

NO. 49903-7-II

**COURT OF APPEALS, DIVISION
OF THE STATE OF WASHINGTON**

RENT-A-CENTER, et al.,

Appellant,

v.

WASHINGTON STATE OFFICE OF INSURANCE COMMISSIONER,

Respondent.

**BRIEF OF RESPONDENT, WASHINGTON STATE
INSURANCE COMMISSIONER**

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I. INTRODUCTION

“The business of insurance is one affected by the public interest.”

RCW 48.01.030. The public’s interest in insurance is so great that the Insurance Code, Title 48 RCW, was established as an entire regulatory scheme designed to ensure that those offering insurance contracts to Washington citizens uphold their fiduciary obligations to their policy holders. The Legislature has charged the Insurance Commissioner with the duty of enforcing the Insurance Code. RCW 48.02.06. Essential to that duty is ensuring that products and transactions that fall within the Legislature’s definition of insurance are only offered by licensed entities. RCW 48.05.030.

With the public’s interest in mind, the Office of the Insurance Commissioner, Mike Kreidler, Commissioner, properly determined that the Benefits Plus Program, a contract that charges a “membership fee” in exchange for a promise to replace products if certain circumstances occur requiring that replacement, falls under his supervision as a contract “to indemnify another . . . upon determinable contingencies.” RCW 48.01.040. The Insurance Commissioner concluded that the term “indemnify” means to secure or protect another against a loss, and includes more than simply monetary payment. The Commissioner’s interpretation is based on the plain meaning of the term, its use in the

insurance industry, principles of statutory construction, and its use in other statutes by the Legislature. The legal errors argued by Rent-A-Center¹ are without merit. Rent-A-Center offers no indicia of contrary legislative intent to challenge the Insurance Commissioner's legal interpretation of the definition of insurance.

The Commissioner's unchallenged findings of fact determined that the Benefits Plus Program protects Rent-A-Center customers who purchase a membership from the loss of furniture and appliances purchased through Rent-A-Center, in the event of a manufacturer defect, or mechanical failure. Benefits Plus Program fits squarely within the definition of insurance, and Rent-A-Center has failed to identify any exception from definition of insurance that the Benefits Plus Program satisfies.

In addition, RCW 48.15.023 and RCW 48.17.060 each authorize monetary penalties of up to \$25,000 for each occurrence, for the unauthorized sale of insurance by an insurer, and the unauthorized sale or solicitation of insurance by an unlicensed producer. The undisputed facts establish that Rent-A-Center sold over 13,000 Benefits Plus Program memberships at Rent-A-Center retail locations in Washington.

¹ Appellants are Benefit Marketing Solutions, LLC ("BMS"), Benefit Services Association ("BSA"), Rent-A-Center, Inc. and Rent-A-Center of Texas, L.P. They are collectively referred to throughout this brief as "Rent-A-Center," unless context and clarity dictate otherwise.

Because the Commissioner correctly interpreted the Insurance Code in making these findings, and properly exercised his discretion in setting the amount of the fine issued against Rent-A-Center, the Commissioner's Order should be affirmed, and Rent-A-Center should be required to comply immediately with the Commissioner's *Findings of Fact, Conclusions of Law and Final Order, No. 14-0081, 14-0082* (Final Order).

II. ISSUES

1. Where the unchallenged findings of fact have established that the Benefits Plus Program a) promises to repair or replace certain items, b) in the event of a manufacturing defect or mechanical failure, has the Insurance Commissioner properly interpreted the statutory definition of insurance to conclude that the Benefits Plus Program secures Rent-A-Center customers against a loss or harm, in the event of determinable contingency, and thus falls under the definition insurance?

2. Where the unchallenged findings of fact have established that Rent-A-Center sold of over 13,000 Benefits Plus Program memberships, without authorization to act as an insurance company, and without a license to sell or solicit insurance products as an insurance producer, is a fine of \$50,000 consistent with the Insurance Commissioners statutory authority, and a proper exercise of his discretion,

to penalize the illegal sale or solicitation of insurance by a fine of up to \$25,000 for each occurrence?

III. FACTS

A. The Highly Regulated Insurance Industry

Insurance plays a unique and important role in our society. As such, insurance is highly regulated “to create public confidence in the honesty and reliability” of the industry. *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 43, 204 P.3d 885 (2009). In order to protect not only the members of the public who purchase insurance, but also those individuals who would make a claim that is covered by insurance, the Legislature created an independently elected statewide official, the Insurance Commissioner, to regulate those who would seek to offer this important product, and to protect those who purchase it. *See* RCW 48.02.01, RCW 48.02.060. The Commissioner and the Office of the Insurance Commissioner (OIC) are tasked with enforcing the Insurance Code, Title 48RCW. RCW 48.02.060(2). The Insurance Code applies to “[a]ll insurance and insurance transactions in this state, or affecting subjects located wholly or in part or to be performed within this state, and all persons having to do therewith . . .” RCW 48.01.020. The Commissioner’s duties also include conducting investigations into violations RCW 48.02.060(3)(b). The licensing, filing, and approval

requirements in the Insurance Code are designed to protect the public interest in this uniquely important industry.

The Legislature has broadly defined “insurance” as “a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies.” RCW 48.01.040. The Legislature also requires that anyone offering an insurance product in Washington State must be authorized to do so. RCW 48.05.030(1). The requirements for becoming an authorized insurance carrier are significant, and reflect the importance the Legislature has placed on ensuring the public is well protected when purchasing insurance products. *See* Chapter 48.05 RCW.

