

FILED  
Court of Appeals  
Division III  
State of Washington  
12/20/2017 11:43 AM

NO. 354261

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

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LEO J. DRISCOLL,

Appellant,

v.

WASHINGTON STATE INSURANCE COMMISSIONER,

Respondent.

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**RESPONDENT'S BRIEF**

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## I. INTRODUCTION

The Insurance Code provides a remedy for anyone “aggrieved” by a final decision of the Insurance Commissioner (Commissioner). RCW 48.04.010. Mr. Driscoll alleges that the Commissioner used a method of actuarial analysis that he believes was erroneous; however, Mr. Driscoll cites to no actuarial evidence or expertise and he does not show that his premium increase would be lower if the Commissioner used his proffered method of analyzing MetLife’s rate filing. Mr. Driscoll’s general accusations that the highly specialized and technical review of MetLife’s rate filing was not properly conducted, particularly when he does not allege that the outcome puts him in a worse position, is not sufficient to create a legal grievance. As a result, the Commissioner properly dismissed his complaint for failing to demonstrate that he was “aggrieved” under the Insurance Code. RCW 48.04.010.

Mr. Driscoll cannot claim legal harm from the fact that he is now being charged a higher premium because he contractually agreed to allow MetLife to raise his premiums as often as annually. He has not alleged that the premium increase he experienced was based on an impermissible health factor, was not fairly applied to everyone in his class of policyholders, or resulted in some other violation of his policy. Moreover, the methodology used to establish the rate likely resulted in lower

premium increases than MetLife would have been entitled to if Mr. Driscoll's proffered method of calculating the rates was used. Because Mr. Driscoll has no legal right to static premiums, he cannot claim a constitutional violation when his premiums are raised.

Moreover, Mr. Driscoll's assertion that the Commissioner erred in dismissing his appeal without reaching the merits of his claims is incorrect. The Commissioner, through a presiding officer, correctly refused to reach the merits of Mr. Driscoll's claims because those claims were resolved on other grounds and such review was unnecessary. Reaching the merits here would also usurp the role of the Insurance Commissioner and impair the rights of the insurer that Mr. Driscoll chose not to make a party to this action.

Finally, the Commissioner properly determined that under the facts of this case, the filed rate doctrine bars a collateral attack on the Commissioner's actuarial review and approval of the rate increase submitted by MetLife. For these reasons, this Court should affirm the Commissioner's Final Order.

## **II. STATEMENT OF THE ISSUES**

1. Does Mr. Driscoll lack standing under RCW 48.04.010 and RCW 34.05.530 to challenge a rate filing approval when he has no

property interest in a static premium rate and has not alleged an actual harm as a result of the approved premium increase?

2. Are there any constitutional due process concerns when the Insurance Code creates in policyholders no property right to future static rates in their long-term care premiums and the rate approval was not arbitrary or capricious or in contravention of any statutory or constitutional requirements?

3. Did the Commissioner address all necessary issues when the appeal can be resolved without reaching the merits?

4. Even if he has standing, should this Court decline Mr. Driscoll's invitation to address the merits of his claims when the Commissioner has not issued a final decision on the merits for review, the affected insurer was not made a party to the case, and the Court would need to apply its own actuarial analysis, review, and judgment to determine whether the rate approval was actuarially justified?

### **III. STATEMENT OF THE CASE**

#### **A. The Insurance Commissioner's Review of Long Term Care Rates**

Like most insurance products, long-term care insurance is heavily regulated by the Insurance Commissioner. *See, e.g.*, RCW 48.83 & 48.84; WAC 284-54, 284-58, 284-60 & 284-83. Long-term care insurance is

defined as an “insurance policy or benefit contract primarily advertised, marketed, offered, or designed to provide coverage or services for either institutional or community-based convalescent, custodial, chronic, or terminally ill care.” RCW 48.84.020. Statutory provisions in the Insurance Code that relate to long-term care insurance policies are found in RCW 48.20, RCW 48.83 and 48.84. Because the definition of disability insurance includes “insurance against bodily injury” and “disablement” by accident or resulting from sickness, that definition is also seen as including long-term care insurance. RCW 48.11.030; *see also* AR 1102 (the Commissioner’s actuary did not apply RCW 48.19.030 or .040 because the product is a disability insurance and those provisions do not apply). As a result, most statutes and rules pertaining to disability insurance also apply to long-term care insurance. However, statutes and rules specific to long-term care insurance supplement, and supersede, the general provisions for disability insurance. *See* RCW 48.83, RCW 48.84, WAC 284-54, and WAC 284-83.

Many factors affect premiums for this type of insurance, including actuarial assumptions such as lapse, mortality, morbidity, and projected returns on investment. U.S. Gov’t Accountability Off., GAO-11-630, *Long-Term Care Insurance: Carrier Interest in the Federal Program, Changes to Its Actuarial Assumptions, And OPM Oversight* 9 (July 2011),

<http://www.gao.gov/assets/330/322553.pdf> (hereinafter GAO Report). Lapse reflects the expected portion of policyholders who will drop their coverage each year. *Id.* at 9. Mortality is based upon the life expectancies of the enrollee population by age. *Id.* at 10. Morbidity is based upon the “amount of claims costs expected for enrollees, by age, and accounts for the portion of enrollees of each age who file a claim and the duration of those claims.” *Id.* The return on investment assumption is a reflection of the expected interest rate that will be earned on investments. *Id.* All of these actuarial assumptions are projections about the future and may change with time as carriers gain more claims experience. *Id.*

Before a carrier can sell long-term care insurance products to consumers in Washington, the insurer must submit “its manual of classification, manual of rules and rates, and any modifications thereof” to the Commissioner for his review. RCW 48.19.010(2); *see also* WAC 284-54-630; WAC 284-60-040. Because long-term care premium rates are based on many evolving factors, all rate filings with premium rate increases must be submitted with evidence supporting the filing. *See* WAC 284-54-630, WAC 284-83-040; *see also* *Long-term Care Insurance Rate Increases*, Office of the Insurance Commissioner, <https://www.insurance.wa.gov/long-term-care-insurance-rate-increases>. The Commissioner’s staff actuaries review all of these

materials and can request further information to evaluate the rate filing. *Id.*; AR 1101-1102. Numerous factors are taken into consideration as part of this review, including the carrier's past and prospective loss experience, hazards, profitability, and expenses. *See* WAC 284-60-080; AR 1104. After reviewing all of the information, the Commissioner disapproves the rate filing if it is not actuarially justified or not in compliance with the statutes and WACs. AR 1102.

