BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

In the Matter of: ARMED CITIZENS LEGAL DEFENSE NETWORK Appellant	Docket No. 20-0257, 20-0457 **SECOND AMENDED FINAL ORDER ON SUMMARY JUDGMENT**

This order is amended to reflect consideration of the Office of the Insurance Commissioner's timely submitted written argument regarding the fine amount. Previously, said written argument had not been considered and was erroneously overlooked prior to issuing the Amended Final Order on Summary Judgment. Thus, this Second Amended Final Order on Summary Judgment addresses the fine amount after considering both parties' submissions regarding the amount, and to address the parties' arguments on reconsideration. This order supersedes both previous orders.

ISSUES

1. Should the Office of the Insurance Commissioner's Motion for Summary Judgment be granted and Armed Citizens Legal Defense Network's Motion for Summary Judgment denied?

2. Did Armed Citizens Legal Defense Network violate RCW 48.05.030(1) and RCW 48.15.020(1) by transacting insurance in Washington as an unauthorized insurer?

3. If so, should the Cease and Desist Order be affirmed?

4. If so, should the Order Imposing a Fine be affirmed?

5. Should Armed Citizens' Legal Defense Network, Inc.'s Motion for Reconsideration of Final Order on Summary Judgment be granted?

6. Should the legal conclusions in the Final Order on Summary Judgment be reversed?

ORDER SUMMARY

1. Yes, the Office of the Insurance Commissioner's Motion for Summary Judgment is granted. Armed Citizens Legal Defense Network's Motion for Summary Judgment is denied.

2. Yes, Armed Citizens Legal Defense Network violated RCW 48.05.030(1) and RCW 48.15.020(1) by transacting insurance in Washington as an unauthorized insurer.

3. The Order to Cease and Desist No. 20-0257 is affirmed.

4. The Order to Impose A Fine No. 20-0457 is affirmed. OIC has the authority to fine Armed Citizens Legal Defense Network under RCW 48.15.023(5)(a)(ii) as a matter of law upon the finding that ACLDN transacted insurance without authorization from the Insurance Commissioner. A fine of $50,000 is imposed.

5. ACLDN's Motion for Reconsideration is granted in part to amend relevant portions the Final Order on Summary Judgment, without disturbing the ultimate holding granting summary judgment for OIC and denying summary judgment for ACLDN. The legal conclusions that discuss that an act of self-defense can be a determinable contingency are amended and refined in light of the objections raised by ACLDN, and the findings regarding the fine amount are amended to include discussion of the factors considered in setting the fine of $50,000. Summary judgment is still granted for the OIC, and ACLDN's motion for summary judgment is still denied.

BACKGROUND

1. On March 26, 2020, the Office of the Insurance Commissioner ("OIC") issued an Order to Cease and Desist ("Order") No. 20-0257 In the Matter of Armed Citizens' Legal Defense Network, Inc ("ACLDN").

2. On March 31, 2020, ACLDN filed a Demand for Hearing ("Demand") with the OIC's Hearings Unit to contest the Order.

3. On May 26, 2020, ACLDN filed a "Motion to Stay Cease and Desist Order," and requested a stay of the Order.

4. On May 29, 2020, OIC filed Order Imposing A Fine No. 20-0457, which sought to fine ACLDN $200,000.00 for the same conduct underlying the Order to Cease and Desist.

5. OIC filed a brief in opposition to a stay of the Order to Cease and Desist, and oral argument was had on the issue. On July 30th, 2020, the request for a discretionary stay was denied.

6. Pursuant to the case schedule set in these matters, both parties then filed motions for summary judgment, responses, and replies thereto.

7. The material submitted by both parties has been reviewed under the summary judgment standard articulated in WAC 10-08-135, applicable to adjudicative proceedings before the OIC per WAC 284-02-070(2)(a).

8. A Final Order on Summary Judgment issued on September 25, 2020, granting the OIC's motion for summary judgment, and denying the same for ACLDN. The record was left open until October 9, 2020, for any briefing the parties wished to submit regarding the fine amount. ACLDN submitted a motion for reconsideration in addition to a brief regarding the amount of any fine to be imposed. OIC submitted a brief regarding the amount of the fine, and a response to the motion for reconsideration. All submissions have been considered prior to issuing this Amended Final Order on Summary Judgment.