The Legislature has also codified certain exceptions from the definition of “insurance”. One example is service contracts. RCW 48.110.015(1)(c). In the case of service contracts, the Legislature has determined that while full compliance with the Insurance Code is not necessary, some level of regulatory oversight is still necessary. RCW 48.110.010. Therefore, the Legislature set out certain requirements that, if met, would allow a product like a service contract that otherwise satisfies the definition of insurance to be sold by a company that is not a fully authorized carrier. RCW 48.110.030. If a company sells a product that could qualify as a service contract, but has failed to fully satisfy the statutory requirements for that exception, the product remains insurance.

And as an insurance product, it can only be sold by an entity that satisfies all the requirements of an authorized insurance carrier.

B. The Benefits Plus Program by Rent-A-Center

Following an administrative investigation, the OIC issued a Notice of Request for Hearing for Imposition of Fines² on May 1, 2014, which was amended on May 7, 2014. AR³ 548-553, 556-561. The amended notice sought a \$100,000 penalty for Rent-A-Center's sale of 13,018 Benefits Plus memberships to WA consumers. AR 548-549. Retired Superior Court Judge George A. Finkle was appointed as Presiding Officer. AR 543-544. He presided over the administrative proceedings, including the evidentiary hearing on January 12, 2015. The Final Order was entered on February 2, 2015.

The findings of fact⁴ in the Final Order note that Rent-A-Center's primary business is providing rent-to-own consumer goods at retail stores in various states, including Washington. AR 5. However, Rent-A-Center also sells a package of benefits, called the Benefits Plus Program. AR 5.

² Under RCW 48.15.023 and RCW 48.17.063, the Commissioner may only impose monetary penalties after an administrative hearing has been held.

³ This brief relies on the record submitted this Court. Throughout this brief, the records identified in the Clerk's Papers Index will be referred to as "CP." The administrative record, which the superior court has transmitted with the Clerk's Papers, but not indexed with the Clerk's papers, will be referred to as "AR." The transcript of the verbatim report of the administrative hearing, also transmitted as part of the administrative record, will be referred to as "TR."

⁴ No error has been assigned to the findings of fact in the Final Order. App. Br. at 1-2.

The Benefits Plus Program was created, operated, and administered by several distinct but related entities: Rent-A-Center, Inc., Rent-A-Center of Texas, L.P., Benefit Marketing Solutions, LLC (“BMS”), and Benefit Services Association (“BSA”). BSA was incorporated with the stated objective of providing for its members by providing services and benefits including “[i]nsurance products and services.” AR 93; 5. BMS administered the program for BSA. TR at 33:7-13, TR 98:11-99:2, 99:25-100:5; AR 158. BMS, on behalf of BSA, contracted with Rent-A-Center to offer the Benefits Plus Program to Rent-A-Center consumers. TR 100:3-5. Rent-A-Center retail stores began to offer the Benefits Plus Program on behalf of BSA in 2004. AR 5; 240; TR 41:7-9.

The Benefits Plus Program provided a range of benefits including group accidental death and dismemberment coverage, retail discounts, liability waiver benefits, and the Paid-Out Product Service Protection (also called the “Paid-Out Account benefit”). AR 5-6; 57-78. The “Paid-Out Account” benefit (AR 64) provides that BSA will repair or replace “all mechanical or electrical failures” of “home electronics, appliances, computers, and furniture,” subject to a number of limitations. AR 5; 64-65.

Rent-A-Center customers obtained the Benefits Plus Program by purchasing a “membership” with BSA. AR 80. The Benefits Plus

Program is a contract between the consumers who join as “members” of BSA, and BSA who provides the benefits to its members. AR 80; AR 94; AR 158. Memberships were available in weekly and monthly durations. AR 5. “Members” of BSA must maintain weekly or monthly payments in order to continue to receive the benefits of the program. AR 5; 80; 94. The weekly or monthly membership fee for the Benefits Plus Program is an additional fee beyond that charged in the lease-to-own agreement between Rent-A-Center and its customers. AR 80; AR 94.

Rent-A-Center stores provided brochures and made its clerks available to provide information about the program. AR 5; TR 29:14-25, 30:1-18. Clerks provided information to consumers about the Benefits Plus Program including exclusions, restrictions, and highlights. AR 5; TR 68:7-23. Membership payments were accepted and processed at Rent-A-Center locations via computer by Rent-A-Center employees. TR 30:1-3. At no point did Rent-A-Center (or BSA or BSM) obtain a certificate of authority to transact insurance in Washington State or register as service contract providers. AR 9, 13. Over the course of 2012 to 2013, Rent-A-Center sold at least 13,018 Benefits Plus Program memberships to Washington residents on behalf of BSA. AR 343.

The Final Order concluded as a matter of law that the group accidental death and dismemberment coverage, the liability waiver

benefits, and the Paid-Out Account benefit satisfy the definition of insurance. AR 7. It also imposed a \$50,000 fine against Rent-A-Center for transacting insurance in Washington State without complying with the insurance code. AR 13. Rent-A-Center's motion for reconsideration that challenged the Presiding Officer's consideration of the waiver benefits was denied on February 26, 2015. In his Order on Motion for Reconsideration, the Commissioner held that the \$50,000 penalty would stand even if the waiver benefits had not been at issue at the hearing. AR 17.

