10-1-2009

Two Jinn, Inc. v. District Court Appellant's Brief Dckt. 36476

IN THE SUPREME COURT OF THE STATE OF IDAHO

TWO JINN, INC., a California corporation duly qualified to do business in Idaho and doing business as Aladdin Bail Bonds and Anytime Bail Bonds; JAMES GARSKE; and SHANTARA CARLOCK, Plaintiffs-Respondents-Cross Appellants, vs. DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO; DARLA S. WILLIAMSON, in her official capacity as Administrative District Judge for the District Court of the Fourth Judicial District; LARRY D. REINER, in his official capacity as Trial Court Administrator for the District Court of the Fourth Judicial District; and DIANE BURRELL, in her capacity as Assistant Trial Court Administrator for the District Court of the Fourth Judicial District, Defendants-Appellants-Cross Respondents.	Supreme Court No. 36476 Fourth Judicial District Case No. CV OC 0706619

APPELLANTS' BRIEF

Appeal from the District Court of the
Fourth Judicial District for Ada County

Honorable James F. Judd, Senior Judge presiding

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Idaho Constitution

Statutes

Other Authorities

I.

STATEMENT OF THE CASE

This case arose from a challenge to the Fourth Judicial District's Bail Bond Guidelines ("BBG"). The Fourth Judicial District appeals from the District Court's holding that certain provisions of the BBG promulgated by the Administrative District Judge ("ADJ") exceeded the ADJ's authority.

II.

FACTS AND COURSE OF THE PROCEEDINGS

In April 2004, the Fourth Judicial District ADJ adopted the BBG for the Fourth Judicial District. R., Vol. II, p.267.[1] Judge Williamson explained in an affidavit that the "Bail Bond Guidelines have been adopted for many years by the Fourth Judicial District *via* order of the administrative district judge pursuant to I.C. § 1-907. . . The Administrative Order signed by me on April 16, 2004, is basically a compilation of the Guidelines adopted by past administrative district judges. Along with reducing all the

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[1] The ADJ subsequently modified the Guidelines on July 16, 2004, August 25, 2004, October 1, 2004, December 9, 2005, October 17, 2006, and November 13, 2006. R., Vol. II, p.267. The BBG were amended again on August 22, 2008 while the case underlying this appeal was pending in district court. Aladdin, like all interested parties, had an opportunity to provide input and comment on the proposed amendments. R., Exhibit 38, *Amended Affidavit of Darla S. Williamson, Administrative District Judge of the 4th Judicial District, filed September 8, 2008*, p. 2 at ¶ 2.

After the District Court issued its decision in this case on March 31, 2009, the Guidelines were further amended on April 29, 2009 to conform to the District Court's decision, with an amendment to Section 17 on May 5, 2009. R., Vol. III, pp. 520-521.

Because the April 29, 2009 conforming guidelines had the potential to moot issues on appeal, the ADJ issued an administrative order on May 29, 2009, suspending the implementation of the Guidelines until this Court issued its decision. *See* R., Vol. III, p. 566, *but note*: the Motion to Include the May 29, 2009 Administrative Order on Appeal was never ruled on by the District Court.

The BBG at issue in this appeal, therefore, are the August 22, 2008 Guidelines.

guidelines into one package, I merely edited, modified, made some additions and incorporated a table of contents for easier accessibility." R., Exhibit 14, *Affidavit of Darla S. Williamson In Support Of State Defendants' Opposition To Plaintiffs' Motion For Summary Judgment,* filed August 14, 2007, at ¶ 2.

The BBG apply to bail agents who do business in the Fourth Judicial District. Bail agents agree to abide by the Guidelines in order to be placed on the district's list of approved bail agents. Bail agents who are not on the list may not write bonds in the Fourth Judicial District. Among other things, the BBG provide criteria that a bail agent must meet to write bonds in the Fourth Judicial District. For example, the BBG require that, to write bonds in the Fourth Judicial District, a bail agent must: (1) possess and maintain a license with the Idaho Department of Insurance, (2) have a criminal history records fingerprint check completed by the Idaho State Police Bureau of Criminal Identification, (3) complete an application to be submitted to the TCA's office, (4) provide the TCA's office with a copy of the current contract between the bail agent and the represented insurance company and/or a current copy of the contract between the bail agent and the supervising agent, and (5) be appointed by the Department of Insurance to post bonds on behalf of the insurance company listed on the application. R., Vol. II, p. 357.

To remain on the List of Authorized Bail Agents, a bail agent must (1) have a criminal records fingerprint check and provide the results to the TCA's office prior to the bail agent's license expiring, (2) submit a copy of the bail agent's renewed Department of Insurance license to the TCA's office, and (3) provide the TCA's office with a current copy of the contract between the bail agent and the represented insurance company. R., Vol. II, p. 351.

A bail agent may be disqualified from offering bonds for acceptance in the Fourth Judicial district for the following reasons: (1) the criminal history check reveals a felony; a misdemeanor involving theft, fraud or any other crime of dishonesty in the past 10 years, including crimes committed before age 18; three or more misdemeanor crimes; or any combination of three or more of the following: failure to appear, contempt of court, or probation violation within the past 5 years; (2) the applicant failed to disclose information requested on the application; (3) the applicant or the applicant's insurance company is not licensed by the Department of Insurance; (4) the applicant has four or more prior violations of the BBG and/or previous Fourth Judicial District policies which have not been excused by the ADJ following a hearing; (5) the applicant is currently employed by the state or county in a court-related position; (6) the applicant was denied the ability to offer bail bonds for acceptance or was removed from the list of authorized bail agents in this or another jurisdiction; (7) the application processing revealed that the applicant had previously had a license suspension or revocation imposed by the Department of Insurance or any state of the U.S.; (8) the applicant or his/her insurance company has previously failed to pay a forfeited bond; (9) the applicant is related by blood, marriage or adoption to a Fourth District Judge; (10) the applicant or his/her insurance company is financially insolvent; (11) the applicant has not satisfied all obligations to any court incurred while working with another bail agency; (12) the applicant was previously removed from the list of authorized agents. R., Vol. II, p. 358-59.