FACTS FOR PURPOSES OF SUMMARY JUDGMENT

I adopt these facts for the purposes of summary judgment:

1. ACLDN was formed on June 6, 2011, as a Washington Profit Corporation with a principal office located in Onalaska, Washington. *Declaration of Jessica Bullington*, Ex. 1. Marty Hayes is the President, Registered Agent, and Governor of Armed Citizens. *Id*. Mr. Hayes is a former police officer, and also president of another company he founded, The Firearms Academy of Seattle, which provides education on the laws of use of force in self-defense, as well as gun safety and marksmanship. *Declaration of Marty Hayes*, p.1, 2. Mr. Hayes obtained a juris doctor from Concord Law School through the school's distance learning law school. *Id*.

2. Armed Citizens Educational Foundation ("Educational Foundation") was formed on September 25, 2012, as a Washington Non-Profit Corporation. *Bullington Decl*., Ex. 2. The Educational Foundation shares the same principal office street address, principal office mailing address, and governors as ACLDN. *Bullington Decl*., Ex. 1, 2.

3. A letter from President Marty Hayes, accessible on the ACLDN website, includes the following statements, outlining ACLDN's "two core missions":

> First, to help members in the legal fight after they justifiably use force in self-defense by paying for the services of attorneys, expert witnesses, private investigators and other professionals essential to mounting a vigorous legal defense of self-defense on behalf of our members. Our second mission is educating our members (and to some extent, the gun-owning public) in the law governing use of force in self-defense and how armed citizens can protect against unmeritorious prosecution.

Bullington Decl., Ex. 9 p. 16.

4. ACLDN does not possess a Certificate of Authority that enables it to lawfully act as an insurer in Washington State. *Bullington Decl*., para. 7.

5. ACLDN's membership brochure states across the top: "Join the Network-Don't face the legal aftermath of self-defense alone." *Bullington Decl*., Ex. 7, p. 2. The page is then broken into three sections, entitled "Before," "During," and "After." *Id*. Under "Before," ACLDN explains that "just as safe gun handling actually starts before you touch a gun, your legal defense should start with personal preparation before you are engaged in a self-defense incident." *Id*. The section then outlines some of the education benefits, and encourages members to "get to know an attorney" before needing one, and mentions that membership grants access to an exclusive list of attorneys affiliated with ACLDN. *Bullington Decl*., Ex. 7, p. 2.

6. Under the "During" section, the brochure explains that knowing the laws and being well-educated help to prepare a member to "use force appropriate to save innocent life." That section also includes the following language:

> Immediate funding: When a member uses force in self-defense, the Network immediately sends up to $25,000 to the member's attorney, and can provide up to $25,000 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.

Bullington Decl., Ex. 7, p. 2.

7. Under the "After" section, ACLDN states that "Armed Citizens' Legal Defense Network membership benefits are not insurance reimbursements. That's a good thing!" *Bullington Decl*., Ex. 7, p. 2. The section then states that membership benefits:

> [G]ive the Network a free hand to tailor post-incident legal assistance to meet the varying needs each situation dictates and paying the expenses to assure a vigorous legal defense if the case goes to trial. This assistance pays attorney fees and if needed, the expertise of an additional attorney or attorneys to contribute much needed experience to the trial team, as well as pay for expert witnesses, private investigators, and other expenses to defense the member's self-defense actions.

Id. The section goes onto explain that even after trial, legal funding can be made available to members to defend against a civil suit, or for retrial or appeal. *Id*.

8. The Membership Application includes a section titled, "Defend Yourself Confidently." *Bullington Decl*. Ex. 7, p.1. This section states that "Network members receive financial assistance to assure vigorous legal representation after using deadly force in self-defense." *Id*. It adds that after joining the Network, a member also receives "extensive education about using deadly force in self-defense and how to interact with law enforcement after self-defense and other aftermath issues." *Id*.

9. To join ACLDN, a member must pay a membership fee and attest: they are not legally prohibited from possessing firearms, that they are 18 years of age or older, that they legally reside in the United States. *Bullington Decl*. Ex. 7, p. 1. The cost of membership is as follows: a single membership can be bought for $135 for 1 year, $295 for 3 years, and $790 for 10 years. A couple membership can be purchased for $195 for 1 year, $474 for 3 years, and $1390 for 10 years. *Id*.