Rent-A-Center timely sought judicial review of the Final Order. Rent-A-Center did not challenge the holding that the accidental death and dismemberment coverage constituted insurance. The Superior Court affirmed that the Paid-Out Account benefit was unauthorized insurance and an unregistered service contract. The Superior Court reversed the holding in the Final Order that the waiver benefits were insurance on the grounds that it was improperly raised. The Commissioner does not dispute that holding. The Superior Court also affirmed that Rent-A-Center's sale of the Paid-Out Account benefit constituted soliciting or transacting insurance.

IV. STANDARD OF REVIEW

The Administrative Procedure Act (APA) governs judicial review of agency orders. *Mills v. W. Washington Univ.*, 170 Wn.2d 903, 909, 246 P.3d 1254 (2011). “The burden of demonstrating the invalidity of agency action is on the party asserting invalidity[.]” RCW 34.05.570(1)(a)¶. On review of an agency decision, this Court sits in the same position as the superior court and applies the standards of the Administrative Procedure Act to the agency order and record. *Tapper v. State Employment Sec. Dep’t.*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

“To reverse an administrative order, a reviewing court must find that the order (1) is based on an error of law; (2) is based on findings not supported by substantial evidence; (3) is arbitrary or capricious; (4) violates the constitution; (5) is beyond the statutory authority; or (6) the agency has engaged in an unlawful procedure or decision making process or has failed to follow a prescribed procedure.” RCW 34.05.570(3); *In re Martin*, 154 Wn. App. 252, 260, 223 P.3d 1221 (2009) (internal citation omitted).

Here, Rent-A-Center alleges an error of law. The unchallenged findings of fact are therefore verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002), (citing *State v. Stenson*, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997), and *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994)).

Although questions of law are reviewed de novo, a reviewing court will accord “substantial weight to the agency’s interpretation of the law it administers-especially when the issue falls within the agency’s expertise.” *Kelly v. State*, 144 Wn. App. 91, 96, 181 P.3d 871 (2008).

V. ARGUMENT

The Commissioner properly held that the Benefits Plus Program, particularly the Paid-Out Account benefit constitutes insurance because it indemnifies policy holders from loss. There is no error in this conclusion and Rent-A-Center fails to demonstrate that the Benefits Plus Program falls within any exception to the Insurance Code. Therefore, the Commissioner properly held that Rent-A-Center had unlawfully solicited or transacted insurance in Washington State by selling and executing the Benefits Plus Program, including an accidental death and dismemberment policy and the Paid-Out Account benefit, for which a \$50,000 penalty was appropriate.

A. The Commissioner Properly Concluded That The Benefits Plus Program Is Insurance

Insurance is defined as:

. . . a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies.

RCW 48.01.040. The central disagreement in this case is the definition of “indemnify” found in the definition of insurance.

Rent-A-Center has offered a definition of “indemnify” that is extremely narrow and inappropriately excludes other applicable aspects of that term. Specifically, Rent-A-Center urges this Court to adopt a definition of “indemnify” to only mean payment or reimbursement, thus excluding their contracts promising to repair and replace furniture and appliances. Appellants’ Brief (App. Br.) at 13. Reducing “indemnify” to merely payment or reimbursement, however, is insufficient given how the term applies to other types of insurance encompassed by the Insurance Code. *See* WAC 284-30-320(7) (defining various types of insurance contracts subject to the Unfair Claims Settlement Practices Regulation rules). The definition of indemnity must reflect a complete understanding of the complex nature of insurance, and thus must also include the act of protecting or securing against risk. When using a proper, and more inclusive definition of indemnity, it is apparent that the Benefits Plus

Program, particularly the Paid-Out Account Benefit, constitutes a contract “to indemnify another . . . upon determinable contingencies.”

1. “Indemnify” under RCW 48.01.040 is broadly defined to include more than merely monetary payment.

In interpreting statutes, the courts look first to the plain language of the statute. *HomeStreet, Inc. v. State, Dept. of Revenue*, 166 Wn.2d 444, 451–52, 210 P.3d 297 (2009), (citing *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007)). Where there is no statutory definition the Court should give a term its “plain and ordinary meaning ascertained from a standard dictionary.” *Am. Cont’l Ins. Co. v. Steen*, 151 Wn.2d 512, 517, 91 P.3d 864 (2004).

A plain English definition of indemnify is “to secure or protect against hurt or loss or damage.” *Webster’s Third New International Dictionary* 1147 (2002); *See also Merriam-Webster Online Dictionary* (2015), available at <http://www.merriam-webster.com/dictionary/indemnify> (last visited Dec. 14, 2015) (defining “indemnify” as “to protect (someone) by promising to pay for the cost of possible future damage, loss, or injury.”). This is also the definition adopted in the widely accepted and cited treatise *Couch On Insurance*. Russ, Lee R., *Couch on Insurance* § 1:7 (3d 2010): “In simple legal terms,

indemnity can be said to secure against future loss or damage.” *Id.* This is not merely reimbursement.

