69848-6

69848-6

No. 69848-6-I

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents.

REPLY BRIEF OF APPELLANTS

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

Plaintiffs present the following points in reply to the Brief of Respondent:

1. The PREMERA defendants have amassed a huge surplus exceeding $1 billion, an amount far in excess of any need to secure financial solvency and inappropriate for a non-profit entity. Plaintiffs' claims are similar to the claims of plaintiffs in *Ciamaichelo v. Independence Blue Cross*, 589 Pa. 415, 909 A.2d 1211 (2006) upheld by the Pennsylvania Supreme Court.[1] Under present Washington law, there is a total inability of the Office of Insurance Commissioner (OIC) to control a health insurer's surplus levels.

2. The amassing of surplus that plaintiffs challenge has been accomplished by the PREMERA defendants engaging in false and deceptive advertising and falsely claiming to be eligible as a "member-governed group" to engage in selective underwriting, practices that in no way involve or violate the filed rate doctrine. These two issues control this appeal and were both ignored by the trial court.

---

[1] *Ciamaichelo* claimed that the defendant had accumulated excess surplus beyond its reasonable needs and that it should be ordered to expand the coverage it provides or return the excess surplus to its policy holders, subscribers and members. The plaintiff's complaint alleged that in accumulating this surplus as a non-profit corporation it had breached its contractual and fiduciary duties.

3. PREMERA misrepresents the filed rate doctrine, particularly the relation of the Federal Communications Act cases to the doctrine and ignores the claims of plaintiffs which have nothing to do with rates.

4. Doctrines of exhaustion of remedies and primary jurisdiction do not apply in this case.

II. REPLY TO RESPONDENT'S FACTUAL AND STATUTORY BACKGROUND

A. Plaintiffs' evidence and claims.

Plaintiffs present substantial and unrefuted evidence that PREMERA has amassed an excessive surplus through unfair and deceptive acts and practices in violation of the Washington Consumer Protection Act (RCW Ch. 19.86). (Brief of Appellants, pp. 7-9.)

The Brief of Respondent distorts plaintiffs' cause of action as an attack on rates approved by the OIC. To the contrary, this is not a rate injury case; it is not a challenge to existing rate regulation or the rate approval process. Approved rates are not challenged. No rate recalculation is sought. PREMERA attempts to shape the factual evidence presented into a single claim that excessive rates have been charged in order to invoke the filed rate doctrine, the doctrine of primary jurisdiction and exhaustion of remedies.

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

Washington cases hold that in the context of insurance, "although a Commissioner cannot bind the courts, the court appropriately defers to a Commissioner's interpretation of insurance statutes and rules." Citing *Credit Gen. Ins. Co. v. Zewdu*, 82 Wn.App. 620, 627, 919 P.2d 93 (1996); see also *Retail Store Employees Union, Local 1001 v. Wash. Surveying & Rating Bureau*, 81 Wn.2d 887, 898, 558 P.2d 215 (1976).

B. Rate approval process for small group and individual plans distinguished from large group plans.

It is important to distinguish the rate approval process for large group plans from individual and small group plans. PREMERA overstates the OIC's rate approval scrutiny, particularly with respect to large group plans.

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

PREMERA claims at p. 5 of Brief of Respondent that the "OIC specifically considers. . . a health care service contractor's surplus levels and estimated investment earnings for the contract period." Citing WAC 284-43-915. Yet, careful reading of that section reveals that the OIC considers only "contribution to surplus" which "will not be required to be less than zero." WAC 284-43-915(2)(c) and (3). In other words, the OIC has no authority to reduce existing surplus through the rate approval process. The OIC interprets controlling statutes and regulations stating "We do not have the authority to order a company to use surplus to subsidize or lower its rates." (CP 128.)

Health insurance rates cannot be used to reduce existing surplus. Thus, no remedy is available at the OIC to reduce existing surplus. Inability

to control existing surplus has caused Insurance Commissioner Kreidler to seek corrective legislation.

