



1 In the preamble paragraph of the order, preceding the above quoted substantive provision, the CHO  
2 wrote:

3 On the basis of the foregoing Findings of Fact and Conclusions of Law, to the effect that the  
4 Respondents' NADC Program is an illegal offering of insurance, that Respondents are acting  
5 as insurance agents and/or brokers without the legal authority to do so, that Respondent  
6 NADC is acting as an insurer without the legal authority to do so, that Respondents are  
engaged in misrepresentation to consumers in the business of insurance, and that the NADC  
Program is misleading and deceptive, . . .

7 It seems obvious that the CHO intended the foregoing as a summary of her conclusions of law.

8 Reformatted, the summary is in four parts:

9 On the basis of the foregoing Findings of Fact and Conclusions of Law, to the effect

- 10 • that the Respondents' NADC Program is an illegal offering of insurance, that  
11 Respondents are acting as insurance agents and/or brokers without the legal authority to  
do so,
- 12 • that Respondent NADC is acting as an insurer without the legal authority to do so,
- 13 • that Respondents are engaged in misrepresentation to consumers in the business of  
14 insurance, and
- 15 • that the NADC Program is misleading and deceptive, . . .

16 The first two bullets correspond to CLs 2, 3, and 4. Read in combination with CL 2, either CL 3 or  
17 4, if affirmed on appeal, will support the CHO's order to cease and desist. RCW 48.15.020(1)  
provides:

18 An insurer that is not authorized by the commissioner may not solicit insurance business in  
19 this state or transact insurance business in this state, except as provided in this chapter.

20 Where the foregoing provision is violated, OIC has the authority to issue a cease and desist order  
21 pursuant to RCW 48.15.023(5)(a)(i). No additional violation of the insurance code is necessary to  
22 affirm issuance of the cease and desist order.

23 The appeal before this court is a petition for review brought pursuant to RCW 34.50.570(3).  
24 Appellants have the burden of establishing the invalidity of the CHO's order. They have assigned  
25 error to each conclusion of law and many findings of fact, but the primary thrust of the appeal  
26 focuses on CL 2, that appellants are offering insurance. This part of the appeal is based on  
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1 §.570(3)(e) and contends that the conclusion “is not supported by evidence that is substantial when  
2 viewed in light of the whole record before the court . . .”

3 In this opinion, I address first assignments of error not related to CL 2.

4 1. Designations of the parties to this litigation. In her final order, the CHO very often  
5 characterized the three petitioning parties, NADC, NADS, and Bailey, as respondents. Counsel for  
6 NADC and NADS criticizes the CHO for failing to distinguish among the respondents, especially  
7 for failing to distinguish between NADC and NADS. I find no error or confusion in the CHO’s use  
8 of the collective term “respondents”. In FFs 3, 4, and 5, the CHO makes findings that establish the  
9 relationship among those respondents, especially the principal – agent relationship between NADC  
10 and NADS. These findings are not challenged specifically, so those relationships are verities. I  
11 follow the same practice here, referring to the three appellants, except where a distinction among or  
12 between them is material – which it seldom is.

13 2. Jurisdiction over Bailey and NADS. Appellant Bailey assigns error to the CHO’s  
14 conclusion that she had jurisdiction over Bailey and NADS.<sup>3</sup> The procedural history relating to this  
15 issue is discussed in OIC’s *Trial Brief*, pages 10-11. The letter of July 19, 2007 (*NADC 402-405*),  
16 provides in its second paragraph:

17 As we discussed, the contentions in this matter are not limited to the Respondent North  
18 American Dealer Co-Op (“NADC”). They also concern Respondent Henry (“Hank”) C.  
19 Bailey, Jr. and Respondent National Administrative Dealer Services, Inc. (“NADS”). All  
20 assertions are made against them individually and collectively.

21 The procedural history following this letter establishes that this case thereafter proceeded on that  
22 basis, without objection and with the full participation of Mr. Bailey and NADS. This assignment  
23 of error has no merit.