Rent-A-Center argues that “indemnify” encompasses reimbursement, or providing payment for a loss, but it incorrectly claims that this is the only meaning of “indemnify.” App. Br. at 13. In fact, the plain meaning of “indemnify” noted above incorporates perhaps the most significant concept in insurance: the shifting and distribution of risk. *See Bordeaux, Inc. v. Am. Safety Ins. Co.*, 145 Wn. App. 687, 696, 186 P.3d 1188 (2008). The broad concept of “to indemnify” or to contractually take responsibility for a risk is the defining characteristic of every definition of insurance. In fact, as noted in *Couch on Insurance*, “Insurance has been defined in numerous ways, but these variations are primarily semantic.” *Couch* § 1:6. Further, “a policy of insurance, other than life or accident insurance, is essentially a contract of indemnity” *Couch* § 1:7.

The more complete definition of “indemnify” adopted by the Commissioner includes shifting a risk so that one is secure and protected from that risk. AR 8. It might mean securing a promise to provide payment to reimburse a loss, as described by Rent-A-Center, and the contracts at issue in the cases they have cited. *See* App. Br. At 14-15. However, the key to indemnification is securing risk, not the form that the security happens to take. In its true sense, “[i]ndemnity is a shifting of

responsibility from the shoulders of one person to another.”
See Schroeder v. Fageol Motors, Inc., 12 Wn. App. 161, 169, 528 P. 992
(1974), quoting W. Prosser, *The Law of Torts*, 281 (3d ed. 1964); *reversed
and remanded* 86 Wash.2d 256, 544 P.2d 20 (1975).

The Commissioner’s order in this case is fully consistent with other uses of the term indemnify. Indemnification policies and indemnification clauses in contracts typically deal with circumstances where one party is demanding reimbursement for expenses that have been incurred, or were improperly denied. But indemnification can also come in the form of direct services. In such an instance, a policyholder would not be required to pay any money out of pocket, and therefore would not need reimbursement, but would still be “secure[d] or protect[ed] against hurt or loss or damage.” *Webster’s* 1147. For example, “[h]ealth or sickness insurance, which may be combined with various forms of accident coverage, can be defined in general terms as insurance providing indemnification for losses caused by illness.” *Couch* § 1:46. When explaining why health maintenance organizations (HMOs) and health care service contractors (HCSCs) are engaged in the business of health insurance, the Ninth Circuit Court of Appeals noted that:

The only distinction between an HMO (or HCSC) and a traditional insurer is that the HMO provides medical services directly, while a traditional insurer does so

indirectly by paying for the service, but this is a distinction without a difference.

Washington Physicians Service Ass'n v. Gregoire, 147 F.3d 1039, 1046 (9th Cir. 1998), *cert denied* 525 U.S. 1141, 119 S. Ct. 1033, 143 L.Ed.2d 42 (1999); citing *Anderson v. Humana, Inc.*, 24 F.3d 889, 890 (7th Cir. 1994), and *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 741, 105 S. Ct. 2380, 85 L.Ed.2d 728 (1985).

Thus, the plain meaning of “indemnify” includes any security, whether a promise to reimburse, or a promise to provide a service, or a promise to replace an object. While “indemnify,” “indemnity,” and “indemnification” may encompass reimbursement, the plain language definition is clearly much broader.

Not only is the comprehensive definition of “indemnify” adopted in the Final Order consistent with the plain meaning of the word, it is also necessary to satisfy the principles of statutory construction. In interpreting a statute, Washington courts have held:

[W]e are obliged to construe the enactment as a whole, and to give effect to all language used. Every provision must be viewed in relation to other provisions and harmonized if at all possible.

Omega Nat. Ins. Co. v. Marquardt, 115 Wn.2d 416, 425, 799 P.2d 235 (1990), (citing *State v. S.P.*, 110 Wn.2d 886, 890, 756 P.2d 1315 (1988)),

State v. Newton, 109 Wn.2d 69, 79, 743 P.2d 254 (1987), and *Addleman v. Board of Prison Terms & Paroles*, 107 Wn.2d 503, 509, 730 P.2d 1327 (1986)).

In this case, the full definition of insurance is “a contract whereby one undertakes to indemnify another *or* pay a specified amount upon determinable contingencies.” RCW 48.01.040 (emphasis added). Because the definition of insurance incorporated contracts to “pay a specified amount,” it already encompassed the concept of all payments, including reimbursement. If “indemnify” was limited to merely being “reimbursement”, then its inclusion in the statute would be superfluous. In order to give effect to all of the language in the statute, “indemnify” must logically encompass more than simply payment. It must include promises to repair and replace that protect consumers from both the physical loss of their furniture and appliances, and the financial loss for the cost of repairs or replacement that consumers would be forced to pay themselves if not for the Benefits Plus Program.

Therefore, the Commissioner’s conclusion that “indemnify” can and does include both “reimbursement” and other forms of securing against a loss, such as performing a specified activity so that the financial losses are never borne by the party who paid to have those risks assumed by someone else, falls well within a comprehensive and complete

understanding of both “indemnify” and insurance generally. The plain meaning of “indemnify” is simply broader than the limited definition offered by the Rent-A-Center.

Even if the Court determines that RCW 48.010.040 is ambiguous in this regard, the Insurance Commissioner’s interpretation is entitled to deference. *Pub. Util. Dist. 1 of Pend Oreille Cy. v. Dep’t of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002); *King Cy. v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000). Washington courts have long held that “substantial weight is accorded the agency’s view of the law.” *Franklin Cy. Sheriff’s Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982). This is especially true when the agency has expertise in a certain subject area. *E.g. Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593-594, 90 P.3d 659 (2004).

