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STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In re the Matter of

EDMUND C. SCARBOROUGH and
WALTER W. WOLF,

Respondents.

No. 13-0084

RESPONDENT EDMUND C.
SCARBOROUGH'S MOTION FOR
SUMMARY JUDGMENT

RESPONDENT EDMUND C. SCARBOROUGH'S
MOTION FOR SUMMARY JUDGMENT - i

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I. INTRODUCTION

Respondent Edmund C. Scarborough moves for summary judgment to vacate a cease and desist order issued by the Washington Office of Insurance Commissioner (OIC). Mr. Scarborough did not transact "surety insurance" governed by title 48 RCW but instead issued bonds as an individual surety, governed by chapter 19.72 RCW. A certificate of authority or surplus lines broker's license is not required to issue bonds as an individual surety. In addition, the bonds Mr. Scarborough issued to contractors on federal projects are subject only to federal and not state law. Finally, the commissioner is not authorized to impose a fine, much less cumulative fines, for failing to obtain a certificate of authority if required.

II. STATEMENT OF FACTS

A. Undisputed Material Facts.¹

In 2009-2012, Respondent Scarborough issued surety bonds relating to construction projects located in the state of Washington. Mr. Scarborough or his attorney-in-fact executed the bonds as "Individual Surety."

A surety bond is an agreement under which one party (the surety) guarantees to another party (the obligee) the performance of certain contractual obligations that a third party (the principal) has assumed to the obligee. In the construction context, the obligee is typically the general contractor or project owner, and the principal is a general contractor or a subcontractor to the general contractor. Accordingly, the surety guarantees performance of certain obligations that the general contractor has assumed in its contract with the owner or that the subcontractor has assumed in its subcontract with the general contractor. These obligations may include the obligation (1) to perform the contract, (2) to pay for labor, materials, and equipment, or (3) both.

¹ The facts in this section are based on the Declaration of Edmund C. Scarborough dated January 20, 2014.

1 Mr. Scarborough issued bonds guaranteeing contractors' or subcontractors'
2 performance or payment, or sometimes both. The bonds were issued using standard forms
3 provided by the federal government or the American Institute of Architects (AIA), depending
4 on the type of project or the requirements of the project owner. Mr. Scarborough has
5 produced to the commissioner his bond documents issued on 22 projects located in the state
6 of Washington and has testified that he issued no other bonds for projects located in the state
7 of Washington.

8 Mr. Scarborough's bonds were typically issued through an intermediary such as a
9 broker. One such broker was Respondent Walter W. Wolf. A few of the bonds issued for
10 projects located in the state of Washington were co-signed by Mr. Wolf as a second
11 individual surety. Both the bond obligee and principal have the opportunity to review and
12 approve the terms of the bonds before acceptance and execution.

13 A surety has defined obligations in the unlikely event of default by the principal,
14 which may include arranging for the principal to perform or pay as required under the
15 contract or subcontract, undertaking to perform the principal's obligations, or arranging for
16 performance by another contractor or subcontractor. Mr. Scarborough's potential financial
17 responsibility as an individual surety is limited to the assets pledged as collateral for the bond.

18 A substantial number of Mr. Scarborough's bonds for projects located in the state of
19 Washington (more than half of the 22 projects) related to work procured by the federal
20 government for projects located on United States property and required by the government
21 under the Miller Act "for the protection of the United States." 40 U.S.C. § 270a(a). Miller
22 Act bonds must be approved by the federal contracting officer under the Federal Acquisition
23 Regulation (FAR), 28 C.F.R. part 28. The FAR includes standards for acceptability of
24 individual sureties for Miller Act bonds. See 28 C.F.R. § 28.203. The FAR requires the
25 contracting officer to determine independently that the individual surety's pledged assets are
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1 sufficient to cover the bond obligation. 28 C.F.R. § 28.203(a). Miller Act bonds, including
2 those issued by Mr. Scarborough, typically state that the principal and surety are “firmly
3 bound to the United States of America.”

4 **B. Procedural Facts.**

5 In March 2013, the commissioner issued a cease and desist order. The order
6 characterized the issuance of individual surety bonds as an unauthorized transaction of
7 insurance and directed Mr. Scarborough and Mr. Wolf to cease and desist from such
8 transactions. The commissioner alleges that Mr. Scarborough and Mr. Wolf acted as insurers
9 and thus were required under the insurance code to obtain a certificate of authority under
10 RCW 48.05.030. In addition, the commissioner alleges that Mr. Scarborough and Mr. Wolf
11 transacted insurance business in Washington on behalf of an unauthorized insurer without
12 being licensed as surplus lines brokers, in violation of RCW 48.15.020 and RCW 48.15.070.