Under the BBG, applicants who are denied a place on the approved list have a right to a hearing before the Administrative District Judge on the denial. If an applicant is denied a place on the list of approved agents, the applicant will be notified by the Trial

Court Administrator's Office in writing. R., Vol. II, p. 359. If the applicant disagrees with the decision, the applicant may request a hearing before the Fourth District Administrative Judge to show why the applicant should be allowed to write bonds in the Fourth Judicial District. *Id.*

Under the BBG, all bail agents who are removed from the list have a right to a hearing before the Administrative District Judge on the removal. In almost all cases, this hearing will occur before the agent is removed from the list. R., Vol. II, pp. 362-63. There are three circumstances in which a bail agent may be temporarily removed without a pre-removal hearing: (1) the agent's license is suspended or revoked by the Department of Insurance; (2) the bail/bond agent writes a check with insufficient funds, and (3) the bail/bond agent's supervisor and/or insurance surety requests that the agent be removed from the list. If a bail agent is removed without prior notice, the bail agent has the ability to petition for an immediate hearing to address the reasons for removal. R., Vol. II, p. 365; Exhibit 14, *Affidavit of Darla Williamson in Support of State Defendants' Opposition to Plaintiffs' Motion for Summary Judgment*, at ¶¶ 12, 16.

In April 2007, Two Jinn d/b/a Aladdin Bail Bonds ("Aladdin") and two of its bail agents filed a Complaint for Declaratory Relief in the Fourth Judicial District, challenging the constitutionality of the Guidelines because the Guidelines interfered with Aladdin's ability to assign any bail agent of its own choosing to write bail in the Fourth Judicial District, regardless of whether that agent could comply with the Fourth District's requirements; in Aladdin's words, the Guidelines "interfere with Aladdin's ability to operate its business, which it does through its bail agent employees." R., Exhibit 22, *Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss for Lack of*

Jurisdiction, Or, Alternatively, For Reconsideration of Prior Summary Judgment Ruling, filed August 21, 2008, p. 2.

Aladdin requested a preliminary injunction to prevent the Fourth Judicial District from enforcing the Guidelines, and Aladdin moved to "augment the record" on its motion for preliminary injunction. Although the augmentation essentially added another bail agent as a plaintiff to the case, the motion was granted by the district court three days after it was filed, without any input from the Fourth District Defendants. However, the District Court ultimately denied Aladdin's motion for a preliminary injunction.

In February 2008, Aladdin filed an Amended Complaint, in which bail agent Shantara Carlock replaced bail agent Rebecca Salinas as a plaintiff. The parties subsequently filed cross-motions for summary judgment, in which Aladdin prevailed and the Fourth District lost. The District Court held that the BBG for the Fourth Judicial District:

> exceed the authority of the ADJ to adopt procedural guidelines by: ignoring the agency relationship between a bail agent and the surety or bail agency; imposing bail agent qualification standards greater than those imposed by the Idaho Department of Insurance (hereinafter "DOI"), except as they relate to a bail agent's family relationship to a Fourth Judicial District judge or a bail agent's simultaneous employment in a court-related position; requiring bail agents to ensure that a forfeited bond is paid; and providing sanctions for a bail agent's failure to pay a forfeited bond.

R., Vol. III, p. 492-493.

As a consequence of the District Court's holding, the Fourth District must:

- Transact bail bond business with convicted felons
- Transact bail bond business with bail agents who have been removed from authorized lists in other jurisdictions in Idaho

- Transact bail bond business with agents who have previously lost their licenses in other states

Under the District Court's holding, the Fourth District may require individual bail agents to submit to a criminal background check; however, if the background check discloses new misdemeanor or felony convictions – even a conviction arising from work as a bail agent - the Fourth Judicial District has no authority to remove the bail agent's name from the list. Under the District Court's holding, the only remaining grounds for preventing a bail agent from working in the Fourth District, i.e. not placing an agent's name on the list in the first instance, are:

- The bail agent is not licensed by the Department of Insurance ("DOI")
- The bail agent is employed in the Fourth District Court or related by blood or marriage to a Fourth District Judge
- The bail agent failed to disclose necessary information on his/her application (note: the District Court held that 9 of the 10 questions posed on the application were impermissible; thus, in light of this holding, the only information that a bail agent could fail to disclose would be contact information and whether the bail agent is employed by the Fourth Judicial District courts)

With the District Court's decision in this case, the Fourth Judicial District's BBGs were effectively enjoined. The Fourth District filed a timely notice of appeal, and Aladdin filed a timely notice of cross-appeal.

III.

ISSUES

1. Do the Bail Bond Guidelines for the Fourth Judicial District exceed the authority of the Administrative District Judge to establish guidelines regarding posting, forfeiture, exoneration and all other matters relating to bonds?

2. Do the Bail Bond Guidelines constitute a judicial exercise of legislative authority in violation of the Idaho Constitution's separation of powers doctrine?

IV.

ARGUMENT

A. The Bail Bond Guidelines for the Fourth Judicial District Are Within the Authority of the Administrative District Judge Based on the 2005 Order of the Idaho Supreme Court and the Inherent Authority of Courts to Regulate Matters Pertaining to Bail

1. Introduction

The authority for the Fourth Judicial District's BBG comes from (1) the 2005 Order of the Idaho Supreme Court, which gave judicial districts the authority to approve/disapprove individual bail agents writing bonds in their districts and/or (2) the inherent authority of the courts to regulate matters relating to bail.

