Court of Appeals No. 49903-7-II

IN THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

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

v.

WASHINGTON STATE OFFICE OF THE INSURANCE COMMISSIONER, Respondent.

BRIEF OF APPELLANTS

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2017 AUG 14 PM 5:02
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I. INTRODUCTION

Appellants Benefit Marketing Solutions, LLC ("BMS"), Benefit Services Association ("BSA"), Rent-A-Center, Inc., and Rent-A-Center West, Inc. (collectively "Appellants") appeal the Order Affirming, Reversing, and Remanding Insurance Commissioner's Findings of Fact, Conclusions of Law, and Order from Thurston County Superior Court. This Court should reverse the Superior Court Order on the areas that it affirmed the Office of the Insurance Commissioner ("OIC") because the Order is arbitrary and capricious, not consistent with the evidence, and not supported by applicable law.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The Superior Court erred in affirming the decision of the OIC Hearing Officer that the Paid-Out Account benefit offered by Appellants was both insurance and a service contract. The Superior Court erred because (1) the Paid-Out Account benefit is not for a specific duration as required by RCW 48.110 to qualify as a service contract, and (2) the Paid-Out Account benefit is not insurance because it is not a contract of indemnification.

Assignment of Error No. 2: The Superior Court erred in affirming the decision that Appellant's "solicited" insurance by providing a membership application for the RAC Benefits Plus program at Rent-A-

Center locations. The Superior Court erred because the act of providing a membership brochure without evidence of any further act is not solicitation as defined by RCW 48.

III. STATEMENT OF THE CASE

Appellant BMS is an Oklahoma limited liability company with its principal place of business in Norman, Oklahoma. BMS administers membership programs as the administrator for a separate entity, BSA. BSA is a nonprofit Illinois corporation. BMS contracts with Rent-A-Center of Texas, L.P. to provide applications, and potential memberships in, the RAC Benefits Plus program, to customers leasing products at Rent-A-Center locations. Rent-A-Center West, Inc. operates a number of stores in Washington State through which it enters into rent to own agreements with its customers for electronics, furniture, appliances, computers, smart phones, and other household items. (CP 4, 5-6).

After the rent to own agreement process, Rent-A-Center customers are offered an opportunity to purchase a membership in the RAC Benefits Plus program. (CP 6, 77). The customer can take a brochure from the Rent-A-Center location that contains a one page membership form. (CP 77). The brochure describes the program benefits. (CP 54-75). Beyond making the brochure available, there is no evidence of any further efforts by the Rent-

A-Center employees to solicit or otherwise entice the customer to joining the RAC Benefits Plus program. (CP 6, ¶ 6).

The RAC Benefits Plus program offers week to week, or month to month, memberships which may be cancelled at any time by the member. (CP 77). When a customer becomes a member of the RAC Benefits Plus Program, they become an association member of BSA and get the benefits from the RAC Benefits Plus program. *Id.*

In conjunction with RAC, BSA provides the enrolled members of the RAC Benefits Plus program access to a number of benefits, including:

- Dining, Shopping, Automotive Care, Rental Car, Hotel Discounts;
- Courtesy Waiver Benefit;
- Involuntary Unemployment Payment Waiver;
- Liability Waiver Product-Replacement Savings Option;
- Accident & Sickness Payment Waiver; and
- Paid-Out Account Product Service Protection (the "Paid Out Account benefit"). (CP 54-74).

The Paid-Out Account benefit, like the other benefits in the program, are benefits that are not tied to the rental or purchase of any specific merchandise. Rather, as a membership benefit the member gets the benefit of the repair and replacement for any item that they pay out in full while a member. (CP 61-62). The benefit is not applicable to repair and

replacement of products while they are being leased. *Id.* The Paid-Out Account benefit only covers product failure or mechanical breakdown resulting from ordinary usage or wear and tear. *Id.* If the member experiences product failure or mechanical breakdown, they may bring the product to any Rent-A-Center location to obtain the repair or replacement. *Id.*

The Paid-Out Account benefit is available to RAC Benefits Plus members because BMS has negotiated the service as part of its agreement with Rent-A-Center Texas, L.P. The Paid-Out Account benefit is in no way tied to a specific product. (CP 61-62) RAC Benefits Plus members are entitled to the benefit for every rental product that the member gains ownership of during their membership. *Id.* The member could own 50 products or one product and the membership fee would be unchanged. *Id.* There is no service contract issued because the benefit does not cover a specific piece of merchandise. Instead, it provides a benefit while someone is a member of BSA to all products the member owns.