13 Simultaneous with the cease and desist order, the commissioner issued a notice of
14 request for hearing for imposition of fines. In response to the order and notice, Mr.
15 Scarborough denied that he violated the insurance code and that any fine should be imposed,
16 and requested a hearing on the cease and desist order.

17 **III. STATEMENT OF ISSUES**

18 A. Is a person who issues bonds as an individual surety under chapter 19.72
19 RCW, required to obtain a certificate of authority as an insurer under RCW 48.05.030 or
20 utilize or be a licensed surplus lines broker under RCW 48.15.020? (Answer: No.)

21 B. Assuming that any part of the insurance code applied to individual sureties,
22 would the code apply to issuance of individual surety bonds on federal procurement projects?
(Answer: No.)

23 C. Assuming that an individual surety were required to obtain a certificate of
24 authority as an insurer before issuing bonds, (1) would the commissioner be authorized to
25 impose a fine and (2) if so, would the commissioner be authorized to impose cumulative
26 fines? (Answers: (1) No; and (2) No.)

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IV. EVIDENCE RELIED UPON

This motion is based on the undisputed facts set forth in the Declaration of Edmund C. Scarborough dated January 20, 2014, and its attachments.

V. AUTHORITY AND ARGUMENT

A. An Individual Surety Is Not Required to Obtain a Certificate of Authority or Utilize or Be a Licensed Surplus Lines Broker.

1. Individual Sureties Are Authorized and Governed by a Separate Chapter Outside the Insurance Code, Not Enforceable by the Commissioner.

The insurance commissioner's authority is defined by statute, and specifically by the bounds of the insurance code—the only statute the commissioner is authorized to enforce. RCW 48.02.060(1). The court's goal in interpreting a statute is to give effect to the legislature's intent. *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). If a statute is clear on its face, its meaning is to be derived from the language of the statute alone. *Id.* Under the plain language of the suretyship statute (chapter 19.72 RCW) and the insurance code, only corporate sureties and not individual sureties are subject to the commissioner's authority.

Notwithstanding the applicability of certain provisions of the insurance code to "surety insurance," the insurance code and the suretyship statute make clear that bonds issued by individual sureties are not "surety insurance." Individual surety bonds are authorized by the suretyship statute, chapter 19.72 RCW, which defines and establishes the eligibility criteria and qualifications for individual sureties. RCW 19.72.020-.040. The suretyship statute distinguishes between individual surety bonds and "surety insurance." It reserves to the insurance code only matters relating to "surety insurance," providing in RCW 19.72.060: "Corporate surety. See surety insurance: Chapter 48.28 RCW." The "surety insurance" governed by chapter 48.28 RCW includes insurance transactions by corporate sureties but not issuance of bonds by individual sureties. *See* RCW 19.72.020-.040; RCW 19.72.060. The

1 commissioner, having authority to enforce only the insurance code, is not authorized to
2 enforce any of the requirements of chapter 19.72 RCW. See RCW 48.02.060.

3 Review of chapter 48.28 RCW confirms, consistent with RCW 19.72.060, that it
4 applies only to a "surety insurer," and that this means only a corporate and not an individual
5 surety. For instance, RCW 48.28.050 provides, "A surety insurer may be released from
6 liability on the same terms and conditions as are provided by law for the release of
7 individuals as sureties." This provision plainly recognizes that individuals may be sureties
8 and that they are governed by a different law than surety insurers. In sum, individual sureties
9 are not subject to the insurance code and therefore are not subject to the insurance
10 commissioner's authority or the requirement to obtain a certificate of authority.

11 **2. Established Principles of Statutory Construction Confirm that the**
12 **Requirement for an Insurer to Obtain a Certificate of Authority Cannot**
13 **Be Applied to Individual Sureties.**

14 If a statute is ambiguous, the court will utilize principles of statutory construction to
15 determine its meaning. *Kilian*, 147 Wn.2d at 21. A statute is ambiguous if it can be
16 reasonably interpreted in more than one way, but it is not ambiguous simply because different
17 interpretations are conceivable. *Id.* at 20-21. While chapter 19.72 RCW is unambiguous in
18 providing that individual sureties are not subject to the insurance code, three principles of
19 statutory construction confirm this conclusion: (1) statutes must not be construed so as to
20 render other provisions meaningless or superfluous; (2) a specific statute supersedes a general
21 one when both apply; and (3) a statute in derogation of the common law will be strictly
22 construed.

