No. 69848-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

90533-9

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.

ON APPEAL FROM KING COUNTY SUPERIOR COURT

ANSWER TO PETITION FOR REVIEW

Frank R. Siderius WSBA 7759
Ray Siderius WSBA 2944
C.R. Lonergan, Jr. WSBA 1267
SIDERIUS LONERGAN & MARTIN, LLP
500 Union Street, Suite 847
Seattle, WA 98101
206/624-2800

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

Plaintiffs, McCarthy Finance, Inc., et al., Appellants in the Court of Appeals, Division I (hereafter "Plaintiffs"), respectfully ask this Court to deny the Petition for Review filed by Premera, Premera Blue Cross, Lifewise Health Plan of Washington and Washington Alliance for Healthcare Insurance Trust and its Trustee, F. Bentley Lovejoy (hereafter "Premera" and/or "WAHIT").

The unanimous decision by Division I of the Court of Appeals does not conflict with decisions of this Court or the Court of Appeals. The petition does not involve an issue of substantial public interest requiring determination by this Court. Thus, pursuant to RAP 13.4(b)(1), (2), and (4), the Petition for Review should not be accepted.

II. ANSWER TO ISSUES PRESENTED FOR REVIEW

Premera attempts to characterize this lawsuit as a direct attack on rates. Plaintiffs are not challenging the legality of the health insurance premiums filed with the Office of the Insurance Commissioner (OIC) pursuant to the Insurance Code, RCW Ch. 48.44. Plaintiffs are not challenging the rate approval process. No rate recalculation is sought.

Rather, plaintiffs intend to litigate a claim under the Washington Consumer Protection Act (CPA), RCW Ch. 19.86 challenging Premera's huge surplus exceeding $1 billion, an amount far in excess of any need to secure financial solvency. The amassing of surplus that plaintiffs challenge has been accomplished by the Premera defendants engaging in false and deceptive advertising and misrepresentations.

The issue as properly framed in the Court of Appeals decision is whether the filed rate, primary jurisdiction and exhaustion of remedies doctrines bar CPA claims alleging misrepresentations by insurers resulting in excessive surplus levels under circumstances where the Insurance Commissioner is unable to effectively regulate surplus levels maintained by non-profit insurers. The Court of Appeals also correctly concluded that plaintiff's claims were not barred by these preclusive doctrines even though the court may be required to consider premiums paid in computing damages. Such calculations do not amount to "rate setting" by the court.

III. STATEMENT OF THE CASE

A. ***Premera's Excessive Surplus.*** Plaintiffs present unrefuted evidence that Premera has amassed an excessive surplus through unfair and deceptive acts and practices in violation of the CPA. Approximately

$250 million of the surplus is profit from investments. In an effort to invoke the filed rate doctrine, the doctrine of primary jurisdiction and exhaustion of remedies, Premera attempts to shape the factual evidence presented as an attack on approved rates.

In its Petition for Review, Premera ignores that the OIC has stated publicly it has no ability to control Premera's surplus through the rate approval process under existing legislation. Premera ignores that Commissioner Kreidler has proposed legislation which would give OIC the right to consider surplus levels in approving or disapproving rates. (CP 117, 209-224.) Premera also ignores that the Insurance Commissioner has stated publicly that the surplus maintained by Premera (and others) is excessive and beyond what is necessary to maintain solvency; that as a non-profit entity, Premera is responsible to the community; that new legislation is necessary to limit the amount of surplus that insurers continue to build; and, under present law, the OIC does not have the authority to control excess surplus levels through the rate approval process. (CP 128, 211-218.)

B. ***Rate Approval Process For Small Group, Individual Plan and Large Group Plans.*** It is important to distinguish the rate approval process for large group plans from individual and small group plans. Premera

overstates the OIC's rate approval scrutiny, particularly with respect to large group plans.

1. ***Small Group and Individual Plans.*** For small groups and individual plans, the OIC reviews the "methodology, justification and calculations used to determine *contribution to surplus*." (Emphasis added.) WAC 284-43-930(3).

Premera claims at p. 6 of its Petition for Review that the "OIC specifically considers. . . a health care service contractor's surplus levels and estimated investment earnings for the contract period." Citing WAC 284-43-915. Yet, careful reading of that section reveals that the OIC considers only "contribution to surplus" which "will not be required to be less than zero." WAC 284-43-915(2)(c) and (3). In other words, the OIC has no authority to reduce existing surplus through the rate approval process. The OIC interprets controlling statutes and regulations stating "We do not have the authority to order a company to use surplus to subsidize or lower its rates." (CP 128.)

