Granting Respondents' Motion for Protective Order ("Protective Order").

4.30 ALJ Schuh based his decision on the standard for relevance, analyzing the requests to determine whether the evidence had "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Protective Order (citing ER 401).

4.31 ALJ Schuh noted that OIC sought to prevent the manner in which Regan posted the 325 bail bonds at issue, because they characterized that activity as unauthorized insurance. Thus, the OIC's discovery requests must lead to evidence that will assist in resolving the issue of whether the manner in which Regan posted the bail bonds at issue constituted unlawful insurance. Protective Order.

4.32 Regarding Interrogatories 5, 6, 7, and 8, ALJ Schuh found that the responses requested would not have any bearing on whether Respondents' conduct constituted functioning as an unauthorized surety insurer.

4.33 Regarding Interrogatories 11 and 12, although ALJ Schuh noted "the information sought could have bearing on whether the Respondents have the financial wherewithal to viably function without a surety insurer," he then went on to find that he was not convinced that evidence was "relevant to establishing whether the Respondents' conduct constituted functioning as a surety insurer."

4.34 Regarding Interrogatories 13 and 14, ALJ Schuh found that since the cease and desist action sought to prevent the types of transactions in the 325 bail bonds at issue, and there was no

fine calculation or other penalty in this action, that this evidence would not assist in determining whether the transactions at issue constituted unauthorized surety insurance. Protective Order.

4.35 Regarding the Requests for Production 1, 2, and 3, ALJ Schuh was not persuaded that any of those documents would “lead to evidence that will assist me in determining whether the specific transactions alleged and at issue here constituted producing surety insurance.” Protective Order.

4.36 ALJ Schuh thus granted the requested protective order, and Respondents did not have to answer Interrogatories Nos. 5, 6, 7, 8, 11, 12, 13, and 14, and Requests for Production Nos. 1, 2, and 3. Protective Order.

### CONCLUSIONS OF LAW

I adopt the Conclusions of Law in the Initial Order, with the following amendments and/or additions:

#### *Jurisdiction*

5.1 I have jurisdiction to review this matter under RCW 48.04, RCW 34.05.464, WAC 284-02-070(2)(d)(i).

#### *This matter is ripe for summary judgment*

I adopt 5.2 – 5.8.

#### *OIC has authority only over insurance transactions*

I adopt 5.9 – 5.12.

#### *The elements of insurance*

I adopt 5.13 – 5.14.

5.15 There is little common law guidance on the application of the current statutory definition of insurance in RCW 48.01.040. Prior to amendment, one Washington court held that “[a]n essential element of insurance is that there be a ‘hazard or peril insured against.’” *State ex re. Fishback v. Universal Service Agency*, 87 Wash. 413, 424 (1915).

5.16 In another context, a Washington court held that “[a] contract may be a risk-shifting device, but to be a contract of insurance, which is a risk-distributing device, it must possess both features, and unless it does it is not a contract of insurance whatever be its name or form.” *In re Smiley’s Estate*, 35 Wn.2d 863, 867 (1950). A federal court also noted that insurance involves risk-shifting and risk-distributing. *Amerco v. C.I.R.*, 979 F.2d 162, 165 (9<sup>th</sup> Cir. 1992).

5.17 A federal court noted that “the principal ingredients [of an insurance contract] are the consideration, the risk and the indemnity. The consideration is the premium for the insurer’s undertaking; the risk may be said to be the perils or contingencies against which the assured is protected; and the indemnity is the stipulated desideratum to be paid to the assured in case he has suffered loss or damage through the perils and contingencies specified.” *Physicians Defense Co v. Cooper*, 199 F. 576, 579 (9<sup>th</sup> Cir. 1912).

5.18 These cases provide background and context in determining what constitutes insurance, even under application of the current version of the statute. Notably, the cases have not been specifically overruled by the 1947 amendment to the definition of insurance.

5.19 The insurance code does not define the term “indemnify.” “In the absence of such a definition, statutory construction requires that we give undefined words their common and ordinary meaning. To ascertain this meaning, we may use a dictionary.” *Vance v. Dep’t of Ret. Sys.*, 114 Wn. App. 572, 577 (2002) (citations omitted).<sup>1</sup>

5.20 “Indemnify” means 1. To reimburse (another) for a loss suffered because of a third party’s or one’s own act or default; 2. To promise to reimburse (another) for such a loss; 3. To give (another) security against such a loss. Black’s Law Dictionary 918 (11<sup>th</sup> ed. 2019).