10. Upon joining ACLDN, the member receives an Explanation of Member Benefits and a Membership Card. *Bullington Decl*. Ex. 8, p. 1, 2. Specific benefits include the following:

    - 9 educational videos
    - 235 page book on self-defense.
    - Access to a list of Network Affiliated Attorneys
    - For legitimate self-defense claims, an initial fee deposit to the member's attorney
    - Coordination of legal assistance by a Network representative if the member does not have an attorney
    - Further financial assistance "to defray the cost of going to trial"

    Bullington Decl., Ex. 9; *Hayes Decl*. p. 3.

    The Explanation of Member Benefits reiterates the dual purpose of ACLDN: "1) understand the legal ramifications surrounding use of deadly force and its aftermath, and 2) have access to vigorous and skillful legal representation immediately after a self-defense incident, and continuing so long as the member is in legal jeopardy stemming from a legitimate self-defense act." *Id*. The ACLDN Advisory Board reviews each case and advises leadership as to specific issues of legal self-dense "on which decisions to grant financial support rest." *Id*. This is to ensure that ACLDN does not waste funds defending criminal acts, and to avoid accusations that ACLDN "supports or encourages use of force without justification." *Id*.

11. ACLDN provided a list of claims made, which showed they made payments on 22 of 25 claims; two of the claims arose from incidents in Washington. *Bullington Decl.*, Ex. 10. Of those two claims, ACLDN made a payment on one. *Id*. ACLDN paid $2000 for a member who was a victim of road rage and displayed a firearm to stop

the incident; no criminal charges were filed. *Id*. For the other incident, ACLDN did not find the actions of the member were self-defense, and did not make any payments; that member arrived home to find a neighbor's dog in in his yard, retrieved a gun and fired shots to scare the dog. *Id*. ACLDN has made payments regarding member claims that range from $400 to $75,000. *Id*.

CONCLUSIONS OF LAW

I adopt the following Conclusions of Law:

Jurisdiction

1. The OIC has jurisdiction over the person(s) and subject matter of this case pursuant to RCW 48.04.010, WAC 284-02-070 and RCW 34.05.

Summary Judgment

2. "A motion for summary judgment may be granted and an order issued if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." WAC 10-08-135, WAC 284-02-070(2)(a). "But where material facts are disputed, a trial is needed to resolve the issue." *Camicia v. Howard S. Wright Constr. Co*., 179 Wn.2d 684, 693, 317 P.3d 987, 991 (2014). "A material fact is one upon which the outcome of the litigation depends." *Zimmerman v. W8Less Prods., LLC*, 160 Wn. App. 678, 693, 248 P.3d 601, 608 (2011). "If the moving party meets this initial burden, then '[t]he nonmoving party must set forth specific facts showing a genuine issue and cannot rest on mere allegations.'" *Id*. (citation omitted).

3. The parties are in agreement that ACLDN does not hold a certificate of authority to act as an insurer, and is not otherwise authorized to transact insurance in Washington. Thus, the primary issue is whether the memberships sold by ACLDN qualify as insurance, such that they are required to have a certificate of authority issued by OIC.

4. As outlined below, ACLDN is transacting insurance in Washington. Thus, the Insurance Commissioner has authority to issue a cease and desist order and to issue a fine, under the provisions listed below. The factual basis for the Order to Cease and Desist No. 20-0257 and the Order Imposing A Fine No. 20-0457 are the same. ACLDN was given additional time for discovery on the fine as that order was filed after the Order to Cease and Desist. Because discovery for the issue of the fine was extended for ACLDN to seek information so they could respond to the fine amount sought by OIC, and that deadline did not pass until after all briefing for the motions for summary judgment and the responses and replies had been submitted, additional time was afforded to the parties to submit any briefing they wished regarding the amount of the fine, after the date of the Final Order on Summary Judgment. The record remained open until October 9, 2020. ACLDN submitted a brief regarding the

fine amount, in addition to the Motion for Reconsideration submitted. OIC submitted argument in support of a $200,000 fine, and also responded to ACLDN's Motion for Reconsideration.

Objection to Bullington Declaration, paragraphs 9-15 and Exhibits 3-6

5. ACLDN objects to the admission of paragraphs 9-15 of Jessica Bullington's Declaration submitted in support of OIC's Motion for Summary Judgment, as well as Exhibits 3-6, under the relevance standard.

6. Under RCW 34.05.452(1):

> Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. The presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. The presiding officer *may* exclude evidence that is irrelevant, immaterial, or unduly repetitious (emphasis added).

Subsection (2) of the same statute provides that "[i]f not inconsistent with subsection (1) of this section, the presiding officer shall refer to the Washington Rules of Evidence as guidelines for evidentiary rulings." RCW 34.05.452(2).

