No. 90533-9
SUPREME COURT OF WASHINGTON

No. 69848-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

PREMERA, a Washington corporation, **PREMERA BLUE CROSS**, a Washington corporation, **LIFEWISE HEALTH PLAN OF WASHINGTON**, a Washington corporation; and **WASHINGTON ALLIANCE FOR HEALTHCARE INSURANCE TRUST**, and its Trustee, **F. BENTLEY LOVEJOY**,

Petitioners,

v.

McCARTHY FINANCE, INC., a Washington corporation; **McCARTHY RETAIL FINANCIAL SERVICES, LLC**, a Washington limited liability company; **HEMPHILL BROTHERS, INC.**, a Washington corporation; and its affiliates and subsidiaries, **J.A. JACK & SONS, INC.**, a Washington corporation, **LANE MT. SILICA CO.**, a Washington corporation; **PUCKETT & REDFORD, PLLC**, a Washington professional limited liability company; and **ANNETTE STEINER**, a single person;

Respondents.

ANSWER OF RESPONDENTS TO MEMORANDUM SUPPORTING REVIEW BY AMICI CURIAE

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I. SUMMARY OF ANSWER

National Association of Mutual Insurance Companies and Property Casualty Insurer's Association of America ("Amici Curiae") are property and casualty insurer trade associations. Each association provides advocacy for its member companies.[1] Neither trade association claims any association with health insurers in Washington or elsewhere. Neither association demonstrates how its member insurers are "likely to be subject to regulation through civil actions as a result of the Court of Appeals decision." [2]

Neither association demonstrates how Washington's Health Care Services statutory scheme at RCW Ch. 48.44 and its Health Carriers and Health Plans administrative regulations found at WAC Ch. 284-43 have any applicability to property and casualty insurers.

The rigid filed rate standard proposed by Amici Curiae would significantly undercut Washington's Consumer Protection Act (RCW Ch. 19.86) ("CPA"), its insurance regulations and the policy rationale for the CPA. The memorandum supporting review by Amici Curiae ignores Washington case law, notably *Tenore v. AT&T Wireless Services*, 136 Wn.2d

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[1] See http://www.pciaa.net and http://www.namic.org.

[2] Memorandum Supporting Review by Amici Curiae at p. 2.

322, 962 P.2d 104 (1998). The Court of Appeals decision agreed with the *Tenore* court's observations that awarding damages for CPA misrepresentation claims does not require a court to substitute its judgment on the reasonableness of a rate. [3]

Amici Curiae (and Premera) mischaracterize plaintiff's lawsuit as a direct attack on rates. The Court of Appeals in its unanimous decision correctly concluded that plaintiff policy holders claiming non-disclosures and misrepresentations by the Premera defendants are not direct challenges to the rates charged.[4]

II. RATE REGULATION

Amici Curiae claim to provide a general primer on rate regulation but ignore that Washington's Insurance Commissioner has stated publicly that his office has no ability to control surplus through the rate approval process under existing legislation. Amici Curiae also fail to distinguish the health care rate approval process in Washington for large group plans from individual and small group plans. The Court of Appeals correctly noted the

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[3] Petitioner's Appendix, Published Opinion, p. 12.

[4] Petitioner's Appendix, Published Opinion, p. 11.

Insurance Commissioner's limited authority to impact the accumulation of surplus by a non-profit entity as alleged in the complaint.[5]

III. THIS IS NOT A FILED RATE CASE

Amici Curiae claim the case at issue here is "unabashedly a rate case."[6] This bold certainty of position is undermined throughout the Court of Appeals decision which correctly notes throughout its opinion that the case is *not* a direct challenge to the rates charged.[7]

The Amici Curiae Memorandum expresses concern that the Court of Appeals decision leaves "Washington law in a state of confusion" and is in conflict with the jurisprudence of the several states considering the issue. [8]

Amici Curiae cite twelve cases but make no attempt to analyze any of the seven cases relied on the by Court of Appeals decision they question. The seven cases are simply ignored in the Amici Curiae memorandum.

A brief filed in the State Supreme Court that claims to clear up the confusion created by the Court of Appeals opinion should, in fairness,

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[5] Petitioner's Appendix, Published Opinion, p. 19.

[6] Memorandum Supporting Review by Amici Curiae at p. 5

[7] Petitioner's Appendix, Published Opinion, pp. 2, 9, 10-11, 12, 13, 14, and 15.

[8] Memorandum Supporting Review by Amici Curiae at p. 4.

identify what the Court of Appeals ruled and discuss the cases on which the Court of Appeals based its ruling.