24 3. Burden of proof. Appellants assign error to all of the CHO’s findings because she fails to  
25 identify the burden of proof applied in making her findings.<sup>4</sup> An appropriate conclusion of law  
26 would have been that OIC had the burden of proving a violation of the law by a preponderance of

27 <sup>3</sup> RCW 34.05.570(3)(b).

28 <sup>4</sup> RCW 34.05.570(3)(d).

1 the evidence; but it was not error to omit that conclusion in the CHO's written decision. As  
2 NADC/NADS describes in their brief, the CHO raised the issue at the conclusion of the  
3 administrative hearing and requested briefing on the applicable burden of proof. Later in the same  
4 colloquy, the CHO resolved her uncertainty and stated twice that the burden was the same as for an  
5 appeal of a cease and desist order – that the burden was on OIC.<sup>5</sup> She withdrew her request for  
6 briefing on the issue. Nevertheless, NADC/NADS filed a brief, arguing that OIC had the burden of  
7 proof by a preponderance. OIC did not respond; and NADC/NADS argues in its brief to this court  
8 that OIC conceded the point.<sup>6</sup> It cannot be disputed that OIC had the burden of proof; further, it is  
9 well established that proof by a preponderance is the correct standard. It was not reversible error to  
10 fail to include those established, uncontested conclusions.

11 4. Procedural error. Appellants point to an apparent violation by the CHO of RCW  
12 34.05.461(8)(a), in failing to file her final order within the time permitted even after accounting for  
13 good cause extensions of the deadline. Appellants contend the entire final order should be vacated  
14 for this reason, apparently relying upon RCW 34.05.570(3)(b) or (c). But appellants do not offer  
15 any legal justification or precedent for the remedy they seek here. Nothing in §.461(8)(a) or  
16 §.570(3)(b) or (c) suggests that vacation of the entire proceeding is a proper remedy. This  
17 assignment of error, relating to FF 1 and CLs 1-7, has no merit.

18 Credibility findings. Among the findings challenged are numbers 24 and 31, relating to the  
19 relative lack of credibility the CHO assigned to the testimony of appellant Bailey and witness  
20 Rottman. For Bailey, the CHO found that, "Mr. Bailey was not credible for the following [eight]  
21 reasons: . . ." (FF 24) For Rottman, she found that, "Mr. Rottman did not present himself as a  
22 particularly credible witness." (FF 31)

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27 <sup>5</sup> *Verbatim Report of Proceedings*, 8/31/2007, 894-5, 901.

28 <sup>6</sup> NADC/NADS *Opening Brief*, p 7, n 2.

1           The CHO's findings about witness credibility are reviewed under the arbitrary and  
2 capricious standard,<sup>7</sup> which is consistently described as willful and unreasoning action, without  
3 consideration and in disregard of facts or circumstances.

4           As noted, the CHO found Mr. Bailey to be not credible for eight different reasons, including  
5 the seventh which focused on his practices, and tribulations, concerning income tax reporting for  
6 NADC and NADS. In arguing that consideration of this seventh factor was arbitrary and capricious,  
7 appellants seem to argue that it was considered in disregard of "circumstances", but they do not  
8 challenge the factual accuracy in the CHO's finding. Nevertheless, even if the seventh (and related  
9 eighth) reason is discounted, the first six reasons identified in the finding establish conclusively that  
10 the finding is not arbitrary and capricious.<sup>8</sup> This assignment of error has no merit.

11           In FF 31, the CHO found that "Mr. Rottman did not present himself as a particularly  
12 credible witness." This finding does not reject Mr. Rottman's testimony in its entirety. It does not  
13 distinguish the specific parts rejected from those that were considered; but the CHO is not required  
14 to make such a finding. Appellants argue that the finding is arbitrary and capricious because the  
15 CHO did not identify "a single instance in which Mr. Rottman's testimony has been contradicted by  
16 any admissible evidence."<sup>9</sup> This argument states the standard for review much too narrowly. The  
17 CHO found:

18           While Mr. Rottman is a highly educated and experienced individual in business and  
19 specifically insurance, by his responses to questioning and comments throughout his  
20 testimony he exhibited an unwillingness to provide thorough and complete information as  
21 requested even though from his position, experience and education the information sought  
22 was within his realm of knowledge.