PREMERA also misstates the OIC's ability to consider "estimated investment earnings." (Brief of Appellant at p. 5.) WAC 284-43-915(d) limits consideration of forecasted investment earnings to "assets related to claim reserves or other similar liabilities . . . ." Plaintiffs challenge the "investment profit" which is an entirely separate figure that has nothing to do with the rates being charged. Instead it represents profit from investments, including whatever profit PREMERA receives from its for-profit subsidiaries. (CP 229, Fackler Declaration, at ¶ 15.)

2. ***Large Group Plans.*** PREMERA misleads the court in stating that the OIC reviews PREMERA's "proposed" large group rates and considers contributions to surplus and investment earnings. (Brief of Respondent, p. 8.) PREMERA presents no evidence in support of this statement.

It is clear from the evidence submitted by PREMERA that review of large group negotiated rates by the OIC is limited to examination of PREMERA's Large Group Rating Model which has nothing to do with surplus levels. PREMERA presents the Declaration of Marshall Blaine along

with numerous exhibits (some filed under seal) containing multiple pages. *None* of these documents reference PREMERA's surplus levels.[2]

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

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

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

After the rate for any large group is negotiated and agreed upon, PREMERA then files the actual large group "contract" with the OIC. (Brief of Respondent, p. 10; CP 348; Marshall Blaine Declaration, ¶ 11.) The

---

[2] In an effort to bolster its false claim that the OIC reviews and approves the contribution to surplus that PREMERA proposes for every large group member, PREMERA cites at page 9 of Brief of Respondent "Table H - 4 Reserve Contribution" (CP 496). PREMERA confuses "Reserve Contribution" with "Surplus." WAC 284-43-910(g) identifies "reserves" as "claims" that have been reported but not paid, plus the "claims" that have not been reported but may be reasonably expected. On the other hand, "surplus" is a company's assets minus its liabilities. (CP 131, Glossary.) This lawsuit addresses excessive "surplus" and does not challenge "reserves".

McCarthy Finance filing is provided at CP 714-22. Nothing in the filing references surplus or contribution to surplus.

C. Selective underwriting and false advertising by PREMERA are unfair and deceptive acts and practices having nothing to do with the filed rate doctrine.

The first 25 pages of the PREMERA brief constitute a valiant attempt to cover, in repetitious detail, what this appeal is not about. It covers the procedures, statutes and regulations to explain that PREMERA files rates with the OIC, that after filing, those rates and surplus levels are carefully reviewed, and occasionally rejected. The preceding section illustrates the absence of scrutiny of existing surplus levels.

It is not until p. 26 of the PREMERA brief that the central issues on this appeal are first mentioned – and then a total of 5 pages of the PREMERA brief constitute the response to the issues[3] presented by plaintiffs.

---

[3] (a) Did the defendant WAHIT falsely represent and falsely advertise that WAHIT is a "member-governed trust;" (b) If WAHIT did so, did it thereby obtain the ability to "selectively underwrite" the selling of the PREMERA policies, thereby increasing its profits; (c) If so, did the profits so obtained by WAHIT increase the PREMERA surplus in a manner not linked to rates for the policies that were sold; (d) Did WAHIT falsely advertise that, as a result of its "increased buying power" and "pooling of a large number of employers" it is able to obtain coverage for purchasing employers at the "lowest possible cost" and that the Trust is able to "negotiate" and obtain high quality benefits at the most affordable cost; (e) If so, as a result of such advertising, was WAHIT able to increase its profits and add to the PREMERA surplus, claims that under Washington law are not barred by the filed rate doctrine.

In response to plaintiffs' selective underwriting claim PREMERA does not deny that WAHIT has advertised that it is a member-governed trust and doesn't deny that such advertising is false. PREMERA offers a single paragraph at p. 29 asserting that selective underwriting is a claim of "fraud" which it clearly is not. Then, with no analysis, PREMERA concludes that the claim would require the court to recalculate rates[4] even though the plaintiffs have cited authorities holding that underwriting practices and underwriting decisions have nothing to do with rates.