The OIC initiated an enforcement action in which it contended that the Paid-Out Account benefit was both insurance and a service contract and that the Appellants were soliciting insurance in Washington state by providing membership forms to Rent-A-Center customers. (CP 8-9, 35-36).

The OIC also contended that an AD&D group policy that was provided as part of the club membership was insurance. *Id.*

The OIC Hearing Officer determined that the Paid-Out Account benefit was insurance and a service contract, that the AD&D policy was insurance, and that two of the waiver benefits offered as part of the membership were insurance. (CP 40-46). The Hearing Officer issued a $50,000 fine. (CP 46, ¶¶ 27-28) in its order, findings of fact, and conclusions of law (the "Final Order").

Thurston County Superior Court, standing in an appellate capacity, affirmed in part, reversed in part, and remanded. (CP 349-350) The Superior Court affirmed the finding that the Paid-Out Account benefit was both insurance and a service contract and that Appellants had solicited and transacted insurance in Washington State. *Id.* The Superior Court reversed the finding that the waivers were insurance and remanded to the OIC Hearing Officer the amount of the fine, based on the Superior Court's findings that the waivers were not properly raised. *Id.*

Appellants' appeal focuses on the issues affirmed by the Superior Court.

IV. ARGUMENT

RCW 34.05.570(3) provides for relief from an agency order when:

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court...;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or,

(i) The agency action is arbitrary and capricious.

Here, the Appellants are entitled to relief from the Order Affirming, Reversing and Remanding Insurance Commissioner's Final Order because the Superior Court incorrectly affirmed (1) that the Paid-Out Account benefit was a service contract and insurance under RCW 48, and (2) that Appellants solicited or transacted insurance in Washington state by making a membership application available at checkout to Rent-A-Center customers.

A. The Superior Court improperly held that the Paid-Out Account benefit was both a service contract and insurance.

1. The Paid-Out Account benefit is not a service contract.

A service contract under RCW 48.110.020(18)(a) requires (1) an agreement (2) for consideration above and beyond the lease or purchase price of the property (3) for a specific duration (4) to perform the repair,

maintenance, or replacement of the property. The Paid-Out Account benefit does not meet the requirements of additional consideration or a specific duration.

a. *The Paid-Out Account benefit does not involve additional consideration above the lease price.*

A membership fee for joining an association that offers numerous benefits does not establish the additional consideration prong of RCW 48.110.020(18)(a). Rent-A-Center customers may choose to pay a membership fee to join the RAC Benefits Plus program under which the Paid-Out Account benefit is one of many bundled benefits. (CP 77). This amount is a set sum and does not change based on which incidental benefits are part of the current package or what (or how many) products are leased by the member. (CP 54-75, 77).

Additionally, the Paid-Out Account benefit is not available until the member has completed the lease and owns the property outright. (CP 61-62). Thus, in the vast majority of cases, the customer joins the RAC Benefits Plus program and pays weekly membership dues during the lease period. Then, once the lease ends the benefit becomes available, but the membership fee stays exactly the same. The fact that there is no increase to the membership fee when the Paid-Out Account benefit becomes available

supports the position that there is no additional consideration paid for this benefit.

Further, the benefit is not tied to any product; instead it is tied to the customer's membership. *Id.* The membership that BSA provides – covering all of the products that a member eventually owns – does not fit within RCW 48.110 as the statute is designed to address a separate and specific agreement for a singular product. RCW 48.110.070 requires the service contract state the consideration paid for the service contract and the merchandise covered by the service contract, but such requirements are inapposite for the BSA membership program. BSA does not know at the time someone joins the membership whether they will ever have a product that is subject to the Paid-Out Account benefit because the member may never own a product by completing the lease.

There is no way to separate the amount paid for the Paid-Out Account benefit from the remainder of the membership benefits and it certainly cannot (and is not) done on a product by product basis. The membership fee is unaffected by either the specific product leased or the quantity of product leased by the customer. A Rent-A-Center customer could lease 50 products but would pay only a single membership fee to BSA to receive a RAC Benefits Plus program membership fee and receive the incidental Paid-Out Account benefit. The customer could lease a $3,000

refrigerator or a $200 TV stand and the cost of the membership would remain unchanged. There is not a minimum membership period required to receive any benefit and a member is not required to be a member throughout the lease period to receive the Paid-Out Account benefit. If the member joins one day prior to owning property outright, they will receive the full benefit. Thus, there is no additional consideration paid for this benefit.