Why would the Amici Curiae ignore the cases that respondents relied on and were adopted by the Court of Appeals in its decision? We submit that the answer to this is the insurance industry generally does not wish to admit what is happening – the courts are no longer willing to automatically apply the filed rate doctrine to every varied factual situation. This is evident in the California case of *Spielholz v. Superior Court*, 86 Cal.App.4th 1366, 104 Cal.Rptr. 2d 197 (2001). That case involved plaintiff Marcia Spielholz, one other individual, and a wireless consumer's alliance claiming damages and restitution based on false advertising by a cellular telephone company. The plaintiffs alleged defendants had falsely advertised a "seamless calling area" when in fact the plaintiff's calling area contained gaps where they were unable to connect calls. The defendants moved to strike all allegations for monetary relief based upon the Federal Communications Act of 1934. Defendants claimed that plaintiff's allegations were merely an attempt to regulate rates precluded by provisions of the Communications Act. The trial court ruled in favor of defendant AT&T on its motion to strike. This was

reversed by the Court of Appeals, holding that plaintiff's claims did not involve any attempt at rate regulation. The opinion states at pp. 1374-77:

> A judicial act constitutes rate regulation only if its principal purpose and direct effect are to control rates. For example, an injunction that prevents a wireless telephone service provider from charging specified rates would directly regulate rates. (*Ball v. GTE Mobilnet of California,* (2000) 81 Cal.App. 4th 529, 537-538 [96 Cal.Rptr. 2d 801]; accord, *In re Comcast Cellular Telecom. Litigation. (E.D. Pa.* 1996) 949 F.Supp. 1193, 1201.) Similarly, if a cause of action directly challenges a rate as unreasonable, an award of damages or restitution to compensate a customer for the difference between the rate paid and what the court determines to be a reasonable rate would directly regulate rates. (*Ball* at pp. 537-538; accord, *Comcast*, at p. 1201.) In general, a claim that directly challenges a rate and seeks a remedy to limit or control the rate prospectively or retrospectively is an attempt to regulate rates and therefore is preempted under section 332(c((3)(A); a claim that directly challenges some other activity, such as false advertising, and requires a determination of the value of services provided in order to award monetary relief is not rate regulation.
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> . . .
>
> Based on the foregoing, we conclude that a claim that does not directly challenge the rate but directly challenges some other activity, such as false advertising, and seeks a remedy to limit or control that activity or seeks damages arising from the activity is not an attempt to regulate rates and is not expressly preempted under section 332(c)(3)A). If the principal purpose and direct effect of a remedy are to prevent false advertising and compensate an aggrieved customer, any prospective or retrospective effect on rates is merely incidental. This is true even if the court determines the value of services provided in awarding damages or restitution.

(Accord, *Tenore v. AT&T Wireless Services, Inc., supra*, 962 P.2d at pp. 112, 115.) Contrary to AT&T's argument, an award of damages or restitution for false advertising that requires the court to determine the value of services provided is not rate regulation.

The *Spielholz* reasoning has support in many other cases around the country that hold that false advertising is not "rate making." This point is not complicated. Cases around the country challenging false advertising and other activities do not constitute rate-making and are unaffected by the filed rate doctrine.[9]

IV. NO RE-EXAMINATION OF RATES IS SOUGHT

Amici Curiae insist the Court of Appeals decision would embroil the Courts in re-examination of rates.[10] Not once in its Memorandum, do the Amici Curiae acknowledge that the case involves a claim under the CPA challenging the amassing of surplus accomplished through false and deceptive advertising and misrepresentations. The Court of Appeals decision correctly noted that almost any business decision by an insurer could ultimately implicate the rates charged to consumers. As noted by the Court

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[9] See *Kellerman v. MCI Telecommunications Corp.*, 112 Ill.2d 428, 493 N.E.2d 1045 (1986); *Qwest Corp. v. Kelly*, 204 Ariz. 25, 59 P.3d 789 (2002); and *Ciamaichelo v. Independence Blue Cross*, 589 Pa. 415, 909 A. 2d 1211 (2006).

[10] Memorandum Supporting Review by Amici Curiae, p. 6.

of Appeals, the interpretation of the filed rate as proposed by the Amici Curiae is too broad.[11] The Court of Appeals' decision is consistent with Washington case law including *Tenore, supra*, which holds that false advertising of a product, that does not attack the cost or reasonableness of the product itself, whether it be insurance or wireless telephone services, does not constitute rate-making. An award of damages for false advertising has merely an incidental effect on rates and accordingly would not conflict with a decision of an agency enforcing rates.

V. SURPLUS

Amici Curiae cite *State Farm v. Superior Court*, 114 Cal.App. 4th 434 (2003) in its discussion of surplus. Amici Curiae assert the challenge to surplus in the present action is further reason why the action is "outside the judicial purview." [12]

Amici Curiae ignore the distinction between "surplus" and "claim reserves" noted in the Court of Appeals decision. "Surplus" refers to a company's total assets minus liabilities. "Claim reserves" are defined in WAC 284-43-910(8) as a total of unpaid reported claims plus reasonably

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[11] Petitioner's Appendix, Published Opinion, p. 13.

[12] Memorandum Supporting Review by Amici Curiae, p. 10.

expected claims not yet reported. "Surplus" in Washington is not the insurer's capital base providing the security for the coverage written as stated by Amici Curiae in quoting from the California case. In any event, the Court of Appeals decision notes that any distinction between surplus and reserves did not change the ultimate conclusion in the appeal.

VI. CONCLUSION

This is not a rate regulation case. No retroactive rate-making is sought by plaintiffs. Amici Curiae offer no analysis of Washington law and the CPA claims of plaintiff. Review of the Court of Appeals decision is not warranted and should be denied.

Respectfully submitted this 9th day of October, 2014.

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Dated this 9th day of October, 2014.

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Dear Clerk: We attach for filing in your court "Answer of Respondents to Memorandum Supporting Review by Amici Curiae."

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