Specifically in the context of insurance, the courts have determined that “although a commissioner cannot bind the courts, the court appropriately defers to a commissioner’s interpretation of insurance statutes and rules.” *Premera v. Kreidler*, 133 Wn. App. 23, 31, 131 P.3d 930 (2006) (citing *Credit Gen. Ins. Co. v. Zewdu*, 82 Wn. App. 620, 627, 919 P.2d 93 (1996)). *See also Glaubach v. Regence Blueshield*, 149 Wn.2d 827, 834, 74 P.3d 115 (2003). The courts “defer to the

commissioner's interpretation of insurance statutes if the OIC's statutory interpretation reflects a plausible construction of the statute's language and is not contrary to legislative intent." *Blueshield v. State Office of Ins. Comm'r*, 131 Wn. App. 639, 648, 128 P.3d 640 (2006) (citing *Seatoma Convalescent Ctr. v. Dep't of Soc. & Health Servs.*, 82 Wn. App. 495, 518, 919 P.2d 602 (1996)).

Nothing suggests that the Legislature intended a different, or narrower, definition of the term "indemnify" than what the Commissioner has offered. *Rent-A-Center* cites no Washington case that applies the narrow definition they have offered to an insurance product, or an action by the Insurance Commissioner. Therefore, in light of the plain meaning of the term "indemnify," the deference the courts afford the Commissioner's interpretation of insurance statutes, and in the absence of any indicia of legislative intent to the contrary, the Commissioner's interpretation of "indemnify" should be upheld.

2. The Paid-Out Account benefit indemnifies BSA members upon determinable contingencies.

When applying the definition of "indemnify" as to "secure against future loss or damage," the Paid-Out Account benefit offered as part of the Benefits Plus Program "indemnifies" the members of the Benefits Plus Program against determinable contingencies. First, the terms of the Paid-

Out Account benefit offer to “repair or replace” an item that has suffered a failure or mechanical breakdown. AR 05, 64. Therefore, members taking advantage of this benefit are secured against a possible future loss of their working furniture or appliance. Members are indemnified not with cash or monetary payment, but with valuable repairs or the complete replacement of the products that they would otherwise have to pay for out of pocket. In addition, the Paid-Out Account benefit is only triggered upon certain determinable contingencies. It is limited specifically to electrical or mechanical breakdowns of qualifying products, and subject to other predetermined exclusions. AR 064-065. All parties can easily determine the contingencies upon which the Paid-Out Account benefit is triggered.

Rent-A-Center argues that the Paid-Out Account benefit is not insurance because it does not fit their narrower definition of indemnify. App. Br. at 13. To get to this result, Rent-A-Center urges this Court to bypass the plain language and statutorily derived definition in the Final Order and adopt a definition found in Black’s Law Dictionary which defines “indemnify” as “to reimburse (another) because of a loss suffered because of a third party’s or one’s own acts or default.” BLACK’S LAW DICTIONARY 837 (9th ed. 2009). Rent-A-Center then claims that the Paid-Out Account benefit does not indemnify because there is: 1) no loss; 2) no reimbursement; and 3) no act by third party or a member. App. Br.

at 13. But Rent-A-Center is mistaken even under their own argument. First, anyone filing a claim under the Paid-Out Account benefit would have to suffer a loss – the failure of their appliance or furniture – prior to making a claim. Second, as noted above, monetary reimbursement is not required to satisfy the definition of “indemnify.” Third, the third party action would be the faulty or substandard manufacturing that led to the product failure in the first place.

More importantly, the Rent-A-Center suggested definition of “indemnify” does not conform to the Legislature’s intent behind RCW 48.01.040, or the way the term “indemnify” is used elsewhere in Insurance Code, or by in the insurance industry. For example, as defined by the Legislature, a warranty “. . . guarantees *indemnity* for defective parts, mechanical or electrical breakdown, labor, or other remedial measures, such as repair or replacement of the property or repetition of services.” RCW 48.110.020 (emphasis added). This definition further demonstrates the Legislature’s intent that the term “indemnify” should be broadly interpreted and includes repair and replacement, rather than simply reimbursement.

In addition, the leading treatise on insurance provides that a contract “does not cease to be one of insurance merely because it requires compensation in something other than money, whether the other form of

payment is the equivalent of money or merely the rendering of some act of value to the insured.” 1 Couch on Ins. § 1:8.

Rent-A-Center also appears to argue that the Benefits Plus Program cannot constitute insurance because there are other benefits bundled with insurance benefits like the Paid-Out Account benefit. App. Br. at 16. However, “the sale of insurance coverage as an incidental part of a more extensive transaction” is still subject to regulation as insurance. *Wayne v. Staples, Inc.*, 135 Cal. App. 4th 466, 476, 37 Cal. Rptr. 3d 544, 551 (2006). As a policy matter, it would be gravely problematic to allow unauthorized entities to escape the requirement of the Insurance Code by merely bundling insurance products with other products.

Further, the findings and conclusions carefully consider only those benefits that constituted insurance, not every benefit in the Benefits Plus Program. Looking specifically at the Paid-Out Account benefit, the question is whether the indemnification is a primary benefit to the agreement. There is no question that the primary purpose of the Paid-Out Account benefit is indemnification of the Benefits Plus Program member. It operates to shift the risk of loss from Rent-A-Center’s customers to third party BSA. The Paid-Out Account benefit is an agreement by BSA, not Rent-A-Center companies, to repair or replace “all mechanical or electrical failures” of “home electronics, appliances, computers, and

furniture,” subject to a number of limitations. AR 064-065. This benefit is a promise to pay for the cost of a possible loss. As the brochure notes, “without this valuable protection, you would be responsible for all costs of repairs after you owned the merchandise.” AR 064.