5.21 Forfeiting a bail bond does not “indemnify” a court. The court does not suffer a monetary loss when a defendant fails to appear, and the payment of the bond does not serve to reimburse the court for the defendant’s absence.

5.21A Similarly, a defendant is not “indemnified” by the bail bond company. The defendant is not liable for the monetary amount of the bond posted, but the defendant will still be subject to other consequences for nonappearance, even if the bond is paid. The defendant may be subject to further criminal charges specifically for a failure to appear, and may have to then reside in jail if apprehended while pending trial or resolution of the case, if the bond is forfeited.

5.21B In a literal sense, a bail bond is a promise to pay a specified amount (the amount of the bail bond) when a determinable contingency occurs (the defendant’s failure to appear). However, the bail bond company may avoid payment or may recover payment if the defendant is returned to custody. In some cases, the bail bond has even been remitted to the bail bond company when the defendant was apprehended and the bail bond company was not responsible for that apprehension. See *State v. Kramer*, 167 Wn.2d 548, 554 (2009) (“This right to exoneration whenever a defendant is returned within 60 days has been upheld “*irrespective of who was responsible*” for the defendant’s return.”) Further, per RCW 10.19.140, when the bail

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<sup>1</sup> The OIC noted in the Petition for Review that Washington courts use Webster’s Third New International Dictionary in the absence of other authority, per GR 14 (appendix). However, per GR 14 Appendix 1, Webster’s is the authority for spelling, not necessarily for a definition. Courts do still also look to Black’s Law Dictionary for assistance in determining the meaning of an undefined statutory term. *E.g. Citizens All. for Prop. Rights Legal Fund v. San Juan Cty.*, 184 Wn.2d 428, 443 (2015). Thus, it was not incorrect for ALJ Schuh to look to Black’s Law Dictionary to define “indemnify.”

bond company *is* responsible for the defendant's return to custody within 12 months of the forfeiture, the company is entitled to have the bond remitted. The purpose of the bail bond arrangement is not to create a duty to pay in the bail bond company, but to incentivize the defendant's appearance in court. If the defendant fails to appear, the court then has, in addition to the resources of the state, the resource of the financially motivated bail bond company and/or agents to aid in apprehension. *State v. Kramer*, 167 Wn. 2d 548, 553-554 (2009) ("The giving of bail should be encouraged for various reasons...that, in cases of flight, a recapture may be aided by the bondsmen who, it is presumed, will be moved by an incentive to prevent judgment, or, if it has been entered, to absolve it and to mitigate its penalties."). It is the nature and the purpose of the bail bond transaction that restricts the application of the definition of insurance, including the second part of 48.01.040 referenced above. Considering the history and purpose of bail bonds, what Washington courts have said regarding insurance and the current statutory definition of insurance, the transactions at issue do not constitute insurance, as further outlined below.

*Bail bonds are not themselves insurance*

I adopt 5.22.

5.22A "Insure" means 1. To provide or obtain insurance on or for; 2. To make certain especially by taking necessary measures and precautions. "Insure." *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/insure>. Accessed 18 Jun. 2020. OIC points to the use of "insure" in the bail bond WAC 308-19-030(3) in the definition of bail bond, but the more likely use of that word in the WAC is "to make certain especially by taking necessary measures and precautions." It is unlikely the bail bond WAC used "insure" to implicate the Insurance Code without any specific reference to it.

5.22B "Bail bond agency" means a business that sells and issues corporate surety bail bonds or that provides security in the form of personal or real property to ensure the appearance of a criminal defendant before the courts of this state or the United States. RCW 18.185.010(5).

5.23 "The object of bail is to insure the attendance of the principal and his obedience to the orders and judgment of the court....The object of an appearance bond is to secure the trial of offenders rather than to fill the state coffers by forced contributions from sureties." *State v. Kramer*, 167 Wn.2d 548, 553 (2009) (citation omitted).

5.24A "If the accused has, under circumstances which show that there was no design to evade the justice of his country, forfeited his recognizance, but *repairs the default* as much as is in his power, by *appearing at the succeeding term, and submitting himself to the law, the real intention and object of the recognizance are effected, and no injury is done.*" *Id.*

5.25 When the defendant must seek the assistance of a bondsman in posting a bail bond, surety relationship is formed in which the bondsman is the surety, the defendant is the principal, and the State is the obligee." *Kramer*, 167 Wn.2d 548, 560-61 (2009) (Fairhurst, J. dissenting).