The District Court's holding that BBG may not regulate individual bail agents is based on the incorrect assumption that the agency relationship between a bail agent and the agent's surety trumps both the ADJ's authority over matters pertaining to bail and judges' ability to oversee their courtrooms. Contrary to the District Court's holding, the judiciary and the courts are the final authority regarding what goes on in the courtroom

with respect to bail matters and, in particular, which bail agents may provide bail in Fourth Judicial District courtrooms.

2. The Idaho Supreme Court's 2005 Order Gave Administrative District Judges the Authority to Issue Bail Bond Guidelines like the Guidelines at Issue Here

On August 4, 2005, then-Chief Justice Gerald Schroeder signed an Order of the Idaho Supreme Court giving the administrative district judge of each judicial district specific authority to: "establish guidelines for bail bonds with regard to posting, forfeiture, exoneration and all other matters." R., Vol. III, pp. 625-627.

As the plain language of the Supreme Court's order indicates, this authority is extremely broad with respect to bail bond guidelines. Under the direction of the Idaho Supreme Court, administrative district judges were to establish guidelines that not only related to **posting** bail bonds, but, by the terms of the Order, related to **forfeiture** of bail bonds, **exoneration** of bail bonds, and **all other matters** related to bail bonds.

Guidelines that require individual bail agents to comply with certain conditions to transact business in a particular judicial district are exactly the sort of provisions contemplated by the Idaho Supreme Court when it issued its 2005 Order regarding posting forfeiture, exoneration and all other matters regarding bail bonds. Individual bail

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agents are involved in posting bail, forfeiture of bail, and exoneration of bail bonds.[2] The bail agents exercise their business judgment concerning who will get bail as explained by the D.C. Circuit:

> . . . The effect of such a system is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as a surety – who in their judgment is a good risk. The bad risks, in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fees, remain in jail. The court and the commissioner are relegated to the relatively unimportant chore of fixing the amount of bail.

Pannell v. United States, 115 U.S. App. D.C. 378, 320 F.2d 698, 699 (1963) (concurring opinion.) A bail agent's character is extremely important to the work s/he performs in the court system. "The critical factor in assuring that the accused returns to court at the appointed time is the bail agent to whom the accused is being released. It is the bail agent who makes contact with the accused and determines the risks of writing the bonds on his or her behalf." R., Exhibit 14, *Affidavit of Darla S. Williamson in Support of State*

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[2] While the Fourth District argues that individual bail agents are involved in posting bail, forfeiture of bail, and exoneration of bail bonds, Aladdin contends that individual bail agents have a different role vis-à-vis the courts in transacting bail bond business: none whatsoever. This fundamental disagreement about the role of a bail agent in the court system appears to be the underlying source of all the legal arguments in this case.

The Fourth District disagrees with Aladdin's position that "[b]ail agents provide no service to the Court, particularly in their capacities as individuals," Exhibit 22, *Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss or, Alternatively, for Reconsideration of Prior Summary Judgment Ruling, filed August 21, 2008*, p. 13, and that "neither the bail agent nor the surety agree to assist the defendant in attending court at the proper time." Exhibit 3, *Memorandum in Support of Plaintiffs' Motion for Summary Judgment, filed September 5, 2008*, p. 16. Aladdin's own website disagrees with the position Aladdin has taken in this lawsuit. The website represents that "Aladdin will also assist the defendant through every step of the process and go to great lengths to guide them through the legal system to make their bail experience easy to understand and comply with," (R., Vol. III, p. 431) and that "Aladdin will walk you through the entire process and even assist in helping the client make their scheduled court dates." R., Vol. III, p. 433. The District Court adopted Aladdin's view of the role of the bail agent. The District Court wrote that "[w]hile the rationales tendered by the ADJ might be aspirational for any poster of bail, whether private surety, cash or surety bond, there is nothing in the record [fn. omitted], the guidelines, or the statutory and case law that requires a bail agent 'to assure the accused's appearance, and . . . the duty to monitor and supervise the accused after release on bail and to recapture should he or she fail to appear." R., Vol. III, pp. 469-470.

Defendants' Opposition to Plaintiffs' Motion for Summary Judgment, filed August 14, 2007, at ¶ 6. Under the Supreme Court's order, a bail agent's activity in posting, forfeiting, exonerating and in all other bail-related matters is properly subject to the Fourth Judicial District's Guidelines.

3. Courts Have Inherent Authority to Regulate Matters Pertaining to Bail

State appellate courts "have traditionally asserted two primary bases for the existence of inherent judicial powers – the first is the separation of powers doctrine and the second is that these powers are inherent in a court because of its existence in the governmental power scheme." Felix F. Stumpf, Inherent Powers of the Court, 6, (NCJ Press, 2008). A court's inherent authority is not derived from statutory provision, but from the inherent "nature and constitution of the tribunals themselves." *Id.*, p. 8, *citing State v. Superior Court*, 275 P.2d 887, 889 (Ariz. 1954). This Court recently reiterated that the inherent authority of the courts is not dependent upon legislative enactments: "We have made it clear from time to time that the rule-making authority of the courts is not dependent upon legislative enactments." *City of Boise v. Ada County and Board of Ada County Commissioners*, 2009 Opinion No. 110, Docket No. 35432, August 25, 2009, p. 8.

