

OCT 6 1992

STATE OF ARIZONA

DEPARTMENT OF INSURANCE

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By                     

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In the Matter of:	)	Docket No. 7584
	)	
WILBURN McCURLEY,	)	ORDER
	)	
Respondent.	)	
_____	)	

On September 11 and 14, 1992, a hearing was held in the above-reference matter. Respondent was present in person and through counsel, J. William Moore, Esq. The Arizona Department of Insurance ("Department") was represented by Assistant Attorney General Kathryn Leonard, Esq.

Based upon the testimony and other evidence presented at the hearing, we find as follows:

1. Notice of this hearing was mailed to Respondent at his address of last record.
2. Respondent is presently, and was at all material times, a licensed bail bond agent in the State of Arizona (license number 0622399).

I. Procedural History

3. On September 10, 1992 at 3:44 p.m., Respondent filed a bankruptcy petition in the United States Bankruptcy Court for the District of Arizona.

4. On September 11, 1992, prior to the commencement of the hearing in this matter, counsel for the Department filed a notice with the hearing officer advising that the only relief sought by the Department in this administrative matter was suspension or revocation of Respondent's insurance license.

1           5.    At the hearing, counsel for Respondent asserted  
2 that the hearing in this matter was subject to the automatic  
3 stay provision of 11 U.S.C. §362. After hearing argument from  
4 counsel, the hearing officer concluded that Respondent's filing  
5 of a bankruptcy petition did not operate as a stay of this  
6 action by the Director of Insurance to enforce the Director's  
7 regulatory power pursuant to 11 U.S.C. §362(a)(4).

8                   II. The Beckner Bond

9           6.    Pursuant to an "Agency Contract", Respondent was  
10 an "executing agent" of International Fidelity Insurance Company  
11 ("International Fidelity") from June 9, 1982 to May 7, 1991. As  
12 an "executing agent", Respondent's duties included soliciting  
13 and writing business; collecting and transmitting premiums and  
14 collateral as prescribed by International Fidelity; seeing to it  
15 that persons bonded appeared in court when required; adjusting  
16 or assisting in the adjustment of claims if and as requested;  
17 and in general, using his best endeavors to further the  
18 interests of International Fidelity.

19           7.    It is undisputed that on August 23, 1989,  
20 Respondent posted an appearance bond on behalf of Scott Beckner  
21 ("Beckner") in the amount of \$5,480.00. Respondent received  
22 \$5,480.00 cash collateral from Dianne Page, Beckner's sister.

23           8.    In the notice of hearing, the Department alleged  
24 that Respondent approached Page at the Yuma County Adult  
25 Detention Facility to solicit business. The only evidence  
26 presented by the Department in support of this allegation was an  
27 undated statement submitted to the Department purportedly signed  
28 by Page. Page did not testify in this matter. Respondent

1 denied having solicited Page at the Yuma County Detention  
2 Facility and testified that Page approached Respondent while  
3 Respondent was at the jail on another matter. Respondent  
4 testified that he and Page then went to Respondent's office.

5 9. Based upon the foregoing, the Department has not  
6 shown by a preponderance of the evidence that Respondent  
7 solicited Page at the Yuma County Detention Facility.

8 10. It is also not disputed that Respondent did not  
9 return the \$5,480.00 cash collateral to Page and that on May 25,  
10 1990, Beckner entered a plea agreement and was sentenced by the  
11 Honorable B.L. Helm. Judge Helm ordered that Beckner's bond was  
12 exonerated.

13 11. At the hearing, Respondent testified that the  
14 cash collateral was not returned to Page because Beckner failed  
15 to appear in court when ordered and Respondent expended time and  
16 money searching for Beckner.