7. ER 401 provides that " '[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

8. ER 402 provides that "[a]ll relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible."

9. The rule for admission of evidence is broader under the APA than under the Rules of Evidence; the APA allows for the exclusion of irrelevant evidence, but does not require it.

10. Paragraphs 9-15 of Jessica Bullington's declaration and Exhibits 3-6 attached thereto provide information regarding how OIC went about investigating ACLDN and obtaining the information upon which they based the Order to Cease and Desist and the Order Imposing A Fine. I accept the referenced paragraphs and exhibits for the information they contain. I decline to adopt the characterization of ACLDN's response to OIC's investigation as "uncooperative," or use the information contained therein as justification to impose a higher fine amount. ACLDN responded as they deemed appropriate at the time they were contacted by OIC. They did not believe there was a duty to respond in a certain manner or provide

specific documents, and instead provided a legal analysis explaining why ACLDN memberships were outside the scope of OIC regulation. In turn, OIC proceeded to issue the subpoena duces tecum in order to receive the additional information and responses OIC believed the agency was entitled to obtain. ACLDN complied with the subpoena. In this case, ACLDN's level of cooperation is not grounds for an increased fine amount, but completes the timeline for investigation and OIC's eventual issuance of the Order to Cease and Desist and the Order Imposing A Fine.

The evidence is admissible as described above.

ACLDN is Transacting Insurance

11. RCW 48.01.040 provides that "[i]nsurance is a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies."

12. "Specified amount" and "determinable contingency" are not defined by statute. "In the absence of such a definition, statutory construction requires that we give undefined words their common and ordinary meaning. To ascertain this meaning, we may use a dictionary." *Vance v. Dep't of Ret. Sys.*, 114 Wn. App. 572, 577 (2002) (citations omitted).

13. In pertinent part, Merriam-Webster defines "specify" as: "to name or state explicitly or in detail." "Specify." *Merriam-Webster.com Dictionary*, Merriam-Webster, http://www.merriam-webster.com/dictionary/specify. Accessed 16 Sep. 2020.

14. Merriam-Webster defines "amount" (the noun) as:

    1. The total number or quantity; aggregate;
    2. The quantity at hand or under consideration;
    3. The whole effect, significance, or import;
    4. Accounting: a principal sum and interest on it.

    "Amount." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/amount. Accessed 16 Sep. 2020.

15. Merriam-Webster defines "determinable" as "capable of being determined, definitely ascertained, or decided upon." "Determinable." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/determinable. Accessed 16 Sep. 2020.

16. Merriam-Webster defines "contingency" in pertinent part:
    1. A contingent event or condition: such as
        a. An event (such as an emergency) that may but is not certain to occur;
        b. Something liable to happen as an adjunct to or result of something else.

"Contingency." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/contingency. Accessed 16 Sep. 2020.

17. There is little common law guidance on the application of the current statutory definition of insurance in RCW 48.01.040. Prior to amendment, one Washington court held that "[a]n essential element of insurance is that there be a 'hazard or peril insured against.'" *State ex re. Fishback v. Universal Service Agency*, 87 Wash. 413, 424 (1915).

18. In another context, a Washington court held that "[a] contract may be a risk-shifting device, but to be a contract of insurance, which is a risk-distributing device, it must possess both features, and unless it does it is not a contract of insurance whatever be its name or form." *In re Smiley's Estate*, 35 Wn.2d 863, 867 (1950). A federal court also noted that insurance involves risk-shifting and risk-distributing. *Amerco v. C.I.R.*, 979 F.2d 162, 165 (9th Cir. 1992).

19. A federal court noted that "the principal ingredients [of an insurance contract] are the consideration, the risk and the indemnity. The consideration is the premium for the insurer's undertaking; the risk may be said to be the perils or contingencies against which the assured is protected; and the indemnity is the stipulated desideratum to be paid to the assured in case he has suffered loss or damage through the perils and contingencies specified." *Physicians Defense Co v. Cooper*, 199 F. 576, 579 (9th Cir. 1912).

20. These cases provide background and context in determining what constitutes insurance. However, these cases do not provide additional requirements for the definition of insurance that are not specifically listed in RCW 48.01.040.

21. Additionally, in examining whether a contract is one of insurance, the Court has noted 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*.