This Court has recognized inherent judicial powers to adopt rules regarding the qualifications of persons seeking to practice law, to regulate law practice by issuing contempt citations, to apply sanctions for the failure of a party to comply with a discovery order, and to grant intervention to persons who may be adversely affected by the outcome of a proceeding or when equitable principles otherwise require. *See In re Edwards*, 266 P. 665 (Idaho 1928), *Application of Kaufmann*, 69 Idaho 297, 206 P.2d 528 (1949), *In re Weick*, 142 Idaho 275, 127 P.3d 178 (Idaho 2005), *State v. Stradley*, 127

Idaho 203, 899 P.2d 416 (Idaho 1995), *City of Boise v. Ada County and Board of Ada County Commissioners*, 2009 Opinion No. 110, Docket No. 35432, August 25, 2009, p. 8. As discussed below, this Court has also recognized inherent judicial powers related to bail. *State v. Currington*, 108 Idaho 538, 541, 700 P.2d 942, 944 (1985). In *Currington*, this Court quoted from a Washington State Supreme Court decision which stated, in part, that " '[s]ince the inherent power to fix bail is grounded in the power to hold a defendant, and thus relates to the *manner* of ensuring that the alleged offense will be heard by the court, we believe it to be implicit that the right to bail is essentially procedural in nature.'" *Id.*

In deciding this case, the Court should adopt the same reasoning that it previously applied in *Application of Kaufman*, 69 Idaho 297, 305, 206 P.2d 528, 536 (1949), a case dealing with applicants to practice in the State Bar.

> The courts are, of course, a separate and independent division of the government, and, within their constitutional rights, not subject to control by the Legislature. Article 3, Constitution of Arizona. We think there is no more important duty, nor one whose performance is more necessary to the proper functioning of the courts, than to see that their officers are of proper mental ability and moral character. The Legislature may, and very properly does, provide from time to time that certain minimum qualifications shall be possessed by every citizen who desires to apply to the courts for permission to practice therein, and the courts will require all applicants to comply with the statute. This, however, is a limitation, not on the courts, but upon the individual citizen, and it in no manner can be construed as compelling the courts to accept as their officers all applicants who have passed such minimum standards, unless the courts are themselves satisfied that such qualifications are sufficient. If they are not, it is their inherent right to prescribe such other and additional conditions as may be necessary to satisfy them the applicants are indeed entitled to become such officers. In other words, they may not accept less, but may demand more, than the

> Legislature has required.' Approved in Re Cate, Cal.App., 270 P. 976, infra, and In re Lavine, 2 Cal.2d 324, 41 P.2d 161 at page 162:
>
> 'The requirements of the Legislature in this particular are restrictions on the individual and not limitations on the courts. They cannot compel the courts to admit to practice a person who is not properly qualified or whose moral character is bad. In other words, the courts in the exercise of their inherent power may demand more than the Legislature has required.'

Id.

Following this same reasoning, the trial courts may exercise their inherent authority to decide which bail agents they will allow to write bail in their courtrooms.

4. The U.S. Supreme Court, Courts Around the Country, and the Idaho Supreme Court Recognize that Courts Have Inherent Authority to Regulate Bail

No less an authority than the U.S. Supreme Court has recognized that it is courts, and not bondsmen, who should be in control of the workings of the bail system. Describing a commercial bail system "with all its abuses . . . in full and odorous bloom in Illinois," the Supreme Court wrote:

> The results [of Illinois' system] were that a heavy and irretrievable burden fell upon the accused, to the excellent profit of the bondsman, and that professional bondsman, and not the courts, exercised significant control over the actual workings of the bail system.

Schilb v. Kuebel, 404 U.S. 357, 359-360 (1972) (upholding legislation in Illinois that effectively abolished commercial bail in that state).

When Kentucky upheld its own legislation abolishing commercial bail, its Supreme Court expressed little patience for the view that the courts were constrained to regulate bail bondsmen the same as any other profession:

> The provisions of bail related to criminal defendants are governed by the rules of this court. To argue that the compensated surety has the same standing as barbers, merchants, professions and other businesses is needless rhetoric.

Stephens v. Bonding Association of Kentucky, 538 S.W.2d 580 (Ky. 1976).

Courts around the country have acknowledged that "'reasonable requirements governing and regulating professional . . . bondsmen clearly come within the inherent powers of the court and may be properly supervised by the court.'" *Calvert v. Lapeer Circuit Judges*, 502 N.W.2d 293 (Michigan 1993) *quoting In re Johnson*, 217 S.E.2d 85 (N.C. Ct. App. 1975) (citing cases from Tennessee, Pennsylvania, Nebraska, North Carolina, Texas, the 2nd Federal Circuit, and the 11th Federal Circuit).

Idaho law similarly recognizes the inherent authority of judges to govern matters pertaining to bail. *State v. Currington*, 108 Idaho 539, 540-41, 700 P.2d 942, 943-44 (1985). Idaho's rules recognize this inherent authority also.

Idaho Misdemeanor Criminal Rule 13(3) acknowledges that the administrative judge of a judicial district has the authority to restrict the acceptance of bail bonds offered. It states:

> A fidelity, surety, guaranty, title or trust company authorized to do business in the state of Idaho and authorized to become and be accepted as sole surety on undertakings and bonds may execute the written undertakings provided for in these rules, which may be accepted by the person receiving the bond without prior approval by a judge unless otherwise ordered by the administrative judge of the judicial district.

(*Emphasis added.*)

Idaho Criminal Rule 46 also recognizes the authority of the administrative district judge to govern matters pertaining to bail bonds.

> Provided, bail may be posted by depositing a cashier's check, money order, or a personal check payable to the clerk of the court under such procedures as shall be established by the administrative district judge, or where acceptance of the personal check has been approved by a magistrate or a district judge.

(*Emphasis added.*)

These rules reflect the understanding in place at the time Idaho's Constitution was ratified: it was up to the courts to determine the sufficiency of sureties. *See Leader v. Reiner*, 143 Idaho 635, 639, 151 P.3d 831, 835 (2007) (noting that the statutes passed in 1864, and in effect at the time Idaho's constitution was ratified, required courts to determine the sufficiency of sureties). Again, under these rules trial courts may decide which bail agents will operate in their courtrooms.