5.26 "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment." *Taylor v. Taintor*, 83 U.S. 366, 371 (1873)(overruled on other grounds). "The effect of the release on bail bond is to transfer custody of the defendant from the officers of the law to the custody of the surety on the bail bond, whose undertaking is to redeliver the defendant to legal custody and the time and place appointed in the bond." "Bail bond," Black's Law Dictionary 187 (8<sup>th</sup> Ed. 2009).

5.27 The defendant pays the bondsman a non-refundable fee for the bondsman to execute the bond with the court, making the bonding company financially responsible to pay the bond amount if the defendant does not appear at a future court date. Whether or not the defendant appears in court, the defendant does not get a refund of the fee, nor pay additional money to the bond agent. If the defendant fails to appear, the bond is forfeited and court gets the value of the bond, but the defendant still has an obligation to appear. Moreover, even if the bonding company does not produce the defendant after a failure to appear, if the defendant is returned to court, the bonding company may still be able to avoid payment of the bond to the court. The payment of the bond does not satisfy the obligation of the defendant, nor does it protect the defendant from future obligation to the court.

*Regan was a surety*

5.28 "'Surety' as it relates to bail bonds, means the depositor/owner of cash if a cash bail bond, the property owner(s) if a property bond, the insurance company if a corporate surety bond, that guarantees performance of the bail bond contract for compensation." WAC 308-19-030(5).

5.29 The definition does not limit "property" to "real property." Thus, a bail bond company may use real or personal property to secure the bond.

5.30 A surety is "a third-party promise to either incur a financial burden or force performance." *State v. Barton*, 181 Wn.2d 148, 160 (2014).

5.31 "[A] surety arrangement...involves a third-party promise to fulfill a financial burden in the event of nonperformance or to compel that performance." *Barton*, 181 Wn.2d 148, 156.

5.32 In this case, Regan Bail Bonds acted as the surety in the transactions at issue. Regan did not identify specific real or personal property, or other financial assets, to secure the bond, but instead offered its general corporate assets as security.

5.33 It is this practice that OIC contends constitutes insurance, specifically acting as a corporate surety insurer.



*A surety may be insured*

5.34 "Surety insurance" includes "guaranteeing the performance of contracts, other than insurance policies, and guaranteeing and executing bonds, undertakings, and contracts of suretyship." RCW 48.11.080(4).

5.35 Surety insurance also includes "bail bond insurance." RCW 48.11.080(2).

5.36 Bail bond insurance is a type of surety insurance. Surety insurance "insures against defaults by those who have undertaken contract obligations." *Seattle First National Bank v. Washington Insurance Guaranty Association*, 116 Wn.2d 398, 406 (1991).

5.37 Regan is able to purchase surety insurance, or bail bond insurance.

*The Respondents were not offering corporate surety bonds*

5.38 "'Corporate surety bail bonds' means a bail bond contract that is guaranteed by a domestic, foreign or alien insurance company which has been qualified to transact insurance business in Washington state by the insurance commissioner." WAC 308-19-030(16).

5.38A "Suretyship is a contractual relation whereby one person, called the surety, agrees to be answerable for the debt or default of another, called the principal. Hence, surety insurance is commonly defined as insurance against defaults on the part of persons who have undertaken contract obligations." *Seattle-First Nat'l Bank v. Wash. Ins. Guar. Ass'n*, 116 Wn.2d 398, 406 (1991)

5.39 When a corporate surety bail bond is posted, the insurance company agrees to pay the amount of the bond if the bail bond company is not able to do so.

5.40 Regan is not an insurance company, and has not been qualified or appointed by OIC to transact insurance business.

5.41 Even though Regan used forms that appear to be slightly altered forms used by the insurance companies, and secured bail bonds with its own general corporate assets, this alone does not make the transactions at issue "surety insurance." Whether bonds are guaranteed by an insurance company, or by a bail bond company themselves, or secured with specific property, does not affect the defendant. A defendant is in the same position regardless of the nature of the bail bond posted with the court. Although the forms seem to be fairly straightforward in that Regan is the sole company listed, and only Regan promises to be bound should the defendant fail to appear, the court may not have realized it was accepting bonds not guaranteed by an insurance company. However, it is up to the court to ensure that it only accepts bonds that abide by the court's rules, and it is the court's responsibility to review the bail bonds offered and determine whether they are sufficient, or should be declined.