22. Given the definitions above, ACLDN is promising to pay a specified amount upon a determinable contingency. The "specified amount" can be identified by using language such as "up to $25,000." This is sufficient to be considered "named or stated explicitly or in detail" under the definition of "specify" noted above. Both parties have discussed *Love v. Money Tree, Inc.*, 279 Ga. 476, 614 S.E.2d 47 (2005), which illustrates that language such as "up to" can render an amount specific enough to qualify a membership as insurance. In that matter, an automobile club membership included language that indicated it would "pay 50% of moving traffic violations up to $ 200; $ 50 for emergency road service; $ 75 for an emergency ambulance service; $ 200 for an emergency travel service if a member's car became disabled more than 100 miles from her home; up to $ 100 in attorney fees to collect damages for personal injuries sustained in an auto accident or to defend a member in traffic court; and up to $ 750 in attorney fees if prosecuted for criminal manslaughter." *Love*, 279 Ga. 476, 478, 614 S.E.2d 47, 48-49. The court found that the auto club "undertakes to pay a

specified amount of money to its members upon the occurrence of determinable contingencies" and also held that "by enlisting numerous members, the club distributes individual losses among a large group of purchasers." *Id.* Although not controlling, this analysis is persuasive. The memberships here offer the same type of benefit outlined in *Love*. The language "up to $25,000" is sufficient in detail to be a "specified amount" within the definition of insurance found in RCW 48.01.040.

ACLDN points out that they have removed the "up to $25,000" language from their website, and argue that they currently specify no amount. But offering to pay a "legal expense" or a "bail expense" is a specified amount as well, although not limited by a dollar amount. The ACLDN materials clarify that disbursements from the funds are always made to vendors, and not directly to members. Although the amounts disbursed vary, these amounts are to pay for specific expenses associated with a member's case. There may be no limit to the amount ACLDN is willing to expend on a particular case, but the amounts expended are tied to specific expenses. This is enough to qualify as a "specified amount" within the meaning of RCW 48.01.040.

Conclusions 23-27 are amended to reflect consideration of the issues raised on reconsideration.

23. More complex is the issue of whether an act of self-defense can qualify as a "determinable contingency." Certainly, an act of self-defense is determinable; what is less clear is whether it is contingent. ACLDN argues that because self-defense is an intentional act, by definition, it cannot be contingent. OIC argues (and it was suggested in the Order on Motion for Stay) that part of the determinable contingency is the legal and/or bail expenses that arise therefrom, and that these are variables that may or may not occur and thus "contingencies."

    Upon further analysis, the event that is covered is the act of self-defense.[1] But self-defense is really a hybrid of a contingent act and an intentional act. It is true that using force to defend yourself from another is an intentional act. However, acting in self-defense is *contingent* upon circumstances outside the control of the person so acting. An act of self-defense "may but is not certain to occur." *See* definition of "contingency," *supra*. It is also "something liable to happen as an adjunct to or result of something else," the something else being the circumstances that arise that make it appear necessary to defend oneself. *Id.* So while the decision to use self-defense and act accordingly is intentional, the circumstances that precede such a decision are necessary and contingent, and thus even use of self-defense is a "determinable contingency."

24. This analysis comports with the application of the legal principles of self-defense, and even the principle that self-defense is available as a defense when it is later proven no attack was imminent. As ACLDN correctly pointed out in their motion for reconsideration, in the

[1] OIC argued in its response that both bail and legal expenses are determinable contingencies. However, while these expenses may or may not occur, members may receive financial assistance prior to those events. As repairs under a home or auto insurance policy are not "covered events" but flow therefrom, so are bail and legal expenses that flow from an act of self-defense under this model of coverage.

criminal context, the defense of self-defense does not require an attack by a third party. As the pattern jury instructions note,

> A person is entitled to act on appearances in defending [himself] [herself] [another], if [he] [she] believes in good faith and on reasonable grounds that [he] [she] [another] is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

WPIC 17.04 Lawful Force—Actual Danger Not Necessary. Like many jury instructions, the comments to WPIC 17.04 note that this particular instruction arose out of the common law. The reasonable belief that an attack was imminent, based on the circumstances at hand, is still required, even though it later is discovered no attack was about to take place. As noted:

> If the appellants, at the time of the alleged assault upon them, *as reasonably and ordinarily cautious and prudent men, honestly believed that they were in danger of great bodily harm*, they would have the right to resort to self defense, and their conduct is to be judged by the condition appearing to them at the time, not by the condition as it might appear to the jury in the light of testimony before it. The appellants need not have been in actual danger of great bodily harm, *but they were entitled to act on appearances*; and if they believed in good faith and on reasonable grounds that they were in actual danger of great bodily harm, although it afterwards might develop that they were mistaken as to the extent of the danger, *if they acted as reasonably and ordinarily cautious and prudent men would have done under the circumstances as they appeared to them, they were justified in defending themselves*.