5. A 1993 Michigan Supreme Court Case Explains the Inherent Authority of Courts to Regulate Bail Bondsmen

The case of *Calvert v. Lapeer Circuit Judges*, 502 N.W.2d 293 (Mich. 1993) is directly on point regarding courts' inherent authority to regulate bail bondsmen within their judicial districts. The Michigan Supreme Court overturned the Court of Appeals' decision, which had held that the insurance commissioner, rather than judges, had authority to remove bail bondsmen from an approved list of bail bondsmen maintained by the Michigan trial courts.

In *Calvert*, the judges of the Lapeer Circuit Court and a district court removed Michael Calvert's name from the list of persons authorized to write bonds after he admitted charging fees and engaging in other conduct violative of Penal Code provisions. His suspension from the list was for 6 months. The Michigan Court of Appeals stayed the removal of Calvert's name from the list and held that judges did not have the

authority to suspend Calvert from writing bonds or to remove his name from the list. The Court of Appeals held that the sole responsibility for supervising the conduct of persons who write bonds had been vested by the Legislature in the insurance commissioner, referring to the fact that the Insurance Code empowered the commissioner to investigate the character and fitness of bail agents and to suspend or revoke licenses.

The Michigan Supreme Court disagreed and reversed the Court of Appeals. In a well-researched opinion, which examined both state and federal law, the Michigan Supreme Court explained that the Insurance Commissioner's regulatory authority under the insurance statutes was not intended to displace the authority of the trial courts over bail bond agents:

> While the insurance commissioner has the power to discipline insurance agents and bail bondsmen, it does not follow that the statutory provisions from which the disciplinary powers of the insurance commissioner derive were intended to occupy the whole field and to preclude judges from declining to accept bonds from persons who violate provisions of the law regulating the furnishing of bonds.
>
> . . .
>
> Because we conclude that the Insurance Code does not confer on the insurance commissioner such comprehensive authority to suspend or revoke the license of an agent that excludes the exercise of similar power by judges, we do not consider or address the question whether the Legislature could constitutionally eliminate judicial power to suspend or revoke the authority of a person who writes bail bonds and who has been found to have done so in violation of law.

Calvert v. Lapeer Circuit Judges, 442 Mich. 409, 412, 502 N.W. 2d 293, 294 (1993) (portion of footnote included in text).

The reasoning of the Michigan Supreme Court applies in this case also. While the DOI has the power to license and discipline insurance agents and bail agents, it does not follow that Idaho's Department of Insurance statutes were intended to occupy the whole field and to preclude judges from disqualifying persons who violate the law in matters pertaining to bail bonds from writing bail bonds.

6. Bail Agents' Lack of a Protected Property Interest in Doing Business in a Particular Judicial District Supports Courts' Inherent Authority to Regulate Individual Bail Agents

The District Court held that the "Guidelines create an additional substantive licensure procedure that more than duplicates the licensure procedure provided by the DOI," (R., Vol. III, p. 470), and that, under this substantive license procedure deriving from the Insurance Code, bail agents have a protected property interest in writing bonds in the Fourth Judicial District. R., Vol. III, p. 484. However, the Guidelines do not create "an additional substantive license procedure" because the Fourth District has never attempted to license, or revoke the license of, a bail agent in the State of Idaho. R., Exhibit 38, *Amended Affidavit of Darla S. Williamson, Administrative District Judge of the Fourth Judicial District, filed September 8, 2008* at ¶¶ 11-12.

There is a difference between being licensed by the DOI, which gives an agent the legal right to offer to write bail bonds anywhere in Idaho, and being placed on a list of approved agents for a particular judicial district, which constitutes an acceptance of the agent to write bonds in that particular judicial district. The DOI regulates the former (producer licenses authorizing the agent to offer his/her services), the Fourth District regulates the latter (acceptance of bail agents in the Fourth District who may bind their principals). While a bail agent may have a protected property interest in his/her statewide

license, a bail agent does not have a protected property interest in compelling the Fourth Judicial District to do business with him/her.

The difference between statewide licensing of persons who may offer a service and district guidelines detailing the conditions for acceptance of the offer is significant because there is no "inherent authority" of the courts to issue producer licenses or revoke producer licenses. The inherent authority of the courts applies to the courts' ability to regulate matters pertaining to bail, which includes choosing which individual bail agents in a particular judicial district meet that district's needs.

The Fourth District does not agree with, and specifically appeals, the District Court's legal conclusion that "a property right attaches to a bail [agent's] authorization to file bonds under the Guidelines." R., Vol. II, p. 271. The courts that have addressed the question whether an individual has a property right or expectation in being on an approved list of bail agents have found that they do not.[3]

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[3] *Baldwin v. Daniels*, 250 F.3d 943, 947 (5th Cir. 2001) (no property interest implicated where bail agent was removed from a list of approved bail agents because her statewide license to write bonds was not revoked; rather, her ability to write bonds at the county jail was restricted); *Richards v. City of Columbus*, 92-7359, 1993 WL 413911 (5th Cir. October 12, 1993) (Unpublished) (even assuming that Richards had a protected property interest in his state-issued bondsman license, he did not have a property interest in his ability to write bonds in Columbus, Mississippi); *Cf. Boyett v. Troy State Univ. at Montgomery, 971 F. Supp.* 1403, 1414 (M.D. Ala. 1997) (granting summary judgment on substantive due process claim because "no evidence has been presented that the plaintiff has been precluded from pursuing his profession with all employers"); *Pirolo v. City of Clearwater*, 711 F.2d 1006, 1011 (11th Cir. 1983) (deprivation of the right to follow a chosen profession cannot be established unless the plaintiff has been banned from engaging in his profession with any employer); *Moates v. Strength*, 57 F. Supp.2d 1305 (N.D. Alabama, 1999) (individual did not have a fundamental right to work as a private detective in Chilton County, Alabama).