23 **a. *Applying the Insurance Code to Individual Sureties Would Nullify***
24 ***their Express Authorization under the Suretyship Statute.***

25 Only a "stock, mutual, or reciprocal insurer of the same general type as may be
26 formed as a domestic insurer under the provisions of chapter 48.06 RCW" is eligible to obtain

1 a certificate of authority. RCW 48.05.040(1). An individual surety (as opposed to a
2 corporate surety) cannot be a stock, mutual, or reciprocal insurer because the insurance code
3 requires that such insurers be *incorporated entities*. RCW 48.06.010. *See also* ch. 48.07
4 RCW (stock insurers); ch. 48.09 RCW (mutual insurers); ch. 48.10 RCW (reciprocal
5 insurers). Construing the insurance code and its requirement of a certificate of authority as
6 applying to individual sureties would effectively prohibit them, nullifying the provisions in
7 chapter 19.72 RCW that expressly authorize them. Statutes must be harmonized where
8 possible and must not be construed so as to render any portion meaningless or superfluous.
9 *Kilian*, 147 Wn.2d at 21.

10 ***b. The Specific Suretyship Statute Supersedes the More General***
11 ***Insurance Code.***

12 As between the insurance code and chapter 19.72 RCW, the latter is the more specific
13 statute with respect to suretyship and particularly individual sureties. "A specific statute will
14 supersede a general one when both apply." *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp.*
15 *Comm'n*, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994). Even if the insurance code could be
16 construed to apply to individual sureties, chapter 19.72 RCW as the more specific statute on
17 suretyship and particularly on individual sureties, would supersede the insurance code with
18 respect to individual sureties.

19 ***c. The Commissioner's Authority to Regulate "Surety Insurance" Must***
20 ***Be Construed Narrowly Because Suretyship Generally Is Not***
21 ***"Insurance."***

22 Although the insurance code applies to "surety insurance," suretyship under the
23 common law is not insurance. While suretyship and insurance have some similarities,
24 material distinctions exist between them, leading to a conclusion that the insurance code's
25 application to "surety insurance" must be construed narrowly so as not to encompass surety
26 bonds lacking the essential characteristics of insurance. "[A] statute...in derogation of the

1 common law, must be strictly construed and no intent to change that law will be found, unless
2 it appears with clarity.” *McNeal v. Allen*, 95 Wn.2d 265, 269, 621 P.2d 1285 (1980).

3 Two primary distinctions between suretyship and insurance are: (1) unlike an insurer,
4 a surety is not obligated to indemnify the principal; and (2) unlike an insured, a principal
5 must indemnify the surety.²

6 (1) *Unlike an Insurer, a Surety Is Not Obligated to Indemnify the Principal.* The
7 Washington Supreme Court has identified the obligation of an insurer to indemnify the
8 insured as an essential component of “insurance.” In a decision addressing the scope of the
9 insurance commissioner’s authority, the Supreme Court identified, as an essential element of
10 any insurance contract, “a hazard or peril insured against whereby the insured or his
11 beneficiary may suffer loss or injury.” *State ex rel. Fishback v. Universal Svc. Agency*, 87
12 Wash. 413, 424, 151 P. 768 (1915); *see also* RCW 48.01.040 (defining “insurance” as “a
13 contract whereby one undertakes to indemnify another or pay a specified amount upon
14 determinable contingencies”). “Indemnify” means “[t]o reimburse (another) for a loss
15 suffered because of a third party’s or one’s own act or default.” BLACK’S LAW DICTIONARY
16 784 (8th ed. 1999).

