BEFORE THE STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

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| In the Matter of:<br><br>**ARMED CITIZENS' LEGAL DEFENSE NETWORK, INC.**<br><br>Appellant | Docket No. 20-0257<br><br>**ORDER ON MOTION FOR STAY** |

## I. Background

On March 26, 2020, the Office of the Insurance Commissioner ("OIC") issued Order to Cease and Desist ("Order") No. 20-0257 *In the Matter of Armed Citizens' Legal Defense Network, Inc.* The Order alleged that Armed Citizens' Legal Defense Network, Inc. ("ACLDN" or "Appellant") was acting as an unauthorized insurer in Washington. The Order, effective immediately, prohibited ACLDN from (a) engaging in or transacting the unauthorized business of insurance in the state of Washington, and (b) soliciting Washington residents to induce them to purchase any insurance contract or service contract. On March 31, 2020, ACLDN filed a Demand for Hearing to contest the Order. On May 26, 2020, ACLDN filed its "Motion to Stay Cease and Desist Order," the main purpose of which was to request a stay of the Order pending the outcome of the hearing. After a briefing schedule was set, the OIC responded and filed "OIC's Response in Opposition to Appellant's Motion to Stay Cease and Desist" on June 5, 2020. ACLDN then filed "American Citizen Legal Defense Network Inc.'s Reply in Support of Motion to Stay Cease and Desist Order" on June 11, 2020.

On June 17, 2020, both parties appeared at oral argument which was held via videoconferencing. Attorney Spencer Freeman appeared on behalf of ACLDN, and Insurance Enforcement Specialist Sofia Pasarow appeared on behalf of OIC. At the hearing, Ms. Pasarow argued for the first time that the constitutional due process challenges raised by ACLDN could not be adjudicated in this administrative proceeding under *Bare v. Gorton*, 84. Wn.2d 380 (1974). The parties were given additional time after oral argument to brief this issue, and both parties submitted briefs on the same.

## II. Issues

Whether a discretionary stay of the Order to Cease and Desist No. 20-0257 should be granted?

## III. Decision

The request for discretionary stay is denied.

## IV. Analysis

*Standard for Discretionary Stay*

RCW 48.04.020(2) states that "where an automatic stay is not provided for, and if the commissioner after written request therefor fails to grant a stay, the person aggrieved thereby may apply to the superior court for Thurston county for a stay of the commissioner's action." However, there is no further guidance on what standard applies when determining whether to grant such a stay. An automatic stay is not provided for in either RCW 48.15.023(5)(a)(i) nor RCW 48.02.080, both of which discuss the Commissioner's authority to issue a cease and desist order.[1]

A stay is not a matter of right, but is an exercise of judicial discretion. *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926). "Where a court is 'sufficiently convinced that a stay is necessary to avoid undue prejudice to a party's prosecution [or defense] of a matter,' a discretionary stay may be warranted." *In re Marriage of Herridge*, 169 Wn. App. 290, 302 (2012). "The party requesting a stay must make out a clear case of hardship or inequity in being required to go forward." *State v. Longo*, 185 Wn. App. 804, 812, 343 P.3d 378, 382 (2015).

In a previous case addressing whether a discretionary stay should be applied the standard adopted was an equitable weighing of each parties' interests at stake. Here, that would mean weighing the harm ACLDN asserts will occur, and has occurred, against the interests OIC asserts justify the Order. However, the parties are not in agreement that this standard should apply. ACLDN asserts that a discretionary stay is required in this case in order to comply with procedural due process. OIC argues that this tribunal cannot rule on such constitutional issues, and a review is limited to compliance with the statutory process in place, and that the equitable weighing of the interests at stake should result in the denial of a stay.

*Constitutional Issues in Administrative Proceeding*

The OIC argues that under *Bare v. Gorton*, 84 Wn.2d 380 (1974), administrative bodies cannot review constitutional challenges to state statutes. ACLDN argues that because they have framed their challenge "as applied" to ACLDN, and are asking for a stay in order to comply with due process requirements, this tribunal can decide these issues and rule in their favor to impose the stay.

[1] The Commissioner has lawfully delegated authority to hear and determine matters such as this to the Presiding Officer pursuant to WAC 284-02-070(2)(d)(i).