23           These factors, among many others, are appropriate factors for a trier of fact to consider in  
24 determining the credibility of a witness.<sup>10</sup> There is ample evidence in the testimony of Mr. Rottman  
25 to support this finding. This assignment of error has no merit.

26 <sup>7</sup> RCW 34.05.570(3)(i).

27 <sup>8</sup> As regards the seventh reason, in a trial where the Rules of Evidence apply, ER 609 would permit admission of the  
28 four convictions identified in the finding for the express purpose of weighing the credibility of Mr. Bailey.

<sup>9</sup> NADC/NADS Opening Brief, p 24.

<sup>10</sup> Others are listed in WPI 1.02.

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I next address assignments of error related to Conclusion of Law 2. There the CHO opines:  
Based upon the above Findings of Fact, the NADC Program created and operated by Respondents, and which involves the offer of the NADC Guarantee to consumers through Dealer Members, is a contractual arrangement whereby Respondents undertake to indemnify another or pay a specified amount upon determinable contingencies. It, therefore, constitutes an offer of "insurance" as defined in RCW 48.01.040.

If the NADC Program is insurance, either CL 3 or 4 concludes that appellants have violated the insurance code.

Conclusion of Law 2 correctly defines insurance and is supported FF 19, which finds, in relevant part:

Under this NADC Program, therefore, [Appellants] promise to pay Dealer Members specified amounts in the event of specified contingencies. Therefore, [Appellants] are conducting the business of insurance.

Appellants challenge this ultimate finding on substantial evidence grounds. The ultimate finding is also supported by many other findings, some of which are also challenged.

In Washington law, insurance is defined as "a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies." RCW 48.01.040. The case here involves the indemnification portion of the definition: "a contract whereby one undertakes to indemnify another . . . upon determinable contingencies." More generally, the essence of indemnification insurance is risk shifting, and that risk shifting is the essence of this case. The phrase that encapsulates this case is that all indemnification insurance is risk shifting, but not all risk shifting is indemnification insurance.<sup>11</sup> This case involves risk shifting; and thus the task for the court on this appeal is to consider whether to CHO's findings material to the risk shifting relationships present here are supported by substantial evidence and whether her conclusion that the risk shifting relationships involving the appellants are insurance is an error of law.

The key to deciding this appeal is to first identify the relationships among the entities described in the evidence and then determine which of those involve risk shifting that is insurance.

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<sup>11</sup> Hereafter the phrase "indemnification insurance" is shortened to insurance.

1 There are three primary relationships material to this appeal and several secondary relations that are  
2 important but not material.

3 The secondary relationships are, first, the relationships that exist among the appellants –  
4 NADC, NADS, and Mr. Bailey. The status of each and the relationship of each to the others are  
5 explained in FFs 3, 4, and 5; and those relationships are unchallenged verities for this appeal. The  
6 central appellant here is NADC. NADS was created to act as agent for NADC; Mr. Bailey created  
7 both entities and his acts material to this case were done for or on behalf of one or both of the  
8 entities. Under Washington law acts done as agent for another do not excuse the actor's  
9 responsibility for failing to comply with the law. The other secondary relationship is between  
10 Western Insurance Co. and Access Insurance Services, Inc.; it is a managing general agency  
11 relationship whereby Access has acted for Western in servicing the Vehicle Service Contract  
12 Reimbursement Guarantee Agreement.

13 There are three primary relationships material to this appeal: (1) the customer – dealer<sup>12</sup>  
14 relationship; (2) the dealer – NADC relationship; and (3) the Western – Named Principal  
15 relationship. Risk shifting occurs within each of these primary relationships.