Historically, carriers have struggled to accurately set long-term care insurance rates at a level that covers the cost of providing long-term care benefits and that ensures sufficient reserves are maintained for future claims.<sup>1</sup> As a result, there has been a significant amount of churn in the long-term care insurance market as carriers have left the market,

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<sup>1</sup> *See* GAO Report 2, 9; *see also* Dawn Helwig, *The Cost Of Waiting: Predicting Long-Term Care Rate Increases*, American Academy Of Actuaries, Contingencies, 22 (Nov/Dec., 2014), (hereinafter Actuarial Article). Long-term care insurance is a relatively new insurance product and it can take several decades before enrollees submit claims and for carriers to obtain data on how their enrollees use their policies. *Id.*; *see also* Kimberly Lankford, *Long-Term-Care Rate Hikes Loom*, Kiplinger (January 2011), <https://www.kiplinger.com/article/insurance/T036-C000-S002-long-term-care-rate-hikes-loom.html> (hereinafter Kiplinger Article). Many carriers have lacked and may continue to lack sufficient data to accurately estimate the revenue needed to cover the costs of these policies. GAO Report at 10-11; *see also* Actuarial Article. This has led to changes in the marketplace; many insurers had to leave the marketplace or consolidate to form larger companies, and most of the remaining companies had to raise premiums to account for initial actuarial assumptions that did not adequately cover current projected costs. GAO Report at 11; *see also* Chad Terhune, *CalPERS Plans 85% Rate Hike for Long-Term-Care Insurance*, Los Angeles Times (February 21, 2013), <http://articles.latimes.com/2013/feb/21/business/la-fi-calpers-longterm-care-20130222>, and Howard Gleckman, *What's Killing The Long-Term Care Insurance Industry*, Forbes, (August 29, 2012), <http://howardgleckman.com/2012/08/whats-killing-the-long-term-care-insurance-industry/>.

consolidated with other carriers with healthier reserves, or attempted to significantly raise premiums.<sup>2</sup> To provide some parameters in dealing with the rapid changes specific to the long-term care insurance market, the Legislature has adopted the National Association of Insurance Commissioners (NAIC) model statutes for long-term care insurance, and has directed the Commissioner to adopt additional regulations that take the NAIC model regulations into account. *See* Final Bill Report, HB 2666, 60th Leg., Reg. Sess. (Wash. 2008); Final Bill Report, SB 5216, 63rd Leg., Reg. Sess. (Wash. 2013).

**B. MetLife's Rate Filings for Mr. Driscoll's Policy**

In 2002, the Driscolls purchased long-term care insurance policies, which were assumed by Metropolitan Life Insurance Company (MetLife) in 2004. AR 1669, 566. Mr. Driscoll's policy provided for possible premium increases on the anniversary date of the policy. AR 1128 (see also discussion *infra* at page 19). After assuming the policies, MetLife requested the first ever rate increase on those policies in 2011. AR 1095. Mr. Driscoll challenged that rate increase in 2014. *Driscoll v. Wash. Ins. Comm'r*, No. 340881, slip op. at 2 (Wash. COA Div. III Dec. 14, 2017) (unpublished opinion; per GR 14.1 it has no precedential value, is not binding on any court and is cited only for any persuasive

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<sup>2</sup> *See id.*

value this Court deems appropriate) (*Driscoll I*). The Commissioner dismissed the appeal as untimely and the Superior Court affirmed that dismissal. *Id.* at 3. Mr. Driscoll further appealed to this Court and this Court recently issued an unpublished slip opinion affirming the dismissal of Mr. Driscoll's appeal on the grounds that it was untimely.<sup>3</sup>

In August 2014, MetLife submitted a second set of rate filings to the Commissioner that sought to increase premium rates for three blocks of long-term care policies, including the policies purchased by the Driscolls, to ensure coverage of all future claims based on the anticipated loss ratios for these policies. AR 1102-03. This second rate filing is the subject of this appeal.

MetLife submitted the required documents to support its 2014 rate increase request and the Commissioner's actuary undertook a lengthy review of those documents. AR 521-824; 1102. The product line at issue here is a closed block of insurance, which means that no new policies can be sold from the line. AR 1103. If no new policies can be sold, it follows that the insurer would not be able to make up for reserve shortfalls by selling new policies to consumers who may not need the benefit for many

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<sup>3</sup> This Court did not address Mr. Driscoll's standing in its opinion in *Driscoll I*. The only reference related to the issue of standing is the statement: "To the extent Mr. Driscoll was aggrieved, it was by the rate increase approved through the OIC's 2011 order." *Id.* at 5. However, there is no finding or analysis as to whether Mr. Driscoll was in fact aggrieved or in fact had established standing.

years. Once current policyholders are eligible for benefits, they no longer have to pay premiums, which means that the cost of claims will continue to rise while no new premiums are coming in. *See* AR 1146. In this circumstance, a rate increase may be the only way an insurer can remain solvent, and solvency is important to ensure that benefits are available to policyholders when they need them. *See* Kiplinger Article; GAO Report at 10.

MetLife's 2014 rate filings provided detailed actuarial information to support its rate increase. AR 1102-04; AR 522-824. The actuarial reports showed that if the Commissioner did not approve MetLife's rate filing, the policies would be operating at well over a 100% loss ratio,<sup>4</sup> making the policies insolvent in the future. *See* AR 679. Even with this change in premiums, the products still projected a 98.4% loss ratio. AR 680, 1104. Operating at such a high loss ratio raised concerns that the premiums would not be sufficient to maintain reserves, as required by WAC 284-83-230(6). AR 1105. However, the Commissioner approved this rate because concerns regarding the effect of premium changes on

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<sup>4</sup> A loss-ratio is "the incurred claims plus or minus the increase or decrease in reserves as a percentage of the earned premiums, or the projected incurred claims plus or minus the increase or decrease in projected reserves as a percentage of projected earned premiums, as defined by the commissioner." RCW 48.84.020(2).

policyholders outweighed the potential concerns regarding loss ratio. AR 1105.

The Insurance Commissioner's actuary, Scott Fitzpatrick, who specializes in long-term care insurance rate filings, reviewed MetLife's 2014 rate filings and supporting materials. AR 1101-1105. These rate filings and supporting materials were no different in form or substance from any other typical rate filing. AR 1104.

