

FILED

BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

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In the Matters of:

**BENEFIT MARKETING SOLUTIONS,
LLC, and BENEFIT SERVICES
ASSOCIATION
and
RENT-A-CENTER, INC. and
RENT-A-CENTER WEST, INC.**

No. 14-0081

No. 14-0082

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND FINAL ORDER

TO: Gulliver A. Swenson, Esq.
Ryan Swanson & Cleveland, PLLC
1201 Third Avenue, Suite 3400
Seattle, WA 98101-3034
Attorney for Benefit Marketing Solution, LLC, Benefit Services
Association, Rent-a-Center Inc. and Rent-a-Center West, Inc.

COPY TO: Mike Kreidler, Insurance Commissioner
James T. Odiorne, Chief Deputy Insurance Commissioner
John F. Hamje, Deputy Commissioner, Consumer Protection Division
Marcia G. Stickler, Staff Attorney, Legal Affairs Division
AnnaLisa Gellermann, Deputy Commissioner, Legal Affairs Division
Office of the Insurance Commissioner
PO Box 40255
Olympia, WA 98504-0255

On January 12, 2015, these matters came before me in Tumwater, Washington,
for evidentiary hearing, pursuant to the Order Consolidating Cases, Notice of Hearing
and Case Scheduling Order, filed September 26, 2014.

The Office of the Insurance Commissioner (“OIC”) appeared through Marcia Stickler, Attorney at Law, Insurance Enforcement Specialist, Legal Affairs Division. Rent-a-Center Inc., Rent-a-Center West, Inc., Benefit Marketing Solutions, LLC, and Benefit Services Association (“Respondents”) were represented by Gulliver Swenson, Attorney at Law, of Ryan, Swanson and Cleveland, PLLC, Seattle, Washington, and Walter Willson, Attorney at Law, of Wells Marble & Hurst, PLLC, Mississippi.

I have considered the exhibits admitted into evidence, the testimony of the witnesses – Bobby Frye (OIC Investigator), James Tompkins (OIC staff attorney, Policy & Legislative Affairs Division), and Bradley Denison (Chief Operating Officer and Executive Vice President of Benefit Marketing Solutions, LLC; Assistant Secretary of Benefit Services Association), and the oral argument of the parties. I have also considered the Parties’ briefing on their cross-Motions for Summary Judgment, the Insurance Commissioner’s Post-Hearing Settlement Response, filed January 15, 2105, Respondents’ Supplemental Authority, dated January 16, 2015, and Respondents’ Response to Commissioner’s Post-Hearing Settlement Response, filed January 26, 2015.

FINDINGS OF FACT

1. On May 1, 2014, the OIC filed a Notice of Request for Hearing for Imposition of Fines as to Rent-a-Center Inc. and Rent-a-Center West, Inc. (collectively “RAC”), Benefit Marketing Solutions, LLC (“BMS”), and Benefit Services Association (“BSA”).

2. On May 2, 2014, the OIC Hearings Unit filed a Notice of Receipt of OIC Notice of Request for Hearing for Imposition of Fines. On May 7, 2014, the OIC filed an Amended Notice of Request for Hearing for Imposition of Fines. The crux of the OIC’s

allegations against BMS and BSA is that they were not registered as service contract providers and that they had no certificates of authority to act as insurers in the State of Washington. The crux of the OIC's allegations against RAC is that it was not licensed as an insurance producer in the State of Washington and therefore was not qualified to solicit insurance coverage.

3. On May 15, 2014, the OIC issued an Amended Cease and Desist Order in Matter No. 14-0081, requiring BMS and BSA immediately to cease and desist from engaging in or transacting unauthorized business of insurance in the State of Washington, including advertising and/or solicitation of service contracts or other insurance-related products, and from seeking or soliciting insurance business in the State of Washington and participating in any act of an insurance producer or insurance company in seeking or soliciting insurance business, including service contracts, in the State of Washington. The Amended Order was based in substantial part on the OIC's conclusion that BMS and BSA acted as unregistered service contract providers, whose contracts to indemnify consumers or pay a specified amount upon determinable contingencies constitute "insurance," as defined in RCW 48.01.040.

4. On June 13, 2014, BMS and BSA filed a Complaint for Declaratory Relief in Thurston County Superior Court ("Declaratory Judgment Action"), asking the Court to declare that the OIC lacks jurisdiction. BMS and BSA asserted: 1) they are not service contract providers and are not engaged in the solicitation or sale of service contracts as defined by RCW 48.110.020; and 2) they are not insurance providers as defined by RCW 48.17.060.

5. On June 18, 2014, BMS and BSA filed a Motion for Stay of Proceedings in OIC Matter No. 14-0082, requesting a stay of that matter pending the Court's ruling in the Declaratory Judgment Action.