17
18 ² An additional characteristic that distinguishes *individual* surety bonds in particular from insurance is
19 their collateralization. In accordance with RCW 19.72.030 and 48 C.F.R. § 28.203(b), and as
20 independently confirmed by federal contracting officers on federal projects, Mr. Scarborough’s bonds
21 are fully collateralized in assets are pledged having value equal to or greater than the face amount of
22 the bond. *See Scarborough Decl. & Exh. A (Performance Bond) § 13.* Fully collateralized bonds
23 cannot be characterized or regulated as insurance because they do not involve distribution of risk
24 amongst policyholders. *See In re Smiley’s Estate*, 36 Wn.2d 863, 867, 216 P.2d 212 (1950) (“A
25 contract may be a risk shifting device, but to be a contract of insurance, which is a risk-distributing
26 device, it must possess both features, and unless it does it is not a contract of insurance whatever be its
name or its form.”). The commissioner’s legal staff speculates without factual basis that Mr.
Scarborough’s bonds are not collateralized as stated and have propounded discovery on this subject,
which is on hold pending resolution of this motion. Collateralization is not material to this motion
because it can be granted upon other, independent grounds as argued. But should the hearing officer
disagree and find that collateralization is material, the motion should be continued pursuant to CR
56(f) to permit targeted discovery on this discrete issue.

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1 A surety does not indemnify either the principal or obligee against loss, but rather
2 assumes obligations *coextensive* with those of the principal to the obligee, jointly and
3 severally. As the Washington Supreme Court has described suretyship, it is unlike insurance,
4 which involves the transfer and distribution of risk, in that “both the surety and the principal
5 are bound upon the obligation, with the principal having the primary obligation.” *Honey v.*
6 *Davis*, 131 Wn.2d 212, 217-18, 930 P.2d 908 (1997), citing & quoting RESTATEMENT OF THE
7 LAW, SECURITY & SURETYSHIP § 82 (1941).³

8 Mr. Scarborough’s bonds are consistent with this traditional description of suretyship.
9 For example, the Skyline-Clarkston performance bond states: “The Contractor and the
10 Surety, jointly and severally, bind themselves, their heirs, executors, administrators,
11 successors and assigns to the Owner for the performance of the Construction Contract, which
12 is incorporated herein by reference.”⁴ Furthermore, the bond disclaims any obligation of the
13 surety to indemnify the principal:

14 This Bond is a guarantee, it is not an insurance policy. ... Nothing in this
15 performance bond shall be deemed to include coverage for or assurance of
16 payment of delay damages, whether liquidated or actual, or any other form of
consequential damages. Such damages are specifically excluded from the
scope of this performance bond.⁵

17 This disclaimer complies with RCW 19.72.107, which forbids a surety bond from including
18 insurance coverage for damage to any person or property.

19 (2) *Unlike an Insured, a Principal Must Indemnify the Surety.* In an insurance
20 relationship, the insured has transferred or assigned its risk and has no obligation to
21

22
23 ³ The Restatement § 82 states: “Suretyship is the relation which exists where one person has
24 undertaken an obligation and another person is also under an obligation or other duty to the obligee,
who is entitled to but one performance, and as between the two who are bound, one rather than the
other should perform.”

25 ⁴ Exh. A to *Scarborough Decl.* at SCA00071.

26 ⁵ Exh. A to *Scarborough Decl.* at SCA00072.

1 indemnify or reimburse the insurer for expenses or amounts paid on the insured's behalf. In
2 other words, the insurer has no right of subrogation against its own insured. The Washington
3 Supreme Court has held: "No right of subrogation can arise in favor of an insurer against its
4 own insured since, by definition, subrogation exists only with respect to rights of the insurer
5 against third persons to whom the insurer owes no duty." *Mahler v. Szucs*, 135 Wn.2d 398,
6 419, 957 P.2d 632 (1998).

7 In contrast to an insurer, a surety is entitled by law to indemnification by the principal
8 for any and all expenses incurred and amounts paid under the surety bond. *Honey*, 131
9 Wn.2d at 218. This obligation is made express with respect to Mr. Scarborough's bonds. For
10 example, with respect to the Skyline-Clarkston bonds, Mr. Scarborough entered into an
11 indemnity agreement specifically for this purpose, entitled "General Agreement of
12 Indemnity."⁶ The agreement provided that Skyline and its affiliates would indemnify and
13 hold Mr. Scarborough completely harmless in the event that Skyline defaulted and Mr.
14 Scarborough was required to perform the contract or pay subcontractors.⁷

15 The absence of an obligation on the part of a surety to indemnify the principal or
16 obligee, and the existence of an obligation on the part of the principal to indemnify the surety,
17 distinguish suretyship from insurance. The insurance code's application to "surety insurance"
18 is thus in derogation of the common law, and the court will construe its application narrowly,
19 meaning that the code can be applied only to the extent expressly stated by the legislature.
20 *See McNeal*, 95 Wn.2d at 269.