*Bare v. Gorton* arose out of an action where the plaintiff sought a declaratory judgment that RCW 42.17.140 was unconstitutional; that statute imposed spending limitations on campaign expenditures in any election campaign for public office or in connection with ballot propositions. 84 Wn.2d 380, 381. The court found that the plaintiff did not have to exhaust administrative remedies, as "[a]n administrative body does not have authority to determine the constitutionality of the law it administers; only the courts have that." *Gorton*, 84 Wn.2d 380, 383. But courts have distinguished between a facial constitutional challenge to a statute, and an "as-applied" challenge to a statute, and noted that in the latter case, exhaustion of administrative remedies should still be required. See *Prisk v. Poulsbo*, 46 Wn. App. 793 (1987)(finding that administrative bodies cannot hear facial challenges to the constitutionality of a statute, but noting in dicta that exhaustion of administrative remedies should still be required for an "as applied challenge"). In the context of land use decisions, several courts have found that exhaustion of remedies is necessary for an "as applied" challenge to the constitutionality of a statute, in order to develop the factual record on review and to allow the agency the opportunity to correct any error in application of the relevant statute. *See Harrington v. Spokane Cty.*, 128 Wn. App. 202, 210 (2005)(finding that administrative review was "required to develop the facts necessary to adjudicate this 'as applied' constitutional challenge"); *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 337 (1990) (determining the landowner's constitutional challenge was "as applied" and finding exhaustion of administrative remedies necessary for the court to have facts before it required to make a determination). At the very least, the facts pertinent to the issue must be developed in this administrative proceeding.

ACLDN does not argue that the statutory process in and of itself is unconstitutional; their argument is that in this case, as applied to ACLDN, issuing the cease and desist order effective immediately results in a violation of ACLDN's due process rights, and that a stay must be issued to preserve those rights. That argument is addressed further below.

*OIC Authority to Issue a Cease and Desist Order Effective Immediately*

The Insurance Code prohibits the transaction of insurance and the solicitation of insurance by unlicensed entities. RCW 48.15.010. The commissioner may issue a cease and desist order effective immediately under RCW 48.15.023(5)(a)(i) and RCW 48.02.080, as there is no statutory notice period required. *Contra* RCW 48.17.540 (revocation of a producer license requires service 15 days prior to effective date) and RCW 48.05.150 (requiring the commissioner to give 10 days of notice to insurer for suspension or revocation of a certificate of authority). As there is no notice period required, there is also no automatic stay available for any order issued "effective immediately." See RCW 48.04.020 (providing for an automatic stay of any action where the demand for hearing is received *prior to the effective date* of the order). Thus, the Insurance Code grants upon the Insurance Commissioner the authority to issue a cease and desist order that is effective immediately regarding unlicensed activity.

*Post deprivation hearings and due process*

"Though the procedures may vary according to the interest at stake, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *City of Redmond v. Moore*, 151 Wn.2d 664, 670 (2004)(citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)). "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Eldridge*, 424 U.S. 319, 335.

"This Court has recognized, on many occasions, that where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause." *Gilbert v. Homar*, 520 U.S. 924, 930-31 (1997) (citations omitted). "[W]e have rejected the proposition that [due process] *always* requires the State to provide a hearing prior to the initial deprivation of property." *Id.* "An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *Id.*

Indeed, *Mathews v. Eldridge* itself was such a case, where the Court found that a pretermination hearing for Social Security disability benefits was not necessary to satisfy due process requirements. 424 U.S. 319, 349. Similarly, in *Gilbert v. Homar*, the Court found that a presuspension hearing for a public employee was not required to satisfy due process. 520 U.S. 924, 935. And again, in *Dixon v. Love*, the Court noted that a presuspension hearing for a driver's license was not necessary to meet due process requirements. 431 U.S. 105 (1977).

Washington has adopted the three-part test laid out in *Mathews* to determine whether due process has been met in any particular case. *See Gourley v. Gourley*, 158 Wn.2d 460, 467-70 (2006) (applying the *Mathews* factors to determine whether Mr. Gourley had been afforded the opportunity to be heard at a meaningful time in a meaningful manner). Under the first factor, the interest at issue here is ACLDN's "liberty of engaging in commerce and engaging with other like-minded individuals and…acquiring future anticipated monies from the sale of memberships." ACLDN's *Motion to Stay Cease and Desist Order*, p. 6, lines 15-17. This is a property interest that should be protected with procedural due process. The length of deprivation is determined by the scheduling of the hearing, unless the party applies for a discretionary stay, as ACLDN has done here. In this case, OIC issued the Order to Cease and Desist on March 26, 2020. *Order to Cease and Desist*, No. 20-0257. The hearing was scheduled for November 17, 2020. *Notice of Hearing*, July 7, 2020. ACLDN filed the Motion to Stay Cease and Desist Order May 26,

2020, and after OIC filed a response, ACLDN then filed a reply on June 11, 2020. ACLDN's *Motion to Stay Cease and Desist Order*; *Armed Citizens' Legal Defense Network, Inc.'s Reply in Support of Motion to Stay Cease and Desist Order*. Oral argument occurred on June 17, 2020 and the parties then submitted additional briefing for consideration after oral argument on June 24, 2020 and July 3, 2020. Thus, ACLDN was able to have the order reviewed, and whether it would remain effective while the administrative proceeding was pending, much earlier than November 17, 2020 hearing date.