16 1. The customer – dealer relationship. In this relationship, substantial evidence establishes  
17 that the dealer seeks to sell a Vehicle Service Contract to the customer, but there is a substantial  
18 disincentive for the customer: the risk that the VSC will provide no benefit to the customer to offset  
19 the customer's cost of purchasing the VSC. To induce purchase of the VSC, the dealer offers to  
20 shift this customer's risk from customer to dealer. In this risk shifting, the dealer assumes the risk  
21 that it will have to repay the purchase price to the customer if the VSC is not used; a determinable  
22 contingency, but one that can be known only at the end of the VSC. The appellants continually ask  
23 the court to focus on this risk shifting relationship between customer and dealer, arguing that if this  
24 guarantee of repayment is insurance, it is insurance offered by the dealer, not the appellants. In  
25 deciding this appeal, I have not addressed this risk shifting relationship, except to acknowledge that

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27 <sup>12</sup> The CHO designated the dealers important to this case as Dealer Members; I have shortened the designation, but  
28 intend that it include only dealers who are "members" of NADC.

1 it exists. It is the risk shifting in the second primary relationship that determines if the insurance  
2 code has been violated by appellants.

3 2. The dealer – NADC relationship. The risk shifting in the dealer – NADC relationship  
4 springs from the desire of the dealer to increase revenue by selling more VSCs. The dealer can  
5 accomplish this by offering the money back guarantee to the customer, i.e., by shifting the  
6 customer's risk back to the dealer. However, there is a two-fold disincentive for the dealer: first is  
7 the cost of administering the guarantee; second is the risk that the dealer will have to pay back the  
8 purchase price of the VSC, a very contingent and uncertain liability a long time in the future.  
9 NADC shifts that risk. By joining as a member, the dealer can pay the costs required at the time of  
10 providing the guarantee to the customer and can thereby eliminate the dealer's responsibility to pay  
11 any additional amount if in the future a customer qualifies for repayment of the VSC purchase price.  
12 In this relationship the determinable contingent liability for repayment of the VSC purchase price is  
13 assumed by NADC and eliminated for the dealer.

14 The CHO's Findings of Fact 8 – 14, 18, and 19 address this relationship and are the  
15 foundation for her conclusion that the NADC Guarantee Program is insurance offered by appellants  
16 to a dealer. Unchallenged in this group are FFs 8 – 10, 12, and 13; they are verities.<sup>13</sup>

17 Finding of Fact 11 is challenged by NADC/NADS, who contend:

18 "The Chief Hearings Officer finds (or at least implies in a manner that makes it appear to be  
19 a "finding") that an additional cost is added to the price of the service contract to pay for the  
"dealer reserves."

20 There is no such finding; instead the finding focuses on the information or advice given by NADC  
21 to dealers. This information is material to understanding the legal relationships at issue here; and it  
22 is supported by substantial evidence, the exhibits of NADC's promotional materials. Appellants  
23 argue this material is taken out of context, but that argument goes to the weight of the evidence.  
24 Weight to be given evidence is not part of the substantial evidence test – weight is solely the  
25 province of the CHO, except under the arbitrary and capricious test, which is neither asserted nor  
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27 <sup>13</sup> FF 12, § 1, seems to contain an error. From the record, I find that the \$200 set up fee is a one-time charge to the  
28 dealer, not a charge on each guarantee. If this portion of the finding is error, it is not material.

1 shown here. Appellants further contend that dealer King's testimony refutes this finding. I  
2 conclude otherwise; although King stated he didn't pass on the cost of the NADC guarantee, he  
3 readily acknowledged that he had discretion to do so. That testimony is consistent with the finding.