21 In sum, because individual surety bonds are governed by chapter 19.72 RCW rather
22 than the insurance code, the requirement that an insurer obtain a certificate of authority from
23 the commissioner does not apply.

24
25 ⁶ Exh. B to *Scarborough Decl.*

26 ⁷ *Id.* at 1.

1 **3. An Individual Surety Is Not an "Unauthorized Insurer," and Chapter**
2 **48.15 RCW Does Not Apply.**

3 The commissioner seeks to circumvent chapter 19.72 RCW by asserting that an
4 individual surety is an "unauthorized insurer" subject to chapter 48.15 RCW. This assertion
5 is inconsistent with the legislature's authorization of individual sureties in chapter 19.72
6 RCW. Under chapter 19.72 RCW, an individual surety does not transact "surety insurance"
7 and is not required to obtain a certificate of authority. See RCW 19.72.020-.040; RCW
8 19.72.060. Not being an insurer, an individual surety is not subject to chapter 48.15 RCW.
9 Mr. Scarborough is entitled to summary judgment that he was not required to obtain a
10 certificate of authority or utilize or be a licensed surplus lines broker in the state of
11 Washington before issuing bonds as an individual surety under chapter 19.72 RCW.

12 **B. Assuming the Insurance Code Applied to Individual Sureties, It Would Be**
13 **Preempted as to Federal Projects Because Applying the Code Would Give the**
14 **State a "Virtual Power of Review" Over the Federal Government's**
15 **Determination to Accept Bonds Issued by an Individual Surety.**

16 State laws can be preempted by federal laws. *Goodwin v. Bacon*, 127 Wn.2d 50, 57,
17 896 P.2d 673 (1995). The preemption doctrine derives from the Supremacy Clause of the
18 United States Constitution. *Id.*, citing U.S. CONST. art. 6, cl. 2. Federal regulations have the
19 same preemptive power as federal statutes. *Id.*, citing *Hillsborough County v. Automated*
20 *Med. Labs., Inc.*, 471 U.S. 707, 713 (1985). Federal preemption will occur if enforcement of
21 the state law would frustrate accomplishment of a federal purpose by providing for state
22 review over a determination by the federal government:

23 A State *may not enforce* licensing requirements which, though valid in the
24 absence of federal regulation, give the State's licensing board a *virtual power*
25 *of review* of the federal determination that a person or agency is qualified and
26 entitled to perform certain functions, or which impose upon the performance
of activity sanctioned by federal license additional conditions not
contemplated by Congress.

1 *Sperry v. State of Fla. ex rel. Florida Bar*, 373 U.S. 379, 385 (1963) (emphasis added,
2 internal quotation marks and footnotes omitted).⁸

3 The United States Supreme Court has found preemption in analogous circumstances.
4 For example, the Court has held that a state may not require a contractor on a federal project
5 to obtain a state contractor's license because enforcement of the state law would give the state
6 licensing board a "virtual power of review" over the federal determination of whether a
7 contractor is a "responsible bidder." *Leslie Miller, Inc. v. State of Ark.*, 352 U.S. 187, 189-90
8 (1956). In reaching this conclusion, the Court noted the similarity between the factors
9 identified by the state and federal laws for evaluating contractors. *Id.*; see also *Gartrell*
10 *Constr., Inc. v. Aubry*, 940 F.2d 437 (9th Cir. 1991) (applying *Leslie Miller* to hold that
11 California's contractor licensing statute was preempted on federal projects).

12 The Miller Act requires a contractor for a federal construction project to furnish bonds
13 "for the protection of the United States." 40 U.S.C. § 270a(a). Each such bond must be
14 approved by the federal contracting officer, and the Federal Acquisition Regulation (FAR),
15 28 C.F.R. part 28 (Bonds and Insurance) provides standards for acceptability of individual
16 sureties for Miller Act bonds. See 28 C.F.R. § 28.203. The FAR allows acceptance of
17 individual sureties and requires the contracting officer to ensure that the assets pledged by the
18 surety are sufficient to cover the bond obligation:

19 An individual surety is acceptable for all types of bonds except position
20 schedule bonds. The contracting officer shall determine the acceptability of
21 individuals proposed as sureties, and shall ensure that the surety's pledged
assets are sufficient to cover the bond obligation.