State v. Miller, 141 Wash. 104, 105-06 (1926) (emphasis added). So, while a mistake as to whether a third party attack was actually imminent does not prevent a person from arguing self-defense to a criminal charge, such a belief must still be reasonable and based upon circumstances outside the control of the actor. Proper application of the defense requires that there be circumstances beyond a person's control that either a) an attack is imminent, or b) a reasonable person presented with the same circumstances would believe an attack was imminent, regardless of whether it actually was. Thus, self-defense is still properly considered a contingency; it may or may not occur, and is liable to happen as an adjunct to something else.

25. *Grange Ins. Co. v. Brosseau*, 113 Wn.2d 91 (1989) discussed how an act of self-defense is intentional, but the circumstances of that consideration distinguish it somewhat from the issue here. In that matter, Brosseau shot and killed Lennis Anderson in what he claimed was self-defense after Anderson attacked him with a knife. In analyzing the insurance company's duty to defend Brosseau from a wrongful death lawsuit under both his auto insurance and

homeowner's insurance policies, the court found there was none because of the intentional nature of the act of self-defense. Under both policies, coverage only extended to "an occurrence" where body injury resulted from "an accident;" thus neither policy covered injuries that resulted from Brosseau intentionally shooting Anderson, even in self-defense. *Brosseau*, 113 Wn.2d 91, 96-97. Unlike the memberships at issue here, the insurance policies weren't specifically designed to provide financial assistance after an incident of self-defense. The court's analysis centered on whether the intentional act of self-defense qualified as an "occurrence" under both the policies, when "occurrence" was defined as "an accident…which results in bodily injury or property damage." *Grange Ins. Co. v. Brosseau*, 113 Wn.2d 91, 93. Notably, the *Brosseau* Court discussed that "members of the public may wish to insure themselves from the cost of defending liability actions where the facts ultimately exonerate them, and that it would not violate public policy to permit an insurance company to defend an action where the insured is excused on the basis of self-defense." *Brosseau*, 113 Wn.2d 91, 99. This premise is directly at odds with what ACLDN asserts: that acts of self-defense can never be covered by an insurance policy, regardless of that policy's intent.

Further, the *Brosseau* Court examined the meaning of terms within a policy, and whether an act of self-defense could be considered an "occurrence" within the meaning of the policy; there was no discussion, argument or decision as to whether an act of self-defense could be considered a determinable contingency within the meaning the definition of insurance under RCW 48.01.040. Nor was there any consideration as to whether an act of self-defense was a contingent act. Thus, finding that an act is both intentional and contingent is not at odds with the holding in *Brosseau*.

26. The holding that an act of self-defense is both contingent and intentional is also not contrary to the holding in *Clemmons v. Am. States Ins. Co.*, 412 So.2d 906 (Fla. Dist. Ct. App. 1982), also cited by ACLDN. Similar to *Brosseau*, the court in *Clemmons* analyzed whether a policy exclusion for intentionally caused injuries or death included a death caused by the necessary use of force in self-defense. 412 So. 2d 906, 907. Even though Leeper intentionally shot Clemmons, he testified that he did not intend to kill Clemmons, but just to keep Clemmons from shooting him; the court ultimately found that the policy exclusion for intentionally inflicted injuries applied, as by intentionally shooting Clemmons, Leeper intentionally injured him, and it did not matter that the ultimate injury exceeded the scope of the injury Leeper intended to inflict. *Id*. at 910. "[E]ach intentionally caused bodily injuries to another by intentionally shooting him, each acted within their insurance policy exclusion, notwithstanding that the ultimate purpose of each was to accomplish a distant objective or goal quite beyond and detached from the intended act of shooting and the immediate obvious result of thereby inflicting serious bodily harm." *Clemmons*, 412 So. 2d 906, 910. The court did not discuss whether the act of intentionally inflicting harm on another was *contingent*.

27. To reiterate, while a third party attack is not necessary to successfully apply the principles of self-defense in a civil or criminal case, successful application does require, at the very least, circumstances that would lead a reasonable person to believe acting in self-defense was

necessary. Thus, self-defense is still contingent upon events out of the control of the person choosing to act in self-defense. Self-defense is both contingent and intentional.