Actuarial and insurance industry standards require that for loss ratios to be statistically credible there must be at least 1,082 active claims—i.e., claims being processed at the time of the filing—in the block of insurance. AR 1104. The product lines here totaled only 873 policies sold in the State of Washington, and only 34,910 nationwide. AR 1104. Only a small number of those policies would have been "active" at the time of the rate filing. AR 1104. Thus, using only Washington experience would not have been actuarially credible. As he did with the 2011 rate filing, the Commissioner accepted MetLife's national experience as one piece of the justification for this rate increase, because it was the only experience that was actuarially credible. AR 1103-04.

The Commissioner spent a significant amount of time diligently reviewing MetLife's August 2014 rate filings and the actuarial information contained in these rate filings. *See* AR 1102-1105;

*see also* 522-825. The Commissioner also demanded additional information from MetLife to support the need for the rate increase. *See* AR 527. MetLife's rate filings were approved in July 2015. AR 1105.

After receiving notice of the rate increase, Mr. Driscoll timely filed a demand for hearing with the Commissioner. AR 1655-1669. On summary judgment, the Commissioner, through his appointed presiding officer, issued a final order dismissing Mr. Driscoll's demand for hearing, finding that Mr. Driscoll lacked standing and his claims were barred by the filed rate doctrine. AR 07-21. Mr. Driscoll filed a petition for reconsideration, which the Commissioner denied. AR 01-05. Mr. Driscoll then appealed to the Spokane County Superior Court, which affirmed the Commissioner's dismissal because Mr. Driscoll lacked standing and the filed rate doctrine barred his claims. CP 133-35. This appeal followed. Mr. Driscoll seeks to have MetLife's rate filings disapproved in this appeal; however, he has not served or named MetLife as a party to this action.

#### **IV. STANDARD OF REVIEW**

Under the Administrative Procedure Act (APA), "[t]he burden of demonstrating the invalidity of agency action is on the party asserting invalidity." RCW 34.05.570(1)(a). Generally, questions of fact are reviewed for substantial evidence. RCW 34.05.570(3)(e). However, "where the original administrative decision was on summary judgment,

the reviewing court must overlay the APA standard of review with the summary judgment standard.” *Verizon Northwest, Inc. v. Wash. Employment Sec. Dep’t.*, 164 Wn.2d 909, 916, 194 P.3d 255 (2008). This requires “viewing disputed facts in the light most favorable to the non-moving party while considering whether the moving party is entitled to judgment as a matter of law if based on undisputed facts.” *Alpine Lakes Protection Soc’y v. Wash. State Dep’t of Nat. Res.*, 102 Wn.App.1, 14, 979 P.2d 929 (1999). Therefore, the facts are evaluated de novo. *Verizon*, 164 Wn.2d at 916.

In reviewing an agency’s legal conclusions for error, review is also de novo, but the reviewing court will accord “substantial weight to the agency’s interpretation of the law it administers—especially when the issue falls within the agency’s expertise.” *Kelly v. State*, 144 Wn. App. 91, 96, 181 P.3d 871 (2008). Thus, “although a commissioner cannot bind the courts, the court appropriately defers to a commissioner’s interpretation of insurance statutes and rules.” *Credit Gen. Ins. Co. v. Zewdu*, 82 Wn. App. 620, 627, 919 P.2d 93 (1996).

Discretionary decisions of the agency are reviewed under the arbitrary and capricious standard. The arbitrary and capricious standard is very narrow and the one asserting it “must carry a heavy burden.”

*Pierce Cty. Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). Arbitrary and capricious means “action that is willful and unreasoning and taken without regard to the attending facts or circumstances.” *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 589, 90 P.3d 659 (2004) (citations omitted). Where there is room for two opinions, a reviewing court will not find an agency action to be arbitrary or capricious even though it may believe the agency opinion is erroneous. *Id.* A court “shall not itself undertake to exercise the discretion that the legislature has placed in the agency.” *Id.*; RCW 34.05.574(1).

## V. ARGUMENT

After an extensive, nearly yearlong review of MetLife’s 2014 rate filing, the Insurance Commissioner approved the rate filing. AR 521-824, 1102-1105. Mr. Driscoll challenges that approval and asks this Court to stand in for the Commissioner and determine for itself whether the approved rate filing is reasonable. The Court should decline to do so.

The Commissioner, through a presiding officer, properly dismissed Mr. Driscoll’s attempt to overturn that approval because Mr. Driscoll failed to allege, let alone demonstrate, how he was “aggrieved” by the rate approval, as required by RCW 48.04.010. Mr. Driscoll also fails to show that he has standing under RCW 34.05.530 to demand judicial review of

the Commissioner's Final Order because he cannot show how he is harmed or that a favorable decision of this Court would alleviate any of his perceived harm. Further, because Mr. Driscoll has no property interest in a static premium rate and there was no error in the Commissioner's final order, there are no constitutional due process concerns that would give Mr. Driscoll standing.

Even if this Court disagrees with the Commissioner's final order and finds that Mr. Driscoll has standing to seek to overturn the Commissioner's approval of MetLife's rate filing, the Court should not reach the merits of his claims because the Commissioner did not reach the merits of Mr. Driscoll's underlying claims. MetLife is also not a party in this appeal and thus would not have an opportunity to be heard on a matter that would directly affect its interests. And despite Mr. Driscoll's claim that he merely seeks review of the process and not the rate itself, Mr. Driscoll's claims are not incidental to agency-approved rates. Therefore, the filed rate doctrine bars that review.

Mr. Driscoll alleges many errors in the Commissioner's decision, but fails to show that the Commissioner's Order was based on an actual error of law, arbitrary and capricious, unconstitutional, procedurally unsound, or any of the limited grounds for review under RCW 34.05.570. Mr. Driscoll also cannot show that he has been substantially prejudiced by

the rate approval, as required by RCW 34.05.570(1)(d), or that any favorable ruling by this Court would alleviate his perceived harm. Mr. Driscoll fails to meet his burden and the Commissioner's final order should be affirmed.

**A. Mr. Driscoll Does Not Have Standing To Appeal the Commissioner's Approval of the Filed Rate Because He Is Not Aggrieved by That Decision**

RCW 48.04.010 provides that a hearing is only required when a person is "aggrieved by any act, threatened act, or failure of the commissioner to act." RCW 48.04.010(1); *see also* WAC 284-02-070(1)(b). RCW 48.04.010(2) further provides that the demand for hearing "shall specify in what respects such a person is so aggrieved."