Rent-A-Center also argues that there are seven “indicia of insurance” that the Paid-Out Account benefit lacks. These indicia purportedly include things like a deductible, underwriting, and use of credit scores. However, Rent-A-Center offer no legal support for their claim that these additional elements are required for insurance contracts in Washington State. The only case Rent-A-Center cites for the proposition that these are even indicia of insurance, is a case involving the Washington State Department of Revenue, and tire sales company offering an extended warranty on tires sold to their customers. App. Br. at 16. The holding of that case concerned applicability of certain tax deductions, not the statutory definition of insurance. *Discount Tire Co. of Washington, Inc. v. Washington*, 121 Wn. App. 513, 85 P.3d 400 (2004).

In addition to actually indemnifying Benefits Plus Program members, the Paid-Out Account benefit also pays a specified sum. The contract provides that reimbursement will cover replacement or “repair costs (including parts and labor).” AR 064. Rent-A-Center argues, without any citation to statute or case law, that a “specified amount” under

RCW 48.01.040 may only be a “face value of the contract or predetermined amount to be paid.” App. Br. at 12. However, they offer no support for the claim that a “specified amount” must be an exact amount.

It is undisputed that the Paid-Out Account benefit protects Rent-A-Center customers from incurring the cost of repairs or replacement of items purchased from Rent-A-Center. It is also an agreement to pay a specified amount: the amount of those repairs, or the replacement costs. This obligation is only payable on certain determinable contingencies: the failure of a product purchased through Rent-A-Center. The Commissioner therefore properly concluded that it was insurance. AR 007-008.

B. Benefits Plus Program Benefits At Issue Are Not Exempt From Regulation Under The Insurance Code

The Legislature has recognized that certain products—including products similar to the Paid-Out Account benefit at issue here—constitute insurance, but have the potential to provide benefits to consumers without the need for full regulation under Title 48 RCW. As a result, “[c]ertain transactions that fall within the definition of insurance have been addressed by exemptions from the Code or the creation of a specific regulatory structure.” S.H.B. 2553, Final Bill Report, 1 (2006). The Legislature created these exceptions so that certain non-traditional

insurance products would not have to satisfy “the same capitalization and reserve requirements, reporting and solvency oversight, and claims handling practices as are required of an insurer selling a traditional insurance product.” *Id.* Although the Legislature has carved out certain products from the definition of insurance, the Benefits Plus Program benefits here do not qualify for any exemption under the Insurance Code.

1. The Paid-Out Account benefit is not an exempt as a warranty for Rent-A-Center products.

Rent-A-Center appears to suggest that the Paid-Out Account benefit should be treated as a warranty. App. Br. at 17. If that is their suggestion, it is meritless. Warranties are exempted from Title 48 and the full regulatory framework of traditional insurance. RCW 48.110.015(1)(a). Title 48 provides that a “warranty” is:

made *solely* by the manufacturer, importer, or seller of property or services *without consideration*; that is *not negotiated or separated from the sale of the product* and is incidental to the sale of the product; and that guarantees *indemnity* for defective parts, mechanical or electrical breakdown, labor, or other remedial measures, such as repair or replacement of the property or repetition of services.

RCW 48.110.020 (emphasis added). Thus, where manufacturers or sellers include a promise to indemnify for defective parts and mechanical or electrical breakdown, without additional consideration or negotiation at

the time of the sale, that warranty will not be subject to Title 48's regulatory framework.

The Paid-Out Account benefit is not such a warranty for three reasons: 1) it is sold for additional consideration as part of the Benefits Plus Program, 2) it is separate from Rent-A-Center's lease contracts, and 3) is executed between the customer and a third party, BSA. The out-of-state cases cited by Rent-A-Center, which distinguish warranties from insurance products, are therefore inapposite. Both cases draw a distinction between warranties and insurance, based on the lack of risk shifting characteristics. Critically, both cases involved agreements in which risk was not shifted to a third party. *See Rayos v. Chrysler Credit Corp.*, 683 S.W.2d 546 (Tex. App. 1985) (holding that a service contract between the Chrysler Corporation and the purchaser of a new vehicle manufactured by Chrysler was a warranty, not insurance); *GAF Corp. v. Cty Sch. Bd. of Washington Cty., Va.*, 629 F.2d 981 (4th Cir. 1980) (holding that agreement by roof shingle manufacturer to repair damage caused by material and workmanship defects was a warranty, not insurance). Thus, the manufacturer in both cases was simply retaining its own risk, rather than transferring it to a third party.

Similarly, the product at issue in the *Discount Tire Co. of Washington, Inc. v. Washington*, (121 Wn. App. 513, 85 P.3d 400 (2004))

was an extended warranty offered by the seller, Discount Tire Co. of Washington, Inc. There, the court found that the Department of Revenue's treatment of the extended warranty, where all the risk remained with the seller and where the original price was fully refunded by the original seller under the terms of the contract, was not insurance. *Discount Tire*, 121 Wn. App. at 529.