The case of *McInTosh v. LaBundy*, 161 S.W.3d 413 (Mo. App. W.D. 2005) is analogous to this case. In *McInTosh*, a licensed clinical social worker sought judicial review of the Department of Correction's decision to deny the social worker a place on the list of approved sex offender therapists, despite the fact that the social worker had met all the DOC's requirements. The court framed the issue as: "...[U]nder the facts plead in his petition, does McIntosh have a legal right to be placed on the approved providers list?" 161 S.W.3d at 416. The court answered that question in the negative after reviewing similar cases from other jurisdictions. The court reasoned:

> In order to prevail McIntosh must show that the agency action of refusing to place him upon the list of approved providers treads upon a legally protected right or privilege. The DOC's refusal to place McIntosh on the Approved Providers List does not deny him to his right to work as a sex therapist in any general or particular sense, and he does not allege that he has been denied a license to practice in the field. ***McIntosh points to no rule, statute, or other authority creating a legal right or entitlement that he be placed on the list of approved providers. McIntosh points to no provision in state law or anywhere else that creates a property interest or privilege in placement on the approved list.*** In accordance with the above authorities, we find that McIntosh's petition failed to state a legal claim for relief because he had no legal right or privilege to be included on the list of approved sex therapists.

161 S.W.3d 413 at 417 (*emphasis added*).

Neither the Department of Insurance license nor the Fourth District's Guidelines provide bail agents with a protected property interest in being placed on the list of approved agents or remaining on the list of approved agents. It is ultimately up to the Administrative District Judge to determine whether an applicant will be approved or not. R., Exhibit 34, *Affidavit of Darla S. Williamson, Administrative District Judge of the Fourth Judicial District, filed September 5, 2008*, p. 2 at ¶ 4. ("In all cases, whether the

bail agent is initially denied a place on the approved list, or removed from the approved list and requesting reinstatement, it is the Administrative District Judge that has the final authority to determine if a bail agent is on the list.")

The legal conclusion that bail agents have no right or entitlement to be on an approved list, i.e. that they lack a property interest in doing business with a particular judicial district, supports courts' inherent authority to decide whether to allow bail agents to write bail bonds before the courts. A bail agent has no protected property interest in compelling a particular judicial district to do business with him/her; on the other hand, the judges' interest in regulating the bail agents who walk into the courtrooms on a daily basis is high.[4]

B. The Bail Bond Guidelines Are Not a Judicial Exercise of a Legislative Function and Do Not Violate the Separation of Powers Doctrine

1. Introduction

Idaho Constitution, Article II, § 1, divides the power of state government into "three distinct departments, the legislative, executive and judicial," and provides that "no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted." Article V, § 2, explicitly provides that the courts in Idaho "constitute a unified and integrated judicial system for administration and supervision by the Supreme Court." Article V, § 13, further provides that "[t]he legislature shall have no power to deprive the judicial

[4] Despite the fact that applicants and bail agents have no protected property right on being on the list, the BBG have, nevertheless, provided for a hearing for applicants who wish to challenge the decision not to place them on the list, as well as bail agents who wish to challenge the decision to remove them from the list. R. Vol. II, pp. 359-363.

department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government."

This Court has specifically held that the right to grant bail is a procedural right, not a substantive one:

> Our Constitution in art. 5, § 13 provides in pertinent part:
>
> 'The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government. . . ."
>
> Our Legislature has recognized and confirmed the procedural rule-making power of the Supreme Court. I.C. §§ 1-212, 1-213.
>
> Our decision at bottom is whether post-conviction bail is one of substantive right within the prerogative of the legislature, or is rather a procedural consideration governed by the rules of this Court. We hold that as to the very narrow issue presented here, i.e., the authority of a trial court to allow post-conviction bail to a convicted criminal made ineligible for bail by a statutory enactment, the issue is one of procedure rather than of substantive law. ...
>
> We note that, where conflict exists between statutory criminal provisions and the Idaho Criminal Rules in matters of procedure, the rules will prevail. [Citations omitted.]
>
> The fixing of bail and release from custody are matters traditionally within the discretion of the courts. [Citations omitted.] We believe that these matters are most wisely left to the trial judge.

State v. Currington, 108 Idaho 539, 540-541, 700 P.2d 942, 943-944 (1985).

The District Court held that ***some*** of the Guidelines do not violate the separation of powers doctrine, for example, the Guideline disqualifying bail agents who have certain relationships with a Fourth District judge, but that ***most*** Guidelines do violate the

separation of powers doctrine. R., Vol. III, p. 470. For example, the District Court held that the following BBG were outside the authority of the ADJ: BBG that permit bail agents to be disqualified based on a felony conviction, three or more misdemeanor convictions, a misdemeanor involving theft, fraud or other crime of dishonesty; BBG that permit bail agents to be disqualified based on the bail agent being denied the ability to offer bail bonds or being removed from an authorized list in another jurisdiction; BBG that permit bail agents to be disqualified based on having their producer license suspended or revoked by the Department of Insurance in any U.S. state; BBG that permit bail agents to be disqualified based on the bail agent being previously removed from the list of authorized bail agents; BBG that permit bail agents to be disqualified based on a failure to satisfy his/her obligations to any court incurred while working with another bail agency. R., Vol. III, p. 480.

This attempt to split the separation-of-powers baby is not well grounded in the law. Either the Legislature may constitutionally eliminate the judicial power to suspend the authority of individuals to write bail bonds in a particular judicial district or it may not. If the Legislature may constitutionally eliminate that judicial power, which is a question the District Court's holding does not address, then the question remains whether the Legislature, by vesting the DOI with the authority to discipline and revoke bail agents' licenses, has eliminated that judicial power in this case. The District Court's holding does not address this question either.

