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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

IN THE COURT OF APPEALS, DIVISION III,  
OF THE STATE OF WASHINGTON

Leo J. Driscoll,	)	
	)	
Appellant,	)	Case No.354261
	)	
v.	)	
	)	AMENDED APPELLANT'S BRIEF
Washington State	)	
Insurance Commissioner,	)	
	)	
Respondent.	)	

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## I. INTRODUCTION

A. The 6/07/2017 *“Final Order of the Superior Court on Petition for Judicial Review”* issued by the Honorable Superior Court Judge Raymond F. Clary affirmed the *Order on Cross Motions for Summary Judgment* (the “6/15/2016 Order”) of the Honorable William G. Pardee, Presiding Officer (“P/O”) of the Office of the Insurance Commissioner (the “OIC”) to whom authority over *agency hearings and adjudicative proceedings* had been delegated by the respondent Washington State Insurance Commissioner.

B. The Superior Court did not “*receive evidence in addition to that contained in the agency record for judicial review*” as permitted by a limited exception to the general prohibition against doing so set forth in RCW 34.05.562(1); accordingly, as held in *Waste Management v. Utilities and Transportation Commission*, 123 Wn. 2d 621, 632-634, 869 P. 2d 1034 (1994), review of the agency proceedings by this Court “*. . . is to be on the agency record without consideration of the findings and conclusions of the superior court.*”

C. As used herein, the term “*Driscoll’s APP and Demand*” means Driscoll’s Application for Adjudicative Proceeding and Demand for Hearing (AP 1655-1669) - - ¶¶ 16 and 41(e) of which were amended by order of the Presiding Officer (AR 1631-1634)–

filed with the OIC Hearing Unit in OIC Hearings Unit Case No.16-0002, and the term "LTCL" means "Long-Term Care Insurance".

## II. ASSIGNMENTS OF ERROR

In entering the *6/15/2016 Order*, the P/O errs as follows:

**No. 1:** Errs in finding that Driscoll is not a person "aggrieved" for purposes of RCW 48.04.010(1)(b) such that he has standing to demand a hearing before the OIC Hearing Unit.

**No. 2:** Errs in finding that Driscoll was not aggrieved by the OIC's order approving the insurer's application for a 22.69% increase in the premium rates of the subject LTCL policy contracts issued to Driscoll and his spouse,

**No.3:** Errs in finding that OIC's approval of the application for 22.69% premium rate increase of the LTCL policies at issue in this matter did not determine legal rights or interests of Driscoll.

**No. 4:** Errs in finding that "*OIC's approval" of "rate increase(s) does not provide Driscoll, or others similarly situated, with a right to a hearing or appeal rights under RCW Ch. 34.05 or RCW 48.04.010(1)(b).*"

**No. 5:** Errs by not finding that the information submitted to the OIC in support of the application for the premium rate change was insufficient to permit the Commissioner to determine whether it

meets the requirements of RCW Ch. 48.19 as mandated by RCW 48.19.040(1) and (2), and RCW 48.19.030(3) and (3)(a).

**No. 6:** Errs by not complying with the requirements of RCW 34.05.461(3) that the 6/15/2016 Order "*shall include a statement of findings and conclusions, including the reasons and basis therefor, as to the material issues of fact and law presented on the record*" pertaining to the issue of whether Driscoll had a meaningful opportunity to be heard before the OIC to seek correction of the agency's erroneous approval of the insufficient submission to the OIC for rate change, and thereby avoid or minimize the unlawful deprivation of the intangible property interests of the Driscolls in their LTCI policies.

**No. 7:** Errs by not complying with the requirements of RCW 34.05.461(3) that the 6/15/2016 Order "*shall include a statement of findings and conclusions, including the reasons and basis therefor, as to the material issues of fact and law presented on the record*" pertaining to the issue of whether Driscoll's constitutionally protected property rights include property rights created by the LTCI contract between the parties thereto, to which Driscoll is entitled, as alleged in Driscoll's *APP and Demand*.

**No. 8:** Errs by not complying with the requirements of RCW 34.05.461(3) that the 6/15/2016 Order *"shall include a statement of findings and issues of fact and law presented on the record"* pertaining to whether the Driscolls' constitutionally protected property rights in their LTCI policies include property interests created by state statutory standards and regulations which guide the discretion of the OIC and which contain mandatory language that guide the decision of the OIC as to approval of the rate change request and that control the outcome of that request for approval.

**No. 9:** Errs by not complying with the requirements of RCW 34.05.461(3) that the 6/15/2016 Order *"shall include a statement of findings and issues of fact and law presented on the record"* pertaining to whether in making rates for LTCI, RCW 48.19.030 and .030(3)(a) permit an insurer to solely give consideration to past and prospective *nationwide* loss experience of the insurance rather than to the past and prospective loss experience of the insurance within this state and in states which are likely to produce loss experience similar to that in this state.

**No. 10:** Errs by not complying with the requirements of RCW 34.05.461(3) that the 6/15/2016 Order *"shall include a statement of findings and issues of fact and law presented on the record"*

pertaining to whether the provisions of RCW 48.19.040(1) and (2) and RCW 48.19.030(3) and (3)(a) apply to the insurer's submission of the application for rate change.

**No. 11:** Errs in finding and/or concluding that Driscoll's *APP and Demand* "violates the "filed rate" doctrine because it seeks to challenge the LTCI premium rates that MetLife filed with the OIC, and the process by which the OIC reviewed and approved the rates charged to the Driscolls, both of which are impermissible."

**No.12:** Errs in finding and/or concluding that the "filed rate" doctrine "trumps" and bars Driscoll's *APP and Demand*.

**No. 13:** Errs in finding and/or concluding that Driscoll's *APP and Demand* "involve claims related to agency-approved rates, which are *not* incidental to agency-approved rates, and therefor would necessarily require courts to reevaluate agency-approved rates."

**No. 14;** Errs by granting OIC's Motion for Summary Judgment.

**No. 15:** Errs by finding or concluding that any non-compliance by the P/O with the requirements of RCW 34.05.461(3) in respect to the subject matter of assignments of error 6, 7, 8, 9. and/or 10 was justified by principles of judicial restraint.

### III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

**A.** Within the meaning of RCW 48.04.010(1)(b) and the applicable law of standing, is Driscoll a "person aggrieved" by an order of the commissioner approving an application for premium rate increase of LTCI policies such as were issued to Driscoll and his spouse if the information submitted to the OIC in support of the rate change application was insufficient to permit the Commissioner to determine whether it meets the requirements of RCW Ch. 48.19 as stated in RCW 48.19.040(1) and (2), and in RCW 48.19.030(3) and (3)(a)? [Assignments of Error 1, 2, 3, 4, 5 and 14].

**B.** Driscoll's *APP and Demand* contests OIC's order that granted the insurer's application for rate change in LTCI policies issued to Driscoll and spouse. RCW 34.05.010(1) defines "adjudicative proceeding" in relevant part as "a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency. Adjudicative proceedings also include . . . \* \* all cases of . . . \* \* rate making in which an application for a . . . \* \*.rate change in which the granting of an application is contested by a person having standing to contest under the law." (Emphasis added). Is an adjudicative proceeding before the OIC as defined by RCW 34.05.010(1) available to a policyholder such as Driscoll who

contests OIC's granting of an application for rate change if that person has standing to contest the granting of that approval under the law? (Assignments of Error 4 and 14).

**C.** *The P/O's 6/15/2016 Order did not include a statement of findings and conclusions, and the reasons and basis therefor, of the issues of fact and law pertaining to whether the loss experience information submitted to the OIC in support of the application for OIC approval of the rate change demonstrated that due consideration had been given to past and prospective loss experience as required and/or as conditionally permitted by RCW 48.19.030(3)(a). Did that constitute adequate compliance with the requirements of RCW 34.05.461(3)? [Assigned Errors 5 &14].*

**D.** *The P/O's 6/15/2016 Order did not include a statement of findings and conclusions, and the reasons and basis therefor, as to the issues of fact and law pertaining to the due process rights of Driscoll under the Washington state and U.S. Constitutions not to be deprived by state action of intangible property rights without due process of law as alleged in Driscoll's APP and Demand. Did that constitute adequate compliance with the requirements of RCW 34.05.461(3)? [Assignment of Errors No. 6 and 14].*

**E.** The *P/O's 6/15/2016 Order* did not include a statement of findings and conclusions, and the reasons and basis therefor, as to the issues of fact and law pertaining to whether the Driscolls' constitutionally protected property rights in their LTCl policies include property interests created by the state standards and regulations which guide the discretion of the OIC and which contain mandatory language that guide the decision of the OIC as to approval of the rate increase request and that control the outcome of that request *without that* statement of findings and conclusions, and the reasons and basis therefor? Did that constitute adequate compliance with the requirements of RCW 34.05.461(3)?

[ Assignments of Error 7 & 14].

**F.** The *P/O's 6/15/2016 Order* did not include a statement of the issues of fact and law pertaining to the issue of whether Driscoll's constitutionally protected property rights include property rights created by the LTCl contract between the parties thereto, to which Driscoll is entitled, as alleged in Driscoll's APP and Demand. Did that constitute adequate compliance with the requirements of RCW 34.05.461(3)? [Assignments of Error 8 and 14].

**G.** The *P/O's 6/15/2016 Order* did not include a statement of findings and conclusions, and the reasons and basis therefor, as to

*the issues of fact and law* pertaining to the issue of whether the provisions of RCW 48.19.040(1) and (2) and RCW 48.19.030(3) and (3)(a) apply to the insurer's submission of the application for rate change. Did that constitute adequate compliance with the requirements of RCW 34.05.461(3)? [Assigned Errors 10 & 14].