5.42 The complainant in this matter is a surety insurance producer who owns a bail bond company, and who believes that Regan is acting in a way that affects fair competition. Clearly, there are differing opinions as to the propriety of posting bonds without specific property attached within the bail bond industry, as evidenced by the attachments Regan provided showing other bail bond companies posting bonds in the same way Regan has, and at least one bail bond company specifically advertising. In addition, when an insurance company acts to provide surety insurance, the insurance company is not insuring the defendant, nor the court. The insurance company is insuring a bail bond agent's ability to pay a forfeited bond. It is guaranteeing a contract of suretyship. This is unlike the promise Regan makes to the court when it posts a bond: in that case, Regan promises that it will produce the defendant for a future appearance, and if it cannot, it will pay the amount of the bond. Regan is agreeing to be financially liable if Regan is unable to produce the defendant for court, or return the defendant to court after the defendant fails to appear.

5.43 Regan did not issue corporate surety bonds. It simply guaranteed the promise to be financially liable with general corporate assets, in the event it was unable to produce the defendant. This construct follows the nature of the bail bond arrangement. It is up to the court as to whether bonds must have the property that secures them listed specifically, or whether bail bond companies can act as Regan has.

5.44-5.46 Stricken

*OIC lacks authority and jurisdiction over the transactions at issue here*

5.47 For the reasons cited above, the transactions at issue here were not insurance transactions, and accordingly, OIC does not have jurisdiction over them.

5.48 The denial of the OIC's motion for summary judgment is affirmed.

5.49 The granting of Respondent's motion for summary judgment is affirmed.

*The Order Granting Respondents' Motion for Protective Order is affirmed*

5.50 The OIC requested review of the Protective Order.

5.51 Review of the Protective Order is permissible under RCW 34.05.464(4):

...The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the reviewing officer upon notice to all the parties. In reviewing findings of fact by presiding officers, the reviewing officers shall give due regard to the presiding officer's opportunity to observe the witnesses.

5.52 Per WAC 284-02-070(2)(e)(i) discovery is available under CR 26 – CR 37, except for CR 26(j) and CR 35. Per CR 26(b)(1), “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” ER 401 defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

5.53 The Protective Order lawfully limited discovery as OIC did not demonstrate that the information requested was likely to lead to evidence that would assist a trier of fact in determining whether the bail bonds at issue constituted unlawful insurance.

### **ORDER**

Based on the foregoing Facts for Purposes of Summary Judgment and Conclusions of Law, there are no genuine issues of material fact, and Regan Bail Bonds Inc., and David A. Regan, are entitled to summary judgment as a matter of law. The Initial Order Denying OIC’s Motion for Summary Judgment and Granting Respondents’ Motion for Summary Judgment is affirmed. The Order Granting Respondents’ Motion for Protective Order is affirmed. The Amended Order to Cease and Desist, Order No. 19-0370, issued July 30, 2019, is withdrawn.

As noted in the Initial Order, all further proceedings remain stricken.

June 25, 2020



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Julia Eisentrout  
Reviewing Officer

Pursuant to RCW 34.05.461(3), the parties are advised that they may seek reconsideration of this order by filing a request for reconsideration under RCW 34.05.470 with the undersigned within 10 days of the date of service (date of mailing) of this order. Further, the parties are advised that, pursuant to RCW 34.05.514 and 34.05.542, this order may be appealed to Superior Court by, within 30 days after date of service (date of mailing) of this order, 1) filing a petition in the Superior Court, at the petitioner’s option, for (a) Thurston County or (b) the county of the petitioner’s residence or principal place of business; and 2) delivery of a copy of the petition to the Office of the Insurance Commissioner; and 3) depositing copies of the petition upon all other parties of record and the Office of the Attorney General.

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the state of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be filed and served the foregoing *Final Order on Summary Judgment* on the following people at their addresses listed below, by e-mail:

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Dated this 25<sup>th</sup> day of June, 2020, in Tumwater, Washington.

*/s/ Rebekah Carter*  
Rebekah Carter  
Paralegal  
Hearings Unit