Health insurance rates cannot be used to reduce existing surplus. Thus, no remedy is available at the OIC to reduce existing surplus. Inability to control existing surplus has caused Insurance Commissioner Kreidler to seek corrective legislation.

Premera also misstates the OIC's ability to consider "investment earnings" when reviewing and approving rates. (Petition for Review at p. 8.) WAC 284-43-915(d) limits consideration of forecasted investment earnings to "assets related to claim reserves or other similar liabilities . . . ." Plaintiffs challenge the "investment profit" which is an entirely separate figure that has nothing to do with the rates being charged. Instead it represents profit from investments, including whatever profit Premera receives from its for-profit subsidiaries. (CP 229, at ¶ 15.)

2. Large Group Plans. Premera misleads the Court in asserting that the OIC reviews Premera's large group rates and considers contributions to surplus and investment earnings. (Petition for Review, p. 8.)

It is clear from evidence submitted by Premera that review of large group negotiated rates by the OIC is limited to examination of Premera's Large Group Rating Model which has nothing to do with surplus levels. Premera produced multiple pages of documents pertaining to large groups. *None* of these documents reference Premera's surplus levels.[1]

---

[1] In an effort to bolster its false claim that the OIC reviews and approves the contribution to surplus that Premera proposes for every large group member, Premera produced "Table H - 4 Reserve Contribution" (CP 496). Premera confuses "Reserve Contribution" with "Surplus." WAC 284-43-910(g) identifies "reserves" as "claims" that have been reported but not paid, plus the "claims" that have not been reported but may be reasonably expected. On the other hand, "surplus" is a

Premera submits the Large Group Rating Model to the OIC. The model weighs numerous factors, none of which include surplus or contributions to surplus. (CP 346, ¶ 6.)

Any objection the OIC makes is only to the Large Group Rating Model, not the negotiated rate with large groups. Surplus levels are not mentioned. (CP 346, at ¶ 7.)

The Large Group Rating Model is the starting point for setting large group rates. The actual rate for large groups may deviate from the Large Group Rating Model. (CP 347, ¶ 10.)

After the rate for any large group is negotiated and agreed upon, Premera then files the actual large group "contract" with the OIC. (CP 348, ¶ 11.) The McCarthy Finance filing is provided at CP 714-22. Nothing in the filing references surplus or contribution to surplus.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. Rigid Application of the Filed Rate Doctrine is Inconsistent with its Policy Rationale, the CPA, and Insurance Regulations. The Court of Appeals decision[2] correctly holds that the rigid filed rate standard Premera

---

company's assets minus its liabilities. (CP 131, Glossary.) This lawsuit addresses excessive "surplus" and does not challenge "reserves".

[2] Petitioner's Appendix, Published Opinion, pp. 9-10.

proposes in this action would significantly undercut the CPA, insurance regulations, and the policy rationale for the filed rate doctrine.

The Petition for Review at p. 11 describes the filed rate doctrine stating that "any filed rate . . . is *per se* reasonable and cannot be the subject of legal action against the private entity that filed it."

Premera does not describe or explain the policy reasons that support the doctrine as set forth in the Court of Appeals decision[3]. The leading filed rate cases discuss the two principal interests served by the doctrine, namely (1) the preservation of the role of agencies in setting rates (the "non-justiciability" strand) and (2) prevention of price discrimination if a favorable rate is set for litigants but not available to non-litigants (the "non-discrimination" strand). *Wegoland Ltd. v. NYNEX*, 27 F.3d 17 (2d Cir. 1994).

The point is this: The filed rate doctrine, and the policy reasons for it, relate entirely to rates. If a matter is presented to the court that has nothing to do with rates the filed rate doctrine is simply not involved.

In the case at bar, plaintiffs bring CPA claims based on false assertions by WAHIT that it is an "employer governed trust"; that it negotiates with providers to obtain the lowest cost; that it is a "member

---

[3] Petitioner's Appendix, Published Opinion, p. 7.

governed group"; that Premera and WAHIT falsely claim that annual premium increases are the result of increases in the cost of medical, hospital and health care concealing the fact that percentage increases in those costs did not justify the increase in premiums; and Premera created WAHIT in order to enable the accumulation of surplus. The conclusion is obvious. Plaintiffs' lawsuit is not an attack on rates.