Here, Mr. Driscoll has failed to allege or demonstrate how he has been harmed by the Commissioner's approval of MetLife's rate filing. Similarly, under RCW 34.05.530, judicial review is only available to those who have been prejudiced by the actions of an administrative agency. Mr. Driscoll has no legal right to static premiums. Nor has he alleged that the premium increase approved by the Commissioner would have been lower but for the Commissioner's acceptance of national experience data. *See* App. Br. 18-20. Conversely, the evidence indicates that had the Commissioner used only the state-based data, the result would have been

an even larger premium increase. *See* AR 1104, 471-494. Because the Commissioner's actuarial judgment in approving rates likely benefited Mr. Driscoll, and because he has failed to allege or demonstrate otherwise, Mr. Driscoll's petitions were properly dismissed for lack of standing.

**1. Neither the Insurance Code nor the APA Create Independent Standing for Policyholders To Challenge Rate Filing Approvals Without a Showing of Actual Harm**

The Insurance Code does not define the term "aggrieved." Neither do the rules governing hearings before the Insurance Commissioner. WAC 284-02-070. Because the term has a distinct legal meaning, turning to the definition contained in Black's Law Dictionary is appropriate. *See, e.g., Kitsap Cty. v. Allstate Ins. Co.*, 136 Wn.2d 567, 586-87, 964 P.2d 1173 (1998) (using Black's Law Dictionary for definition of "wrongful entry"); *Whidbey Gen. Hosp. v. State*, 143 Wn. App. 620, 628-29, 180 P.3d 796 (2008) (turning to Black's for definition of "employee benefit plan"). Black's Law Dictionary defines "aggrieved" as "having legal rights that are adversely affected; having been harmed by an infringement of legal rights." Black's Law Dictionary 73 (8th ed. 2004) (hereinafter Black's).<sup>5</sup>

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<sup>5</sup> Similarly, *Webster's Third New International Dictionary* 41 (2002) also includes "suffering from an infringement or denial of legal rights" as one of the definitions of "aggrieved."

The insurer is the party that would most obviously be potentially aggrieved by the Commissioner's decision on a rate filing because its rights are being determined and could be directly adversely affected by the decision. While it is possible that a particular rate approval will result in particularized harm to a group or individual policyholder—for example, a policyholder may have a cause of action if the insurer engaged in unfair discriminatory practices when setting the rates (*see, e.g.*, WAC 284-54-620)—Mr. Driscoll has not alleged those circumstances here.

In addition, it is possible that a rating approval may be contrary to the terms of a particular contract; for example, a consumer could purchase additional riders to their long-term care insurance contracts to prevent future premium increases, or to limit future premium increases. However, those possibilities are not what Mr. Driscoll has alleged. Mr. Driscoll instead alleges that the Commissioner's actuarial methodology was wrong. *See* App. Br. 27-28. He has not alleged that the result of that methodology is a higher premium than he should be charged. *Id.* Mr. Driscoll failed to “specify in what respects [he] is so aggrieved” by the Commissioner's approval, and thus has failed to demonstrate standing under RCW 48.04.010.

The APA supports this reading. RCW 34.05.010(1) defines “adjudicative proceeding” as including “all cases of licensing and rate making in which an application for a license or rate change is denied.” RCW 34.05.422 further provides that “[a]pplications for rate changes *may*, in the agency’s discretion, be conducted as adjudicative proceedings” while “review of denials of applications for licenses or rate changes *must* be conducted as adjudicative proceedings.” RCW 34.05.422(1) (emphasis added). Thus, in the case of a rate-making denial, the applicant is expressly entitled to an adjudicative proceeding, while the APA does not require an adjudicative proceeding in the context of a rate approval.

Mr. Driscoll contends that because RCW 34.05.010(1) states that adjudicative proceedings also include cases in which “the granting of an application is contested by a person having standing to contest under the law,” he has standing to pursue this appeal. App. Br. at 18. However, as discussed above, under RCW 34.05.422, any such review is discretionary, not mandatory. In any event, Mr. Driscoll does not have such standing because he cannot show a “legal right” that has been “adversely affected” by the Commissioner’s rate approval

**2. The Commissioner's Rate Approval Did Not Harm Any Legal Right or Property Interest of Mr. Driscoll's**

Mr. Driscoll has no legal rights that were adversely impacted by the Commissioner's approval of MetLife's rate filing. Therefore, he is not an aggrieved party. Because long-term care insurance is a year-to-year contract that renews on its yearly renewal date, Mr. Driscoll has no legal right to a continued static rate. Mr. Driscoll's own contract contemplates premium increases on the anniversary dates of the policy. *See* AR 1128.

His long-term care insurance contract explicitly provides:

We have a limited right to increase premiums. Your premium will not increase due to a change in Your age or health. We can increase Your premium based on Your premium class, but only if We increase the premiums for 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.

AR 1128.

Given the contractual language above, Mr. Driscoll possesses a contractual guarantee against increases during the annual term of his policy, but not a guarantee against increases for future terms. That is the type of premium increase at issue here—the premium increase notice sent to Mr. Driscoll stated that the premium increase would take place on the anniversary date of the policy, not during that current contract year.

See AR 1227-28. The notice also informed Mr. Driscoll of other options he could consider if he did not want to pay the increased premium rate. AR 1228.

Allowing any person who may elect to pay an approved rate—including any future policyholders—to litigate all rate filing approvals would open the door for constant, and potentially conflicting, litigation by persons who simply disagree with the Commissioner's decision but have sustained no actual harm to an actual legal interest. Logic dictates that this cannot have been the legislature's intent. Instead, the party whose legal rights were determined by approval of the rate filing was MetLife, not Mr. Driscoll. Pursuant to the Insurance Code and the APA, MetLife would be entitled to review of the Commissioner's decision because its legal rights were determined by the rate approval, but Mr. Driscoll would not.

**3. Mr. Driscoll Has Not Shown That He Was Adversely Affected by the Commissioner's Rate Approval**

Mr. Driscoll also cannot show how the Commissioner's decision has subjected him to actual harm. While Mr. Driscoll will likely be *affected* by the rate increase, he must show that he was *adversely* affected or *harmed* by the rate approval in order to be aggrieved. See Black's ("aggrieved" means "having legal rights that are adversely affected; having been harmed by an infringement of legal rights");

*see also Patterson v. Segale*, 171 Wn. App. 251, 253, 289 P.3d 657 (2012) (though looking at “aggrieved” under APA and not the Insurance Code, the court states that to show injury in-fact, persons must show specific and perceptible harm caused by the agency action).