17 On October 6, 1989, the Yuma County Attorney filed an  
18 affidavit avowing that Beckner failed to appear for his  
19 arraignment on September 18, 1989 as ordered. An order to show  
20 cause hearing was set for October 23, 1989. A bench warrant was  
21 issued for Beckner's arrest on September 18, 1989. At the  
22 request of the Yuma County Attorney, the order to show cause  
23 hearing on October 23, 1989 was vacated.

24 On November 8, 1989, the Yuma County Attorney filed  
25 another motion for order to show cause. A hearing was scheduled  
26 for November 20, 1989. On November 20, 1989, Beckner did not  
27 appear in person or through counsel, and a hearing on the bond  
28 forfeiture was set for March 12, 1989 [sic 1990].

1           12. Respondent testified that his office records for  
2 this period of time were lost in a flood and that he had  
3 attempted to reconstruct from memory a log of his time and  
4 activities regarding this transaction. According to Respondent,  
5 Respondent made several trips in September and October 1989 to  
6 Buckeye, Arizona looking for Beckner. Respondent calculated his  
7 time at a rate of \$75.00 per hour, including his expenses. In  
8 addition, Respondent testified that he retained Espinosa  
9 Investigations and Collections to search for Beckner. The  
10 investigator charged \$1,100.00 for three days of investigation  
11 on October 9, 10 and 11, 1989.

12           13. Neither Respondent nor the investigators he  
13 retained was able to located Beckner. According to Respondent,  
14 in approximately December 1989 Beckner was arrested on an  
15 outstanding bench warrant. Respondent testified that no one  
16 advised him that Beckner had been arrested and that he was  
17 unaware that Beckner was in jail.

18           14. In July, 1991, Respondent met with Investigator  
19 Sandra Yaffi of the Department of Insurance regarding the  
20 complaint from Page. As a result of that meeting, Investigator  
21 Yaffi wrote to Respondent to confirm their understanding  
22 regarding deductions from collateral.

23           15. On or about August 31, 1991, Respondent sent a  
24 package of materials to Page including copies of the orders to  
25 show cause, a copy of the invoice from Espinosa Investigations  
26 and a copy of the log reconstructed by Respondent. The package  
27 returned to Respondent marked "Unclaimed".

28

1           16. In response to a request from the Department, on  
2 January 21, 1992 International Fidelity issued a check to Dianne  
3 Page in the amount of \$5,480.00.

4           17. We find that when Beckner failed to appear in  
5 court as ordered, Respondent was permitted to charge Beckner for  
6 reasonable expenses incurred in locating Beckner. However, we  
7 find the charges by Respondent to be excessive, unreasonable and  
8 lacking proper documentation. The log reconstructed by  
9 Respondent provides very general descriptions of Respondent's  
10 four trips to Buckeye for which Respondent billed almost 75  
11 hours and for which he charged a total of \$5,623.00, in addition  
12 to \$1,100.00 paid to Espinosa Investigations.

13           III. The Martinez/Garcia/Calderon-Alvarado Bonds

14           18. On or about January 17, 1990, Respondent entered  
15 into a "Bail Bond Contract" with Empire-American Bail Bond, Inc.  
16 ("Empire-American"). Empire-American was a general agent for  
17 Spencer Douglass Managing General Agent ("Spencer Douglass").  
18 Pursuant to the agreement between Empire-American and Spencer  
19 Douglass, Spencer-Douglass selected Ranger Insurance Company  
20 ("Ranger") as the admitted underwriter whose bail bonds were  
21 provided to Empire-American. Pursuant to the "Bail Bond  
22 Agreement", Empire-American provided Ranger bail bonds to  
23 Respondent.

24           19. At the hearing it was not disputed that  
25 Respondent accepted collateral and posted bonds on behalf of  
26 Horacio Z. Martinez, Victor Rito Garcia and Jose  
27 Calderon-Alvarado. Respondent testified that he posted  
28

1 immigration bonds and appearance bonds on behalf of each of  
2 these three defendants.