It is important to recognize that in addition to the filed rate doctrine, causes of action can also be precluded by statutory preemption. In *Hardy v. Claircom Communications Group, Inc.*, 86 Wash.App 488, 937 P.2d 1128 (1997) the Court of Appeals ruled that all of the plaintiffs' claims were barred by both the filed rate (tariff) doctrine and statutory preemption. In the present action the Court of Appeals noted the "limited significance" of the *Hardy* decision[4].

The Court of Appeals decision[5] correctly concluded that Plaintiffs' claims alleging non-disclosures and misrepresentations by Premera and WAHIT are not direct challenges to the rates charged. Other states have recognized similar limits to the filed rate doctrine. In its Petition for Review,

---

[4] Petitioner's Appendix, Published Opinion, p. 9.

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

Premera ignores those cases relied upon by the Court of Appeals in its decision[6]. See *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976); *Spielholz v. Superior Court*, 86 Cal.App.4th 1366, 104 Cal.Rptr.2d 197 (2001); *Kellerman v. MCI Telecommunications Corp.*, 112 Ill.2d 428, 493 N.E.2d 1045 (1986). *Qwest Corp v. Kelly*, 204 Ariz. 25, 36 - 37, 59 P.3d 789 (2002).

Premera refuses to accept or acknowledge the many limits to the filed rate doctrine which are created in decisions that recognize if the challenged conduct is not a rate challenge, it does not violate the filed rate doctrine. Premera also fails to distinguish the statutory preemption cases which reach the same conclusion.

The Court of Appeals also recognized other limitations to the filed rate doctrine. The CPA provides that consumers may bring claims against insurers. RCW 19.86.170 expressly allows CPA claims by private consumers in insurance-related disputes, including claims based on misrepresentations prohibited by the Insurance Code.

B. The Court of Appeals Decision is Consistent with this Court's Decision in Tenore. RAP 13.4(b) states that a petition for review

---

[6] Petitioner's Appendix, Published Opinion, pp. 10-11.

will be accepted by the Supreme Court "only" if the Court of Appeals decision is in conflict with a decision of the Supreme Court or another decision of the Court of Appeals. Neither factor applies to Premera's Petition for Review. The Court of Appeals opinion is consistent with prior opinions of this Court and the Court of Appeals.

Tenore v. AT&T Wireless Services, 136 Wn.2d 322, 962 P.2d 104 (1998) 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. It holds that 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. This is powerful precedent in Washington. It is at variance with the oft-cited case of *Wegoland Ltd. v. NYNEX Corp.*, *supra*, which held that false advertising does involve rate-making requiring application of the filed rate doctrine and holding that any award of damages would require a court to determine a reasonable rate.

Premera states at p. 2 of the Petition for Review that the Court of Appeals analysis of *Tenore v. AT&T Wireless Service* involved a

"misreading" and at p. 17 of its Petition that the Court of Appeals had a "flawed understanding" of the filed rate doctrine.

The Court of Appeals did not misread *Tenore* nor did the Court of Appeals decision demonstrate a flawed understanding of the filed rate doctrine. Premera fails to distinguish federal preemption of a claim by statute and preclusion of a claim by the filed rate doctrine. Premera also fails to acknowledge an exception to the filed rate doctrine where there is no direct attack on rates.

The facts in *Tenore* were not complicated. The plaintiffs had purchased cellular telephone services from the defendant and filed a class action on behalf of all purchasers similarly situated. The plaintiffs claimed violation of the CPA for fraud claiming that the defendants had engaged in deception by not disclosing their billing practice of "rounding up" to the next minute time spent on cellular telephones. The class members were billed for full minutes even though the telephone conversations were terminated at less than a full minute. Plaintiffs claimed that they were overcharged because the practice by the defendants of "rounding up" had not been disclosed. The *Tenore* decision at p. 344-345 reads as follows:

> Appellants do not attack the reasonableness of AT&T's practice of rounding up call charges. They challenge only

> non-disclosure of the practice. *Nader* addresses the precise issue now before this court. We consider it applicable authority.
>
> There is sufficient reliable authority for this court to conclude that the state law claims brought by Appellants and the damages they seek do not implicate rate regulation prohibited by *Section 332* of the FCA. The award of damages is not per se rate regulation, and as the United State Supreme Court has observed, does not require a court to 'substitute its judgment for the agency's reasonableness of a rate.' (Quoting *Nader, supra* at p. 299.) Any court is competent to determine an award of damages.

Most importantly the *Tenore* decision emphasized that the class plaintiffs were not in any way attacking the reasonableness of the practice of charging for rounding up calls. The plaintiffs' challenge was to non-disclosure of the practice. To say it another way, the plaintiffs were not in any way attacking the rates being charged by the defendants.