The Order required ACLDN to stop accepting new members in Washington, but did allow them to continue "fulfilling the terms of contracts formed prior to the effective date of this Order pursuant to RCW 48.15.020(2)(b)." *Order to Cease and Desist*, Order No. 20-0257, p.3. So, OIC curtailed ACLDN's business with the Order but did not require that they cease operations altogether. Additionally, ACLDN is free to continue to do business in other states.

The second factor looks at the risk of erroneous deprivation through the existing procedures, as well as what value additional or substitute safeguards may add. OIC conducted an investigation prior to issuing the Order. It began on or before April 15, 2019, but on that date, OIC sent formal notice to ACLDN it was conducting an investigation. ACLDN provided information, at one point in response to a subpoena duces tecum issued by the OIC.[2] The Order included what OIC felt were relevant facts and law, and informed ACLDN of the right to a hearing. ACLDN was then able to request a hearing, although not able to do so prior to the effectiveness of the Order. However, because they did not receive an automatic stay, they were able to request a discretionary stay, submit briefing on that issue and have it heard prior to the resolution of the requested hearing, with the availability of a possible remedy that could convert the proceedings into a "pre-taking" hearing.

Further, while there is some risk of "erroneous deprivation," the availability of the request for a discretionary stay mitigates that risk. As noted above, this review occurs much earlier in the process than the evidentiary hearing. Additionally, it is only new Washington memberships that have been "taken," such that ACLDN can continue to service existing Washington memberships as well as solicit memberships in other states.

Finally, the government interest is analyzed, including any additional burden that further procedural safeguards would place on OIC. ACLDN does not take issue with the sufficiency of the process and the hearing available, but the timing of it. ACLDN asserts that OIC has not established any "extraordinary circumstances" that justify the "post taking" hearing. However, the Insurance Code differentiates between types of conduct and when an automatic stay is available and when it is not. When attempting to curtail unlicensed activity, the Insurance Code confers upon the Insurance Commissioner the

[2] ACLDN raised an objection to responding to the subpoena duces tecum after they had complied and provided materials to OIC, and whether they were required to respond is not reviewed here.

authority to issue a Cease and Desist Order effective immediately, without any required notice period. RCW 48.15.023(5)(a)(i); RCW 48.02.080. The penalties for knowingly conducting unlicensed activity are also significant, with the availability of stiff fines and even criminal charges. RCW 48.15.023. These statutes evidence the legislature's recognition of the importance of curtailing unlicensed activity. Unlicensed entities transacting insurance avoid review of their policies and prices, undercut competition, do not have to meet capital requirements that licensed entities have to meet, and also avoid paying taxes that licensed entities have to pay. These requirements for licensed entities are in place to protect consumers. The OIC thus has a significant interest in preventing and stopping unlicensed insurance transactions to protect the public. Requiring a pretermination hearing would inhibit the OIC's ability to do so and likely encourage unlicensed entities to unlawfully transact insurance, as there would be no threat of immediate repercussions.

Under the Insurance Code, the OIC had the authority to issue the cease and desist order, effective immediately, to limit what it asserts is unlicensed insurance activity transacted by ACLDN. There is prima facie evidence (as analyzed below) that ACLDN is transacting insurance without the required license or certificate, as laid out in the order. The order is limited to restricting ACLDN's ability to solicit new memberships, but allows ACLDN to continue servicing existing memberships. Because the order was effective immediately, there was no opportunity for ACLDN to seek an automatic stay. However, ACLDN was able to request a discretionary stay and have a hearing on that issue, with the potential for resolution and relief from the order at a much earlier date than an evidentiary hearing could provide. As such, as noted above, ACLDN's procedural due process rights have not been violated and imposition of a stay is not necessary to comport with due process.

*Equitable weighing of the parties' interests*

As noted above, ACLDN asserts harm as a result of the OIC's Order to Cease and Desist, namely in lost revenue from potential memberships, and the possibility of having to cease operation as a result. OIC asserts that ACLDN is transacting insurance and unlawfully soliciting insurance business in Washington without the required license and certificate, and as such poses a danger to the insurance buying public in Washington. The harm asserted by OIC only occurs if ACLDN is truly offering some form of insurance. Similarly, if ACLDN is actually transacting insurance without the required license and certificate, they should not be afforded protection from the oversight of OIC. Thus, there must be some analysis of the substantive issues to determine whether a discretionary stay should be imposed.

"Insurance" is defined in RCW 48.01.040 as "a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies." RCW 48.01.050 defines insurer in pertinent part as including "every person engaged in the business of making contracts of insurance…" That same statute then goes on to note exceptions to the definition of insurer.