28. Additionally, there is some transfer and distribution of risk present in the ACLDN memberships. The risk is that if a member acts in self-defense there may be legal and bail expenses associated with that act. Assuming ACLDN agrees the act was one of self-defense, financial assistance is provided. The risk of legal and other expenses is distributed among ACLDN members at least somewhat, as membership fees do account for 25% of the monies added to the fund from which ACLDN draws upon in order to provide assistance.

29. Finally, ACLDN 's disclaimer that membership "is not insurance," does not trump the nature of the relationship between ACLDN and its members. When viewed along with the totality of the contents of the website, the membership application and brochure, and the Explanation of Membership Benefits, this advisement does not alter the relationship that is created between insurer and insured. At the very least, ACLDN is promising financial assistance to members that it deems have engaged in legitimate acts of self-defense. Specifically, ACLDN notes in its materials that any claim reviews that occur are not done for the purpose of denying assistance to members that have acted in self-defense, but rather to ensure that they do not provide financial assistance to any member that has committed a crime. This type of review is similar to the review any insurance company completes to ensure that a claim by an insured is covered by the policy.

    Nor are the declarations of 13 members as to their subjective understanding of the relationship determinative as to whether ACLDN membership are insurance. Each declarant states that he or she was "fully aware ACLDN retain full discretion to provide a member access to and receive financial assistance" and that "[a]t no time did I think or believe that ACLDN was providing me…insurance or contractual obligation to have access to the ACLDN fund." However, these statements do not inform whether the memberships sold by ACLDN fall within the statutory definition of insurance. The standard for application of the definition of insurance is objective: the determination is made by applying the facts of the transaction to the meaning of the words in the statutory definition. Entities cannot evade supervision from OIC by having consumers sign attestations that the consumers agree the product purchased is not insurance and that no contractual obligation to pay exists.

30. For the reasons outlined above, the memberships sold by ACLDN do qualify as insurance, as ACLDN promises to pay a specified amount upon a determinable contingency. As they qualify under this portion of the definition of insurance in RCW 48.01.040, there is no need to reach whether the memberships constitute indemnification.

ACLDN is not authorized to transact insurance in Washington

31. RCW 48.05.030(1) states in pertinent part that "[n]o person shall act as an insurer and no insurer shall transact insurance in this state other than as authorized by a certificate of authority issued to it by the commissioner and then in force…"

32. RCW 48.15.020(1) provides that "[a]n insurer that is not authorized by the commissioner may not solicit insurance business in this state or transact insurance business in this state, except as provided in this chapter."

33. It is undisputed that ACLDN does not hold a certificate of authority to transact insurance in Washington, and ACLDN is not otherwise authorized to engage in the business of insurance. Thus, because ACLDN has transacted insurance, they have violated the above statutes.

Authority to issue cease and desist order

34. Under RCW 48.02.080(3), "[i]f the commissioner has cause to believe that any person is violating or is about to violate any provision of this code or any regulation or order of the commissioner, he or she may: (a) issue a cease and desist order…"

35. Under RCW 48.15.023(5)(a), "[i]f the commissioner has cause to believe that any person has violated the provisions of RCW 48.15.020(1), the commissioner may: (i) [i]ssue and enforce a cease and desist order in accordance with the provisions of RCW 48.02.080…"

36. As discussed above, ACLDN has transacted insurance without being authorized to do, in violation of RCW 48.15.020 and RCW 48.05.030. Thus, under RCW 48.02.080 and RCW 48.15.023(5)(a) the Commissioner had the authority to issue Order to Cease and Desist No. 20-0257.

OIC Authority to Fine and Fine Amount (Amended)

37. Per RCW 48.15.023(5)(a)(ii), "[i]f the commissioner has cause to believe that any person has violated the provisions of RCW 48.15.020(1), the commissioner may:…(ii) [a]ssess a civil penalty of not more than twenty-five thousand dollars for each violation, after providing notice and an opportunity for a hearing in accordance with chapters 34.05 and 48.04 RCW."

38. "Notice and opportunity for a hearing" does not require that an evidentiary hearing actually occur prior to assessment of the fine. Nor does it preclude resolution of the matter with a motion for summary judgment, prior to and absolving the need for said evidentiary hearing. OIC has satisfied this requirement by informing ACLDN of the right to a hearing, at a time prior to the fine becoming due. The issue of whether OIC has authority to fine ACLDN is resolved in OIC's favor upon determining that ACLDN indeed transacted insurance without authorization from the Insurance Commissioner, as required.

