

ORDER; NOTICE OF HEARING

14-0204

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COPY TO: Mike Kreidler, Insurance Commissioner
James T. Odiorne, J.D., CPA, Chief Deputy Insurance Commissioner
John F. Hamje, Deputy Commissioner, Consumer Protection Division
Darryl Colman, Esq., 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

This Notice is provided pursuant to RCW 48.04.010 and RCW 34.05.434.

On October 23, 2014, the Office of the Insurance Commissioner ("OIC") issued an Order to Cease and Desist to Digital Leash, LLC dba ProtectCELL, Fortegra Financial Corporation, Lots Intermediate Company, and Scott McLaren, Robert Emery, Bryan Finnerty and Christopher P. Beyersdorff ("Respondents") ordering them to immediately cease and desist from engaging in or transacting the unauthorized business of insurance. The Order was based in substantial part on the OIC's determination that the Respondents have 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.

On October 31, 2014, Respondents, through their attorney Brian F. Kreger, filed an Objection to OIC's Order to Cease and Desist; Demand for Hearing; Request to Vacate and Quash Order to Cease and Desist, and for Other Relief ("Demand for Hearing"). In their Demand for Hearing, Respondents assert, in brief: the Order to Cease and Desist and the acts and threatened acts of

the OIC are an attempt to deprive them of property rights without due process; their activities are not regulated under the Insurance Code and are lawful; the OIC lacks jurisdiction; the Order contains allegations that are untrue or unsupported and intentionally harm them; the Order is untimely; the OIC has refused to engage in good-faith discussions to resolve any issues related to their business activities; this matter should be heard by an Administrative Law Judge; and they are entitled to a stay pending the evidentiary hearing.

On December 8, 2014, the undersigned held a first prehearing conference. The OIC was represented by Darryl Colman, Esq., Insurance Enforcement Specialist in the OIC's Legal Affairs Division. The Respondents were represented by Brian F. Kreger, Esq. After considering the views of the parties as to hearing dates and procedures:

Request to transfer to an ALJ.

Under RCW 48.04.010(1)(b), the Commissioner shall hold a hearing, among other circumstances, upon written demand made by any person aggrieved by any act or threatened act of the commissioner. Under RCW 48.04.010(5), a licensee under Title 48, RCW, may request that such hearing "be presided over by an administrative law judge assigned under chapter 34.12 RCW. Any such request shall not be denied."

Respondents request transfer of this matter, in its entirety, to an ALJ, under RCW 48.04.010(5). The OIC asks that this matter, in its entirety, remain before the Hearing Unit, asserting that the OIC is not seeking to impose any penalty on Mr. Beyersdorff or take other action related to use of his license.

RCW 48.04.010(5) requires without qualification that a hearing set upon the demand of a Title 48 licensee be presided over by an ALJ. Mr. Beyersdorff is such a licensee, having apparently obtained an insurance producer's license in March 2014. Mr. Beyersdorff's hearing is transferred to OAH for assignment to an ALJ.

No evidence was presented that any respondent besides Mr. Beyersdorff is a Title 48 licensee. Neither RCW 48.04.010(5) nor any other RCW or WAC appears to require or permit transfer to an ALJ of hearings demanded by non-licensee Respondents. Even assuming transfer of this entire matter were within the scope of my authority, I would not order transfer, given that: 1) RCW 48.04.010(5) is for the benefit of licensees, not others; 2) the Hearings Unit is able to offer a speedy evidentiary hearing, as OAH probably cannot; and 3) the ALJ's final order is subject to review under RCW 34.05.464(4), by me or another reviewing officer designated by the commissioner, so transfer would not result in substantial relief for Respondents. *See, Chandler v. OIC*, 173 P.3d 275, 279 (2007).

Request for stay.

Respondents seek a stay of the Cease and Desist Order pending the evidentiary hearing "in accordance with the mandate of RCW 48.04.020," arguing that due process so requires.

Under RCW 48.04.020(1), a demand for hearing received by the commissioner prior to the effective date of action taken or proposed to be taken by him or her stays such action pending the hearing, with inapplicable exceptions. Under RCW 48.04.020(2), upon written request, the commissioner may grant a stay where an automatic stay is not provided for.

The OIC's October 23, 2014, Order to Cease and Desist was effective immediately. RCW 48.02.080(3); RCW 48.02.060(1). On October 31, 2014, Respondents' filed their Demand for Hearing. The automatic stay under RCW 48.04.020(1) is therefore not applicable.