Washington courts have addressed the definition of insurance in limited contexts. In *In re Estate of Smiley*, 35 Wn.2d 863, 864 (1950), the court affirmed a finding that the proceeds of the policies at issue were not insurance policies, and thus were not exempt from taxation upon distribution of the proceeds; the nature of the transaction was akin to transferring property to another for safekeeping, with instructions for distribution upon death, which did not involve "any hazard or risk to anyone." *Id*. at 867. In another case, the Court held that self-insurance did not constitute insurance for the purposes of the state's insurance guaranty act. *Stamp v. Dep't of Labor & Indus.*, 122 Wn.2d 536 (1993). In examining whether a contract is one of insurance, the Court notes that "[n]o one can change the nature of insurance business by declaring in the contract that it is not insurance." *McCarty v. King Cty. Med. Serv. Corp.*, 26 Wn.2d 660, 684 (1946). Specifically, the nature of the contract, and "the examination of its contents," aside from the terms used or omitted, determine whether a contract is one of insurance. *Id*.

ACLDN advertises membership benefits, like:

- "Network members receive financial assistance to assure vigorous legal representation after using deadline force in self defense [sic]. You can rely on the Network leadership, attorneys, and legal experts for knowledgeable assistance and guidance."

Declaration of Jessica Bullington, Ex. 7, p.1. (ACLDN Membership Application).

The following is also listed as a benefit of membership in the application:

- "Immediate funding: When a member uses force in self defense [sic], the Network Immediately sends up to $25,000 to the member's attorney and can provide up to $25, 0000 in bail assistance. This assistance is extended after any legal self-defense incident whether you use a firearm or other defense option.

- "Funding we pay to your attorney assures critical precautions are taken including having an attorney present during any questioning, interfacing for you with law enforcement, keeping the news media at bay, and other assistance during those critical times immediately following self defense [sic]."

*Id*. at p. 2. In addition, the membership application states that ACLDN can "tailor post-incident legal assistance to meet the varying needs each situation dictates," which includes paying for trial expenses, attorney fees, expert witnesses, and investigators. *Id*. Benefits can also include "legal funding to defend against civil law suit," and additional assistance for a retrial or appeal. *Id*. The same membership application notes that ACLDN membership benefits are not insurance. *Decl. of Bullington*, Ex. 7 p. 2.

The Explanation of Membership Benefits provides further detail. Members have access to a list of ACLDN affiliated attorneys, and ACLDN will also send "an initial fee

deposit to your attorney so he or she immediately has funding to represent you during any questioning and can initiate an independent investigation of the incident for your protection." *Decl. of Bullington*, Ex. 8, p. 1 (*ACLDN Explanation of Member Benefits*). If a member is arrested and held in jail with bail set, "the Network will assist the member in making that bail." *Id*. The member's attorney can also "request a grant of further financial assistance from the Network to defray the cost of going to trial." Once such a request is received, an advisory board "will review the facts of the case and advise the Network leadership on specific issues of legal self defense [sic] on which decisions to grant financial support rest." *Id*. The document specifies that this step is in place to assure that funds "are not wasted defending a criminal act," and that such review is "never undertaken to deny assistance to a member who acted in legitimate self-defense." *Id*. A membership card is attached to these benefits.

ACLDN contributes 25% of collected membership fees to its Legal Defense Fund. *Decl. of Bullington*, Ex. 9. P. 4. Memberships are as yearly, or on a three year basis, or a ten year basis. *Id.* They are offered in single or couple memberships. *Id*. The Legal Defense Fund is also funded through corporate donations, bequests, individual donations from members and member friends, and ACLDN donations to the fund. *Second Decl. of Marty Hayes*, p 5.

First, although ACLDN does note in its materials that they are not providing insurance, this is not determinative as to whether membership with ACLDN constitutes insurance. Regarding the definition of insurance, there is prima facie evidence that ACLDN is paying a specified amount - up to $25,000 - upon a determinable contingency – a self-defense incident that requires legal representation. This is sufficient, at this time, to meet the definition of "insurance." Further analysis of this issue may result in a different finding, but based on the materials and evidence available at this time, there is prima facie evidence that the memberships offered by ACLDN meet the definition of insurance.

Because OIC has made an initial showing that ACLDN's memberships constitute insurance, the OIC's interest in preventing and stopping unlicensed activity weigh in support of denying the request for a discretionary stay at this time.

## V. Order

Thus, IT IS ORDERED:

The request for a discretionary stay of Order to Cease and Desist No. 20-0257 is DENIED.

DATED: July 30, 2020

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Julia Eisentrout
Presiding Officer

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the state of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be filed and served the foregoing *Order on Motion for Stay* on the following people at their email addresses listed below:

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Dated this 30th day of July, 2020, in Tumwater, Washington.

/s/ Rebekah Carter
Rebekah Carter
Hearings Unit Paralegal