H. RCW 48.19.040(1) and (2) requires that before an insurer uses a proposed modification of a class rate of insurance subject to those statutes, the insurer is required to make a filing therefor with the Commissioner that *"must be accompanied by sufficient information to permit the Commissioner to determine that it meets the requirements of"* Ch. 48.19 RCW, including RCW 48.19.030(3) and (3)(a). Does judicial review as to whether such requirements were met require the P/O or the Court(s) to evaluate or reevaluate the reasonableness of the rate modification that was proposed to and approved by the OIC? [Assignments of Error 11, 12, 13, 14].

I. Does judicial determination of Driscoll's contention that the rate change application submitted to the OIC was not accompanied by sufficient information to permit the Commissioner to determine that it meets the requirements of RCW Ch. 48.19, including RCW 48.19.030(3) and (3)(a), constitute a determination that is incidental

to the agency-approved rates or does such require judicial re-evaluation of such rates? [Assignments of Error 11, 12, 13 and 14]

J. Does the “filed rate” doctrine bar Driscoll's *APP and Demand*? [Assignments of Error 11, 12, 13 and 14]

K. Did the principles of judicial restraint justify and excuse non-compliance by the P/O with the requirements of RCW 34.05.461(3) with respect to the subject matter of assignments of error 6, 7, 8, 9, and/or 10? [Assignments of Error 6 to10, 14 & 15].

#### IV. STATEMENT OF THE CASE

##### A. PROCEDURAL HISTORY

1. Driscoll's *APP and Demand* (AR 1655-1669) was filed with the OIC Hearing Unit on 1-04-2016. (AR1653-1654). On 1-26-2016, pursuant to prior written notice by the P/O, a telephonic prehearing conference was held between the P/O, the OIC's legal representative, and Driscoll (appearing pro se ) ( AR 1648-1650).
2. On 1-27-2016, the P/O entered an Order scheduling dates for completion of discovery and for filing dispositive motions and responses thereto (AR 1648-1650).
3. On 2-12-2016 Driscoll submitted his *motion to amend paragraphs 16 and 41 (e) of Driscoll's APP and Demand* to correct

inadvertent pleading errors (AR 1644-1647), which motion was granted by P/O's Order entered 3-11-2016. (AR 1633-1635).

4. On 4-28-2016 Driscoll filed and served three Motions for Partial Summary Judgment (AR 1106-1122). On 4-28-2016, Driscoll filed and served Driscoll's 4/23/2016 Declaration (AR 1542-1543) and Driscoll's Exhibits No. 1 to 17 (AR 1123-1630) in support of Driscoll's *APP and Demand* and Driscoll's Motions for partial summary judgment. On 5-13-2016, the OIC filed OIC Exhibits No. 5 and 6 (AR 314-494) in support of the OIC's Response in Opposition to Driscoll's Motions (AR 298-313).. Driscoll's Motions for Partial Summary were denied by the P/O's 6/15/2016 Order (AR 7-21). On 4-29-2016, OIC filed OIC'S Motion to Dismiss <sup>1</sup> or in the Alternative for Summary Judgment (AR 495-520) based on multiple alleged grounds (AR 505- 519). [with a declaration and OIC Exhibits No. 1 to 4 in support thereof (AR.523-1105) Later, Driscoll filed and served his 5/2/2016 Response To The OIC's Dispositive Motions (AR 277-294) and Driscoll's 4/27/2016 Declaration (AR 1541-1543) and Exhibits 1-17 (AR 1127-1630 )

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<sup>1</sup> Driscoll's response to that Motion, at AR 277, noted that CR 12(b)(6) was not adopted by the Insurance Commissioner as a procedure for use in adjudicative proceedings and that Driscoll did not consent to the use of CR 12 (b) (6) in addressing the issues in this proceeding. The P/O did not cite or rely on CR 12 (b)(6) in ruling on the issues in this matter and error has not been assigned in this appeal to that non-reliance by the P/O.

which included Driscoll's factual evidence in response to the OIC's contentions that Driscoll is not aggrieved by the OIC's order that approved the application for premium-rate change.(id.)

5. At AR 9, the P/O identified the applicable standard for summary judgment under WAC 10-08-135, which provides:

"A motion for summary judgment may be granted and an order issued if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

6. The P/O's *6/15/2016 Order* stated that when considering the Cross Motions for Summary Judgment, the P/O "will consider material evidence in the record in the manner most favorable to the nonmoving party in each instance. If reasonable persons might reach different conclusions given the evidence, then I should deny the Cross Motions of either or both the OIC and Driscoll." (AR 10).

7. The *6/15/2016 Order* ruled that in their respective briefs filed in support of their Cross Motions for Summary Judgment, both Driscoll and the OIC *incorrectly* ". . . cite to the standard governing standing for purpose of judicial review, RCW 34.05.530,. . . \* \* as the basis in determining whether Driscoll has standing for purposes of an adjudicative proceeding before the OIC." (AR 11). The *6/15/2016 Order* ruled that the word "aggrieved" used in RCW

48.04.010(1) –(2) and in WAC 284-02-070(1)(b)(1) is not defined and should be given the definition set forth in Black’s Law Dictionary (8<sup>th</sup> ed. 2004) which defines “aggrieved” as: “(Of a person or entity) having legal rights that are adversely affected; having been harmed by an infringement of legal rights.” (AR 13).

8. Driscoll’s Petition for Reconsideration of that 6/15/2016 Order (AR 26-33) contended that:

“ . . . [A]ssuming arguendo that at least one of those definitions accurately reflects the meaning of the word “aggrieved” as used in the above laws, Driscoll nonetheless is a person aggrieved by the OIC’s approval of the premium-rate increase request that was not supported by submissions by MetLife to the OIC that showed that such submissions complied with the requirements of Ch. 48.19 RCW and Ch. 284-60 WAC.” (AR 27-28).

9. Neither the 6/15/2016 Order (AR 7-21) nor the Order on Driscoll’s Petition for Reconsideration (AR 1-6) addressed that contention of Driscoll; neither of those orders addressed the issue of whether granting summary judgment to the OIC was warranted under WAC 10-08-135 given the facts and the substance of: (a) Driscoll’s Declaration of 4/27/2016 (AR 1541-1543); (b) Driscoll’s Exhibits No. 1 to No. 17 (AR 1127-1630) referenced in that 4/27/2016 Declaration; and, (c) ¶¶5 and ¶¶6 of Driscoll’s Declaration of 5/12/2016 (AR 295-296).

10. **APPENDIX 1** of this Brief is a true copy of Driscoll's 7/16/2016 inquiry to the OIC Hearings Unit (AR 23) and the P/O's 7/18/2016 reply thereto which identify the factual circumstances summated below which caused the P/O to treat Driscoll's petition for reconsideration of the P/O's 6/15/2016 Order as timely filed and to issue his 7/15/2016 Order thereon (AR 1-6). As stated in AR 23, on June 27, 2016, by agreement, Driscoll served counsel for the OIC by e-mail with Driscoll's Petition for Reconsideration of the P/O's 6/15/2016 Order on Cross Motions for Summary Judgment. and, with the P/O's permission, endeavored to file that Petition by e-mail with the OIC's Hearings Unit. On July 11, 2016, having been advised by the OIC Hearing Office that Driscoll's Petition for Reconsideration of the P/O's 6/15/2016 Order was not received at the Hearings Unit Office by 6/27/2016 (AR 23), Driscoll filed in Spokane County Superior Court Cause No. 16-2-02598-1 his petition for judicial review (CP 1-19) of the P/O's 6/15/2016 Order on Cross Motions for Summary Judgment (AR 7-21)]. After receiving the P/O's 7/15/2016 Order on the Petition for Reconsideration (AR 1-6), and notice of the the P/O's 7/18/2016 e-mail explanation (AR 22), on 7/25/2016 Driscoll filed Driscoll's Amended Petition for Judicial Review (CP ~~#~~ 4 \_\_\_\_\_), which was

later superseded by Driscoll's Revised Amended Petition for Judicial Review filed 11/10/2016 (CP 26-56) in keeping with an Agreed Order to amend and revise filed 10/28/2016 (CP 22-25).

11. Driscoll's Revised Amended Petition for Judicial Review (at CP 29-32) alleges that: (a) Pursuant to RCW 34.05.570(3)(d) and (e), Driscoll is entitled to judicial review of the P/O's 6/15/2016 Order because Driscoll is *aggrieved or adversely affected* by such order, and (b) That Driscoll has standing to seek judicial review of the P/O's 6/15/2016 Order pursuant to RCW 34.05.530, contending that the three conditions for Driscoll's standing to do so as specified by that statute are present and satisfied. (id.)

12. ¶14 of Driscoll's *Petition For Reconsideration* of the P/O's 6/15/2016 Order, at AR 3, requested that the 6/15/2016 Order be amended as needed to comply with the requirements of RCW 34.05.461(3) in respect to the issues referenced in ¶¶ 4 to 14 of that petition. That request was denied by order (AR 1-6) which found and/or concluded at AR 3-4 that principles of judicial restraint dictated that the requirements of RCW 34.05.461(3) did not need to be addressed because the need for decision as to compliance with those requirements had been effectively disposed of by the

6/15/2016 Order granting the OIC's summary judgment motion on other grounds.

## B. STATEMENT OF FACTS

1. The P/O's 6/15/2016 Order granting OIC's Cross Motion for Summary Judgment (AR 7-21) was based upon these stated grounds: (a) That Driscoll was not "*aggrieved*" by the OIC's order approving the application for the 22.69% premium- rate increase and "*therefore his Demand for Hearing does not trigger the right to a hearing before the OIC under (RCW 48.04.010(1)(b) –(2)*" [AR 14]; (b) That ". . . *the OIC's approval of the 22.69% rate increase in the premiums of LTCL at issue in this matter determined the legal rights or interests of MetLife and T-C Life, not Driscoll.*" (id.); (c) That ". . . *the OIC's approval or disapproval of rate increase(s) does not provide Driscoll, or others similarly situated, with a right to a hearing or appeal rights under RCW 34.05 or RCW 48.04.010(1)((b)).*"[id.] ; (d) That Driscoll's APP and Demand "*violates the "filed rate" doctrine because it seeks to challenge the LTCL premium rates that MetLife filed with the OIC, and the process by which the OIC reviewed and approved the rates charged to the Driscolls, both of which are impermissible.*" (AR18); (e) That the "*filed rate*" doctrine "*trumps*" and bars Driscoll's APP and Demand

(AR 16-18); and (f) That Driscoll's *APP and Demand* "involve claims related to agency-approved rates, which are not incidental to agency-approved rates, and therefor would necessarily require courts to reevaluate agency-approved rates."(AR 18).