This is not a case where a government entity has increased a rate or fee (*e.g.*, *Lane v. City of Seattle*, 164 Wn.2d 875, 194 P.3d 977 (2008)); rather, this rate increase is between the Mr. Driscoll and his insurer. Indeed, Mr. Driscoll does not appear to argue that he was harmed by the rate increase itself, which makes sense because an insurer may increase rates if those rates are actuarially justified and supported by the applicable statutes and WACs. AR 1101-02; *see also* WAC 284-83-090(2). And, as discussed above, Mr. Driscoll’s own contract with MetLife contemplates premium increases on the anniversary of the policy. *See* AR 1128. The rate approval did not affect Mr. Driscoll’s current policy term with MetLife at the time of the approval. Mr. Driscoll remained free to contract with his insurer or other insurers for future contract terms, or to decide

whether to renew the policy at the new rate, search for alternative coverage, or exercise non-forfeiture protection.<sup>6</sup>

Instead of alleging harm from the rate increase itself, Mr. Driscoll argues that he was harmed by what he perceives was a procedural error in the Commissioner's approval of MetLife's rate filing. *See* App. Br. at 27. But Mr. Driscoll has not alleged that the approval resulted in a higher premium than MetLife was entitled to charge or that a different actuarial method would have resulted in a lower premium. Rather, Mr. Driscoll claims that the actuarial method MetLife used did not consider sufficient information because it relied on a national loss experience as opposed to a loss experience based on Washington or states similar to Washington. App. Br. 33-34. Mr. Driscoll does not contend and has failed to demonstrate that acceptance of Washington experience would have resulted in a lower premium. Nor has he alleged or demonstrated that different information would have produced credible actuarial experience. If anything, in the state of Washington where long-term care insurance costs are typically higher than the national average, it is likely that a national loss experience resulted in a lower premium compared to the

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<sup>6</sup> Long-term care policyholders, like Mr. Driscoll, have specific protections under the Insurance Code to ensure that consumers have more options in order to retain some benefits from their prior contract terms. *See* RCW 48.83.120; WAC 284-83-125. Policyholders can choose to lessen or avoid the impact of the new premium rate by choosing to reduce coverage on the policy or not renewing the contract while retaining a level of benefits commensurate with the premiums paid. WAC 284-83-125; AR 1228.

Washington loss experience. *See* AR 471-494.<sup>7</sup> Mr. Driscoll offers no evidence regarding other states that he believes should have been used, so he also cannot show that MetLife's failure to consider the loss experience of other, unknown states resulted in a higher premium rate.

Mr. Driscoll has failed to carry his burden to show that the Commissioner's final order erred in determining that he was not aggrieved. Mr. Driscoll's rights were not determined by the order and even if they were, Mr. Driscoll has failed to demonstrate that his rights were *harmed*. Further, the rate filings did not impact Mr. Driscoll's present policy term and he remained free to contract and to choose among options presented. Thus, Mr. Driscoll has failed to demonstrate that he was adversely affected or harmed by an act of the Commissioner.

**4. Mr. Driscoll Is Also Not an Aggrieved Party Under RCW 34.05.530**

To have standing to seek judicial review of an agency decision under RCW 34.05.530, Mr. Driscoll must show that (1) the rate approval prejudiced or will likely prejudice him; (2) his "asserted interests are

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<sup>7</sup> The Genworth 2016 *Cost of Care Survey* shows costs of care by state. AR 472-491. Compare, for example, the national median monthly cost for assisted living facility care (\$3,628) with Washington's median cost (\$4,500); the national median daily costs for nursing home care (\$225 for semi-private and \$253 for private) with Washington's costs (\$265 for semi-private and \$295 for private). AR 472-72, 477-481. While adult day care daily costs are lower in Washington according to the survey, the chart on home health care costs by states reveals that Washington is one of the costliest states for these services. *See* AR 472, 481; AR 487-491.

among those that the agency was required to consider” when it approved the rate filing; and (3) a judgment in his favor “would substantially eliminate or redress the prejudice” to him caused by the rate approval. This test was derived from federal case law. *St. Joseph Hosp. & Health Care Ctr. v. Dep’t of Health*, 125 Wn.2d 733, 739, 887 P.2d 891(1995). Although the Commissioner may consider policyholders’ interests when reviewing rate filings (*see* AR 1105), being part of the zone of interests is not sufficient to confer standing. Mr. Driscoll must also establish actual harm and redressability. *Allan v. Univ. of Washington*, 140 Wn.2d 323, 326, 997 P.2d 360 (2000) (a plaintiff must satisfy all three prongs of RCW 34.05.530 in order to have standing).

Mr. Driscoll may assert that he will be affected by the rate approval—e.g., he may have higher premium rates for future policy terms if he chooses to remain with the same insurer and the same policy and benefit amounts—but this alleged harm is not sufficient to confer standing. As the *City of Burlington* court points out, while “[t]here are many people potentially affected by agency action in a complex interdependent society,” if a court were to “permit them all to seek review [it] would overburden both the courts and the agencies.” *City of Burlington v. Wash. State Liquor Control Bd.*, 187 Wn. App. 853, 863, 351 P.3d 875 (2015) (citations omitted). As discussed above, Mr.

Driscoll has failed to allege any specific harm or prejudice to his legal interests caused by the rate approval. Instead, it is likely that the use of national experience resulted in lower premiums. *See* discussion *supra* pages 22-23.

More importantly, even if Mr. Driscoll can show that he has been “specifically and perceptibly harmed by the agency action,” he must also show that “this injury will be redressed by a favorable decision by the reviewing court.” *Patterson*, 171 Wn. App. at 254. Driscoll cannot make this showing.<sup>8</sup>

Mr. Driscoll’s requested relief is not easily discernable. It appears that he wants the Court to order the Commissioner to reopen the review of the MetLife rate filing, and reevaluate the proposed filing using only Washington specific data. *See* App. Br. at 39-40. He claims he is not asking the Court to enjoin the use of the approved rate, or asking the Court to impose a lower rate, or asking the Court to prohibit a rate increase. *See id.* However, a favorable ruling by this Court would ultimately only exacerbate Mr. Driscoll’s perceived harm by leading to even higher rates or possibly insolvency of the insurance pool. *See* AR 1104-05, 679-80.

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<sup>8</sup> RCW 34.05.570(1)(d) also only allows a court to provide relief if the petitioner has been “substantially prejudiced” by the agency’s action.