If the Idaho Legislature had vested all the authority over bail agents in the Department of Insurance, and if this licensing authority somehow included the authority to force judicial districts to use any bail agent who is licensed by the DOI, then what basis would the Fourth Judicial District have for drafting Guidelines for bail agents ***at***

all? For example, what authority would the Fourth Judicial District have for requiring that a bail agent not be married to a Fourth Judicial District Judge?

The Fourth District's requirement that bail agents who do business in the Fourth District Courts not be married to a Fourth District Judge is no more procedural (no less substantive) than the Fourth District's requirement that bail agents be in good standing in all other judicial districts in Idaho. Neither of these conditions is regulated by the DOI, and yet, the former is permissible under the District Court's holding, but the latter is enjoined. The District Court's separation of powers line, then, is not procedural vs. substantive. Nor is the line what is regulated by the DOI vs. what is not regulated by the DOI. The District Court's separation of powers line is unclear and not well grounded in the law.

The District Court erred as a matter of law in holding that the Guidelines violate the separation of powers *at all* because such holding ignores the fact that two branches can co-regulate different aspects of one area without violating the Constitution.

2. Two Branches of Government Can Regulate Different Aspects in the Same Area without Violating the Separation of Powers Doctrine

The District Court held that, "[w]hile some of the Guidelines...are not violative of the separation of powers...the bulk of the licensure procedure 'creates, defines, and regulates primary rights' of bail agents in violation of Idaho Const. art. III, § 1." *Id.* This holding appears to have two separate bases.

First, the District Court appears to interpret ***any*** overlap between the BBG and the DOI statutes as a constitutional violation. ("The Guidelines create an additional substantive licensure procedure that more than duplicates the licensure procedure provided by the DOI." R., Vol. III, p. 470.) This interpretation is contrary to law. The

licensing function (authorizing a person to hold himself out as qualified to perform the licensed service) is distinct from the decision whether to use the licensee's services.

Second, the District Court interprets the BBG to make individual bail agents "co-sureties" on bonds by requiring that the individual bail agent make sure the bond is paid by the surety (insurance company). This interpretation of the BBG is contrary to the evidence that was presented to the District Court.

3. That the BBG and the DOI Statutes Both Address Bail Bond Agents Does Not Violate the Separation of Powers

"In light of the many express provisions authorizing the exercise of power in one department by persons in another department, it is perhaps more accurate to say the Idaho Constitution embodies a blended powers principle than a separated powers principle." Dennis C. Colson, *Divided Powers and Court Rules in the Idaho Constitution*, 31 Idaho L. Rev. 461, 465-66 (1995). "The legislative, executive and judicial powers are often mixed, and no sharp line of distinction can be made between them. In these circumstances, the Constitution is offended only when the whole power of one of these departments is exercised by the same hands which hold the whole power of another of the branches." *Id.* at 470.

> . . . [T]he doctrine of the separation of powers was never intended to create, and certainly never did create, utterly exclusive spheres of competence. The compartmentalization of governmental powers among the executive, legislative and judicial branches has never been watertight. Harmonious cooperation among the three branches is fundamental to our system of government... The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.

Zylstra v. Piva, 539 P.2d 823, 827 (Wash., *en banc*, 1975) (citations omitted).

Under the separation of powers doctrine, the question is not whether the Legislature and the Judiciary both engage in the activity of identifying certain persons who may perform as bail agents (they do), but rather whether the activity of one branch in this area threatens the independence or integrity or invades the prerogatives of another (it does not).

The District Court's opinion does not consider how, if it all, the BBG activity of the judicial branch in the Fourth District threatens the independence or integrity or invades the prerogatives of the Legislature. Aladdin did not present any evidence or explanation, nor is there any reason to conclude, that the Legislature's lawmaking is threatened by the BBG.

The BBG and the Department of Insurance statutes do not threaten the independence or integrity or invade the prerogatives of the other because each addresses different issues; thus, there is no issue with respect to the separation of powers. The statutory licensing scheme for the DOI determines who meets the minimum statutory requirements for licensing to write bail bonds anywhere in Idaho; the Fourth District's BBGs determine which bail bond agents have established the practical working relationships with the Fourth District that the ADJ requires to have confidence in their work.

To use an imperfect but nevertheless useful analogy, the DOI statutes for bail agents are analogous to those for health insurers; the Fourth District BBG's are analogous to the Department of Administration's requirements to bid upon the contract to provide health insurance for State employees. A license qualifying one to offer bail bonds or health insurance to the State does not guarantee that the State must purchase one's services.

4. Individual Bail Agents Are Not Co-sureties as Interpreted by the District Court

The District Court wrote that the "substantive change of the bail agent's status from that of an agent of a disclosed principal to that of a principal has led to most of the problems facing the parties in this litigation." R., Vol. III, p. 476. The District Court noted that the BBG required an individual bail agent to:

> ensure that a forfeited bond is timely paid, notwithstanding the right of the state or county to pursue collection of a forfeited bond from the insurance company, and notwithstanding any agreement between the bail agent and the insurance company.

Id.

If a bail agent does not comply with this requirement under the Guidelines, the bail agent can be removed from the approved list of agents. The District Court held that this requirement - to ensure that a forfeited bond is timely paid at the risk of being removed from the approved list - transforms a bail agent from an agent to a disclosed principal, thus creating, defining and regulating primary rights of bail agents in violation of Idaho Const. art. III, § 1.