## V. ARGUMENT

**A. By definition, an "adjudicative proceeding" is a statutory process that is available to a policyholder who has standing to contest the granting of an application for rate change which was not accompanied by information sufficient to permit the OIC to determine that the application meets the requirements of RCW Ch. 48.19.**

1. The OIC's Motion to Dismiss, or For Summary Judgment (at AR 507, 11'lines 5-8), erroneously contends that ; " . . . RCW 34.05.010 which discusses the right to adjudicative review limits standing regarding rate filings to the applicants (MetLife) who submitted the rate filing, and only in the case of a denial or modification of the filed rate. See RCW 34.05.010(1)."

2. Driscoll's *APP and Demand* (AR 1655-1669) contests the OIC's Order granting the insurer's application for rate change, contending that Driscoll is aggrieved thereby, and that proof of such grievance gives Driscoll standing to demand an "adjudicative proceeding" as defined and provided by RCW 34.05.010 (1), to-wit::

"(1) "Adjudicative proceeding" means a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency. Adjudicative proceedings also include all cases of licensing and rate making in which an application for a license or rate change is denied except as limited by RCW 66.08.150, or a license is revoked, suspended, or modified, or in which the granting of an application is contested by a person having standing to contest under the law." (Underling emphasis added)

**B. Driscoll has legal rights that were and are adversely affected by the OIC's order that granted the application for rate change; accordingly, Driscoll has standing to contest that order under applicable law.**

1.The PIO's 6/15/2016 Order concludes that the meaning of the word "aggrieved" is aptly defined in Black's Law Dictionary (8<sup>th</sup> ed. 2004) as :"(Of a person or entity) having legal rights that are adversely affected; having been harmed by an infringement of legal rights." (AR 13). Given that meaning, Driscoll contends that as a policyholder he has at least these legal rights that were adversely affected by the OIC's order approving the non-compliant rate change application and as to which genuine issue exists as to material facts under WAC 10-08-135: (a) As alleged at ¶¶24-28 of Driscoll's *APP and Demand*, at AR 1661-1662, the legal right to have OIC examine the subject application for rate change sufficiently to determine whether the application meets the requirements of RCW Ch. 48.19, which duty of examination is

explicitly stated in RCW 48.19.060(1) <sup>2</sup> and is also implied by WAC 284-60-050(1) and (2) <sup>3</sup> ; (b) ¶¶ 33- 34 of Driscoll's *APP and Demand* allege (at AR 1664) that Driscoll has the legal rights to constitutionally-protected property interests conferred upon policyholders of the subject policy forms created by WA state statutory standards and regulations, including those cited above, which [in keeping with *Conard v. University of Washington*, 119 Wn.2d 519, 529, 834 P, 2d 17 (1992)] contain “*substantive predicates*” or “*particularized standards or criteria*”. . . to guide the discretion of decisionmakers” and which contain “*explicitly mandatory language*”, i.e., specific directives to the decisionmaker “*that if the regulations’ substantive predicates are present, a particular outcome must follow*”, i.e., disapproval by the commissioner of any request for approval of rate change that does not comply with the Insurance Code or regulation of the

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<sup>2</sup> RCW 48.19.060(1): “The commissioner shall review a filing as soon as reasonably possible after made, to determine whether it meets the requirements of this chapter.”

<sup>3</sup> WAC 284-60-050: “The following standards and requirements apply to individual disability insurance forms: (1) Benefits shall be deemed reasonable in relation to the premiums if the overall loss ratio is at least sixty percent over a calculating period chosen by the insurer and satisfactory to the commissioner.(2) The calculating period may vary with the benefit and renewal provisions. The company may be required to demonstrate the reasonableness of the calculating period chosen by the actuary responsible for the premium calculations. A brief explanation of the selected calculating period shall accompany the filing.”

commissioner issued pursuant to the Code. [AR 1664-1665]; (c) Driscoll has a constitutionally protected property right and interest in the subject LTCI policies and regulation of premium rate changes thereof except as otherwise agreed by Driscoll and the LTCI insurer, as alleged in ¶¶ 33- 38 of Driscoll's *APP and Demand* at AR1664 -1665; and, (d) The property rights created by the express and implied terms of the LTCI contracts between the insurer and the Driscolls as alleged in ¶¶ 29-32 of Driscoll's *APP and Demand* at AR 1663. Laws existing in 2001-2004 when the LTC.04 policies were issued in WA and that are deemed by law as being part of those LTCI contracts <sup>4</sup> included RCW 48.19.030 and .040 [both of which were enacted and in force since 1989] and WAC Ch. 284-60 adopted and in force since 1983, as well as the due process provisions of Article I, Section 3 of the state Constitution and the 14<sup>th</sup> Amendment, United States Constitution. (AR 1663)

**C. The PIO's 6/15/2016 Order (AR 7-21) and Order on Petition for Reconsideration thereof (AR 1-6) do not adequately comply with the requirements of RCW 34.05.461(3) insofar as such pertain to the issues set forth in ¶ C to¶ G inclusive at pages 7**

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<sup>4</sup> *Wagner v. Wagner*, 95 Wn. 2d 94, 98-99, 621 P. 2d 1279 (1980); *Bort v. Parker*, 110 Wn. App. 561, 42 P. 3d 980 (Division III, 2002); *Corpus Juris Secundum*, Vol. 17 A, *Contracts*, 2011 Edition, Section 439, p. 342-343.

**and 8 of this Brief. That inadequate compliance can and should be remedied as provided by RCW 34.05.574 (1) and (4).**

1. *U.S. West v. Utilities Commission*, 86 Wn. App. 719, 937 P.2d 1326 (Division I, 1997) considered the requirements of RCW 34.05.461(3) that provides in relevant part: "Initial and final orders shall include a statement of findings and conclusions, and the reasons and basis therefor, on all the material issues of fact, law, or discretion presented on the record, including the remedy or sanction . . . \* \* ." Division I there held that RCW 34.05.461(3)

*"does not require that findings and conclusions contain an extensive analysis"* and that *"Adequacy, not eloquence, is the test."*

2. Here, the *Order on the Petition for Reconsideration* {at AR 3-4} states that "principles of judicial restraint dictate that if resolution of an issue effectively disposes of a case, we should resolve the case on that basis without reaching any other issues that might be presented. *Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 307, 174 P.2d 1142, 1153 (2007) . . . \* \* ".(internal cite omitted)".

However, it follows that such principles of judicial restraint are inapplicable if on judicial review this court determines that the case was erroneously resolved by summary judgment order, that the case remains viable, and has not been effectively disposed of.

See *Amalgamated Transit Union, Local 1384 v. Kitsap Transit et al.* 187 WA. App.113.126, 349 P.3d 1 (Div. II, 2015) in which the appeals court ruled that Superior Court's decision to not remand a matter to a state agency for further fact finding was error calling for remand and further findings, As to RCW 34.05.461(3) the appeals court ruled : *"On remand, if the Commission affirms its finding that Kitsap Transit could not have restored PPO coverage after engaging in further fact finding, the Commission must make the findings required by RCW 34.05.461(3) so that we might understand the basis for its decision in the event of an appeal,"* In Assignment of Error 14, supra, Driscoll contends that here it was error for the P/O to grant the OIC's Motion for Summary Judgment. If that is found by this court to be true, all other issues before the OIC must be addressed by that agency as provided by RCW 34.05.461(3) to facilitate needed judicial review thereof at the earliest feasible time. *Justice delayed is justice denied.* RCW 34.05.574 provides in relevant part:

"(1) In a review under RCW 34.05.570, the court may (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order. The court shall set out in its findings and conclusions, as

appropriate, each violation or error by the agency under the standards for review set out in this chapter on which the court bases its decision and order. In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency. The court shall remand to the agency for modification of agency action, unless remand is impracticable or would cause unnecessary delay."

... \* \* "4) If the court sets aside or modifies agency action or remands the matter to the agency for further proceedings, the court may make any interlocutory order it finds necessary to preserve the interests of the parties and the public, pending further proceedings or agency action."

**D. OIC's "order" granting the application for the premium rate change of the LTCI policies at issue in this matter is "a written statement of particular applicability that finally determines the legal rights, duties, . . . \* \* , or legal interests of" T-C Life, MetLife, and policyholders (like Driscoll) in those policies within the ordinary meaning of those words as used in RCW 34.05.010(11(a)).**

1. The OIC's approval of MetLife's legally non-compliant submission in support of the rate modification was effected by action and written order of the OIC on 7/10/2015, such being a "*written statement of particular applicability that finally determines the legal rights . . . \* \* or other legal interests of a specific person or persons*", i.e., the insurer, the reinsurer, and the policyholders of the series LTC.04 policy forms including Driscoll and spouse Mary T, Driscoll. The written order was issued and memorialized at

pages 1 and 4 (of 100 pages) of Applicant's Exhibit 9 filed in the administrative proceeding, such being identified as OIC's "Disposition" of the rate increase request submitted to the OIC by MetLife, See AR 1336 and AR 1339

2. The P/O's 6/15/2016 Order (AR 7-21) errs in finding that "The OIC's approval of the 22.69% rate increase in the premiums of LTCL at issue in this matter determined the legal rights or interests of T-C Life, not Driscoll." [AR 14]. The word "determines" appears in the definition of the word "Order" in RCW 34.05.010(11)(a) but is not defined by RCW Ch. 34.05; thus, in keeping with *City of Spokane v. Department of Revenue*, 145 Wn. 2d 445, 454, 38 P.3d 1010 (2002), one looks to the ordinary dictionary meaning of the word 'determine' (or 'determined') for its meaning, which is "to fix authoritatively or conclusively". Webster's New Collegiate Dictionary, 1977 Ed. As contended at Page 8, ¶ B of Driscoll's *Revised Amended Petition for Judicial Review* ( CP 15), the legal rights of LTCL policyholders like Driscoll in their LTCL premium rates were determined, i.e., fixed authoritatively and/or conclusively, by the OIC's order approving the subject rate change application.