4 Appellants challenge Finding of Fact 14, which for purposes of review I have divided into  
5 three findings:

- 6 • A review of the evidence presented, including the Membership Agreement drafted by  
7 Respondents [Appellants here], reflect that Respondents commit that the fees remitted to  
8 NADC for each NADC Program guarantee will be used to pay . . . valid claims for the  
9 NADC Program[.] Further, Respondents commit that [NADS] will provide Dealer with an  
10 annual report of all NADC Program guarantees in force and a balance of funds held to pay  
11 NADC Program guarantee claims.
- 12 • Further, in Respondents' brief before the U.S. Court of Appeals in 2005 U.S. 3<sup>rd</sup> Cir. Briefs  
13 1453, on the occasion of their suit for unlawful cancellation by Interstate Indemnity  
14 Company, their third party liability carrier prior to Western, Respondents represent that for  
15 each extended service contract sold with a money back guarantee, a set amount of the sale  
16 price was "reserved" by NADC to pay claims (based on actuarial expectations of how many  
17 claims for refunds will be made)[.] and in its decision the Court described the process as  
18 follows: [if] the consumer does not file a claim under the extended service contract, the  
19 consumer receives a refund from the dealer. The dealer then receives a refund from NADC.  
20 NADC maintained a reserve of funds for this purpose, and also bought insurance to cover  
21 any shortfalls.
- 22 • [W]hen a valid claim is presented to the Dealer Member from the consumer, the Dealer  
23 Member sends the claim to Respondents: It is Respondents who determine whether the  
24 claim is valid based upon the NADC criteria. Should Respondents determine the claim is  
25 valid, it is Respondents who write a check from their own funds for the entire amount of the  
26 NADC Guarantee to the individual Dealer Member or the Dealer Member and the consumer.  
27 The Dealer Member is actually prohibited from paying the claim himself.

28 The third bullet of the finding, particularly that portion referring to appellants' payment from their  
own funds, is challenged by appellants as being the "single most erroneous finding in the order."

Consideration of the basis for this challenge does not lead to that conclusion.

Appellants offer two arguments:

1. Neither NADC nor NADS hold, have access to, or control any of the dealers' reserve funds.
2. The member dealer is the party offering the money-back guarantee and who is contractually responsible to the customer.

1 There is little, if any, evidence found credible by the CHO that establishes the existence of any  
2 reserve fund held in any sort of trust relationship for the dealers. Appellants contend there is a fund  
3 held by Western that is paid to NADS before funds are dispersed from the Western insurance  
4 policy. To the extent that this contention accurately describes the transaction between Western and  
5 NADS, there is substantial evidence that money received from Western goes into the NADS  
6 account as a bulk claim payment and that individual claims are then dispersed by NADS to  
7 individual dealers to pay guarantees due customers.<sup>14</sup> As found by the CHO (FF 15-17), Western's  
8 responsibilities, both by contract and practice, ran to appellants, not the dealers.

9 The second of appellants' arguments on this assignment of error ask the court to focus on the  
10 rights and responsibilities of the customer – dealer relationship. That is not the correct focus; the  
11 issue here is the indemnity rights and responsibilities of the dealer – NADC relationship. Those are  
12 the rights and responsibilities that the CHO declared to be insurance in violation of the insurance  
13 code.

14 Appellants describe FF 18 and 19 as essentially compiling earlier findings. I agree, although  
15 FF 18 adds more succinct findings and FF is the ultimate finding that leads to CL 2. Because  
16 appellants have assigned error to both these findings, I have reviewed all the findings relating to  
17 these compilations for substantial evidence, even those not specifically challenged and so  
18 considered verities. I conclude that all are supported by substantial evidence.

19 Finding of Fact 18 is more properly considered eight separate findings, which I have  
20 separated and reviewed individually for substantial evidence. All pass muster. The seven parts are:

- 21 • While originally the Dealer Member has entered into the NADC Guarantee with the  
22 consumer, the Dealer Member at the same time pays substantial fees of various kinds, as  
23 found above – at times called fees and at times called premiums – to Respondents  
24 [Appellants here], in order that the Dealer Member not ever actually have to pay any funds  
25 of his own in reimbursing the consumer.
- 26 • [A]t the time the consumer submits a claim to the Dealer Member, the Dealer Member  
27 simply passes it along to NADC (or to NADS as “administrator” for NADC). It is  
28 NADC/NADS which makes the determination whether the claim is valid based on criteria

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<sup>14</sup> There is also evidence that appellants subsequently changed this procedure.

1 NADC has set forth in 1) its NADC Membership Agreement with Dealer Members; and, 2)  
2 the NADC Guarantee form signed by the Dealer Member and the consumer but drafted by  
and required by NADC.