The member is paying to join RAC Benefits Plus and receives any and all benefits of membership once enrolled. They are not specifically paying for any particular benefit and are not paying any identifiable consideration for the Paid-Out Account benefit.

b. *The Paid-Out Account benefit lacks a specific duration.*

The Final Order concluded that the "specific duration" was "from inception to termination," as viewed in hindsight, no matter how long or short that time period was. (CP 45). The Superior Court affirmed this finding. (CP 349-50). This determination was a misapplication of the law because it renders the term "specific" meaningless and just requires that there be a "duration."

Under Washington law, statutes must be construed "so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546,

909 P.2d 1303 (1996). Statutes should be interpreted "in a way that avoids a strained or unrealistic interpretation." *In re Pers. Restraint of Brady*, 154 Wn. App. 189, 193, 224 P.3d 842 (2010) (*citing State v. Tejada*, 93 Wn. App. 907, 911, 971 P.2d 79 (1999)). The only way to interpret "specific duration" is that "specific" modifies "duration". This interpretation is consistent with case law that has previously looked at agreements with a specific duration.

Cases using the term "specific duration" in contract law have uniformly held that a specific duration exists when the exact duration is set out at the initiation of the contract. *See Yung v. Institutional Trading Company*, 693 F.Supp.2d 70 (DC 2010). In *Freeman v. Hardee's Food Systems, Inc.*, 165 S.E.2d 39 (N.C. 1969), the court dealt with a contract that had very similar periods as the Paid-Out Account benefit at issue here, and stated that a contract:

> [W]here the compensation is specified at a rate per year, month, week or day, but where the duration of the contract is not specified, is for an indefinite period. There is no presumption that it is for any particular period of time and the rate is fixed only for whatever time the employee might actually serve.

Similarly, in *Kepper v. School Directors of District No. 120*, 325 N.E.2d 91 (3rd Dist. 1975), the court stated:

> It has been held expressly that a contract specifying no duration[], and thus terminable at will, is not made otherwise

> by the inclusion of salary rates based on units such as months or years.

For a contract to have a specific duration, that duration must be set at initiation, not in hindsight, or every contract would have a specific duration. Simply waiting for a contract to terminate, counting the days, months, or years since initiation, and stating that time period would be the specific duration does not meet the requirement or definition of specific. This hindsight approach to determining the length of a contract renders the term "specific" meaningless.

The Final Order from the OIC described a contract of *indefinite duration* that was terminable at-will by either party. The Final Order correctly identified how either party could terminate the membership (and thus the benefit) without penalty and the ability to terminate the membership at-will critically undermines the position that there is a specific duration. (CP 45). If the parties can terminate an agreement at will without further obligations, then there is no specific duration. When there is a specific duration, terminating the contract prior to the end of the duration without cause would be a breach. *See Krizan v. Storz Broadcasting Company*, 145 So.2d 636 (La. 1962); *Kvidera v. Rotation Engineering & Manufacturing Co.*, 705 N.W. 2d 416 (Minn. 2005); *Thomsen v. Indep. Sch. Dist. No. 91*, 244 N.W.2d 282, 284 (Minn. 1976).

Both parties agree there is a duration for the Paid-Out Account benefit, it just is not specific. The statutory interpretation in the Final Order renders the term "specific" meaningless. Without a specific duration, the Paid-Out Account benefit is not a service contract and the Final Order's conclusion that the Paid-Out Account benefit is a service contract should be reversed.

2. The Paid-Out Account benefit is not insurance as defined by RCW 48.

RCW 48.01.040 defines insurance as "a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies." The statute provides two disjunctive definitions for what may qualify as insurance, and the Paid-Out Account benefit fails to qualify as either.

a. *The Paid-Out Account benefit is not insurance because there is not a specified amount to be paid.*

"Specified" modifies "amount" and would indicate that to qualify as insurance there would need to be a face value of the contract or pre-determined amount to be paid out following certain conditions. The "specified amount" could be most commonly identified in a circumstance like life insurance where the insurer agrees to pay the beneficiary a death benefit (say $1,000,000.00) upon the insured's death. Nothing of the sort exists here. Instead, if the product requires repair, maintenance, or

replacement, Rent-A-Center will provide those services at no charge to the customer. There is no amount at all paid to the customer and there certainly is not an amount that is specified.

b. *The Paid-Out Account benefit is not insurance because the Appellants have not undertaken to indemnify members from any loss.*

Indemnify is defined as "to reimburse (another) because of a loss suffered because of a third party's or one's own acts or default." BRYAN GARNER, *BLACK'S LAW DICTIONARY* 837 (9th Ed. 2009). The Paid-Out Account benefit does not have any of the elements of a contract of indemnity. There is no loss suffered by the BSA members, there is no reimbursement to the BSA members, and there is no act by a third party or the member themselves. Instead, as one of the many incidental benefits of joining RAC Benefits Plus, the member may return a product that has sustained product failure or mechanical breakdown and have that product repaired or replaced at no charge. This benefit in no way constitutes insurance under RCW 48.01.040 because it is not a contract of indemnity.