And that harm would likely extend beyond Mr. Driscoll and reach all policyholders.

As disclosed in MetLife's 2014 rate filing, actuarial calculations showed that without the rate increase requested by MetLife, the policies would be operating at much greater than a 100% loss ratio, making the policies insolvent in the near future. *See* AR 679. Even with the new rate, the projected loss ratio is 98.4%, which still exceeds the 60% loss ratios contemplated in NAIC model rules adopted in WAC 284-83-230. AR 680, 1104-05. Any order that would reverse the approved rate filings would only drive the policies closer to insolvency, making it unlikely that policyholders like Mr. Driscoll could file claims against the policy in the future. It would also violate WAC 284-83-230(6), which requires that loss-ratios must provide for future reserves and must account for the maintenance of such reserves for future needs.

Mr. Driscoll fails to satisfy the requirements of RCW 34.05.530 to show that he has standing to bring this appeal. Mr. Driscoll's alleged procedural failings do not demonstrate a harm or prejudice to any legal or property right he might assert. Even if he had asserted a sufficiently concrete harm, he fails to show how a favorable ruling by this Court would redress that harm. Instead, a ruling favorable to Mr. Driscoll may

only increase the perceived harm to Mr. Driscoll and all policyholders.

Thus, Mr. Driscoll does not have standing to pursue this action.

**B. Because Mr. Driscoll Has Not Asserted a Property Interest That Has Been Impinged or an Applicable Procedure That Was Not Followed, the Commissioner's Order Approving MetLife's Rate Filing Has Not Violated Mr. Driscoll's Constitutional Due Process Rights**

Mr. Driscoll has no property interest that was harmed by the Commissioner's rate approval; therefore, this case implicates no due process concerns under the state or federal constitutions.<sup>9</sup> Mr. Driscoll cites to the due process provisions of the state and federal constitutions; however, he does not explain how he believes his due process rights were violated by the Commissioner's decision. *See* App. Br. 20, 34.<sup>10</sup> Because "naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion," this Court need not address the issue. *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992)

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<sup>9</sup> Mr. Driscoll does not contend that the state constitution's due process clause (Wash. Const. art. I, § 3) grants more due process protection than the federal constitution (U.S. Const. amend. XIV, §1). *See* App. Br. at 30. Accordingly, this brief addresses both as though they offer the same protections.

<sup>10</sup> The closest thing to an argument on this issue is the sentence on page 34 that asserts he had a right to notice and an opportunity to be heard in an administrative hearing in connection with the "erroneous approval of the unfounded rate increase request." App. Br. at 34. It appears that this is a procedural due process argument; however, because he has had notice and a hearing before the commissioner, and he does not say what process was lacking, it is also possible that he is asserting a substantive due process concern relating to what he believes is an "erroneous" decision. Because it is not clear, both potential arguments are addressed.

(citations omitted). However, even if it does, it is clear that there are no procedural or substantive due process concerns in this case.

“Procedural due process refers to the procedures that the government must follow before it deprives a person of life, liberty, or property.” *Nieshe v. Concrete Sch. Dist.*, 129 Wn. App. 632, 640, 127 P.3d 713 (2005). “A protected property interest exists if there is a ‘legitimate claim of entitlement’ to a specific benefit.” *Id.* at 641–42. Though it is “a flexible concept,” the “essential principle of due process is the right to notice and a meaningful opportunity to be heard.” *Downey v. Pierce Cty.*, 165 Wn. App. 152, 164, 267 P.3d 445 (2011).

Mr. Driscoll cannot, and does not, claim that he was entitled to static premium rates for the life of his policy, so he had no property interest that was harmed by the Commissioner’s rate approval. Even if he did have a property interest, he cannot claim that he was entitled to be involved in the rate filing approval process, as the Insurance Code does not contemplate that policyholders will be involved in that process. *See* RCW 48.19.010(2); *see also* WAC 284-54-630; WAC 284-60-040. And as discussed more fully below, the procedure used by the Commissioner in approving MetLife’s rate filing was correct. On the other hand, if Mr. Driscoll is asserting that he has not been afforded procedural due process throughout this appeal, he points to no particular deficiency in the notice

or hearing provided to him below. *See* App Br. at 20, 33-34. He has received notice and a hearing before the Commissioner in this matter. Mr. Driscoll fails to show that any procedural due process concerns are implicated here.

If, however, Mr. Driscoll is instead asserting that the Commissioner's decision on the rate filing was arbitrary and capricious and therefore a violation of substantive due process, he fails to make that showing as well. "Substantive due process generally asks whether the government abused its power by arbitrarily depriving a person of a protected interest, or by basing the decision on an improper motive." *Nieshe*, 129 Wn. App. at 640-41. "Arbitrary agency decisions violate a citizen's right to substantive due process." *Bircumshaw v. State*, 194 Wn. App. 176, 207, 380 P.3d 524 (2016).

There are no substantive due process concerns here because, as discussed above, Mr. Driscoll lacked a property right in static rates. In any event, the Commissioner's approval of MetLife's rate filing was in accordance with statutory procedures and was not arbitrary or capricious. When reviewing an agency action to determine whether it was arbitrary and capricious, the court gives substantial deference to the agency and the party asserting an action is arbitrary or capricious "bears the heavy burden of showing that an agency clearly and willfully erred." *Id.*

Mr. Driscoll presents no evidence that the approved rate filing contained any actuarial errors. He claims instead that, pursuant to RCW 48.19.030(3), the insurer should have used Washington rates or perhaps looked only at certain states (which he does not name), and that under RCW 48.19.040(2), the rate filing therefore lacked sufficient information for the Commissioner to determine whether it met the requirements of chapter 48.19. App. Br. at 27. His argument fails because RCW 48.19.030 and .040 do not apply to his long-term care policies. As discussed above, long-term care policies are a type of disability insurance and are thus exempted from chapter 48.19. RCW 48.19.010(1)(b); RCW 48.11.030.; *see also* AR 1102 (the Commissioner's actuary did not apply 48.19.030 or .40 because the product is a disability insurance and those provisions do not apply).

While 48.19.010 exempts disability insurance from the chapter, 48.19.010(2) does provide:

Except that every insurer shall, as to disability insurance, before using file with the commissioner its manual of classification, manual of rules and rates, and any modifications thereof provided under RCW 48.43.733 or rate filing requirements established by a specific statute or federal law.