- 3 • If NADC/NADS determines the claim is valid, NADC/NADS pays the amount of the claim,  
4 out of NADC's/NADS' own checking account, to the Dealer Member. Then, and only then,  
5 can the Dealer Member write its own check, or sign over NADC's/NADS' check to the  
6 consumer.
- 7 • The money for the claim clearly comes from NADC/NADS, not from the Dealer Member,  
8 which is consistent with the Respondents' marketing of their NADC Program: that NADC  
9 Program money back guarantees result in absolutely no liability to dealers and no cost to the  
10 dealership. The sample checks in evidence, which represent Respondents' payments of valid  
11 claims under the NADC Guarantees, are drawn on Respondents' checking accounts and are  
12 each made payable to both the individual Dealer Member and the consumer.
- 13 • Said claim amounts may be paid from 1) the NADC Program Fee paid by the Dealer  
14 Member to NADC specifically in part for this purpose; 2) and/or from the "policy reserve"  
15 fee paid by the Dealer Member to NADC specifically for this purpose; 3) and/or from other  
16 continuing fees paid to NADS for its "administrative services", all sources of funds as  
17 identified in Findings above.
- 18 • [I]t is Western and not Respondents who maintain the reserve funds; nowhere in the Western  
19 insurance policy or its Endorsement A, is there any agreement that Western will receive and  
20 hold "policy reserve" or other funds transmitted from Dealer Members to Respondents and  
21 Respondents to Western, or that Western is to receive and hold any funds of any kind on  
22 behalf of Respondents or any other entity affiliated with this entire arrangement.
- 23 • [U]nder the terms of the Western insurance policy, in the event of a valid claim being  
submitted by a consumer under the NADC Guarantee, 100% of the amount of the claim  
(without deductible) is also paid by Western to NADC as the Named Principal under the  
policy (and/or NADS as "administrator" for NADC).
- 24 • No evidence has been presented to show that Respondents have made any payments to any  
Dealer Members for any payments of valid NADC Guarantee claims the Dealer Members  
made themselves, as they have paid none themselves. Indeed, all Dealer Members' fees are  
paid to Respondents as required under the NADC Membership Agreement, and although  
some of these fees may go to pay Western premiums, there is no evidence that any entity  
other than NADC (and/or [NADS] as the "administrator" for NADC) ever receives any  
portion of the Western reimbursements.

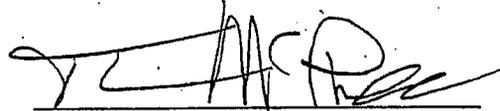
25 3. The Western – Named Principal relationship. The third primary relationship material to  
26 this appeal is the Western – Named Principal relationship. The CHO entered Findings of Fact 15 –  
27 17, 20, and 21 that are relevant to this relationship. I conclude that those findings are not material to  
28 the CHO's decision; although they may be accurate, they are not necessary to support her

1 conclusion that appellants violated RCW 48.15.020(1) and that a cease and desist order should  
2 enter.

3 The risk shifting aspect of this relationship is the shift of risk, from appellants to Western,  
4 that appellants may not have sufficient funds to indemnify dealers for any guarantees they must pay  
5 customers. Thus, it is a third layer of insurance in this process. I have identified the relationship as  
6 the Western – Named Principal relationship because the Western policy insures the “Named  
7 Principal” and identifies such as “North American Dealer Co-op (NADC) and its Members and  
8 Subsidiaries”. The designation in this form thus leaves open the possibility that the policy creates  
9 rights and responsibilities running directly between Western and a dealer. Bulleted parts 6, 7, and 8  
10 of FF 18 address this issue. The evidence here convinced the CHO that rights in the policy rest with  
11 the appellants, not the dealers. The findings are supported by substantial evidence and will not be  
12 reversed.

13 The *Final Findings of Fact, Conclusions of Law and Order on Hearing* is affirmed.

14 Date: September 1, 2010



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16 Thomas McPhee, Judge

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