The Commissioner is not alone in his interpretation that products like the Paid Out Account benefit constitute insurance, and not a warranty. In an official legal opinion addressing vehicle service contracts, prior to the enactment of Chapter 48.110 RCW, the Attorney General's Office explained that a product would be insurance if it indemnifies an owner against "loss or damage resulting from . . . risk not related to quality or fitness of the parts or workmanship involved in the vehicle itself. . . ." Att'y Gen. Op. 17, at 6 (1976). It is also insurance "if someone other than the manufacturer or dealer purports to indemnify an automobile owner against loss resulting from defects in the vehicle itself . . . because the risk insured against will not be one within the control of the insurer." *Id.*

Alternatively:

if the risk covered by the contract is exclusively one relating to the parts and workmanship involved in the vehicle itself, and if the contract is issued either by the manufacturer of that vehicle or by a dealer in connection

with a specific sale, . . . the contract will not . . . constitute an insurance contract.

Id.

Because Rent-A-Center charges additional consideration for the Benefits Plus Program, and sells the program separately from any rent-to-own agreements, the Paid-Out Account benefit cannot be a warranty. Further, it is a third party, BSA, that is contracting with consumers to offer the protection of the Benefits Plus Program, and not the manufacturer or seller of the product. Therefore, the Paid Out Account benefit of the Benefits Plus Program is not a warranty and is not exempt from regulation under the Insurance Code.

2. Rent-A-Center failed to take advantage of the limited exception the Legislature carved out for service contracts.

Rent-A-Center failed to obtain valid registration as a service contract provider before offering the Benefits Plus Program and the Paid-Out Account benefit in Washington State. Therefore, the Benefits Plus Program cannot be exempt as a properly registered service contract.

The Legislature enacted Chapter 48.110 RCW to create a carve-out from the complete regulatory framework of Title 48. The Legislature explained:

increasing numbers of businesses are selling service contracts for *repair, replacement, and maintenance of motor vehicles, appliances, computers, electronic equipment, and other consumer products*. There are risks that contract obligors will close or otherwise be unable to fulfill their contract obligations that could result in unnecessary and preventable losses to citizens of this state. The legislature declares that *it is necessary to establish standards that will safeguard the public from possible losses arising from the conduct or cessation of the business of service contract obligors or the mismanagement of funds paid for service contracts*. The purpose of this chapter is to create a legal framework within which service contracts may be sold in this state and to set forth requirements for conducting a service contract business.

RCW 48.110.010 (emphasis added). Thus, the Legislature was aware of services like the Paid-Out Account benefit at issue here, which provide for the repair and replacement of appliances, computers, electronic equipment, and other consumer products. If Title 48 RCW was not applicable to these products, it would not have been necessary for the Legislature to enact Chapter 48.110 RCW to create a separate regulatory framework within Title 48 RCW.

The Commissioner does not concede that Rent-A-Center has accurately described what is necessary to qualify as a service contract provider. *See* App. Br. at 6-12. However, Rent-A-Center's argument misses the operative point of the Commissioner's Final Order. Had Rent-A-Center obtained registration as a service contract provider for the Paid-Out Account Benefit, then this product would have been exempt from the

definition of insurance. But Rent-A-Center concedes that they were not a registered service contract provider at the time this produce was sold. App. Br. at 12; AR 6. Therefore, this equally concedes that the service contract provider option does not apply here, and does not exempt their product from the definition of insurance under RCW 48.01.040. It is therefore subject to the complete regulatory framework of Title 48 RCW and the Final Order of the Commissioner.

C. The Commissioner Properly Found That Rent-A-Center Was Soliciting Or Transacting Insurance In Washington State By Marketing And Selling The Benefits Plus Program

Under Title 48, “an insurer not authorized by the Commissioner may not solicit or transact business in Washington.” RCW 48.15.020(1). Similarly, “[a] person shall not sell, solicit, or negotiate insurance in this state . . . unless the person is licensed . . . in accordance with this chapter.” RCW 48.17.060(1). Here, it is uncontroverted that Rent-A-Center “sold 13,018 memberships” to customers at Rent-A-Center retail locations in Washington for BSA. AR 5; 343. Those memberships included benefits, as described above, that constitute insurance. Therefore, there is no question that Rent-A-Center violated RCW 48.17.060(1). Rent-A-Center contends that despite these 13,018 sales, they did not “solicit” or “transact” insurance under RCW 48.15.020(1). This contention is untenable and lacks merit.

“Transact” is not defined under Title 48. However, an “insurance transaction” is defined as any:

- (1) Solicitation.
- (2) Negotiations preliminary to execution.
- (3) Execution of an insurance contract.
- (4) Transaction of matters subsequent to execution of the contract and arising out of it.
- (5) Insuring.

RCW 48.01.060. Here, there is no question that Rent-A-Center employees sold, and therefore executed, 13,018 contracts for the Benefits Plus Program.

In addition, “solicit” is defined as “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). Even before “solicit” was defined in statute, the Supreme Court had determined that solicitation under RCW 48.01.060(1) can include “materials which advise recipients concerning available insurance policies, [and] inform them of the attractive provisions of such policies”, can constitute solicitation of insurance. *National Federation of Retired Persons v. Insurance Com'r*, 120 Wn.2d 101, 112, 838 P.2d 680 (1992).