3. As alleged in ¶ 1 of Driscoll's *APP and Demand*, the OIC's "order" that approved the subject LTCL rate change application

*authoritatively* fixed and approved a 22.69% increase in the premiums of the LTCI policies issued to Driscoll and Driscoll's spouse (AR 1655), which order, until set aside, will *conclusively* require Driscoll and his spouse to experience a 22.69% increase in the premiums of their LTCI policies if those policies are to remain in full force and effect under their present terms and conditions (see ¶ 39 of Driscoll's *APP and Demand*, at AR 1665-1666).

4. As stated in Driscoll's Petition for Reconsideration of the *6/15/2016 Order*, at AR-27-28, the *Washington Administrative Law Practice Manual* (2015), at section 9.03[B], concludes:

"It is arguable that a person whose interests may be adversely affected by an order, as defined in RCW 34.05.010(11)(a), may have standing to obtain or to participate in an adjudicative proceeding. An order, as defined in RCW 34.05.010(11)(a), is " a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons." {**Emphasis added**}.

5. The *6/15/2016 Order*, at AR 13, correctly stated:

*"As Driscoll does in his Demand, I assume that the OIC's approval of the 22.69% rate increase in the premiums of LTCI at issue in this matter equates to the OIC's issuance of an order. RCW 34.05.010(11)(a) defines "order" as: ". . . without further qualification, means a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons.* (Emphasis added). RCW 34.05.010(14) defines "person" as "any

*individual, partnership, corporation, association, governmental subdivision or unit thereof, or public or private organization or entity of any character, and includes another agency."*

6. As evidenced in Driscoll's Petition for Reconsideration of the 6/15/2016 Order, at AR 28, the learned publication *Insurance Rate Litigation*, by Judith K. Mintel, © 1983, Kluwer–Nijhoff Publishing Co., at p. 83 opines: "*In most instances, courts have allowed standing to any organization or person to challenge a commissioner's rate decisions when it is established that the plaintiff has purchased insurance from the company seeking the rate change.*" Supporting cases cited at pgs, 83-84 of that publication include *Thaler v. Stern*, 44 Misc.2d 278, 253 N.Y.S. 2d 622 (1964)" - - which at 253 N.Y.S. 2d 625 rejected a challenge to the standing of a premium-paying subscriber of health services who was directly and individually affected by an increase in premiums approved by New York state Superintendent of Insurance had standing to bring a proceeding to annul the determination of the Superintendent approving that increase.

7. ¶ 1 of Driscoll's *APP and Demand* alleges that Driscoll is a person aggrieved by the action (order) of the OIC that authorized and/or approved an unfounded request for a 22.69% increase in the

rates of LTCI issued to Driscoll and spouse, (AR 1655). Particular causes of alleged grievance include:

(a) Contrary to the requirements of RCW 48.19.040(2), the information submitted to the OIC in support of that filing was not *“accompanied by sufficient information to permit the commissioner to determine whether it meets the requirements of this chapter”* (i.e., RCW Ch. 48.19, including RCW 48.19.030(3) and (3)(a), as alleged at ¶¶13 – 15 and 17 of Driscoll’s *APP and Demand* (AR 1658-1659) and in amended ¶16 and ¶41(e) of Driscoll’s *APP and Demand* (AR1644-1645), which amendments were approved by order of the P/O (AR 1631-1635).

( b) As alleged at ¶39 and Ftn.9 of Driscoll’s *APP and Demand*, Driscoll and spouse have and will experience significant financial loss from and after August 1, 2016 because, effective that date, the OIC’s approval of the subject rate change application caused the monthly premium of the LTCI policy issued to Driscoll to increase from \$421.45 monthly to \$517.06 monthly, and caused the monthly premium for the policy issued to Mary T.Driscoll to increase from \$295.14 to \$362.10 monthly. (AR 1665-1666).

(c) As alleged in ¶ 39 of Driscoll’s *APP and Demand* (AR 1665-1166) each option that the insurer offered to Driscoll and spouse to

partially mitigate the financial effects of the premium increases (Driscoll's Exhibit 7 at AR 1221-1237) are financially detrimental to the property interests of Driscoll and spouse in their LTCI policies (See Driscoll's Exhibit 11 at ¶¶ 7 and 8, AR 1542-1543).

**E. The terms of the 'premium-increase' provision of the LTC.04 LTCI Policy Form issued to the Driscolls are materially-incomplete and unenforceable. However, the insufficient express terms of that form were impliedly supplemented and made complete by laws which were then in existence and that affected the premium increase provision of that Policy Form.**

1. As alleged in paragraph 26 of Driscoll's *APP and Demand* (at AR1662), the series LTC.04(WA) policy forms issued to the Driscolls (AR 1127-1168; AR 1169-1206) includes this provision:

**"We have a limited right to increase premiums. Your premium will not increase due to a change in Your health or age. We can increase your premium but only if we increase the premiums of all similar policies issued on the same form as this Policy, If the premium increases, the increase will only be made as of an anniversary of the Policy Effective Date. We will give you at least 30 days written notice before We increase your premium."**

2. ¶¶ 27-28 of Driscoll's *APP and Demand*, at AR 1662-1663, alleges that the above-quoted premium-increase provision is a materially-incomplete and legally unenforceable contract provision because: it does not express the circumstances which would justify an increase in premiums; it does not state that premiums can be increased for any or no reason or without cause, and it does not

express how or by what means the amount of a premium increase is to be determined (e.g., by a designated, impartial, neutral source or otherwise), such being material and essential to enforceability of the insurance contract.<sup>5</sup>

3. Nonetheless, the insufficient express terms of the LTCI policy form were impliedly supplemented and made complete by laws which were then in existence and that affected the premium increase provision of that Policy Form. Washington law recognizes that laws which affect the subject matter of a contract presumably are incorporated into and becomes a part of the contract unless the parties thereto expressly set forth their contrary intent. *Wagner v. Wagner*, 95 Wn. 2d 94, 98-99, 621 P. 2d 1279 (1980); *Bort v. Parker*, 110 Wn. App. 561, 42 P. 3d 980 (Division 3, 2002); *Riley-Hordsky v. Bethel School District*, 187 Wn. App. 748, 350 P. 3d 681 (2015); *Corpus Juris Secundum*, Vol 17-A, Contracts, 2011 Edition. Section 439, pgs. 342-343. The LTCI Policy form issued to the

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<sup>5</sup> *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn. 2d 171, 177-8 (2004) holds that a valid contract requires that the parties objectively manifest their mutual intent to all material terms of the contract and (“Moreover, the terms assented to must be sufficiently definite. *Sandeman*, 50 Wn. 2d at 541 (observing if a term is so indefinite that a court cannot decide just what it means, and fix exactly the legal liability of the parties “there cannot be an enforceable agreement)”).

Driscolls (AR 1127-1168; AR 1169-1206) does not include any expression of intent that is contrary to that presumption.

4. MetLife's Actuarial Memorandum that accompanied the request for the premium increase at issue here states that the LTC.04 LTCI Policy forms that were issued in the state of Washington were issued during the years 2001-2004 (AR 1382). Laws then existing that affect the validity and enforceability of the premium increase provision of those policy forms and that impliedly became part of the Series LTC.04 LTCI contract, include RCW 48.19.030 and RCW 48.19.040(2) <sup>6</sup>, WAC Ch, 284-60, and the due process provisions of the WA and U.S. Constitutions <sup>7</sup> which prohibit deprivation by state action of a person's property without due process of law.

**E. The Lewin Group Report #2002 Reveals Vast Differences Between the LTCI Rate-Setting Regulatory Laws, Requirements, and Practices of the States of the Union which reasonably infers that OIC's Reliance on the Nationwide" Loss-Ratio Experience of policy forms issued Nationwide Was Unacceptable for Washington LTCI Rate Setting Purposes (if it was otherwise permitted).**

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<sup>6</sup> In 2012 and 2013, amendments were made to RCW 48.19.040 that are irrelevant to the issues that are here under consideration.

<sup>7</sup> See cases cited at *Corpus Juris Secundum*, Vol. 17 A, Contracts, Sec. 435 and Footnote 7 thereof, and Sec. 439.

1. Prior to summer of 1999, the AARP Public Policy Institute commissioned The Lewin Group, a healthcare research and policy consulting firm, "to conduct a survey of state regulatory practices in the area of reviewing initial rate setting and premium increases" with respect to LTCI.<sup>8</sup>

2. Driscoll's Exhibit 13 (AR 1546-1615) is a true copy of the Lewin Group Report #2002 dated February 2002 entitled "*Long-Term Care Insurance: An Assessment of States' Capacity to Review and Regulate Rates*". Segments of the report, cited in the subparagraphs immediately below, disclose pragmatic reasons why use of "*nationwide*" loss ratio experience for purposes of LTCI premium- rate setting is and was unacceptable for use in Washington (assuming that it were permitted by RCW 48.19.030(3)(a) - - which is not the fact).<sup>9</sup>

3. Page 5 of the Lewin Group Report #2002 states that during July to September 1999 the Lewin Group conducted a survey of all

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<sup>8</sup> Source: See first page of the Foreword to the Lewin Group Report. (Driscoll's Exhibit 13, AR 1546-1615).