There is no allegation of "fraud" on the selective underwriting issue. Nowhere in plaintiffs' brief does the word "fraud" appear. At this point the PREMERA defendants have not responded to the facts plaintiffs allege on the issue, but we have assumed they will attempt to defend their position by asserting that they are, in fact, an "employer governed trust" and that their

---

[4] Plaintiffs are particularly troubled by this statement in the PREMERA brief on p. 29 referring to selective underwriting: "...it would require a court to second-guess the OIC in its rate review process, and ultimately require a recalculation of the OIC approved rate." We ask PREMERA – in a selective underwriting case, PREMERA announces that it will refuse to insure Applicant A who has incurable cancer, but will continue to insure Applicant B who is in normal health. What rate is PREMERA saying will now require a court to recalculate? Applicant A is not even issued a policy and there are no rates there to review. Applicant B is continuing to pay his same rate as previously. What "recalculation" of rates is PREMERA asserting is necessary? We repeat – selective underwriting is not rate related.

advertising is accordingly not false.[5] This is a material issue of fact that the trial court ignored completely in its rulings.

In response to plaintiffs' claims that WAHIT has falsely advertised, that by its "increased buying power" and "pooling of a large number of employers" it is able to obtain coverage at the "lowest possible cost" (CP 9), PREMERA does not deny that WAHIT so advertised, nor does PREMERA deny that all of these claims by WAHIT are false. Instead, PREMERA at p. 27, continues to assert that plaintiffs' false advertising claims involve rate-making and that damages would require the court to ascertain what would be a reasonable rate absent the alleged fraud. PREMERA attempts to dismiss the cases cited[6] by the plaintiffs that recognize false advertising is not rate-making and does not violate the filed rate doctrine, asserting at pp. 18 and 29 that the cases plaintiffs cite are Federal Communications Act cases and do not involve the filed rate doctrine, a confusion that is addressed later in this brief.

---

[5] We note that the WAHIT trust itself in Article III, Paragraph 6 (CP 39) states that the trustee may be removed by written request of a two-thirds majority of participating employers. We have assumed WAHIT might utilize that fact to claim that their "employer-governed" claim in their ads is true.

[6] *Spielholz v. Superior Court,* 86 Cal.App. 4th 1366 (2000); *Ball v. GTE Mobilenet*, 81 Cal.App. 4th 529 (2000); *In Re Comcast Cellular Telecom Litigation*, 949 F.S. 1193 (1996); *Kellerman v. MCI Telecommunications Corp.*, 112 Ill.2d 428, 493 NE 2d 1045 (1986).

Summary judgment is proper only if there is no genuine issue of material fact. CR 56(c). The Appellate Court construes the facts and draws all factual inferences in a light most favorable to the nonmoving party. *Kofmehl v. Baseline Lake, LLC*, 177 Wash.2d 584, 594, 2013 Wash. LEXIS 505 (June, 2013).

III. ARGUMENT

A. The Washington State Supreme Court decision in Tenore controls this appeal

Tenore v. AT&T Wireless Services, 136 Wn.2d 322, 962 P.2d 104 (1998) holds that false advertising of a product, whether it be insurance or wireless telephone services does not constitute rate-making. It holds that an award of damages for false advertising has merely an incidental effect on rates and accordingly would not conflict with a decision of an agency enforcing rates. This is powerful precedent in Washington. It is at variance with the oft-cited case of *Wegoland Ltd. v. Nynex Corp.*, 27 F.3d 17 (2nd Cir. 1994) which held that false advertising does involve rate-making requiring application of the filed rate doctrine and holding that any award of damages "would require a court to determine a reasonable rate."

It is necessary to read *Tenore* carefully. *Tenore* is not a "filed rate doctrine" case. As the decision explains at p. 334, defendant AT&T was not

required to file any of its rates with the FCC. AT&T was exempt from all rate and tariff filing requirements. Thus, our Supreme Court as of this date, has not issued a decision on the filed rate doctrine. Accordingly, PREMERA does not cite our Supreme Court on the doctrine and instead cites 12 filed rate decisions from states other than Washington.

The claims made by the plaintiff in *Tenore*, as in the case at bar, included deceptive, fraudulent and misleading advertising,[7] allegedly violating the Washington State Consumer Protection Act, particularly a claim that defendant did not disclose in its advertising that it "rounded up" its billings to the next full minute.