Here, Rent-A-Center provided the Benefits Plus brochures at its retail locations and was doing so as far back as 2004. AR 240; TR 41:7-9. There is no evidence that BSA received memberships from any entity

other than Rent-A-Center. The record establishes that a customer entering a Rent-A-Center retail location would be provided with the Benefits Plus Program brochure and application form, which would be filled out on Rent-A-Center computers by a Rent-A-Center clerk. TR 29:14-25, 30:1-18. Providing a marketing brochure, which by its very purpose is designed to advertise and sell a product, clearly rises to the level of "attempting to sell." Even if providing the brochure did not fall within the statutory definition of solicit, by providing and executing the membership form, Rent-A-Center was transacting business in Washington State.

Further, by its very terms the membership agreement was only active in Washington State. AR 080 (providing that "Rent-A-Center does not offer this RAC Benefits Plus Program anywhere but the state of Washington. . . if you move outside of Washington, your RAC Benefits Plus membership . . . will automatically terminate.").

In light of these findings, the Commissioner found that providing brochures that promoted the Benefits Plus Program was soliciting insurance. AR 9. He further found that selling over 13,000 Benefits Plus Program policies was transacting insurance. AR 10.

D. The Commissioner Properly Imposed A Lawful Fine Of \$50,000, Jointly And Severally, Against Rent-A-Center Who Unlawfully Sold 13,018 Packages Of Insurance Benefits To Washington State Consumers

The Commissioner has broad enforcement authority—including the authority to issue monetary penalties—against individuals and entities that violate the Insurance Code. For those acting as an insurer⁵ by issuing an insurance product, the Insurance Code provides that,

If the commissioner has cause to believe that any person has violated the provisions of RCW 48.15.020(1)⁶, the commissioner may: . . . [a]ssess a civil penalty of not more than twenty-five thousand dollars for each violation

RCW 48.15.023(5)(a)(ii).

For entities acting as insurance producers (also known as agents or brokers), the Insurance Code provides “[i]f the commissioner has cause to believe that any person has violated the provisions of RCW 48.17.060⁷, the commissioner may: . . . [a]ssess a civil penalty of not more than twenty-five thousand dollars for each violation”

RCW 48.17.063(4)(a).

Here, the Commissioner properly found that Rent-A-Center is not an authorized insurer in Washington State. Nor is Rent-A-Center a

⁵ , An “insurer” is anyone “engaged in the business of making contracts of insurance.” RCW 48.01.050.

⁶ RCW 48.15.020 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.”

⁷ RCW 48.17.060 provides that “[a] person shall not sell, solicit, or negotiate insurance in this state . . . unless the person is licensed . . . in accordance with this chapter.”

licensed insurance producer that is permitted or qualified to sell, solicit, or negotiate insurance in this state. Further, Rent-A-Center has not applied for or been granted registration as a service contract provider. As discussed above, the Commissioner properly held that Rent-A-Center had sold insurance products 13,018 times in Washington State. Even assuming *arguendo* only the Paid-Out Account benefit was properly considered by the Commissioner, there were at a minimum 13,018 violations of the Insurance Code. Therefore, imposing a fine of \$50,000 was well within the Commissioner's discretionary authority of \$25,000 per violation.

Importantly, in issuing the Final Order the Commissioner found three components of the Benefits Plus Program constituted Insurance: the accidental death and dismemberment coverage, the Paid Out Account Benefit, and the waiver benefits. In issuing the \$50,000 fine, the Commissioner did not only find that Rent-A-Center violated RCW 48.01.250. Instead, the Commissioner found that each of these components of Rent-A-Center's Benefits Plus Program also violated RCW 48.05.030, and RCW 48.15.020. AR 7-9. The Commissioner also found that in addition to the cease and desist provision in RCW 48.01.250, the penalty provisions in RCW 48.05.185, and RCW 48.15.023, and RCW 48.17.063 also apply to Rent-A-Center's conduct. Thus the penalty

provisions applicable to Rent-A-Center's sale of any part of the Benefits Plus Program that is found to be insurance is subject to fines of up to \$25,000 for each occurrence. It is undisputed that in 13,018 instances, the Rent-A-Center sold the Benefits Plus Program, which included insurance in the form of the accidental death and dismemberment coverage. Each of those policies also included insurance coverage in the form of the Paid-Out Account Benefit. Moreover, each of those sales was solicited and transacted by Rent-A-Center retail centers which were not licensed as insurance producers.

Further, the Commissioner expressly provided that his "decision as to appropriate fines/penalties would not be altered if . . . no more than one of the referenced statutory sections authorizing fines/penalties were applicable." AR 013. On reconsideration, the Commissioner also found that even if the accidental death and dismemberment coverage were the only insurance product at issue, the fine of \$50,000 would not be altered. AR 17. Rent-A-Center cites no authority that the multiple statutory violations found by the Commissioner are bound to only the pre-hearing cease and desist penalty found in RCW 48.01.250.

Because the Commissioner has clear statutory authority to issue fines well in excess of \$50,000 for the 13,018 instances in which Rent-A-Center violated multiple insurance statutes, the Commissioner's fine

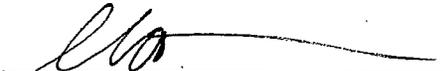
amount is a wholly appropriate exercise of his discretion, and should be affirmed.

VI. CONCLUSION

The components of the Benefits Plus Program are insurance, and do not fit any exception to the broad definition of insurance applicable in Washington State. Rent-A-Center was properly fined for 13,018 instances of soliciting and transacting insurance within Washington State. Therefore this Court should affirm the Final Order imposing a \$50,000 fine against Rent-A-Center.

RESPECTFULLY SUBMITTED this 4th day of October, 2017.

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