<sup>9</sup> RCW 48.19.030(3)(a) conditionally permits use of loss information of those states which are likely to produce loss experience similar to that in this state; it does not authorize use of or reliance on *nationwide* loss experience.

state insurance departments (except for California which declined to participate) plus the District of Columbia. Numerous tables and summaries in the report compare and rank the similarities and differences in practices, capacities, resources, and authority of state regulatory agencies in regulating LTCI rates. At page 6 to 27, the Lewin Report identifies its findings from the survey, which include at p. 6 this finding regarding the strong regulatory capacity of the WA OIC as compared to that of other states:

*" Table 1 presents the composite scores on the summary measures for each of the states. According to these composite measures, states with the strongest regulatory capacity are Florida, New York, Illinois, **Washington**, and North Dakota. The states with the least regulatory capacity are Alaska, Louisiana, Hawaii, Wyoming, and Missouri."* (bold emphasis added)

a. Page v of the Foreword to the Lewin Report includes this finding and explanation:

*"Only a small number of states exercise their regulatory authority to disapprove premium increases. Another recent study found that only about half of the states surveyed had ever disapproved, or required a modification of, a LTCI premium increase. [Footnoted reference is omitted here] Only seven states had objected to 10 percent or more of all rate increase filings. We hypothesized that states with the strictest regulatory standards and the most thorough review of rates would have the highest propensity to disapprove or modify insurers' proposed rate increases. Analysis of the rate increase data showed that a composite measure of regulatory capacity was positively and significantly related to the proportion of rate increases disapproved or modified. States actively regulating LTCI find some premium increases are unjustified. This implies that unjustified rate increases may be occurring in all states , but*

that many states lack the necessary authority, resources, or will to stop these increases.”

b. Page 27 of the Lewin Report includes these **“Policy Lessons and Considerations**

- Many states do not require prior approval of LTCI premium rates, and five states have no authority to regulate premiums;
- Individuals reviewing rates in many states may lack adequate knowledge and skills to ensure thorough reviews;
- Most states are not collecting all information necessary to conduct a comprehensive rate review;
- Existing criteria for determining whether policies are appropriately priced may not be adequate;
- States have only limited ability to monitor trends in LTCI premiums;
- Few states exercise their regulatory authority to disapprove premium increases; and
- Consumers have little ability to determine whether a policy is accurately priced.”

**F. In making rates. RCW 48.19.030(3) and (3)(a) normally only permits the insurer to give consideration to “past and prospective loss experience information within this state.” However, by the statute’s express terms, “If the information is not available or is not statistically credible, an insurer may use loss experience in those states which are likely to produce loss experience similar to that in this state.” In neither of those circumstances does such statute permit the insurer to use *nationwide* loss information in making rates.**

1. The administrative record in this matter does not include any information of any inquiry made by or for the insurer of the subject Series LTC.04 LTCI forms (or by the OIC) as to the past and/or prospective loss experience of such forms in *“those states which are likely to produce loss experience similar to that in this state .”*

2. ¶3 of Driscoll's *APP and Demand* expressly invokes Driscoll's statutory and constitutional rights under the due process clauses of

the WA state constitution and the constitution of the United States to notice and an opportunity to be heard in an administrative hearing to address and seek correction of the OIC's erroneous approval of the unfounded rate increase request. (AR 1655). The rate change filing was unfounded because, as alleged in ¶ 13 of Driscoll's *App and Demand*, RCW 48.19.040(2) requires that such filing "***must be accompanied by sufficient information to permit the commissioner to determine whether it meets the requirements of this chapter***"

including RCW 48.19.030, which in part provides that:

"(3) Due consideration in making rates for all insurances **shall** be given to:

(a) **Past and prospective loss experience within this state** for experience periods acceptable to the commissioner. If the information is not available or is **not statistically credible**, an insurer **may use loss experience in those states which are likely to produce loss experience similar to that in this state.**" [Emphasis added]

3. Undisputed ¶15 of Driscoll's *App and Demand* alleges:

"Further, the MetLife submissions to the OIC in support of the rate-increase did not include or use the loss experience within WA **coupled with loss experience of similar forms of " . . . those states which are likely to produce loss experience similar to that in this state"**, as conditionally permitted by RCW 48.19.030(a), and did not show or demonstrate that such information was not available or was not statistically credible." (Bold emphasis added). AR 1659.

4. The information submitted to the OIC in the subject rate increase filings (AR 1541-1543; AR 1224-1540) does not include

any information as to efforts by anyone to determine the loss experience of similar forms in those states which *are likely to produce loss experience similar to that in this state* – giving rise to the reasonable inference that no such effort was made.

5. If it is determined by the insurer that loss experience within the state of Washington alone is not available or is not statistically credible, the provisions of RCW 48.19.030(3)(a) do not provide for the insurer to use nationwide loss experience in lieu of using “*loss experience in those states which are likely to produce loss experience similar to that in this state.*” That was a policy choice made by the legislature. “*It is not the province of the judiciary to concern itself with questions of legislative policy where the provisions of the statute leave no room for construction.*” *Hardy v. Herriott*, 11 Wash. 460 (1895).

6. As to the intent of the statutes in play here, the words “**shall**” used in RCW 48.19.040 (1) and the word “**must**” used in RCW 48.19.040(2) clearly reflect the mandatory nature and intent of those provisions.<sup>10</sup> Likewise, the words “**shall be used**” and “**only**”

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<sup>10</sup> RCW 48.19.040(1) in relevant part requires that “*Every insurer ...shall before using, file with the commissioner every classifications manual, . . . \* \* \* rating plan, rating schedule, minimum rate, class rate, . . . \* \* and every*

if made in accordance with the following provisions", as used in RCW 48.19.030(3)(a), clearly reflect the mandatory nature and intent of those provisions. <sup>11</sup>

7. The previously quoted provisions of RCW 48.19.040(1) and (2) and of RCW 48.19.030(3)(a) likewise are plain and unambiguous. *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn. 2d 392, 396 (2000) includes these rulings regarding interpretation of unambiguous statutes:

"Statutory interpretation is a question of law that is reviewed de novo. *W. Telepage, Inc. v. City of Tacoma Dep't of Fin.*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000). Where statutory language is plain and unambiguous, courts will not construe the statute but will glean the legislative intent from the words of the statute itself, regardless of contrary interpretation by an administrative agency. *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 752, 888 P.2d 147 (1995); *Wash. Fed'n of State Employees v. State Pers. Bd.*, 54 Wn. App. 305, 309, 773 P.2d 421 (1989). A statute is ambiguous if "susceptible to two or more reasonable interpretations," but "a statute is not ambiguous merely because

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*modification of any of the foregoing which it proposes".* Subsection (2) of RCW 48.19.040 In relevant part requires that every such filing "**must be accompanied by sufficient information to permit the commissioner to determine whether it meets the requirements of this chapter**". **(bold emphasis added)**

<sup>11</sup> RCW 48.19.030 provides that: "**Rates shall be used, subject to the other provisions of this chapter, only if made in accordance with the following provisions:** . . . \* \* \* (3) **Due consideration in making rates for all insurances shall be given to (a) Past and prospective loss experience within this state for experience periods acceptable to the commissioner. If the information is not available or is not statistically credible, an insurer may use loss experience in those states which are likely to produce loss experience similar to that in this state.**" **(bold emphasis added)**

different interpretations are conceivable." *State v. Hahn*, 83 Wn. App. 825, 831, 924 P.2d 392 (1996).

**G. The P/O's 6/15/2016 Order erred in ruling that the "Filed Rate Doctrine" bars the P/O (and the courts) from reviewing the process by which the OIC reviewed and approved the insufficiently-supported (legally-non-compliant) premium-increase request. Driscoll's *App and Demand* involve claims that "are merely incidental to approved rates" and that would not require the P/O or the courts to reevaluate agency-approved rates that have been approved by the OIC.**

1. The P/O's 6/15/2016 Order (at AR 16-18) erred in ruling that "the "filed rate doctrine" trumps Driscoll's Demand for hearing", and that Driscoll's Demand "violates the "filed rate doctrine" because it seeks to challenge the LTCI premium rates that MetLife filed with the OIC, and the process by which OIC reviewed and approved the rates charged to the Driscolls, both of which are impermissible." (see pg. 12 of the 6/15/2016 Order). The 6/15/2016 Order, at AR 18, also erroneously rules that:

*"Driscoll's Demand, and this administrative matter, involve claims related to agency-approved rates, which are not incidental to agency-approved rates, and therefore, would necessarily require courts to reevaluate agency-approved rates. Such claims may not be considered by the courts or by myself under Premera."*

3. In fact, Driscoll's *APP and DEMAND* (AR 1655-1669) as amended (AR 1644-1647) does not include any claims that would

require the P/O or the courts to reevaluate agency-approved rates that have been approved by the OIC. Instead, Driscoll's *APP and DEMAND* as amended alleges at AR 1658 that OIC's approval of the premium-rate change application filing did not comply with subsection (2) of RCW 48.19.040 which provides that every such filing " ***must be accompanied by sufficient information to permit the commissioner to determine whether it meets the requirements of*** " RCW Ch. 48.19, including RCW 48.19.030 and .030(3)(a) and RCW 48.19.040(1) and (2). *McCarthy Finance, Inc. v. Premera*, 182 Wn. 2d 936, 942, 347 P. 3d 872 (2015) ruled that:

¶ 10 Consumers' power to challenge agency-approved rates is limited by the common law filed rate doctrine, *See Wegoland Ltd. v. NYNEX Corp.*, 806 F.Supp. 1112, 1113-16 (S.D.N.Y.1992) (providing a history of the doctrine). As this court observed:

" . . . \* The purposes of the filed rate doctrine are twofold: (1) to preserve the agency's primary jurisdiction to determine the reasonableness of rates, and (2) to insure that regulated entities charge only those rates approved by the agency. These principles serve to provide safeguards against price discrimination and are essential in stabilizing prices. But this doctrine, which operates under the assumption that the public is conclusively presumed to have knowledge of the filed rates, has often been invoked rigidly, even to bar claims arising from fraud or misrepresentation.