6. On July 2, 2014, I stayed Matter No. 14-0082 "until the Thurston County Superior Court resolves the Declaratory Judgment Action."

7. On July 22, 2014, BMS and BSA filed a Motion for Stay of Amended Cease and Desist Order in OIC Matter No. 14-0081, requesting a stay of that matter pending the Court's ruling in the Declaratory Judgment Action.

8. On August 7, 2014, I stayed Matter No. 14-0081 "until the Thurston County Superior Court resolves the pending Declaratory Judgment Action."

9. By Order Granting the OIC's Motion to Dismiss, dated August 29, 2014, Thurston County Superior Court Judge Carol Murphy dismissed the Declaratory Judgment Action "without prejudice and without addressing whether Plaintiffs can petition the court to amend the complaint."

10. Judge Murphy's Order resolved the Declaratory Judgment Action. The stays granted in my July 2 and August 7, 2014, Orders were therefore dissolved.

11. On September 11, 2014, BMS and BSA filed a Demand for Administrative Hearing before the OIC.

12. On September 26, 2014, I entered an Order Consolidating Cases, Notice of Hearing and Scheduling Order, which consolidated OIC Matters 14-0081 and 14-0082 and set the evidentiary hearing date, which was later rescheduled to January 12, 2015.

13. BMS and BSA served and filed a Motion for Stay of Amended Cease and Desist Order, dated September 19, 2014. OIC served and filed a Response to such Motion, dated September 25, 2014. By Order on Motion for Stay of Amended Cease and Desist Order, filed October 2, 2014, I granted a stay of the Amended Cease and Desist Order pending the present Order.

14. RAC provides rent-to-own consumer goods at Washington State retail stores. In 2004, RAC began offering "Benefits Plus" memberships to its customers, by inviting customers to join through brochures prominently displayed at its stores and by making its clerks available to provide benefits information. Benefits Plus membership fees were apparently \$3 per week, payable weekly, bi-monthly, or monthly.

15. Benefits Plus membership benefits included group accidental death and dismemberment ("AD&D") coverage underwritten by Life of the South Insurance Company; BSA paid monthly premiums for each member. RAC sold approximately 13,018 Benefits Plus memberships including AD&D coverage in 2012 and 2013.

16. Life of the South holds a Certificate of Authority to transact insurance business in Washington State. In February 2012, it applied for OIC group AD&D program approval. The OIC disapproved the application on April 10, 2012. RAC acknowledged that it should not have offered AD&D benefits in Washington State without the OIC's approval.

17. In addition to AD&D, Benefits Plus membership benefits also include: 1) "Paid Out Account Service Protection," which covers all mechanical or electrical failures, unless caused by accidents, lightening, or other outside influences. 2) "Liability

Waiver, Product Replacement Option,” which provides a replacement if a member suffers a loss under the available Liability Damage Waiver program. 3) Involuntary “Unemployment Payment Waiver,” which assists members with rental payments if they are laid off, fired, or lose their jobs due to strikes or labor disputes. 4) Merchant discounts and other benefits.

18. None of Respondents has, or has had, a certificate of authority to act as an insurer, or has been registered as an insurance producer or Service Contract Provider, in Washington State.

CONCLUSIONS OF LAW

1. This adjudicative proceeding was properly convened, and all substantive and procedural requirements under the laws of Washington State have been satisfied. These Findings of Fact, Conclusions of Law, and Final Order are entered pursuant to Title 48 RCW, specifically RCW 48.04, Title 34 RCW, and regulations pursuant thereto.

2. RCW 48.01.030 provides: “The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.”

3. The present Conclusions of Law and Final Order consider the public interest that the legislature intended to protect in enacting the statutes herein considered. Given such public interest and the legislative directive that insurers be actuated by good faith

and abstain from deception, I have considered the substance, not only the form, of the activities and documents at issue.

Insurance.

4. RCW 48.01.040 provides: "Insurance is a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies."

5. The group AD&D coverage provided under the Benefits Plus program was a contract whereby Respondents, through Life of the South, undertook to indemnify or pay members specified amounts upon accidental death or dismemberment and therefore was insurance.

6. Under RCW 48.01.250, any person promising, in exchange for dues, assessments, or payments, to furnish members or subscribers with any accident, sickness, or death insurance benefit program must have a certificate of authority issued by the commissioner. Neither Life of the South nor Respondents had a certificate of authority to provide AD&D coverage. Violations of this section are subject to the enforcement provisions of RCW 48.02.080 and to the hearing and appeal provisions of Ch. 48.04 RCW.

7. The Paid Out Account Service Protection was a contract whereby Respondents undertook to indemnify members in case of mechanical or electrical failures (with certain exceptions) and was therefore insurance.

8. The Liability Waiver, Product Replacement Option was a contract whereby Respondents undertook to indemnify members who suffered losses under a Liability Damage Waiver program and was therefore insurance.