In addition to this provision, the provisions covering long-term care insurance are contained in RCW chapters 48.20, 48.83 and 48.84 and

WAC chapters 284-54 and 284-83. Mr. Driscoll does not allege that the rate filing contravened any provisions relating to long-term care insurance.

Although the Commissioner addressed Mr. Driscoll's arguments about RCW 48.19.030 and .040, that does not mean that those arguments are applicable here, or that this Court must resolve Mr. Driscoll's claims. Instead, the Court should apply the plain language of the statute, which excludes this type of insurance from the provisions of RCW 48.19.

Even if the provisions of RCW chapter 48.19 did apply to Mr. Driscoll's policies, they grant Mr. Driscoll no relief here. RCW 48.19.030 merely instructs insurers to give "due consideration" to loss experience in this state or "in those states which are likely to produce loss experience similar to that in this state." Here, "due consideration" was given and it was determined that with the small number of policies sold, an actuarially credible experience rating could not be attained by looking at only Washington or a combination of a few states. *See* AR 1099, 1103-04. But the provision does not mandate that state experience must be the only consideration. It also allows the insurer to consider "[a]ll other relevant factors within and outside this state." RCW 48.19.030(3)(g). Thus, the use of the nationwide loss experience did not contravene the statute.

Additionally, the role of the Commissioner in approving rates submitted under RCW 48.19.030 is to find the submitted experience

acceptable to him. RCW 48.19.040(2). The provisions in RCW chapter 48.19 do not contain mandatory language regarding use of national or statewide loss experience. The Commissioner had determined that MetLife's submission of national experience was acceptable in 2011 and again in 2014 because of the small number of policies still in force in Washington State. *See* AR 1099, 1103-04. The Commissioner had no reason to believe that experience was inaccurate or unacceptable. *See* AR 1103-04.

Mr. Driscoll cites to a report that relies on a survey conducted in 1999 to support his contention that nationwide rates should not have been used. App. Br. at 30-33; AR 1560-61. However, that report provides no guidance here. The survey it discusses is outdated and was conducted prior to the enactment of NAIC's long-term care insurance model rules for reviewing long-term care rate filings. *See* AR 1555. The report itself acknowledges that the NAIC revisions to the Long-Term Care Insurance Model Act (that were in development at the time of the survey) would improve regulation of long-term care premiums. AR 1555. Moreover, Mr. Driscoll provides no evidence that the use of a nationwide experience rate here resulted in incorrect actuarial calculations or higher premium rates. Mr. Driscoll has not submitted any actuarial testimony, or any other

evidence that demonstrates that the use of national experience in this instance has harmed him.

Conversely, use of only Washington loss experience would contravene actuarial and insurance industry standards and likely create a genuine cause for concern. AR 1104. For loss experience ratios to be credible there must be at least 1,082 active claims. AR 1104. Active claims are filed claims that are being processed at the time of the rate filing. AR 1104. The product line at issue here is a closed block of insurance, meaning no more policies can be sold from the line. AR 1103. In Washington, there were only 873 policies sold, and nationwide there were only 34,910 policies sold; of those, only a small percentage would be "active" claims. AR 1104. Using only the small number of active claims in Washington would lead to rates that are not credible. AR 1104. It would likely also result in even higher premium rates because long-term care costs are much higher in Washington than in many other states. *See* AR 472-491. Thus, using a national average instead of a Washington state average likely resulted in a lower premium than would have otherwise resulted.

Mr. Driscoll fails to show that the Commissioner's approval of MetLife's rate filing deprived him of a legitimate property interest in static rates for his long-term care insurance. Even if Mr. Driscoll can make that

showing, the Commissioner's decision on the rate filing and Mr. Driscoll's hearing accorded him the process he was due. There are no state or federal constitutional concerns that this Court need address.

**C. This Court Should Decline Mr. Driscoll's Invitation To Reach the Merits Because the Commissioner Should Be Afforded Primary Jurisdiction, a Necessary Party Is Not Present, and the Filed Rate Doctrine Bars Review**

Mr. Driscoll's claims were resolved without reaching the merits, so it was not error for the final order not to address the merits. Even if this Court disagrees with the Commissioner that Mr. Driscoll lacks standing to seek to overturn the rate filing, the Court should not reach the merits of Mr. Driscoll's claims because the Commissioner has not reached the merits and is entitled to first review. In addition, the insurer was not joined in this action and should be made a party to any action that would significantly affect its interests. Finally, the type of review that Mr. Driscoll seeks is barred by the filed rate doctrine. Remand is the only appropriate remedy if this Court finds that Mr. Driscoll has standing.

**1. Because Mr. Driscoll Failed To Satisfy the Statutory Requirements for Standing, the Commissioner Need Not Consider the Merits of Mr. Driscoll's Claims**

The Commissioner, through his presiding officer, correctly determined that he need not reach the merits of Mr. Driscoll's claims, and did not do so. "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.3d 1142 (2007) (citations omitted). It would have made little sense for the Commissioner to address all the issues raised by Mr. Driscoll when the case could be and was resolved based on Mr. Driscoll’s lack of standing and the filed rate doctrine. For the reasons discussed *supra*, Mr. Driscoll lacks standing and the Commissioner was able to resolve his claim on grounds other than the merits. Therefore, the Commissioner’s final order did not err by not addressing the merits of Mr. Driscoll’s claims.

**2. If This Court Finds that Mr. Driscoll Has Standing To Appeal the Rate Filing, the Matter Should Be Remanded To the Commissioner Because the Commissioner Has Not Yet Reviewed or Weighed Any Evidence on the Merits**

If this Court were to determine that Mr. Driscoll’s challenge may proceed under the Insurance Code, this Court should remand the matter to the Commissioner so that he can consider the merits of Mr. Driscoll’s claims. Remand would be necessary “to preserve the agency’s primary jurisdiction to determine the reasonableness of the rates.” *McCarthy Fin. Inc. v. Premera*, 182 Wn.2d 936, 942, 347 P.3d 872 (2015)

(explaining that one reason for the filed rate doctrine is to preserve Commissioner's primary jurisdiction).

