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2011 DEC -8 A 10:12

Hearing Officer
Patricia D. Petersen
Chief Hearing Officer

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of

RELIAMAX SURETY COMPANY

Unauthorized Entity.

OAH Docket No. 2011-INS-0002
OIC No. 11-0092

RELIAMAX SURETY COMPANY'S
REPLY IN SUPPORT OF MOTION TO
WITHDRAW REQUEST FOR
HEARING

I. INTRODUCTION

This administrative tribunal should reject the Commissioner's request that the voluntary dismissal of this proceeding be with prejudice. No authority requires this, there is no basis for it, and such a dismissal could wrongly and unfairly be asserted as a basis to preclude ReliaMax from exercising its statutory and constitutional rights in a future proceeding.

II. AUTHORITY AND ARGUMENT

The Commissioner does not dispute ReliaMax's absolute right to dismissal, but requests that the dismissal be with prejudice. The Commissioner cites no authority providing for a dismissal with prejudice in these circumstances, and there is no such authority.

ReliaMax has an absolute right under the Insurance Code and the Administrative Procedure Act to request a hearing, and thus to withdraw its request for hearing. *See* RCW 48.04.010(1)(b); RCW 34.05.413(2). In civil actions, by analogy, CR 41(a) provides for

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1 voluntary dismissal upon the plaintiff's request and without notice to the opposing party.
2 *Greenlaw v. Renn*, 64 Wn. App. 499, 504, 824 P.2d 163 (1992). The dismissal is presumed
3 to be without prejudice unless otherwise stated in the order of dismissal. *In re Detention of*
4 *G.V.*, 124 Wn.2d 288, 294 n.2, 877 P.2d 680 (1994). "[A] voluntary nonsuit does not result
5 in an adjudication on the merits and no judgment is entered." *Cork Insulation Sales Co., Inc.*
6 *v. Torgeson*, 54 Wn. App. 702, 706, 775 P.2d 970 (1989).

7 The Commissioner contends the dismissal here should be with prejudice because the
8 90-day deadline to request a hearing on the Cease and Desist Order has passed. But if the
9 Commissioner were to take future action to enforce the Cease and Desist Order, ReliaMax
10 could timely request a hearing from that action under RCW 48.04.010(1)(b) and would be
11 entitled to raise all applicable defenses, including invalidity of the underlying Cease and
12 Desist Order. The passing of the 90-day deadline to request a hearing on the Cease and
13 Desist Order itself is not dispositive.

14 The Commissioner apparently would take the position in any subsequent
15 administrative proceeding that a dismissal with prejudice would bar, under res judicata, any
16 challenge to the validity of the Cease and Desist Order or the Commissioner's authority to
17 enter it.¹ Although ReliaMax does not concede that a dismissal with prejudice would be a
18 bar,² this illustrates why the dismissal should not be with prejudice, as accepting the

19
20 ¹ ReliaMax presumes the Commissioner will *not* take the position that a dismissal of this proceeding
21 with prejudice would bar ReliaMax's pending federal district court lawsuit. In that case, ReliaMax
22 seeks relief under federal law, including 42 U.S.C. § 1983, which *undisputedly* is not available in a
23 state administrative proceeding. See *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 866, 93
24 P.3d 108 (2004) (holding that res judicata did not bar claims arising from different causes of action);
25 *Dunning v. Pacerelli*, 63 Wn. App. 232, 243 n.4, 818 P.2d 34 (1991) (holding that order dismissing
26 administrative proceeding did not bar, under res judicata, subsequent civil action under § 1983
because the subject matter was not identical).

² "The threshold requirement of res judicata is a final judgment on the merits in the prior suit." *Hisle*,
151 Wn.2d at 866. Even assuming an administrative order of dismissal could be deemed a final
judgment on the merits, res judicata requires identity of subject matter between the two actions, which
would not exist in a future proceeding on enforcement of the Cease and Desist Order. See *id.*;
Dunning, 63 Wn. App. at 243 n.4.

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1 Commissioner's position would result in a deprivation of ReliaMax's rights without due
2 process, contrary to the Fourteenth Amendment to the United States Constitution. *See*
3 *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 217, 143 P.3d 571 (2006) ("When a state seeks
4 to deprive a person of a protected interest, procedural due process requires that an individual
5 receive notice of the deprivation and an opportunity to be heard to guard against erroneous
6 deprivation."), citing *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S. Ct. 893, 47 L. Ed. 2d 18
7 (1976). Res judicata may not be applied to effect a denial of due process. *See Hisle v. Todd*
8 *Pac. Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004) (recognizing res judicata is
9 not intended to "deny the litigant his or her day in court").

10 Should ReliaMax request a hearing in the future, the Commissioner may assert and
11 the parties may then litigate affirmative defenses such as timeliness or waiver. There is no
12 reason for this tribunal to consider or adjudicate those defenses now. "[T]he effect of a
13 voluntary dismissal 'is to render the proceedings a nullity and leave the parties as if the action
14 had never been brought.'" *Beckman v. Wilcox*, 96 Wn. App. 355, 359, 979 P.2d 890 (1999),
15 quoting *Bonneville Assocs., Ltd. P-ship v. Barram*, 165 F.3d 1360, 1364 (Fed. Cir. 1999).
16 There is no reason or basis to dismiss with prejudice where ReliaMax can timely request a
17 hearing in the future, and the Commissioner can assert his defenses then.

18 III. CONCLUSION

19 ReliaMax respectfully requests that this tribunal enter an initial order terminating
20 these proceedings, *without prejudice*, pursuant to RCW 34.05.461(1)(c).

21 DATED this 7th day of December, 2011.

22 CARNEY BADLEY SPELLMAN, P.S.

23
24 By 

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26 • Jason W. Anderson, WSBA No. 30512
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CERTIFICATE OF SERVICE

I, Christine Williams, under oath hereby declare as follows: I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, and not a party to nor interested in this action. On December 7, 2011, I caused to be delivered in the manner indicated a copy of the foregoing document on the following parties at the last known address as stated:

Administrative Law Judge Terry A. Schuh
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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 7th day of December, 2011.



Christine Williams, Legal Assistant