Second, in paragraph 11 of the Conclusions of Law, the Final Order cites to two cases for the proposition that the Paid-Out Account benefit "involved indemnity and the transfer and distribution of risk characteristic of insurance, not warranty or other non-insurance benefits." (AR 008). The Hearing Officer misapplied these two cases and the Superior Court

improperly affirmed these decisions. In *Rayos v. Chrysler Credit Corp.*, 683 S.W.2d 546 (Tx. App. 1985), the court dealt with a protection plan that entitled the holder to have a Chrysler Corporation Dealer repair certain defects in a vehicle. The court held:

> [T]he plan may be more in the nature of a warranty to repair certain defects than an insurance policy which undertakes to pay a sum of money upon certain conditions. Warranties are not considered contracts of insurance although they may contain the essential elements of an insurance contract. ... Basically, a warranty is issued to provide protection against defects or failures in a product, whereas an insurance policy is issued to provide reimbursement or indemnity based on an accident or occurrence unrelated to any defect or failure of the product.

Here, the Paid-Out Account benefit only provides protection for "product failure and mechanical breakdown of the merchandise not caused by external conditions." (AR 64-68). Similar to *Rayos*, the protection is to be provided by a Rent-A-Center store. Under the *Rayos* decision, the Paid-Out Account benefit is clearly designed to provide protection against defects and failures of the product, not reimbursement or indemnity based on an occurrence unrelated to the product. Since the only element of the Paid-Out Account benefit is the protection against product failure and mechanical breakdown, there are no other elements of the benefit the Hearing Officer could look at to determine the benefit is insurance. The Hearing Officer should have applied the *Rayos* case to determine that the

Paid-Out benefit is not insurance. The Superior Court should not have affirmed this decision.

The *GAF Corp. v. Country Sch. Bd. Of Wash. Co.*, 629 F.2d 981 (4th Cir. 1980) case goes further than the *Rayos* decision by holding that contracts could contain elements of insurance – in the *GAF Corp.* case, transfer and distribution of risk – and still not be considered insurance if, taken as a whole, the contract is substantially focused on potential defects in the products sold. The case supports the legal proposition that there must be more than a transfer and distribution of risk for a benefit to be considered insurance. Here, the Superior Court should have determined that the Hearing Officer misapplied the law when holding that because the Paid-Out Account benefit involved the transfer and distribution of risk, it was an insurance product.

c. *The Paid-Out Account benefit does not bear any indicia of insurance.*

In addition to not meeting the definition of insurance, the Paid-Out Account benefit does not have any typical characteristics of insurance:

- There is no application for insurance.
- There is no insurance policy.
- No deductible is imposed upon the customer.
- No underwriting applies, as with insurance. No use of credit history, insurance scores or any other metrics that would gauge the risk of the member.

- The membership fee is a flat fee that is charged to all members, regardless of the market value of the merchandise rented or the number of items rented. There is no relationship between the cost of membership and the potential cost to BMS of providing the benefit.

- The membership provides a bundle of benefits for a flat fee, similar to that offered through AAA. If a member decides to maintain membership after pay out, there is no increase in the membership fee for the services that are provided post-payout.

- The benefit covers repair costs (including parts and labor) of all items that were covered through the original manufacturer's warranty. Thus, it operates in a manner similar to a manufacturer's warranty.

Each of these factors supports Appellants' position that the Paid-Out Account benefit is not insurance.

In *Discount Tire Co. of Washington, Inc. v. State of Washington*, 85 P.3d 400 (2004), the Washington Court of Appeals discussed distinctions between extended warranties and insurance, and such distinctions may be applicable to the Paid-Out Account benefit. In *Discount Tire*, a tire retailer brought suit claiming entitlement to a tax credit for sales tax it was accessed by the Department of Revenue on the sale of new tires which replaced tires returned by a customer under an optional extended warranty. The Department of Revenue argued, among other things, that the extended warranty was analogous to an insurance contract for which the tire purchaser paid an additional fee. Thus, it claimed that the payments to the

purchaser constituted insurance, as opposed to refunds subject to a tax credit. The court disagreed, finding that the Department's analogy to insurance contracts did not apply, because "payments under insurance contracts are generally pro-rated or based upon depreciated values of damaged or destroyed property, often subject to a deductible borne by the insured." *Discount Tire*, 85 P.3d at 408. Under any reasonable legal analysis, the outcome is the same: the paid out account benefit is not insurance.