9. The Involuntary Unemployment Payment Waiver was a contract whereby Respondents undertook to indemnify members who were laid off, fired, or lost their jobs due to strikes or labor disputes by assistance with rental payments and was therefore insurance.

10. The Paid Out Account Service Protection, Liability Waiver, Product Replacement Option, and Involuntary Unemployment Payment Waiver, each taken as a whole, constituted indemnification, which is broadly defined. *See, In re Estate of Martha J. Knight*, 31 Wn. 2d 813, 816 (1948); *McCarty v. King Co. Medical Service Corp.*, 26 Wn.2d 660, 683-85 (1946); *State ex. rel. Fishback v. Globe Casket & Undertaking Co.*, 82 Wash. 124 (1914).

11. Each program benefit involved indemnity and the transfer and distribution of risk characteristic of insurance, not warranty or other non-insurance benefits. *See, GAF Corp. v. County School Board of Washington Co., Virginia*, 629 F.2d 981 (4th Cir. 1980); *Rayos v. Chrysler Credit Corp.*, 683 S.W.2d 546, 548 (Tex. App. 1985). (*Discount Tire Co. v. Department of Revenue*, 121 Wn.App. 513, 529 (2004), which stated by way of analogy that “payments made under insurance contracts are generally prorated or based upon depreciated values of damaged or destroyed property, often subject to a deductible borne by the insured,” involved the Department’s effort to recoup a refunded sales tax amount which it believed Discount Tire had wrongfully deducted and is not authority for the definition of “insurance.”)

12. Under RCW 48.05.030, no person may act as an insurer and no insurer may transact insurance in Washington other than as authorized by a certificate of authority

issued by the commissioner. Respondents did not have the required certificate of authority and therefore were in violation of RCW 48.05.030 (unless the Benefits Plus program was authorized under Chapter 48.110, as discussed below).

13. Under RCW 48.05.185, after hearing, the commissioner may issue an order levying a fine upon an insurer of \$250-\$10,000, due within 15-30 days of the date of the order in addition to or in lieu of suspension, revocation, or refusal to renew a certificate of authority.

14. Under RCW 48.15.020(1), an insurer not authorized by the commissioner may not solicit or transact insurance business in Washington. Nor, under RCW 48.15.020(2), may a person (other than an attorney-at-law or adjuster) represent an unauthorized insurer, except as authorized in Chapter 48.15 RCW.

15. Under RCW 48.17.010(14), "solicit" means attempting to sell insurance or asking or urging a person to apply for a particular kind of insurance from a particular insurer. By providing Benefits Plus brochures to retail customers and having sales personnel available to answer questions, Respondents solicited or transacted insurance business in Washington State and represented an unauthorized insurer, in violation of RCW 48.15.020(1) and (2). *See, National Federation of Retired Persons v. Insurance Commissioner*, 120 Wn.2d 101, 110-112 (1992) (adopting broad plain meaning of "solicit").

16. Under RCW 48.15.023, where the commissioner has cause to believe any person has violated the provisions of RCW 48.15.020(1), the commissioner may issue and enforce a cease and desist order in accordance with the provisions of RCW 48.02.080

and/or assess a civil penalty of not more than \$25,000 for each violation, after notice and an opportunity for hearing.

17. Under RCW 48.15.020(3), each violation of RCW 48.15.020(2) constitutes a separate offense punishable by a fine of \$25,000.

18. Under 48.17.060(1), a person shall not sell, solicit, or negotiate insurance in Washington State for any line(s) of insurance unless the person is licensed by the OIC for that line. By offering and facilitating the offering of the Benefits Plus Program, Respondents sold, solicited, and/or negotiated insurance in Washington State.

19. Under RCW 48.17.063, if the commissioner has cause to believe any person has violated the provisions of RCW 48.17.060, the commissioner may issue and enforce a cease and desist order in accordance with RCW 48.02.080 and/or assess a civil penalty of not more than \$25,000 for each violation, after notice and an opportunity for hearing.

Service contract.

20. The Insurance Code requires that insurers meet certain financial requirements and that agents, solicitors and brokers of insurance comply with specified licensing standards, providing possible financial and criminal penalties for non-compliance. Certain transactions falling within the definition of insurance have been addressed by exemptions from the Insurance Code or by the creation of a specific regulatory structure. Entities regulated under such chapters may not be required to comply with the rigorous capitalization and reserve requirements, reporting and solvency oversight, and claims handling practices required of an insurer selling a traditional insurance product. Such

chapters include Chapter 48.110 RCW, Service Contracts and Protection Product Guarantees. 2006 Final Bill Report.