"*Tenore v. AT&T Wireless Servs.*, 136 Wn. 2d 322.331-32,962 P. 2d 104 (1998) (footnotes omitted). In cases such as this that involve claims and damages related to agency approved rates, courts must determine whether the claims and damages are merely

incidental to agency approved rates and therefore may be considered by courts, See id. at 344. [Underlining emphasis added].

4. At 182 Wn.2d 943-4, the McCarthy Finance decision held:

“¶ 12 In this case, however, rather than requesting general damages or seeking any damages that do not directly attack agency-approved rates, the Policyholders specifically request (1) a “refund[] of the gross and excessive overcharges in premium payments” and (2) a refund of “the amount of the excess surplus.” CP at 28. The Policyholders’ requested damages cause their CPA claims to run squarely against the filed rate doctrine. Even assuming that the Policyholders can successfully prove all the elements of their CPA claims, a court’s awarding either of the two specific damages requested by the Policyholders would run contrary to the purposes of the filed rate doctrine because the court would need to determine what health insurance premiums would have been reasonable for the Policyholders to pay as a baseline for calculating the amount of damages and the OIC has already determined that the health insurance premiums paid by the Policyholders were reasonable. Accordingly, the Policyholders’ claims are barred by the filed rate doctrine because to award either of the specific damages requested by the Policyholders a court would need to reevaluate rates approved by the OIC and thereby inappropriately usurp the role of the OIC. [Emphasis added]

5. Unlike the claims by policyholders who sought refunds from insurers in *McCarthy Finance, Inc. v. Premera, supra*, Driscoll’s *APP and DEMAND* as amended does not seek refunds, monetary damages, or other retroactive financial relief; instead, as alleged at AR 1667, it seeks prospective administrative relief from the OIC to “set aside as legally unfounded” the approval of the application for rate change. . . relief that would/should result from a determination that the rate change application to the OIC was not “accompanied

by sufficient information to permit the Insurance Commissioner to determine whether it meets the requirements of “ RCW Ch. 48.19, including RCW 48.19.030(3)(a), as required by RCW 48.19.040(1) and (2). AR 1666-1667; AR 1631-1635. Such relief is “merely incidental” to the agency-approved rates and does not “necessarily require courts to reevaluate agency approved rates”. The reasonableness or quantum of the rate approved by the agency is incidental to and not the intended focus and/or purpose of Driscoll’s challenge to the application that was made for rate change; rather the intended focus and purpose of that challenge is to show that the application for rate change did not comply with statutory requirements that govern its approval. [id.]

6. To rule that the judicially-created *filed rate doctrine* is a bar to an administrative adjudicative proceeding to determine whether the OIC erred in the process of approving an insufficiently-supported (legally-non-compliant) rate change request has absurd and harmful results, including these: **(a)** It would invite financially-interested insurers to file requests for OIC approval of premium-rate changes without also submitting to the OIC information that is legally required by statute to assure that each such request complies with applicable legal standards, including standards

enacted by the legislature; **(b)** It would promote laxity, casualness and carelessness in the OIC's performance of duties assigned to the OIC by the legislature to review and approve or disapprove LTCI premium- rate change requests; **(c)** it would deprive policyholders of the right to be heard before the agency to correct error of the OIC in approving a request for change in the premium-rates of their policies - - thereby depriving them of their intangible property rights and interests in the stability of such premiums-rates without due process of law, contrary to the due process provisions of the state and federal constitutions; **(d)** it would undermine public confidence in the legitimacy of the OIC, its' functions and purposes under the insurance Code of the state; and **(e)** It would effectively usurp and/or over-ride Legislative Authority that Article II of the State Constitution has delegated to the legislative branch of our state government.

**G: Driscoll's APP and DEMAND as amended does not include a CPA claim (RCW Ch. 19.86) against anyone. However, the P/O's 6/15/2016 Order at AR 18-20 discusses "Whether a CPA cause of action against MetLife and T-C Life is available to Driscoll?" In doing so, the P/O cites a case which includes obiter dictum in its rulings, the nature of which may have implications that call for it to be compared or contrasted with the facts and law that is applicable to whether Driscoll's APP and DEMAND as amended is viable under applicable law,**

The P/O's 6/15/2016 Order, at AR19-20, cites *Pain Diagnostics v. Brockman*, 97 Wn. App 691,697-698, 988 P. 2d 972 (Div. I, 1999), which was cited and relied upon by the P/O solely in relation to the issue of "(w)hether a CPA cause of action against MetLife and T-C Life is available to Driscoll" (AR 18). CPA issues are not the subject of Driscoll's APP and Demand as amended or of Driscoll's claims of alleged error assigned in this appeal and therefore are not addressed by Driscoll here except to emphasize that a key ruling in the *Pain Diagnostics* case contains obiter dictum that is not binding on this court. "Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed." *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 442 n.11, 120 P.3d 46 (2005) [quoting *State v. Potter*, 68 Wn. App. 134, 149 n.7, 842 P.2d 481 (1992)]. As stated in the *Pain Diagnostics* decision, 97 Wn.App at 687, the appellant brought an assigned negligence claim which was predicated on the duty of good faith in insurance owing to the assignor-insured. Here is the key, overly-broad ruling in the *Pain Diagnostics* case that was unnecessary for Division 1 to decide in that case:

"In *Pain Diagnostics v. Brockman*, 97 Wn. App 691,697-698, 988 P. 2d 972 (1999), the court emphasized that the insurance regulatory scheme was not designed to protect or provide remedies for individuals, but rather to regulate the insurance industry, whereas the CPA was the proper venue for private causes of action, stating in part:

"In creating the insurance regulatory scheme, the Legislature and the insurance commissioner did not intend to provide protection or remedies for individual interests; they only intended to create a mechanism for regulating the insurance industry. *Escalante v. Sentry Ins.*, 49 Wn. App. 375, 389, 743 P.2d 832 (1987), review denied, 109 Wn. 2d 1025 (1988). . . \* \* ."

That ruling was unnecessary to decide the *Pain Diagnostics* case: it should have referenced only those provisions of the Insurance Code and/or WAC Regulations that were actually before the court for review in the *Pain Diagnostics* case, namely RCW 48.01.030 [which is not involved in this case]. The Insurance Code and Regulations adopted thereunder include a myriad of provisions that were not before Division 1 in the *Pain Diagnostics* case, including all of those that are in issue here.

The *Pain Diagnostics* decision at AR 20 also cited *Escalante v. Sentry Ins.*, supra, presumably as support for the specific ruling which contains the obiter dictum in the *Pain Diagnostics* decision. However, review of the *Escalante* decision discloses that it did not include any of the obiter dictum such as appears in the *Pain Diagnostics* decision and did not involve any of the insurance code

statutes or regulations on which Driscoll's *APP and DEMAND as amended* is predicated [AR 1655-1669; AR 1631-1635]

H. **OIC's Contention That the Provisions of RCW Ch. 48.19 Do Not Apply to LTCl [except for RCW 48.19.010(2)] is Contrary to and Refuted by OIC's Judicial Admissions Made By OIC's Counsel of record in Hearings Unit Case No. 14-0187, and by the OIC's counsel of record in the Spokane County Superior Court judicial review proceedings, Civil Cause #15-2-00920-1,**

1. The OIC's Response (AR 298-313) to Driscoll's 1<sup>st</sup> Motion for Partial Summary Judgment contends at AR 303-307 that the provisions of RCW 48.19.030 and RCW 48.19.040 do not apply to LTCl -- contending that it is **a form of disability insurance** and that RCW 48.19.010(1)(b) excepts disability insurance from the application of all provisions of RCW Ch 48.19 other than to *"file with the commissioner its manual of classification, manual of rates, and any modifications thereof"*.
2. In advancing those contentions, the OIC ignores **judicial admissions** to the contrary made by counsel of record for the OIC in the earlier administrative proceeding initiated by Driscoll in Hearings Unit Case No. 14-0187 which admissions were reiterated by the OIC's counsel of record in the Spokane County Superior Court judicial review proceedings, Civil Cause #15-2-00920-1 (AR 53-55), specifically that:

*“ . . . that RCW 48.19.010(1) originally excluded disability insurance from the provisions of Ch. 48.19 RCW and that RCW 48.19.010(2) placed disability insurance within the purview of that regulatory section.”*

3. Appendix 2 attached hereto includes Driscoll's May 19, 2016 Declaration (AR 51-52), which authenticates Driscoll's Exhibit 18 (AR 54-55) which is a true and complete copy of pages 7 and 8 of OIC's Motion for Summary Judgment signed and filed on November 7, 2014 by Ms. Mandy Weeks as counsel of record for the OIC in the matter of Hearings Unit Docket No. 14-0187. At p. 7, line 25, to p. 8, line 2 thereof, ending with footnote 2, the following statements appear:

“The Insurance Code, in combination with the Washington Administrative Code (WAC 284) provide the requirements for rate filings, including rate filings for disability insurance premiums. See RCW 48.19”

after which footnote 2 appears, which footnote states::

“2. RCW 48.19.010(1) originally excluded disability insurance from this section; however RCW 48.19.010(2) placed disability insurance within the purview of this regulatory section.”

4. As shown in Driscoll's Exhibit 20 submitted herewith (AR 60-61) as part of attached Appendix 2, in the judicial review proceedings of Hearings Unit Docket No. 14-0187 before the Spokane County Superior Court, Civil Cause No. 15-2-00920-1, the

OIC, there represented by an Assistant Attorney General, reiterated the OIC's position regarding the effect of RCW 48.19.020(2) on the provisions of RCW Ch. 48.19, by again stating in footnote 7 to the Insurance Commissioner's Response to Petition for Judicial

Review:

.” RCW 48.19.010(1) originally excluded disability insurance from this section; however RCW 48.19.010(2) placed disability insurance within the purview of this regulatory section.”