B. The Superior Court misapplied RCW 48.17.010(14) in affirming the decision that Rent-A-Center "solicited" insurance.

"Solicit" means attempting to sell insurance or asking or urging a person to apply for a particular kind of insurance from a particular insurer. RCW 48.17.010(14). The Hearing Officer relied on two pieces of evidence to determine that the Respondents solicited insurance: (1) that Rent-A-Center had brochures for the RAC Benefits Plus program available at its stores, and (2) if a Rent-A-Center customer had a question about the AD&D that they were directed to a call center. (CP 42, ¶ 15). None of these acts constitute Rent-A-Center "attempting to sell," "asking," or "urging."

The testimony from OIC witness Bobby Frye was that the brochure was simply handed to him, nothing more. There was no description offered by or request made from the Rent-A-Center employees and there certainly

was no evidence of asking or urging. Furthermore, there was no evidence offered or admitted of any Washington consumer ever accessing the call center, nor was there evidence of what the call center employees stated to any consumer (there was not even evidence of who operated the call center).

The Hearing Officer incorrectly relied on *National Federation of Retired Persons v. Insurance Commissioner*, 120 Wn.2d 101, 110-112 (1992), to adopt a broad plain meaning of "solicit." In *National Federation* the court adopted a broad plain meaning because the term "solicit" had not yet been defined by the Washington legislature. The court therefore applied the broad plain meaning and used terms like "invite," "tempt," and "lure" to describe the definition of solicit. The OIC's own witness, Jim Tompkins, testified about how the *National Federation* case would be inapplicable because the statutory definition of solicit had been enacted after the *National Federation* case. Hearing transcript 83:8-25.

The Hearing Officer should have only used the definition of solicitation under RCW 48.17.010(14). To apply the *National Federation* case and its definition constituted an error of law. The Superior Court erred in affirming the Hearing Officer's conclusion that Rent-A-Center solicited insurance because there is no evidence that Rent-A-Center asked, urged, or attempted to sell as required by RCW 48.17.010(14).

C. The Superior Court erred in affirming that Appellants could be fined for receiving membership applications from Washington consumers for RAC Benefits Plus memberships.

The Final Order concluded that a $50,000 fine was appropriate against Appellants under RCW 48.05.185, 48.15.020(3), and 48.17.063 because the Appellants solicited and/or transacted insurance in Washington State. As discussed above, there was no solicitation. Similarly, the Appellants did not transact insurance in Washington State.

There was nothing in the process that occurred in Washington State beyond a customer receiving a brochure and filling out a one-page membership form for the RAC Benefits Plus program. There was no discussion of any insurance or coverage and there was no application for insurance. After the application, the member exchanges membership dues for membership in the association and for the benefits provided in the RAC Benefit Plus program. The insurance policy at issue in this matter, the group AD&D policy, was sold to BSA as the insured at its principal place of business in Oklahoma. None of these activities reach the level of selling, soliciting, negotiating, or otherwise transacting insurance in Washington state.

The Legislature has specifically directed the OIC in RCW 48.01.250 on the enforcement provisions that are applicable to member associations

that provide AD&D benefits as part of its membership. The only relief applicable to a violation of RCW 48.01.250 is a cease and desist order.

This Court should set aside the $50,000 fine because without soliciting or transacting insurance in Washington, the Appellants are not subject to any provisions of the Insurance Code that provide for a monetary fine.

V. CONCLUSION

The trial court erred in determining that the Paid-Out Account benefit was insurance or a service contract and further erred in determining that the Appellants solicited or transacted insurance in Washington state. This Court should reverse.

RESPECTFULLY SUBMITTED this 14th day of August, 2017.

By _____

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on the 14th day of August, 2017, I caused to be served the foregoing document on counsel for Respondents, as noted, at the following addresses:

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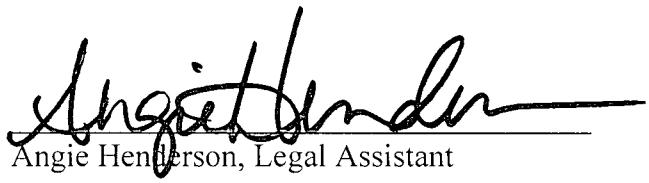
DATED this 14th day of August, 2017, at Seattle, WA.



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