The claims made by the plaintiffs in *Tenore*, as in the case at bar, included deceptive, fraudulent and misleading advertising,[7] allegedly violating the CPA.

Though no rates or tariffs were required by the Federal Communications Act to be filed, defendant AT&T promptly moved for CR

---

[7] Plaintiff also alleged breach of contract in the trial court but withdrew this claim prior to the appeal.

12(b)(6) dismissal based on Section 332(c)(3)(A) of the Federal Communications Act, reading in part:

> . . . no State or local government shall have any authority to regulate the entry of *or the rates charged* by any commercial mobile service or any private mobile service . . . (Emphasis supplied.)

The defense contended the advertising was rate making and the statute preempted all of the plaintiff's claims. The respective positions of the parties were summarized in a single paragraph in the *Tenore* decision at p. 338:

> The gravamen of Respondent AT&T's argument, however, is that Appellants' request for monetary damages requires a court to retroactively establish new rates in determining damages, which, in effect, is state rate-making explicitly preempted by 47 U.S.C. § 332(c)(3)(A) of the FCA. Appellants assert they challenge only AT&T's inadequate disclosure practices in connection with billing, and do not contest the reasonableness or legality of the underlying rates. AT&T counters by stressing that Appellants' claim is essentially a disguised form of attack on the reasonableness of its rates.

In the present action, Premera attempts to characterize Plaintiffs' claims as essentially a disguised form of attack on rates. As in *Tenore,* a court may award damages without it constituting rate making.

C. Plaintiffs' CPA Claims Do Not Require a Court to Substitute Its Judgment on the Reasonableness of a Rate. The Court of Appeals

decision[8] agrees with the *Tenore* court's observation that awarding damages for CPA misrepresentation claims does not require a court to substitute its judgment on the reasonableness of a rate.

It is necessary to clear up Premera's apparent misunderstanding of the filed rate doctrine as it has been applied in cases filed under the Federal Communications Act of 1934. *Tenore* is such a case. Many filed rate decisions[9] rule that if an award of damages to the plaintiff involves the court in rate making (requiring the court to recalculate the filed rate to allow for the damage award) it is barred by the non-justiciability strand of the doctrine. The Federal Communications Act prohibits rate making by Section 332(c)(3)(A). That statute preempts entirely state law claims that involve rate making.

Look at the practice being challenged to determine whether it conflicts with either strand of the filed rate doctrine. In the Federal Communications Act cases, if such a conflict is found the ruling will be that

---

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

[9] See for example *Wegoland, et al. v. Nynex Corp., supra.*

the practice is rate making and accordingly preempted by the Federal Communications Act statute. But it also violates the filed rate doctrine.[10]

The Court of Appeals decision[11] correctly observed that an award measured by reference to premiums paid, as a remedy for misrepresentation, does not amount to a court second guessing the health insurance rate approved by the Insurance Commissioner and does nothing to weaken the rate approval process.

Premera misplaces reliance on *Horowitz v. Banker's Life & Casualty Co.*, 319 Ill.App.3d 390, 745 N.E.2d 591 (2001) and *In Re Empire Blue Cross & Blue Shield Customer Litigation*, 62 N.Y.S.2d 843, 164 Misc. 2d 350 (NY Sup. Ct. 1994). Those cases have no applicability in the context of the CPA claims at issue here. In the present action, consistent with the

---

[10] To provide an example of this, it is necessary to look no farther than *Marcus v. AT&T*, 138 F.3d 46 (2nd Cir. 1998) 1998 U.S. App. LEXIS 3648, one of the key "filed rate" decisions relied on by Premera at pp. 11 and 14 of the Petition for Review. The *Marcus* opinion at page 62 cites three cases two of which are claims under the Federal Communications Act analyzing whether they are barred by the filed rate doctrine and concluding as follows: "Thus, it appears that if the appellants can establish the substance of their state and federal fraud claims, the *filed rate doctrine* would not bar them." (Emphasis supplied.) The foregoing is an example of a court citing three cases two of which are under the Federal Communications Act cases with the *Marcus* court referring to the three collectively as the "filed rate doctrine".

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

Tenore case, Plaintiffs' request for damages is not an attack on approved rates or the rate approval process. In *Horowitz*, the Illinois appellate court dismissed consumer fraud claims based on the manner in which the defendant calculated and applied rates for individual health policies. In ascertaining damages, the court would be required to determine a reasonable rate absent the fraud. In *Empire Blue Cross*, the New York Supreme Court dismissed consumer claims alleging fraud in submissions for rate approval, concluding that the court would be forced to determine the reasonableness of rates.