21. A Chapter 48.110 RCW service contract is an insurance product, subject to somewhat less rigorous requirements and OIC oversight than other insurance products (described by Mr. Tompkins as Insurance Code “regulatory lite”). If, as Respondents assert, the Benefits Plus program is not subject to Chapter 48.110 RCW it is -- as discussed above -- an insurance product subject to the more rigorous requirements of the Insurance Code.

22. RCW 48.110.020(18)(a) defines “service contract” as a contract or agreement entered into at any time for consideration over and above the lease or purchase price of property for any specific duration to perform the repair, replacement, or maintenance of property or the indemnification for repair, replacement, or maintenance for operational or structural failure due to a defect in materials or workmanship or normal wear and tear.

23. Under RCW 48.110.020(18)(b), “service contract” also includes a contract or agreement sold for separately stated consideration for a specific duration to perform one or more of services including (v), services provided pursuant to a protection product guarantee.

24. Considering the substance of the Benefits Plus program, I believe such program constitutes a service contract, under RCW 48.110.020(18), because: 1) Members are charged a separate fee above the rent-to-own cost, although a single periodic program membership fee bundles multiple benefits including insurance products

and merchant discounts, and no additional fee was charged for protection of additional products. (Although protection of additional products without additional fee was theoretically possible, no evidence was presented that this in fact occurred, and in any case, a separate fee was charged for the initial product(s) covered.) Bundling benefits and providing additional coverage without additional cost did not mean that the benefits at issue were provided without separate fees – the cost of each benefit was a component of the overall fee, even though Respondents did not itemize the components. 2) The Membership Form provided coverage upon enrollment, continuing until either the member voluntarily terminated, the member did not make a payment within 31 days of the due date, or RAC terminated on 10 days' written notice. Coverage was for a specific duration – from inception to termination for stated reasons, even if in some cases this duration may have been short. (Satisfaction of the “specific duration” requirement of the statute is, however, a close call.) 3) Although members received non-insurance benefits, including merchant discounts, Benefits Plus program benefits included product servicing and replacement.

25. Under RCW 48.110.030(1), a person may not act as, or offer to act as, or hold himself or herself out to be, a service contract provider in Washington, nor may a service contract be sold to a Washington consumer, unless the service contract provider has a valid registration as a service contract provider issued by the commissioner.

26. Respondents are not registered as service contract providers. They are therefore subject to the fine/civil penalty provisions of the Insurance Code.

27. Pursuant to RCW 48.05.185, 48.15.023, 48.15.020(3), and 48.17.063, I impose fines/penalties in the amount of \$50,000 because: 1) Respondents are responsible for the sale of the Benefits Plus program to thousands of Washington State consumers. 2) However, consumers do not appear to have suffered harm as the result of the program. 3) The OIC does not appear to have received consumer or other complaints about the program (except for the complaint triggering its investigation, which may have been from a legislator). 4) A valid Contractual Liability Insurance Policy ("CLIP") appears to protect Washington consumers. 5) The parties appear to be prepared to negotiate in good faith toward possible OIC authorization of a product generally similar to the Benefits Plus program. 6) Deterrence of future similar acts is appropriate, even assuming Respondents acted in good faith.

28. My decision as to appropriate fines/penalties would not be altered if the Benefits Plus program were not subject to Chapter 48.110 RCW or if no more than one of the referenced statutory sections authorizing fines/penalties were applicable -- in any case, I believe fines/civil penalties totaling \$50,000 would be appropriate.

29. I believe a brief delay in implementing a C&D order is appropriate, to permit orderly transition and to permit the parties to engage in limited further negotiation of

possible OIC authorization. (I do not suggest that the parties must reach agreement, and no further delay based on ongoing negotiations should be expected.)

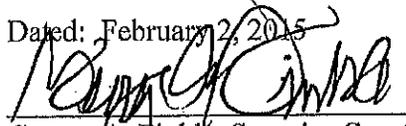
ORDER

Respondent shall pay a fine/penalty of \$50,000. 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 February 27, 2015, the Commissioner may seek enforcement of this Order from the Thurston County Superior Court pursuant to RCW 48.02.080.

Effective March 1, 2015, Respondents shall cease and desist from engaging in or transacting the unauthorized business of insurance in the State of Washington, including advertising and/or solicitation of service contracts or other insurance-related products, and from seeking or soliciting insurance business in the State of Washington and/or participating in any act of an insurance producer or insurance company in seeking or soliciting insurance business, including service contracts, in the State of Washington.

Respondents are jointly and severally liable and responsible for the requirements imposed by this Order.

Dated: February 2, 2015


George A. Finkle, Superior Court Judge (Ret.)
Presiding 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.

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: Gulliver Swenson, Esq., Mike Kreidler, James T. Odiorne, John F. Hamje, AnnaLisa Gellermann, and Marcia Stickler.

DATED this 2nd day of February 2015.


KELLY A CAIRNS