22 28 C.F.R. § 28.203(a).

23
24
25 ⁸ In *Sperry*, the Supreme Court held that a state bar could not enjoin one not licensed to practice law,
26 but registered to practice before the United States Patent Office, from preparing and prosecuting
patent applications in the state.

1 Among other requirements for individual sureties, the FAR provides that “the
2 unencumbered value of the assets (exclusive of all outstanding pledges for other bond
3 obligations) pledged by the individual surety, must equal or exceed the penal amount of each
4 bond.” 28 C.F.R. § 28.203(b). Before accepting any bond from an individual surety, the
5 federal contracting officer must obtain a legal opinion as to the adequacy of the documents
6 pledging the assets. 28 C.F.R. § 28.203(f). The FAR dictates the types of assets acceptable
7 as collateral and the terms of an acceptable security interest in such assets. 28 C.F.R. §§
8 28.203-1, 28.203-2. It also lists several grounds upon which an individual, to protect the
9 federal government, may be excluded from acting as a surety on federal projects. 28 C.F.R. §
10 28.203-7. Those grounds include failure to fulfill the obligations under any bond, failure to
11 disclose all bond obligations, misrepresentation of available assets or outstanding liabilities,
12 any false or misleading statement, and any other cause affecting responsibility as a surety. *Id.*

13 The qualifications for obtaining a certificate of authority under RCW 48.05.030
14 include being a “stock, mutual, or reciprocal insurer” as well as complying with all provisions
15 of the insurance code and regulations, including capital and surplus requirements. RCW
16 48.05.030. As explained above, an individual surety cannot be a “stock, mutual, or reciprocal
17 insurer.” Therefore, assuming these requirements applied to individual sureties, allowing the
18 commissioner to enforce them would effectively prohibit individual sureties in Washington,
19 in conflict with the federal government’s express authorization of them to ensure the
20 availability of Miller Act bonds. In addition, the commissioner requires background checks
21 of the officers and directors of an insurer applying for a certificate of authority, *see* WAC
22 284-07-620, which would give the commissioner a “virtual power of review” over the federal
23 contracting officer’s determination to accept bonds issued by a particular individual surety.

24 Alternatively, assuming that an individual surety could be deemed an “unauthorized
25 insurer” under chapter 48.15 RCW, that statute requires an applicant for a surplus lines
26

1 broker's license to submit to a background check and review of "personal history; experience;
2 business records; purposes; and other pertinent information, as the commissioner may
3 require." RCW 48.15.070(1). In addition, a surplus lines broker must obtain a bond in favor
4 of the state of Washington, a requirement not imposed by the federal government on
5 individual sureties. RCW 48.15.070(2). Allowing the commissioner to enforce compliance
6 with these and other requirements of chapter 48.15 RCW would give him a "virtual power of
7 review" over the federal contracting officer's determination to accept bonds issued by an
8 individual surety.

9 Because compliance with the insurance code would prohibit individual sureties or
10 give the commissioner a "virtual power of review" over the federal contracting officer's
11 determination to accept a bond from an individual surety, the insurance code must be deemed
12 preempted with respect to surety bonds issued on federal projects.⁹

13 **C. The Commissioner Is Not Authorized to Impose a Fine, Much Less a Cumulative**
14 **One.**

15 **1. The Insurance Code Does Not Authorize a Fine for Failing to Obtain a**
16 **Certificate of Authority.**

17 Assuming the insurance code required an individual surety to obtain a certificate of
18 authority from the commissioner, no provision of the insurance code authorizes the
19 commissioner to impose a fine for failing to obtain a certificate of authority. The
20 commissioner's general authority to enforce the insurance code is set forth in RCW 48.02.080

21 ⁹ In addition, a federal regulation provides that a surety issuing bonds in favor of the United States
22 need not be licensed in the state where the principal resides or where the contract is to be performed:

23 Although a company must be licensed in the State or other area in which it executes a bond, it
24 *need not be licensed* in the State or other area in which the principal resides or *where the*
25 *contract is to be performed.*

26 31 C.F.R. § 223.5(b) (emphasis added). Bonds issued under the Miller Act are issued for the benefit
of the federal government and state that the principal and surety are "firmly bound to the United States
of America" for the bond's penal sum. See Exh. C to *Scarborough Decl.* These bonds are therefore
exempt from compliance with the insurance code by federal preemption under 31 C.F.R. § 223.5(b).