However, the District Court's holding is contrary to the evidence that was presented to the Court. Judge Williamson's affidavit stated that:

2. I am familiar with the Bail Bond Guidelines for the 4th Judicial District. The Bail Bond Guidelines do not make an individual bail agent a "co-surety" on a bond.
3. I am not aware of any time that an individual bail agent has ever been made personally financially liable for the payment of a bond under the Guidelines.
4. The Guidelines are not intended to make individual bail agents co-sureties on a bond and I have never interpreted them to do so or applied them in this manner. I know the intent behind the language in the Guidelines because I

was the individual with the responsibility to approve and adopt the guidelines by administrative order. I also had the primary responsibility in drafting the current Guidelines.

5. The language referring to the bail agent as 'the responsible party to ensure that a forfeited bond is timely paid,' is not intended to make the individual bail agent financially responsible for the payment of the bond. It means that the bail agent is the individual whose job is to facilitate the payment of the bond from the surety or other responsible entity.

R., Exhibit 19, *Affidavit of Darla Williamson, Administrative District Judge*, filed July 10, 2008.

The District Court should have deferred to Judge Williamson's interpretation of the BBGs because she was the authority who issued them.[5] The evidence before the District Court was that individual bail agents are not co-sureties on bonds. Individual bail agents have never been made personally financially liable for the payment of a bond under the Guidelines. It is true that agents are held "responsible" for bonds being paid, in the sense that bail agents are removed from the approved list when the bonds they signed

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[5] It is a principle of Idaho law that when a statute or rule is ambiguous the District Court and the Supreme Court will defer to an administrative agency's interpretation of the statute or rule:

> Interpretation of a statute is an issue of law over which this Court exercises free review. In Re Estate of Elliott, 141 Idaho 177, 181, 108 P.3d 324, 328 (2005). Administrative regulations are subject to the same principles of statutory construction as statutes. Mason v. Donnelly Club, 135 Idaho 581, 586, 21 P.3d 903, 908 (2001). An agency's interpretation of its statutes is entitled to deference if (1) the agency is entrusted with the responsibility to administer the statute in question, (2) the agency's statutory construction is reasonable, (3) the statutory language does not treat the precise issue, and (4) any of the rationales underlying the rule of deferenee are present. Pearl v. Board of Professional Discipline, 137 Idaho 107, 113, 44 P.3d 1162, 1168 (2002).

Stafford v. Idaho Dept. of Health & Welfare, 145 Idaho 530, 533, 181 P.3d 456, 459 (2008). That rationale should be no different when the ADJ has promulgated a guideline. In this case, all four factors also apply to Judge Williamson's performance of her duties as an ADJ: (1) she has responsibility to administer bail bond matters and to promulgate guidelines, (2) her construction is reasonable, (3) the language of the guidelines does not treat the precise issue, and (4) there are at least two rationales supporting deference: The guidelines provide a practical interpretation for the ADJ's responsibilities and the ADJ's expertise informs the intepretation. *See Canty v. Idaho State Tax Comm'n*, 138 Idaho 178, 184, 59 P.3d 983, 989 (2002), for a listing of the five rationales that may support deference.

for are not paid by the surety; however, the courts have inherent authority to demand this level of accountability from agents who transact business on bail bonds. If courts lacked this authority, unscrupulous bail agents could easily run amok, writing one bad bond after another (bonds that the surety does not pay), and leaving the courts/counties/cities holding the bill. If courts lacked this authority, unscrupulous bail agents could take advantage of criminal defendants as well.

The Fourth District argued to the District Court in this case that courts have inherent authority to govern matters related to bail. In support of this argument, the Fourth District relied on Idaho's Rules and Idaho Supreme Court precedent.

The District Court rejected the Fourth District's reliance on Idaho law, but adopted Aladdin's argument relying on a 3 page, 1977 Montana Supreme Court decision, and agreed with Aladdin that the courts are compelled to do business with any bail agent licensed by the DOI. The District Court summarized the parties' positions in its 2/6/09 Opinion:

> Bail Plaintiffs contend that such state licensure [by the DOI] vest[s] bail agents with rights that cannot be superseded by the Guidelines adopted by the ADJ. See *Wilshire Ins. Co. v. Carrington*, 570 P.2d 301 (Mont. 1977).
>
> The State Defendants take the position that it is the long recognized general rule that the '[f]ixing of bail and release from custody are matters traditionally with the discretion of the courts. We believe that these matters are most wisely left to the trial judge,' *State v. Fry*, 128 Idaho 50, 53, 901 P.3d 164, 167 (Ct. App. 1994); *State v. Currington*, 108 Idaho 539, 541, 700 P.2d 942, 944 (1985); *State v. Kerrigan*, 98 Idaho 701, 571 P.2d 762 (1977); *State v. Jiminez*, 93 Idaho 140, 456 P.2d 784 (1969); *State v. Dunn*, 91 Idaho 870, 434 P.3d 88 (1967) and that this discretion also extends to the approval of the bail agents who post bail bonds as agents of the surety.

R., Vol. III, p. 465. The Fourth District respectfully disagrees with the District Court's conclusion that courts lack the inherent authority to hold bail agents responsible for ensuring that the surety pays forfeited bonds and that the ADJ's attempt to do so makes a bail agent a co-surety on a bond. This conclusion is contrary to the law and the evidence presented to the District Court.

V.

CONCLUSION

Appellants pray that the Court reverse and remand the District Court's decision holding that the Fourth District's Bail Bond Guidelines violate the Constitution and direct the District Court to issue a declaratory judgment in favor of Defendants that the Fourth Judicial District's Bail Bond Guidelines do not violate any of Plaintiffs' constitutional or statutory rights.

DATED this 1st day of October 2009.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By _____
MELISSA MOODY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of October 2009, I caused to be served a true and correct copy of the foregoing APPELLANTS' BRIEF by the following method to:

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