5. APPLICANT'S EXHIBIT 18 (AR 53-55) at page 8 of *OIC Staff's Motion for Summary Judgment* filed in Hearings Unit Docket No. 14-0187 also includes these judicial admissions by the OIC regarding applicable provisions of RCW Ch, 48.19:

“The Insurance Code specifies various considerations that must be taken into account in the setting of rates, including past and prospective loss experience, hazards, profitability, and expenses. *See id.* Washington's insurance statutes and rules also provide detailed guidelines for determining whether a rate filing is justified, excessive, inadequate or discriminatory. **See RCW 48.19.030, WAC 284.24.065 and WAC 284-24-060.** Moreover, the Code directs the Insurance Commissioner to conduct a review of the rate filings and requires insurers to submit extensive documentation in support of their rate filing, such as loss information and other pertinent information. **See RCW 48.19.040.** The Insurance Commissioner undertakes a review of a rate filing as soon as reasonably possible. **See RCW 48.19.060 and RCW 48.19.100.** The Insurance Commissioner can approve or disapprove a rate filing. **See RCW 48.19.060, RCW 48.19.100.**” (Emphasis added)

6. Those formal, deliberate admissions in the pleadings authored by counsel for the OIC dispensed with the need for

further proof in those proceedings that the enactment of RCW 48.19.010(2) placed disability insurance within the purview of all provisions of Ch.48 19 RCW. Those admissions constitute *judicial admissions* that are binding on the OIC, which is not permitted to dispute them. *Washington Practice Series*, Volume 5B. Evidence Law and Practice, Sixth Edition, pg. 556, Section 801.54; McCormick On Evidence, Seventh Edition, Section 257, Pg. 577: "*Subject to the qualifications developed later in this section, pleadings are generally usable against the pleader. As noted earlier, if they are the effective pleadings in the case, they have the standing of judicial admissions, \* \* \* A party's pleadings in one case may generally be used as an evidentiary admission in other litigation.*" In issuing the 6/15/2016 Order, the P/O did not reference those judicial admissions or the credibility of the OIC's evidence seeking to prove that RCW 48.19.040 and RCW 48.19.030 do not apply here. See RCW 34.05.461(3) and its requirements for findings based on the credibility of evidence.

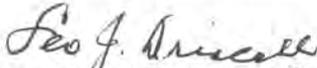
I. **Driscoll has standing to seek judicial review of the P/O's 6/15/2016 Order pursuant to RCW 34.05.530 because the three conditions for Driscoll's standing to do so as specified by that statute are present and satisfied.**

A. Driscoll has standing to seek judicial review of the P/O's 6/15/2016 Order pursuant to RCW 34.05.530 because the three conditions for Driscoll's standing to do so as specified by that statute are present and satisfied. The first condition for standing listed in RCW 34.05.530 is that "*The agency action has prejudiced that person.*" The term "prejudiced" is not defined by RCW 34.05.510 or by RCW 34.05.010. However, an ordinary dictionary, *Webster's New Collegiate Dictionary* © 1977, defines the term "prejudiced" as follows: "to injure or damage by some judgment or action (as in a case of law)".

B. The second condition of RCW 34.05.530 is present because the asserted interests of the person seeking judicial review (Driscoll) "*are among those that the agency was required to consider when it engaged in the agency action challenged*", as asserted and argued at ¶B at pages 18-20 of this Brief.

C. The third standing condition of RCW 34.05.530 is that " *A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.*" That condition is present because a judgment in these proceedings by this court granting relief to Driscoll would likely prospectively terminate the ongoing harm to Driscoll and his spouse from the order of the OIC that approved the rate change application that was not accompanied by information required by RCW 48.19.040(1) and (2) and by RCW and RCW 48.19.030(3) and RCW 48.19.030 and (3)(a) thereof.

Respectfully submitted December 15, 2017

  
Leo J. Driscoll, Appellant (pro se)  
4511 E. North Glenngrae Ln.  
Spokane, WA 99223

APPENDIX 1 TO APPELLANT'S BRIEF (first referenced at p. 14 of that Brief) consists of Driscoll's e-mail inquiry for the Presiding Officer dated July 16, 2016 (AR23) and the e-mail response thereto by the Presiding Officer dated July 18, 2016 (AR 22), copies of which are attached.

**From:** Leo Driscoll  
**To:** OIC Hearings Unit  
**Cc:** Weeks, Mandy (OIC)  
**Subject:** Re: Leo J. Driscoll, 16-0002, Order on Petition for Reconsideration  
**Date:** Saturday, July 16, 2016 11:11:13 AM

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Ms. Seabourne-Taylor:

I have received the electronic copy of the Order on Petition for Reconsideration that you sent yesterday, July 15, 2016.

Paragraph 1 of the Order includes the statement that "On June 28, 2016, Leo Driscoll ("Driscoll") timely filed with the OIC Hearings Unit "Applicant's Petition for Reconsideration of the [Order] ("Petition")", with a footnote reference to RCW 34.05.470(1).

I ask that you forward a copy of this e-mail to Presiding Officer Pardee with this request that he inform me and Ms. Mandy Weeks as to the reasons why he concluded that the Petition was timely filed on June 28, 2016, as stated in his July 15, 2016 Order.

The "Order on Cross Motions for Summary Judgment" was issued June 15, 2016 with a notation on page 14 thereof that a request for reconsideration of that order could be made "within 10 days of the date of service (date of mailing) of this order". The date of mailing of the Order shown by post-mark on the envelope received by me containing the hard copy of the Order is June 16, 2016. Ten days thereafter brought the deadline-due date for filing the request for reconsideration to June 27 (not counting the immediately preceding Saturday and Sunday).

You will recall that I obtained permission to e-mail the Petition for Reconsideration to the Hearings Unit in PDF form with same day mailing in hard form via USPS. On June 27, 2016, I caused the nearby UPS Store to send the e-mail with copy of the petition in PDF form to the Hearings Unit, to Mandy Weeks, to Christine Tribe, and to me. However, you advised me that the E-mail with the PDF form of the Petition was not received by the Hearings Unit on June 27.

RCW 34.05.470(1) states that a petition for reconsideration of final order may be made "Within ten days of the service of a final order". WAC 10-08-110(1)(a) states that papers to be filed with the presiding officer "shall be deemed filed upon actual receipt during office hours at the office of the presiding officer."

I concluded that my Petition for Reconsideration had not been timely received and filed. Accordingly, on JULY 11, 2016, I filed my Petition for Judicial Review of the Final Order and Other Agency Action in the Spokane County Superior Court, Civil Cause No. 16-2-02598-1. I have caused the Insurance Commissioner to be served with a copy of that Petition and have mailed notice to the Attorney General.

I will greatly appreciate Presiding Officer Pardee's input in response to this inquiry. If I misunderstand the facts I need to face-up to that reality.

Respectfully, Leo Driscoll

Page 50-A of Brief

**From:** Seabourne-Taylor, Dorothy (OIC)  
**To:** "Leo Driscoll"; Weeks, Mandy (OIC)  
**Subject:** FW: Driscoll Reconsideration  
**Date:** Monday, July 18, 2016 8:41:44 AM

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Below is Presiding Officer Pardee's response to Mr. Driscoll's e-mail dated July 16, 2016 regarding the timeliness of the filing of the Petition for Reconsideration.



**OFFICE of the  
INSURANCE  
COMMISSIONER**  
WASHINGTON STATE

**Dorothy Seabourne-Taylor**  
*Paralegal, Hearings Unit*  
*Washington State Office of the Insurance Commissioner*  
360.725.7002 | [DorothyS@oic.wa.gov](mailto:DorothyS@oic.wa.gov)

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**From:** Pardee, Bill (OIC)  
**Sent:** Monday, July 18, 2016 8:37 AM  
**To:** Seabourne-Taylor, Dorothy (OIC) <[DorothyS@oic.wa.gov](mailto:DorothyS@oic.wa.gov)>  
**Subject:** Driscoll Reconsideration

WAC 10-08-200(17) allows me to waive any requirement of the WAC 10-08 rules unless a party shows that it would be prejudiced by such a waiver. OIC never asserted any prejudice, but why would they, they timely received Mr. Driscoll's petition for reconsideration. Again, I treated Mr. Driscoll's petition as timely, and issued an order concerning it for that reason.



**OFFICE of the  
INSURANCE  
COMMISSIONER**  
WASHINGTON STATE

**William G. Pardee**  
*Presiding Officer*  
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*Page 50-B of Brief*

APPENDIX 2 TO APPELLANT'S BRIEF, first referenced at p.45 of that Brief, consists of Driscoll's Declaration of May 19.2016 (AR 51-52), Applicant's Exhibit 18 (AR 53-55), and Applicant's Exhibit 20 (AR 60-61), as referenced in that Declaration, copies of which are attached.