The doctrine of primary jurisdiction "is predicated on an attitude of judicial self-restraint and is applied when the court feels that the dispute should be handled by an administrative agency created by the legislature to deal with such problems." *Kerr v. Dep't of Game*, 14 Wn. App. 427, 429, 542 P.2d 467 (1975) (citations omitted). The legislature has tasked the Commissioner with regulating long-term care insurance. *See e.g.*, RCW 48.83 and 48.84. Here, the Commissioner has already reviewed MetLife's rate filing, but the Commissioner has not reached the merits of Mr. Driscoll's underlying argument because he lacked standing. Therefore, addressing the merits was unnecessary. And since Mr. Driscoll has never provided any actuarial information to the Commissioner on what he believes the rates would have been if a different process was used, or even what a reasonable rate would be in this case, the Commissioner has not had an opportunity to review or respond to such hypothetical information. If this Court determines that Mr. Driscoll's claims should be resolved on the merits, the matter should be remanded so the Commissioner has the first opportunity to pass on the merits, as is within his purview. *See McCarthy Fin.*, 182 Wn.2d at 942.

**3. The Insurer Has Not Been Joined as a Party To This Action and Would Likely be Aggrieved by Any Decision That Grants Mr. Driscoll Relief**

This Court should not reach the merits of this appeal because the party that would be most affected by a ruling in Mr. Driscoll's favor—MetLife—is not a party to this action. A party is necessary to litigation if it has an interest in the action and if disposition in its absence may impair or impede its ability to protect that interest. *See* CR 19; *see also Burt v. Wash. State Dep't of Corrections*, 168 Wn.2d 828, 834, 231 P.3d 191 (2010). To determine whether an action should proceed without a necessary party, a court must consider, among other factors, the extent a judgment rendered in the party's absence might be prejudicial to the absent party and the extent to which the court is able to craft a remedy to lessen or avoid that prejudice. *Coastal Bldg. Corp. v. City of Seattle*, 65 Wn. App. 1, 7, 828 P.2d 7 (1992).

There can be no question that MetLife's interests would be prejudiced if this Court determines that the rates themselves, or the process MetLife used for its rate filing, were unreasonable. Thus far, MetLife has not had an opportunity in this litigation to respond to Mr. Driscoll's substantive allegations about its 2014 rate filing or its current contract with Mr. Driscoll. Further, MetLife would certainly be an aggrieved party if it were not allowed to institute the approved rates.

It seems unlikely that this Court could craft any relief that is favorable to Mr. Driscoll but that avoids harming MetLife. Mr. Driscoll has not asserted that MetLife could not be joined and proceeding on the merits without MetLife would potentially impair or impede its interests. For these reasons, this Court should decline to reach the merits of Mr. Driscoll's claims.

**4. In These Circumstances, the Filed Rate Doctrine Also Bars Review**

Mr. Driscoll asks this Court to review the Commissioner's approval of MetLife's rate filing and determine whether that approval was reasonable. In this case, the filed rate doctrine is appropriately invoked and bars such review.

The filed rate doctrine is a court-created doctrine that provides that a rate filed with, and approved by, a regulatory agency is per se reasonable as a matter of law. *McCarthy Fin.*, 182 Wn.2d at 942. The policy behind the filed rate doctrine is "(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." *Id.* In *McCarthy Finance*, the Court declined to reach insurance policyholders' consumer protection act claims seeking refunds of premium charges because it would require the Court to "reevaluate rates approved

by the OIC and thereby inappropriately usurp the role of the OIC.”  
*Id.* at 943.

Mr. Driscoll is not unlike the policyholders in *McCarthy Finance* because, although he asserts he is only asking this Court to set aside the approved rates (App. Br. at 39), that relief is not “merely incidental” to the rates approved by the Commissioner. When a case involves “claims and damages related to agency-approved rates,” the court may not consider the claims if they are not “merely incidental to agency-approved rates” and would instead require the court “to reevaluate agency-approved rates.” *McCarthy Fin.*, 182 Wn.2d at 942. Here, Mr. Driscoll’s claims are not incidental to the approved rate because this Court cannot grant the relief he requests without first evaluating the actuarial reasonableness of the rates. Mr. Driscoll asserts that the Commissioner failed to consider sufficient information in his rate approval process. Reviewing that claim would necessarily require this Court to determine what additional actuarial information the Commissioner should have considered, how the Commissioner should have evaluated it, and whether the additional information would effect a different result. This Court would essentially have to conduct its own rate approval process and re-review the information the Commissioner reviewed to determine whether that information supported the rate approval.

Furthermore, Mr. Driscoll has put forth no evidence or alleged any facts that overcome the presumption that the approved rate in this case is per se reasonable. Instead, he simply alleges that the Commissioner should not have accepted MetLife's filing because the loss experience was a national experience. *See* App. Br. at 34. However, Mr. Driscoll does not allege or demonstrate that a combination of different sets of states would have been more credible or that he was harmed in any way by the Commissioner's acceptance of MetLife's loss experience. While he may speculate as to why MetLife submitted this experience and why the Commissioner permitted its use, he fails to provide any actual evidence to support his allegations that the Commissioner incorrectly approved the rate filing.

Mr. Driscoll's claims are not incidental to agency-approved rates; rather, his claims directly pertain to the reasonableness of the rate approved by the Commissioner. The Commissioner is the governing regulatory authority for long-term care insurance and rate filings approved by the Commissioner are per se reasonable. Mr. Driscoll has submitted no evidence or facts or alleged any harm that would undermine this presumption. This Court should apply the filed rate doctrine and decline review.

## VI. CONCLUSION

Because he has failed to show any legally cognizable harm, Mr. Driscoll lacks standing to appeal MetLife's rate filing approval under the Insurance Code and the APA. Even if he did have standing, this Court should not reach the merits of his claims because the Commissioner must first review the claims, the insurer MetLife is not a party to this action, and the filed rate doctrine bars such review. The Commissioner's Final Order that dismissed Mr. Driscoll's appeal was correct and should be affirmed.

RESPECTFULLY SUBMITTED this 20th day of December,  
2017.

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NO. 354261

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

LEO J. DRISCOLL,

Appellant,

v.

WASHINGTON STATE INSURANCE  
COMMISSIONER,

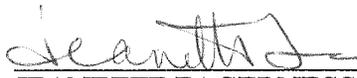
Respondent.

CERTIFICATE OF  
SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on December 20, 2017, I served a true and correct copy of the *Respondent's Brief* and this *Certificate of Service* by placing same in the U.S. mail via state Consolidated Mail Service to:

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

DATED this 20<sup>th</sup> day of December, 2017, at Olympia, Washington.

  
JEANETTE FAGERNESS  
Legal Assistant

**AGO/GCE**

**December 20, 2017 - 11:43 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 35426-1  
**Appellate Court Case Title:** Leo J. Driscoll v Washington State Insurance Commissioner  
**Superior Court Case Number:** 16-2-02598-1

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