1 and includes the authority to issue a cease and desist order and to bring an action in court to
2 enforce such an order and enjoin further violations. It does not authorize the commissioner to
3 impose a fine. Under RCW 48.05.185, the commissioner is authorized to impose a fine "in
4 addition to or in lieu of the suspension, revocation, or refusal to renew any certificate of
5 authority." If one does not have a certificate of authority, there is none to suspend, revoke, or
6 refuse to renew. As a result, no fine may be imposed.

7 **2. Even Assuming the Commissioner Had Authority to Impose a Fine for**
8 **Failing to Obtain a Certificate of Authority, the Maximum Total Fine**
9 **Would Be \$10,000 Regardless of the Number of Bonds Issued.**

10 Absent clear and unambiguous language demonstrating legislative intent to impose a
11 separate penalty for each violation of a statute, a court will presume that the legislature
12 intended to authorize a single penalty. *State v. Adel*, 136 Wn.2d 634-35, 965 P.2d 1072
13 (1998). This rule has been applied in the context of insurance regulation. For instance, where
14 an insurer failed to file forms as required, in violation of a statute providing for a \$500 fine,
15 the New York appellate court held that imposing a penalty of \$500 per day was unauthorized
16 where the statute did not expressly provide for a daily penalty. *In re Am. Transit Ins. Co. v.*
17 *Corcoran*, 76 N.Y.2d 977, 563 N.Y.S.2d 736 (1990). And where a trial court imposed two
18 fines of \$500 each for violating an anti-discrimination statute, the Illinois Court of Appeals
19 reversed on the ground that the statute did not expressly authorize cumulative penalties.
20 *People ex rel. Williams v. United States Life Endowment Co.*, 143 Ill. App. 517 (1908).

21 When the legislature intends to permit cumulative penalties for violation of a statute,
22 it has done so expressly. Indeed, the insurance code alone contains over *two dozen* different
23 provisions in which the legislature has used terms such as "per violation," "each violation,"
24 "each offense," or "per day" to grant the commissioner express authority to impose

1 cumulative monetary penalties.¹⁰ In contrast, the only arguable statutory authority to impose
2 a fine for failing to obtain a certificate of authority, RCW 48.05.185, clearly and
3 unambiguously authorizes only a single fine of \$250 to \$10,000:

4 After a hearing or with the consent of the insurer and in addition to or in lieu
5 of the suspension, revocation, or refusal to renew any certificate or authority
6 the commissioner may levy a fine upon the insurer *in an amount not less than
two hundred fifty dollars and not more than ten thousand dollars.* ...

7 RCW 48.05.185 (emphasis added). The legislature's establishment of a range of the amount
8 of fine authorized confirms that it intended to authorize only a single penalty. In fact, the
9 legislature has periodically amended the statutes to increase the range of the authorized fine.¹¹
10 Since 1980, the range of authorized penalties has been \$250 to \$10,000. 1980 WASH. LAWS
11 ch. 102, § 1.

12 Even if there were any ambiguity in RCW 48.05.185, as a penal statute it must be
13 construed in favor of Mr. Scarborough to provide for only a single penalty of up to \$10,000.
14 *See State v. Mason*, 31 Wn. App. 680, 686-87, 644 P.2d 710 (1982) ("The rule of lenity is a
15 canon of statutory construction which applies when a penal statute is ambiguous as to
16 whether the legislative body intended to impose multiple punishment."), citing *Albernaz v.*
17 *United States*, 450 U.S. 333, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981).

18 _____
19 ¹⁰ See, e.g., RCW 48.08.050(4) ("each violation"); RCW 48.09.340(3) ("each violation"); RCW
20 48.17.063(4)(iii) ("each violation"); RCW 48.30.010(5) ("each violation"); RCW 48.30A.030 ("each
21 violation"); RCW 48.30A.065 ("each violation"); RCW 48.31.141(2)(b) ("each violation"); RCW
22 48.31B.050(1) ("per day"); RCW 48.31B.050(2) ("per violation"); RCW 48.31C.090(1) ("per day");
23 RCW 48.31C.090(2) ("per violation"); RCW 48.44.015(3) ("each violation"); RCW
24 48.44.016(5)(a)(ii) ("each violation"); RCW 48.44.166 ("each offense"); RCW 48.46.027(3) ("each
violation"); RCW 48.46.033(5)(a)(ii) ("each violation"); RCW 48.46.135 ("each offense"); RCW
48.56.050(2) ("each offense"); RCW 48.102.046(2) ("per day"); RCW 48.102.160(7)(b) ("each
violation"); RCW 48.110.130(3) ("per violation"); RCW 48.111.100(3) ("per violation"); RCW
48.126.100(1) ("each violation"); RCW 48.140.020(3) ("per day"); RCW 48.166.130(1)(b) ("each
violation"); RCW 48.160.070(1)(b) ("each violation"); RCW 48.160.080(3) ("each violation").