Premera ignores *Ciamaichelo v. Independence Blue Cross,* 589 Pa. 415, 909 A.2d 1211 (2006). *Ciamaichelo* involved an allegation that the insurance company had accumulated excessive surplus funds dedicated to purposes inconsistent with its non-profit status. The *Ciamaichelo* plaintiffs sought expansion of the insurance coverage or return of the excess surplus to its policy holders, subscribers and members. The court determined that only issues or matters lying within the special competence of the Insurance Director should be referred to that department. The case was not a direct challenge to the rates charged.

D. Separation of Powers Argument Does Not Apply to a Court's Interpretation of the Filed Rate Doctrine. In its Petition for Review, at pp. 3 and 19, Premera asserts the Court of Appeals decision violates the separation of powers doctrine in allowing a court to adjudicate issues subject to "exclusive and pervasive" regulatory authority. Premera would not allow an exception to the filed rate doctrine for false advertising that is not rate related. Premera claims the Legislature has limited the remedy or relief the agency may grant.

Premera cites *MCI Telecommunications Corp. v. AT&T,* 512 U.S. 218 (1994). In that case, Congress had required tariff filing and the Supreme Court, interpreting the statute, held the agency had no power to make such filing optional. It was a case of statutory interpretation. Premera's separation of powers argument fails because the claims Plaintiffs urge in the present action do not conflict with either of the two basic policies supporting the filed rate doctrine. Premera's false advertising that WAHIT "negotiates" with major health care providers to obtain the lowest cost is simply a false claim. This claim has nothing to do with rates being charged and accordingly does not violate either the discrimination strand or the justiciability strand

policy reasons for the filed rate doctrine. Rather, Plaintiffs' claims are consistent with reasonable interpretation of the filed rate doctrine.

Premera's separation of powers argument has no applicability in the present case because Plaintiffs do not seek to abolish or ignore the filed rate doctrine but merely interpret it correctly, adhering to the policies that have supported the doctrine since its inception.

E. Doctrines of Exhaustion of Remedies and Primary Jurisdiction are Inapplicable. Premera asserts the Court of Appeals erred in not affirming the Superior Court dismissal based on doctrines of primary jurisdiction and exhaustion of remedies. (Petition for Review at p. 20.)

The Court of Appeals properly concluded that deference should be paid to the Insurance Commissioner's public statements that he lacks authority through existing regulations and laws, or otherwise, to effectively regulate non-profit health insurance companies' accumulation of excessive surpluses. Additionally, the CPA expressly allows claims against insurers for matters subject to the Insurance Commisioner's regulation, provided the claim is not based on statutorily permitted activity.

The Court of Appeals decision also found exhaustion of remedies was not required when there is no showing that an adequate administrative

remedy exists. Plaintiffs are suing for an award of monetary damages pursuant to the CPA. No statute or regulation allows the Insurance Commissioner to grant the relief plaintiff seeks.

V. CONCLUSION

For the foregoing reasons, this Court should deny review of the unanimous decision of the Court of Appeals.

Respectfully submitted this 18th day of August, 2014.

Frank R. Siderius WSBA 7759
SIDERIUS LONERGAN & MARTIN LLP
Attorneys for Respondents

Ray Siderius WSBA 2944
Of Counsel

C.R. Lonergan, Jr., WSBA 1267
Of Counsel

SIDERIUS LONERGAN & MARTIN LLP
500 Union Street, Ste 847
Seattle, WA 98101
206/624-2800

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date I mailed via U.S. Mail, first class, postage pre-paid and/or sent by legal messenger and/or electronic mail, a true copy of this document to:

Gwendolyn C. Payton
Erin M. Wilson
John R. Neeleman
LANE POWELL PC
1420 - 5th Avenue, Ste 4100
Seattle, WA 98101-2338

PaytonG@LanePowell.com

Kathleen M. O'Sullivan
Eric Grayson Holmes
PERKINS COIE LLP
1201 - 3rd Avenue Ste 4800
Seattle, WA 98101

KOSullivan@perkinscoie.com

Randall W. Redford
Puckett & Redford, PLLC
901 - 5th Avenue, Ste 800
Seattle, WA 98164

rredford@puckettredford.com

Joseph C. Brown
P.O. Box 384
Cashmere, WA 98815

jbrown@jcbrownlawoffice.com

Dated this 18th day of August, 2014.

Mary Berghammer