39. However, OIC issued the Order Imposing A Fine well after the initial Order to Cease and Desist was issued. As such, ACLDN was afforded additional time for discovery regarding the fine, in order to prepare any argument regarding the fine amount. While there is no question that legally, if ACLDN is transacting insurance without authorization from the Insurance Commissioner, the Insurance Commissioner has the authority to fine ACLDN, ACLDN was afforded the opportunity to make argument regarding the amount of the fine, after the conclusion of discovery on that issue. Discovery concluded September 9, 2020,

regarding Order Imposing A Fine, No. 20-0457.[2] This was after motions for summary judgment, responses, and replies were submitted. As such, the parties were afforded until October 9, 2020, to provide additional written argument solely on the amount of the fine.

40. Given the facts of this case, there is evidence of multiple violations committed by ACLDN, subjecting them to a possible fine of more than $25,000. Because ACLDN is not a licensed insurer, each membership sold in Washington constitutes a violation of RCW 48.15.020 as an insurance transaction, subject to the penalty of up to a $25,000 fine under RCW 48.15.023(5)(a)(ii).

41. The OIC's argument points out that since ACLDN's inception, they have avoided OIC regulation and thus have not paid premium tax, and because ACLDN has not kept records concerning the total amount of money collected for memberships, there is no way for OIC to calculate what premium tax is owed. In addition, ACLDN has not had to comply with the prohibition on unfair trade practices, has not complied with rate and form filing requirements, nor capital and surplus requirements. The OIC adds that under the current statutory scheme, given the more than 2000 separate instances of memberships ACLDN sold in Washington the OIC is authorized to fine ACLDN over $63 million, and thus $200,000 is "abundantly reasonable."

42. Nevertheless, the evidence submitted by ACLDN is credible and demonstrates that they attempted to create a business model that was not insurance, and did not intentionally thwart OIC authority and jurisdiction by conducting business in the manner that they have. Further, ACLDN's behavior in responding to the OIC's investigation was consistent with their belief that they were not transacting insurance, and thus were not required to provide OIC with the documents requested. ACLDN's initial response to OIC's investigation and requests analyzed the legality of OIC's oversight and ACLDN's belief that they operated outside the bounds of OIC jurisdiction. OIC issued a subpoena duces tecum and ACLDN responded by producing the documents sought. In this case, this is not grounds for an increased fine amount.

43. Nor are there any consumer complaints against ACLDN in evidence. Considering they have been in operation since 2008, this is significant.

44. There is no evidence of ACLDN solicitation through social media, radio, or television, or evidence of other large scale marketing campaigns. There is no evidence ACLDN made misrepresentations, intentional or otherwise, that confused consumers about their products.

45. A fine of $50,000 is significant enough to recognize the seriousness of the offense, and the fact that multiple transactions of unauthorized insurance occurred in Washington.

[2] OIC argued that the timing of ACLDN's discovery request should preclude raising any issue regarding summary judgment on the issue of a fine. However, as that request was submitted with sufficient time for OIC to respond by the discovery deadline, there is no basis to deprive ACLDN the opportunity to review that discovery and make any argument regarding the fine accordingly.

ORDER

Based on the foregoing Facts for Purposes of Summary Judgment and Conclusions of Law, the Office of the Insurance Commissioner is entitled to summary judgment.

ACLDN engaged in the unauthorized transaction of insurance in Washington in violation of RCW 48.05.030 and RCW 48.15.020.

The Insurance Commissioner lawfully issued the Order to Cease and Desist No. 20-0257 pursuant to RCW 48.02.080 and RCW 48.15.023.

The Insurance Commissioner has authority to fine ACLDN under RCW 48.15.023. A fine of $50,000 is imposed and due 30 days from the date of this order.

All future proceedings are stricken

November 5, 2020

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Julia Eisentrout
Reviewing 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.

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 *Amended Final Order on Summary Judgment* on the following people at their addresses listed below by electronic mail:

Spencer Freeman, Esq.
Freeman Law Firm, Inc.
sfreeman@freemanlawfirm.org

Sofia Pasarow, Insurance Enforcement Specialist
Legal Affairs Division
Office of the Insurance Commissioner
SofiaP@oic.wa.gov

Dated this 5th day of November, 2020, in Tumwater, Washington.

/s/ Rebekah Carter
Rebekah Carter
Hearings Unit Paralegal