25 ¹¹ From 1965 to 1975, the range of authorized penalties was \$250 to \$1,000. 1965 WASH. LAWS, ex.
26 sess., ch. 70, § 3. From 1975 to 1980, it was \$250 to \$5,000. 1975 WASH. LAWS, 1st ex. sess., ch.
266, § 3.

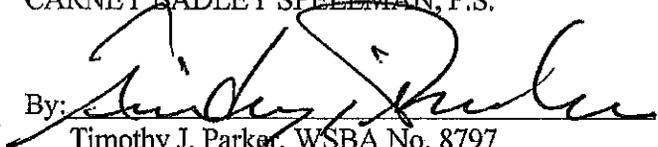
1 The legislature has circumscribed the commissioner's authority with respect to the
2 amount of fine he can impose under RCW 48.05.185. Interpreting the statute to authorize
3 cumulative fines would contravene the legislature's intent to set a maximum fine.

4 **VI. CONCLUSION**

5 Because he was not required to obtain a certificate of authority from the commissioner
6 or utilize or be a licensed surplus lines broker, Mr. Scarborough respectfully requests that the
7 hearing officer grant his motion for summary judgment, vacate the commissioner's cease and
8 desist order, and dismiss this proceeding. In the alternative, Mr. Scarborough requests that
9 the hearing officer grant summary judgment on the issues of preemption and authority to
10 impose a fine.

11 DATED this 21st day of January, 2014.

12 CARNEY BADLEY SPELLMAN, P.S.

13
14 By: 

15 Timothy J. Parker, WSBA No. 8797

16 Jason W. Anderson, WSBA No. 30512

17 Attorneys for Respondent Edmund C. Scarborough

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RESPONDENT EDMUND C. SCARBOROUGH'S
MOTION FOR SUMMARY JUDGMENT - 16

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DECLARATION 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 January 21, 2014, 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:

Judge Patricia Petersen – ORIGINAL Chief Hearing Officer Office of the Insurance Commissioner 5000 Capitol Boulevard Tumwater, WA 98501 kellyc@oic.wa.gov via e-mail and legal messenger	<u>Attorney for OIC</u> Mr. Alan M. Singer Office of the Insurance Commissioner 5000 Capitol Boulevard Tumwater, WA 98501 alans@oic.wa.gov via e-mail and legal messenger
<u>Attorney for Walter W. Wolf</u> James A. McPhee Workland & Witherspoon, PLLC 601 W Main Avenue, Suite 714 Spokane, WA 99201 jmcphee@workwith.com via e-mail and U.S. mail	<u>Attorneys for Edmund C. Scarborough</u> Michael M. Miles Duane Morris LLP 100 North City Parkway, Suite 1560 Las Vegas, NV 89106-4617 mmmiles@duanemorris.com via e-mail and U.S. mail

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 21st day of January, 2014.


Christine Williams, Legal Assistant

RESPONDENT EDMUND C. SCARBOROUGH'S
MOTION FOR SUMMARY JUDGMENT – 17

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STATE OF WASHINGTON, OFFICE OF THE INSURANCE COMMISSIONER

In re the Matter of

EDMUND C. SCARBOROUGH and
WALTER W. WOLF,

Respondents

No. 13-0084

DECLARATION OF
EMAILED DOCUMENT
(DCLR)

I declare as follows:

1. I am the party who received the foregoing email transmission for filing.
2. My address is: 3400 Capitol Blvd. SE #103, Tumwater WA 98501
3. My phone number is (360) 754-6595.
4. I have examined the foregoing document, determined that it consists of 21 pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: January 21, 2014 at Tumwater, Washington.

Signature: _____

Print Name: James Lincoln