

FILED

2014 NOV 18 A 11: 35

BEFORE THE STATE OF WASHINGTON  
OFFICE OF INSURANCE COMMISSIONER

In the Matter of	)	<b>Docket No. 13-0084</b>
	)	
<b>EDMUND C. SCARBOROUGH,</b>	)	<b>ORDER IMPOSING FINES</b>
	)	
	)	
Respondent.	)	
_____	)	

**TO:** Edmund C. Scarborough  
6850 CR 540 East  
Haines City, FL 33845

Ross Mabery, Esq.  
Perry Gruman, P.A.  
3400 W. Kennedy Blvd.  
Tampa, FL 33609

**COPY TO:** Mike Kreidler, Insurance Commissioner  
James T. Odiorne, J.D., CPA, Chief Deputy Insurance Commissioner  
John F. Hamje, Deputy Commissioner, Consumer Protection Division  
Charles Brown, Sr. Insurance Enforcement Specialist, Legal Affairs Division  
AnnaLisa Gellermann, Deputy Commissioner, Legal Affairs Division  
Office of the Insurance Commissioner  
PO Box 40255  
Olympia, WA 98504-0255

On November 13, 2014, this matter came before me for hearing pursuant to the Revised Notice of Hearing, filed September 26, 2014. The Office of the Insurance Commissioner ("OIC") appeared by Charles Brown, Attorney at Law, Insurance Enforcement Specialist, Legal Affairs Division. Mr. Scarborough was represented by Ross Mabery, Attorney at Law, of Tampa, Florida (also Mr. Scarborough's personal counsel in proceedings before the bankruptcy court in Florida). The purpose of the hearing was to determine the penalties to be imposed upon

ORDER IMPOSING FINES

13-0084

Page - 2

Mr. Scarborough based on violations of the Insurance Code determined by Summary Judgment Order filed April 16, 2014. I have considered the Summary Judgment Order, the exhibits admitted into evidence, the testimony of Mr. Scarborough, and the oral argument of counsel.

**FINDINGS OF FACT**

1. On March 8, 2013, the Office of the Washington State Insurance Commissioner ("OIC") issued a Notice of Request for Hearing for Imposition of Fines ("Notice") to Mr. Scarborough and Walter W. Wolf. The Notice proposed actions against Mr. Scarborough and Mr. Wolf based on their alleged violations of the Insurance Code, including that 1) by being listed and signing as individual sureties on a performance bond issued relative to a City of Clarkston, Washington construction project, they acted as insurers without having a proper Certificate of Authority, in violation of RCW 48.05.030(1); and 2) by soliciting and transacting insurance business in Washington on behalf of an unauthorized insurer without being licensed as surplus lines brokers, they violated RCW 48.15.020 and RCW 48.15.070.

2. On April 16, 2014, then Chief Presiding Officer Patricia D. Petersen entered an Order Denying Scarborough's Motion for Summary Judgment and Granting OIC's Cross-Motion for Summary Judgment ("Summary Judgment Order"), determining that Mr. Scarborough had engaged in the unauthorized business of insurance by selling and issuing individual surety bonds without having a Certificate of Authority or being licensed as a surplus lines broker and therefore was subject to the imposition of fines. The Summary Judgment Order ruled that the OIC could properly seek a separate fine for each violation, but did not decide the amount of such fines.

3. On September 9, 2014, the OIC filed a Withdrawal of Hearing Request as to Walter Wolf, and I entered an Order dismissing the action against Mr. Wolf later that day.

4. In determining the appropriate fines, I have considered the record herein, in particular the November 13, 2014, OIC Hearing Exhibits: Ex. 1, 1-21-14 Scarborough Declaration in support of the Motion for Summary Judgment; Ex. 2, 11-18-13 Amended Declaration of Scarborough; Ex. 3, OIC List of Bonds Identified in Alan Singer's Declaration re the Motion for Summary Judgment, Exhibit E; Ex. 4, 2-03-14 Singer declaration, exhibit E; documents related to insurance regulatory matters in other states attached to Mr. Singer's February 3, 2014, Declaration.

5. Mr. Scarborough acknowledged in his Declarations that during the years 2009-12, he personally, or through representatives, issued bonds as the "Individual Surety" related to 22 Washington State construction projects, without a Washington State certificate of authority or a surplus lines broker's license. According to Mr. Scarborough, 12 of the projects involved work procured by the federal government. I find, based on Ex. 3 and Ex. 4, that Mr. Scarborough issued 24 bonds for Washington State construction projects, in the total amount of \$27,339,915.

6. Mr. Scarborough testified on November 13, 2014: When he wrote the surety bonds at issue he intended to comply with Washington State law, and any violation was unintentional.

ORDER IMPOSING FINES

13-0084

Page - 3

The bonds were adequately secured -- in particular, by mine tailings at a West Virginia coal mine he owned or controlled -- and no person suffered a loss as the result of any default. All but one of the bonds was written on federal projects, and on advice of counsel, he believed licensing was not required on such projects. Since, during the 2009-2012 period at issue, well under 20% of the bonds written by IBCS Fidelity were written on Washington State projects, and his salary during those years totaled approximately \$800,000, his compensation attributable to Washington State activities was limited. The net revenues to IBCS totaled less than 1% of overall premiums. Although a fine would not be dischargeable in bankruptcy, Washington State would have the lowest priority among unsecured bankruptcy creditors. He would like to pay an imposed fine, but his ability to do so after his discharge from bankruptcy would be quite limited.