APPLICANT'S EXHIBIT **18**

Hearings Unit Case No. 16-0002

Office of the Insurance Commissioner

*Page 51 - B of Brief*

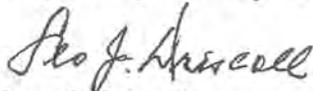
Leo J. Driscoll's May 19, 2016 Declaration

I, Leo J. Driscoll, declare and state under penalty of perjury of the laws of the state of Washington that the following statements are true and correct:

1. I am of adult age and reside at 4511 E. North Glenngrae Ln., Spokane, WA 99223.
2. All matters stated in this declaration are based and made on my own personal knowledge.
3. I am the applicant in the administrative adjudicative proceedings pending before the Washington Insurance Commissioner, Hearings Unit Docket No. ~~14~~16-0002 which seeks a hearing as to the legality of the OIC's approval of a 22.69% request for increase in premiums of the long-term care insurance (LTCI) policy forms series LTC,02, LTC,03, and LTC,04 policy forms, the latter of which include LTCI policies issued myself and my spouse Mary T, Driscoll . JD
4. I was also the applicant in the administrative adjudicative proceedings before the Washington State Insurance Commissioner, Hearing Unit Docket No. 14-0187 which sought a hearing as to the legality of the OIC's approval of a 41% request for increase in the same policy forms. Orders issued in that proceeding are the subject of my petition for judicial review filed in the Spokane County Superior Court, Civil Cause No. 15-02-00920-1. Orders issued in that forum are now on appeal to Division III of the Washington Court of Appeals, Case No. 340881.
5. Applicant's Exhibit 18 which is being filed herewith in the OIC Hearings Unit Docket No. 16-0002 proceeding is a true and complete copy of pages 7 and 8 of OIC's Motion for Summary Judgment dated November 7, 2014 served on me in the matter of Hearings Unit Docket No. 14-0187
6. Applicant's Exhibit 19-a which is being filed herewith in the OIC Hearings Unit Docket No. 16-0002 proceeding is a true and complete copy of the page of my application filed by me in the matter of Hearings Unit Docket No. 14-0187 which sets forth paragraph 1.34 of that application.
7. Applicant's Exhibit 19-b which is being filed herewith in the OIC Hearings Unit Docket No. 16-0002 proceeding is a true and complete copy of page 3 of the November 7, 2014 Declaration of OIC actuary Scott Fitzgerald, paragraph 18 of which addresses paragraph 1.34 of my application filed the matter of Hearings Unit Docket No. 14-0187 and served upon me in that proceeding.

8. Applicant's Exhibit 20 which is being filed herewith in the OIC Hearings Unit Docket No. 16-0002 proceeding is a true and complete copy of page 5 of the INSURANCE COMMISSIONER'S RESPONSE TO PETITION FOR JUDICIAL REVIEW served upon me in Spokane County Superior Court Civil Cause No. 15-02-00920-1 proceedings, lines 1-3 and footnote 7 of which page 5 address the provisions of RCW 48.19.010(1) and (2).

Signed by me May 19, 2016 in Spokane County, Washington.



Leo J. Driscoll

1 needed to evaluate the rate filing. *Id.* When all information is reviewed, the Insurance  
2 Commissioner disapproves the rate filing if it is excessive, inadequate or unfairly  
3 discriminatory. *See* RCW 48.19.020. Alternatively, the rate filing is approved  
4 provided it is supported by the required information and is not excessive, inadequate  
5 or unfairly discriminatory. *See* RCW 48.19.030, RCW 48.19.040, WAC 284-54-630.  
6 The Insurance Commissioner continues to try to find solutions to problems  
7 surrounding long-term care insurance, independently in the State of Washington, and  
8 nationally with the National Association of Insurance Commissioners ("NAIC").

9 In response to the growing number of premium increases in long-term care  
10 insurance, the NAIC has continued its work to determine the best practices to address  
11 the complex issues surrounding long-term care insurance. *State Insurance Regulators*  
12 *Work on Long-Term Care Insurance*, NAIC (June 11, 2013),  
13 [http://www.naic.org/Releases/2013\\_docs/state\\_insurance\\_regulators\\_work\\_long\\_term\\_care\\_insurance.htm](http://www.naic.org/Releases/2013_docs/state_insurance_regulators_work_long_term_care_insurance.htm),  
14 (Last visited Nov. 1, 2014). The NAIC is the U.S. standard-setting  
15 and regulatory support organization created and governed by the chief insurance  
16 regulators from the 50 states, District of Columbia and five U.S. territories. Through the  
17 NAIC, state regulators establish standards and best practices, conduct peer review and  
18 coordinate their regulatory oversight. In 2011, the NAIC again revised its model long-  
19 term care insurance regulation, a model law that is used by most states as a foundation to  
20 regulate long-term care insurers. *Id.* The State of Washington, as a member of the  
21 NAIC, has adopted the revised model long-term care insurance regulation. The NAIC  
22 has since continued working with state regulators to identify a way to address this  
23 national problem. *Id.*

#### 24 B. Long-Term Care Insurance Regulations

25 All insurance in Washington, including long-term care insurance is regulated  
26 under the Washington Insurance Code in Title 48 of the Washington Revised Code.  
The Insurance Code authorizes the Insurance Commissioner to "make reasonable rules  
and regulations for effectuating any provision of the code." RCW 48.02.060. The  
Insurance Code, in combination with the Washington Administrative Code (WAC

1 284), provides the requirements for rate filings, including rate filings affecting  
2 disability insurance premiums. See RCW 48.19.<sup>2</sup> Washington law defines disability  
3 insurance to include long-term care insurance. Specifically, RCW 48.11.030 defines  
4 disability insurance as "insurance against bodily injury, disablement or death by  
5 accident, against disablement resulting from sickness, and every insurance  
6 appertaining thereto including stop loss insurance." As a result, most statutes and  
7 rules pertaining to long-term care insurance fall primarily under the statutes and rules  
8 applicable to disability insurance. However, statutes and rules specific to long-term  
9 care insurance supplement the general provisions for disability insurance. See RCW  
10 48.83, RCW 48.84, WAC 284-54, and WAC 284-83.

11 The Insurance Code specifies various considerations that must be taken into  
12 account in the setting of rates, including past and prospective loss experience, hazards,  
13 profitability, and expenses. See *Id.* Washington's insurance statutes and rules also  
14 provide detailed guidelines for determining whether a rate filing is justified, excessive,  
15 inadequate or discriminatory. See RCW 48.19.030, WAC 284.24.065 and WAC 284-  
16 54-060. Moreover, the Code directs the Insurance Commissioner to conduct a review  
17 of the rate filings and requires insurers to submit extensive documentation in support  
18 of their rate filing, such as loss experience and other pertinent information. See  
19 RCW 48.19.040. The Insurance Commissioner undertakes a review of a rate filing as  
20 soon as reasonably possible. See RCW 48.19.060 and RCW 48.19.100. The  
21 Insurance Commissioner can approve or disapprove a rate filing. See RCW 48.19.060,  
22 RCW 48.19.100.

23 "Furthermore, the Code anticipates consumer involvement, and provides a  
24 mechanism for their input on rate-setting." *Blaylock v. First Am. Title Ins. Co.*, 504 F.  
25 Supp 2d 1091, 1095 (W.D. Wash. 2007). Pursuant to a written request and a  
26 reasonable fee, insurers are required to provide affected consumers "all pertinent  
information" related to the rate. See *Id.* and RCW 48.19.310. Insurers are also

<sup>2</sup> RCW 48.19.010(1) originally excluded disability insurance from this section; however RCW  
48.19.010(2) placed disability insurance within the purview of this regulatory section.

APPLICANT'S EXHIBIT **20**

Hearings Unit Case No. 16-0002

Office of the Insurance Commissioner

1 **B. Role Of The Insurance Commissioner**

2 The Insurance Code (Title 48 RCW), in combination with the Washington  
3 Administrative Code (Title 284 WAC), provides the requirements for rate filings, including  
4 rate filings affecting disability insurance premiums. See RCW 48.19.<sup>7</sup> Washington law  
5 defines disability insurance to include long-term care insurance. RCW 48.11.030. As a result,  
6 most statutes and rules pertaining to long-term care insurance fall primarily under the statutes  
7 and rules applicable to disability insurance. However, statutes and rules specific to long-term  
8 care insurance supplement the general provisions for disability insurance. See RCW 48.83,  
9 RCW 48.84, WAC 284-54, and WAC 284-83.

10 The Insurance Code specifies various considerations that must be taken into account in  
11 the setting of rates, including past and prospective loss experience, hazards, profitability, and  
12 expenses. See *id.* Washington's insurance statutes and rules also provide detailed guidelines  
13 for determining whether a rate filing is justified, excessive, inadequate or discriminatory. See  
14 RCW 48.19.030, WAC 284-24-065, and WAC 284-54-600. Moreover, the Code directs the  
15 Insurance Commissioner to conduct a review of the rate filings and requires insurers to submit  
16 extensive documentation in support of their rate filing, such as loss experience and other  
17 pertinent information. See RCW 48.19.040. The Insurance Commissioner undertakes a review  
18 of a rate filing as soon as reasonably possible. See RCW 48.19.060 and RCW 48.19.100. The  
19 Insurance Commissioner can approve or disapprove a rate filing. See RCW 48.19.060,  
20 RCW 48.19.100.

21 Because of concerns about long-term care insurance premium rate increases, its affect  
22 on consumers, and the future problems for policyholders if there are not enough funds to cover  
23 benefits, all rate filings with premium rate increases are submitted with evidence supporting  
24 the filing. See RCW 48.19.030, RCW 48.19.040, WAC 284-54-630. All of these materials are

25 <sup>7</sup> RCW 48.19.010(1) originally excluded disability insurance from this section; however  
26 RCW 48.19.010(2) placed disability insurance within the purview of this regulatory section.

FILED

DEC 15 2017

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COURT OF APPEALS FOR THE STATE OF WASHINGTON  
Division III

LEO J. DRISCOLL,	)	<b>Case No. 354261</b>
Appellant,	)	
	)	
v.	)	Declaration of Mailing
	)	
WASHINGTON STATE INSURANCE	)	
COMMISSIONER,	)	
Respondent.	)	

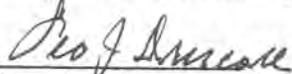
Leo J. Driscoll declares under penalty of perjury of the laws of the State of Washington:

That I am the appellant in the above captioned matter: That on December 15, 2017, I mailed in the United States Postal Service mail, with postage prepaid for first-class mail, in an envelope addressed to the following listed person at the mailing address listed below, a true copy of the Amended Appellant's Brief. the original of which will be filed today in this proceeding:

Sharon M. James  
Assistant Attorney General,  
1125 Washington Street. SE  
P.O. Box 40100, Olympia, WA 98504-0100

[Sharon M. James is now the attorney of record representing the Washington State Insurance Commissioner, respondent in such matter].

Signed and dated by me in Spokane County, Washington December 15, 2017.

  
Leo J. Driscoll, 4511 E. North Glenngrae Ln., Spokane, WA 99223