I offered to schedule the evidentiary hearing without delay, to address Respondents' concern that OIC had entered the Cease and Desist Order without providing a prior opportunity to be heard. However, Respondents, with OIC's agreement, reasonably requested -- based on expected discovery, the projected 4-5 day evidentiary hearing length, and scheduling challenges -- to set the hearing for the first available week during April 2015 or later, which is the week of June 15, 2015.

Given the importance of the conduct at issue to the citizens of Washington (*see*, RCW 48.01.030; RCW 48.110.010) and the availability of an early evidentiary hearing, I do not grant a stay under RCW 48.04.020(2). This ruling is without prejudice to my full consideration of the facts and law at the evidentiary hearing.

Respondents' Request for Stay is denied.

Discovery.

Counsel shall seek to agree on discovery scope and procedures. Discovery issues subject to resolution without briefing shall be presented by telephone conference call with me, arranged through Hearings Unit paralegal, Kelly Cairns. Discovery issues requiring briefing shall be presented on a schedule pursuant to the King County, WA Superior Court Local Rules or as agreed by counsel; I expect to rule without oral argument on such issues.

YOU ARE HEREBY NOTIFIED that an evidentiary hearing will be held at the Office of the Insurance Commissioner, 5000 Capitol Blvd., Tumwater, WA, beginning on June 15, 2015, at 1:00 PM, Pacific Daylight Time. The hearing is expected to conclude by June 19, 2015, but will continue until terminated. The purpose of the hearing is to consider whether the Respondents' alleged activities set forth in the OIC's Order to Cease and Desist constituted violations of the Insurance Code justifying the Order.

The hearing will be governed by the Administrative Procedure Act, Chapter 34.05 RCW, and the model rules of procedure contained in Chapter 10-08 WAC. All parties may be represented and may examine witnesses, respond, and present evidence and argument on all relevant issues.

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A party who fails to attend or participate in the hearing or another stage of this proceeding may be held in default in accordance with Chapter 34.05 RCW. *See*, RCW 34.05.434(2)(i).

Judge George Finkle (Ret.), Presiding Officer, has been designated by the Insurance Commissioner to hear and determine this matter. The hearing will be held under the authority granted by the Insurance Commissioner under Chapter 48.04 RCW.

Pursuant to WAC 10-08-040(2) and in accordance with Ch. 2.42 RCW, if a limited English speaking or hearing impaired or speech impaired party or witness needs an interpreter, a qualified interpreter will be appointed. There will be no cost to the party or witness therefore, except as may be provided by Ch. 2.42 RCW. A Request for Interpreter form, with instructions, is attached to the original of this Notice.

All case related documents and correspondence shall be directed to the Hearings Unit, Office of Insurance Commissioner, P.O. Box 40255, Olympia, Washington 98504-0255. All interested individuals and entities who have questions or concerns concerning this proceeding should direct them to the Hearings Unit paralegal, Kelly Cairns, at the same address. Ms. Cairns' telephone number is (360) 725-7002.

Dated: December 8, 2014



JUDGE GEORGE FINKLE (Ret.)
Presiding Officer

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: Digital Leash/ProtectCELL, Fortegra Financial Corporation, Lots Intermediate Company, Scott McLaren, Robert Emery, Bryan Finnerty, Christopher Beyersdorff, Brian F. Kreger, Esq., Mike Kreidler, James T. Odiorne, J.D., CPA, John F. Hamje, Esq., Darryl Colman, Esq., and AnnaLisa Gellermann, Esq.,

DATED this 9th day of December, 2014.


KELLY A. CAIRNS

OFFICE OF INSURANCE COMMISSIONER
HEARINGS UNIT
Fax: (360) 664-2782

To request an interpreter, complete and mail this form to:

Presiding Officer
Hearings Unit
Office of Insurance Commissioner
P.O. Box 40255
Olympia, WA 98504-0255

REQUEST FOR INTERPRETER

I am a party or witness in Matter No. 14-0204 before the Insurance Commissioner. I NEED AN INTERPRETER and request that one be furnished.

Please check the statements that apply to you:

I am a non-English-speaking person. I cannot readily speak or understand the English language. My primary language is _____ (insert your primary language). I need an interpreter who can translate to and from the primary language and English.

I am unable to readily understand or communicate the spoken English language because:

- I am deaf.
- I have an impairment of hearing.
- I have an impairment of speech.

[Please state below or on the reverse side any details which would assist the Commissioner or Presiding Officer in arranging for a suitable interpreter or in providing appropriate mechanical or electronic amplification, viewing, or communication equipment.]

Date: _____ Signed: _____

Please print or type your name: _____

Address: _____

Telephone: _____