3           Copies of receipts issued by Respondent indicate  
4 that on November 14, 1990, Respondent accepted a total of  
5 \$10,190.00 in cash from "Martha Garcia" for a cash bond, an  
6 immigration bond and expenses on behalf of Victor Garcia. On  
7 November 22, 1990 Respondent received \$9,000.00 cash from  
8 "Horatio Sasueta" and on November 26, 1990 Respondent received  
9 \$5,900.00 cash from "Horatio Martinez". These amounts appear to  
10 be for bonds for Horatio Sasueta Martinez. Finally, on November  
11 22, 1990, Respondent received \$9,000.00 cash from "Tony Lopez"  
12 and on November 26, 1990 Respondent received \$7,100.00 cash from  
13 "Jakeline Gastlum". It is unclear from the record on whose  
14 behalf these amounts were paid.

15           20. It was not disputed that shortly after the  
16 appearance bonds were posted, the charges against Garcia and  
17 Martinez were dismissed and their appearance bonds were  
18 exonerated. Charges against Calderon-Alvarado were not  
19 dismissed. Respondent testified that all three defendants  
20 failed to appear on their immigration bonds and these bonds were  
21 forfeited.

22           21. At the hearing, Respondent offered three  
23 explanations for why the collateral was not returned on the  
24 Garcia and Martinez appearance bonds after the bonds were  
25 exonerated: (1) the individuals who remitted the cash collateral  
26 to Respondent did not ask for the collateral to be returned; (2)  
27 the immigration and appearance bonds posted on behalf of the  
28 three defendants were "tied together" and collateral on just the

1 two exonerated appearance bonds could not be returned; and (3)  
2 Respondent had used the cash collateral to look for the three  
3 defendants when they failed to appear on the immigration bonds  
4 and to look for Calderon-Alvarado when he failed to appear on  
5 the appearance bond.

6 22. No evidence was presented to show that Respondent  
7 made any effort to return the cash collateral to the individuals  
8 who remitted the collateral to him when the Martinez and Garcia  
9 appearance bonds were exonerated. Respondent testified that had  
10 they contacted him, he would have returned the collateral to  
11 them. Martha Garcia's address was on one of the receipts issued  
12 by Respondent, yet apparently no effort was made by Respondent  
13 to contact Garcia.

14 23. In addition, if Respondent would have returned  
15 the collateral had the people who remitted it to him asked for  
16 it, it is inconsistent that if they did not ask for the  
17 collateral, Respondent could use this collateral to search for  
18 Calderon-Alvarado or to search for Garcia and Martinez well  
19 after the immigration bonds had been forfeited. Respondent  
20 failed to provide any documentation to show that any time spent  
21 or expenses actually incurred in relation to Garcia and Martinez  
22 were reasonable or necessary.

23 24. Finally, although Respondent testified that all  
24 of the immigration and appearance bonds posted on behalf of  
25 these three defendants were "tied together", no documentary  
26 evidence was presented to show that Respondent was in any way  
27 prohibited under the terms of the bonds from refunding the  
28 collateral when the Garcia and Martinez bonds were exonerated.



1 The only evidence presented on this issue by Respondent other  
2 than his own testimony were copies of letters from  
3 Empire-American in which Empire-American concluded that all the  
4 bonds were "tied together". We find that these conclusions are  
5 not supported by the evidence presented in this matter.

6 25. On November 21, 1991, Respondent signed a  
7 document requesting that Spencer Douglass pay on Respondent's  
8 behalf refund of cash collateral to Horacio Sasueta Martinez and  
9 Philip Jones in the amount of \$13,700.00 and to Victor Rito  
10 Martinez Garcia and Philip Jones in the amount of \$5,600.00.

11 26. On November 26, 1991, Spencer Douglass issued a  
12 check to "Harold (sic) S. Martinez and Phillip Jones" in the  
13 amount of \$13,700.00 and another check to "Victor R. Garcia and  
14 Phillip Jones" in the amount of \$5,600.00. These funds were  
15 drawn from the Tapp's "Build Up" Fund maintained by Spencer  
16 Douglass.