7. Judge Petersen determined that Washington State licensing was required for all bonds at issue, whether on state or federal projects. Mr. Scarborough's Declarations establish that, at minimum, ten of the Washington State projects he bonded were not federal, and mitigation based on Mr. Scarborough's allegation that he mistakenly believed in good-faith that licensing was not a prerequisite to his bonding of federal projects, even assuming such mitigation were otherwise persuasive, does not apply to non-federal projects.

8. A maximum \$25,000 penalty may be imposed for Mr. Scarborough's violation of each of the three statutory provisions at issue, as to each bond at issue. Therefore, the maximum available penalty is \$1.8 million (24 bonds x 3 violations per bond x \$25,000 maximum penalty per violation = \$1.8 million). Mr. Scarborough did not challenge this calculation or suggest another calculation. The OIC seeks fines totaling \$600,000.

9. Total premiums on the bonds at issue cannot be determined with precision. However, such premiums may reasonably be estimated. Ex. 4, Page 94 of 368, sets forth the penal sum of \$1,197,209 and the rate of \$35 per \$1000 (a total premium of \$41,902) on the performance bond for the principal CMEC-Sabelhaus West J/V, LLC, Silverdale, WA, written by Mr. Scarborough, as surety. Assuming premiums averaged \$35 per \$1000, total premiums on the bonds at issue were \$956,897 (\$35 per \$1000, or 3.5%, x total bonds of \$27,339,915 = \$956,897). At minimum, premiums averaged half of the \$35 per \$1000 rate applicable to the CMEC project, or \$17.50 per \$1000, and total premiums were therefore not less than \$478,448 (\$17.50 per \$1000, or 1.75%, x \$27,339,915 = \$478,448).

10. Mr. Scarborough has been subject to orders of the insurance commissioners or regulators of other states related to his transaction of the business of surety insurance without the required licensing or authority. On December 20, 2013, Idaho imposed an administrative penalty on Mr. Scarborough based on his admission that he acted as a surety insurer without the required certificate of authority by issuing payment and performance bonds in connection with an Idaho Department of Transportation construction project. On September 21, 2011, Iowa imposed an agreed payment on Mr. Scarborough based on allegations related to his improper issuance of surety bonds. On February 25, 2011, Virginia imposed an agreed monetary penalty on Mr. Scarborough based on the allegation that he transacted the business of surety insurance without

ORDER IMPOSING FINES

13-0084

Page - 4

the required license. At minimum, Virginia's agreed penalty appears to have preceded Mr. Scarborough's writing one or more of the bonds at issue herein.

11. I am not persuaded that Mr. Scarborough's violations of law, and particularly those violations not related to federal projects, were unintentional. Even assuming that such violations were unintentional, Mr. Scarborough himself, or entities controlled by him and his wife, have reaped substantial sums from his unlawful activities, including salary and other revenue. I determine the total amount of the fines based on the number and seriousness of the violations, the amount of premiums paid for the bonds at issue, and the importance of deterring similar future violations by Mr. Scarborough and others.

12. Maximum permissible fines total \$1.8 million (24 bonds x 3 violations per bond x \$25,000 maximum penalty per violation = \$1.8 million). I believe fines totaling \$200,000 are appropriate. I would impose fines totaling \$200,000 even assuming that 22, rather than 24, bonds were at issue and that fines were limited to a total of \$25,000 per bond, and regardless of the risk of nonpayment.

**CONCLUSIONS OF LAW**

1. This adjudicative proceeding was properly convened, and all substantive and procedural requirements under the laws of Washington have been satisfied. This Order is entered pursuant to Title 48 RCW, specifically RCW 48.04; Title 34 RCW; and regulations pursuant thereto.
2. Fines totaling \$200,000 are appropriate.

**ORDER**

Mr. Scarborough shall pay fines to the Office of the Insurance Commissioner totaling \$200,000. Said amount shall be paid to the Office of the Insurance Commissioner, either 1) by mail addressed to P.O. Box 40255, Olympia, WA 98504-0255, or 2) by delivery to 5000 Capitol Boulevard, Tumwater, WA 98501. If payment in full is not received by January 1, 2015, the Commissioner may seek enforcement of this Order from the Thurston County Superior Court pursuant to RCW 48.02.080.

Dated: November 17, 2014



---

JUDGE GEORGE FINKLE (Ret.)  
Presiding Officer

ORDER IMPOSING FINES

13-0084

Page - 5

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.

Declaration of Mailing

I declare under penalty of perjury under the laws of the State of Washington that on the date listed below, I mailed or caused delivery through normal office mailing custom, a true copy of this document to the following people at their addresses listed above: Edmund C. Scarborough, Ross Mabery, Esq., Mike Kreidler, James T. Odiorne, J.D., CPA, John F. Hamje, Esq., Charles Brown, Esq., and AnnaLisa Gellermann, Esq.,

DATED this 18<sup>th</sup> day of November, 2014.

  
KELLY A. CAIRNS