17 27. Based upon the foregoing, we find that Respondent  
18 had no factual or legal basis for Respondent's failure to return  
19 the collateral on the Martinez and Garcia appearance bonds.

#### 20 IV. Certificate of Assumed Name

21 28. It was undisputed that Respondent has transacted  
22 bail bond business since approximately 1980 under the name "A-1  
23 Bail Bonds". Respondent testified that he had previously filed  
24 an affidavit that he was the owner of "A-1 Bail Bonds", but that  
25 he was never told to file a certificate of assumed name. Such  
26 an affidavit does not appear in Respondent's licensing file  
27 maintained by the Department. Respondent also testified that he  
28 inquired about such a form on three separate visits to the



1 Department but did not receive any information about a  
2 certificate of assumed business name.

3 29. In July 1992, when Respondent renewed his  
4 license, Respondent filed a certificate of assumed business  
5 name.

6 30. We find that Respondent's failure to file the  
7 required certificate was unintentional.

8 CONCLUSIONS OF LAW

9 1. The Director has jurisdiction in this matter  
10 pursuant to A.R.S. § 20-142.

11 2. Notice of this hearing was proper pursuant to  
12 A.R.S. §§ 41-1061 and 20-163.

13 3. Respondent's conduct in each of the Beckner,  
14 Martinez and Garcia bond transactions constitute separate  
15 instances of misappropriation or conversion to his own use or  
16 illegal withholding of monies belonging to policyholders,  
17 beneficiaries or others received in or during the conduct of  
18 business under Respondent's license or through its use in  
19 violation of A.R.S. § 20-316(A)(4).

20 4. Respondent's conduct in each of the Beckner,  
21 Martinez and Garcia bond transactions constitute separate  
22 instances of acceptance of collateral security which Respondent  
23 failed to return on termination of liability on the bond in  
24 violation of A.R.S. §§ 20-321(A)(6), 20-321(C)(3) and A.A.C.  
25 R4-14-601(E)(2) and (E)(4).

26 5. We do not find that Respondent solicited business  
27 in or around any place where prisoners are confined in violation  
28 of A.R.S. § 20-321(A)(2).

1           6. We do not find that Respondent made  
2 misrepresentations in the solicitation of a bond in violation of  
3 A.R.S. § 20-443(1).

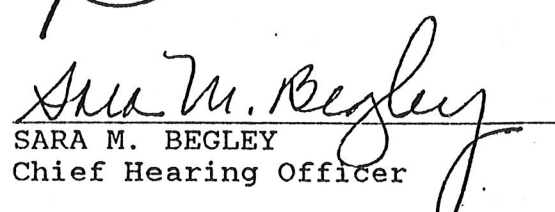
4           7. Respondent was transacting insurance under an  
5 assumed name without having filed the requisite certificate with  
6 the Director in violation of A.R.S. § 20-318(A).

7           IT IS HEREBY ORDERED that Respondent's bail bond agent's  
8 license is revoked effective this date.

9           The aggrieved party may request a rehearing with respect to  
10 this Order by filing a written petition with the Hearing Officer  
11 within thirty days of the date of this Order, setting forth the  
12 basis for such relief pursuant to A.A.C. R4-14-114(B).

13           DATED this 6th day of October, 1992.

14   
15 \_\_\_\_\_  
16 SUSAN GALLINGER  
17 Director of Insurance

18   
19 \_\_\_\_\_  
20 SARA M. BEGLEY  
21 Chief Hearing Officer

22 COPY of the foregoing mailed/delivered  
23 this 6th day of October, 1992, to:

24 Kathryn Leonard, Esq.  
25 Assistant Attorney General  
26 Attorney General's Office  
27 1275 West Washington  
28 Phoenix, Arizona 85007

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