Though no rates or tariffs were required by the Federal Communications Act to be filed, defendant AT&T promptly moved for CR 12(b)(6) dismissal based on Section 332(c)(3)(A) of the Federal Communications Act, reading in part:

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

---

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

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

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

Though *Tenore* is not a filed rate doctrine case, it did make the following unanimous rulings:

(a) False advertising is not rate making;

(b) False advertising does not constitute an attack on the reasonableness of rates;

(c) An award of damages for false advertising does not require a remand to a court to determine a reasonable rate.

The PREMERA brief at p. 11 correctly states that plaintiffs' Complaint includes the charge: that the defendants accumulated "massive" surplus,[8] inconsistent with its status as a non-profit corporation.

PREMERA's brief at this point ignores the other claims in plaintiffs' Complaint that the accumulation of the massive surplus was as a result of:

(a) WAHIT's false advertising practices;

(b) WAHIT's unsupportable claim to be exempt from statutory limitation on certain of its underwriting practices; and

(c) continuing contributions to surplus of investment proceeds which during the 7-year period 2004 – 2010 contributed over $220 million to the PREMERA Blue Cross surplus levels.

---

[8] PREMERA attempts to dismiss the *Ciamaichelo* case, *supra*, with a footnote at p. 24 of the PREMERA brief. That footnote misstates both the claims made by *Ciamaichelo* and the resolution of those claims. PREMERA asserts that *Ciamaichelo* did not seek compensatory damage and that the court conclude that the director of insurance had "primary jurisdiction." Both of these are incorrect. *Ciamaichelo* sought expansion of the coverage or return of the excess surplus to its policy holders, subscribers and members. The court did not conclude that the Director of the Insurance had primary jurisdiction, stating instead at p. 1218: ". . . we conclude that instead of placing this case in the exclusive domain of either the Department or that of the trial court, the proper course is to allow the trial court to refer to the Department any issue or matter that is revealed to lie within the Department's regulatory jurisdiction, including any remedial action should that become necessary, and is of sufficient complexity to require the Department's special competence."

(CP 20-22, Complaint at ¶42; CP 229, Fackler Declaration at ¶15.)

B. The Filed Rate Doctrine

The leading filed rate cases discuss the two principal interests served by the doctrine, namely (1) the preservation of the role of agencies in setting rates (the "non-justiciability" strand) and (2) prevention of price discrimination if a favorable rate is set for litigants but not available to non-litigants (the "non-discrimination" strand).

The *Tenore* decision in permitting a damage award for false advertising, does not conflict with either strand.

It is necessary to clear up PREMERA's apparent misunderstanding of the filed rate doctrine as it has been applied in cases filed under the Federal Communications Act of 1934. *Tenore* is such a case. Many filed rate decisions[9] rule that if an award of damages to the plaintiff involves the court in rate-making (requiring the court to recalculate the filed rate to allow for the damage award) it is barred by the non-justiciability strand of the doctrine. The Federal Communications Act prohibits rate-making by Section 332(c)(3)(A), the statute quoted at p. 12, *supra.* That statute preempts entirely state law claims that involve rate-making.

---

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

Thus in *Tenore* the court first observed at page 334 that "there are no tariffs on file", but the rate making question and the issue of preemption under § 332 still required resolution. The ultimate *Tenore* decision at page 349 was that a damage award for false advertising does not constitute rate-making and any impact on rates is "merely incidental".

Judicial rate-making where there are rates filed by an appropriate agency violates the filed rate doctrine. If it is challenged in a case brought under the Federal Communications Act the rate-making is preempted. It is also a violation of the filed rate doctrine because it violates the non-justiciabilty strand.

Look at the practice being challenged to determine whether it conflicts with either strand of the filed rate doctrine. In the Federal Communications Act cases, if such a violation is found the ruling will be that the practice is rate-making and accordingly preempted by the Federal Communications Act statute. But it also violates the filed rate doctrine.[10]

---

[10] To provide an example of this, it is necessary to look no farther than *Marcus v. AT&T*, 138 F.3d 46 (2nd Cir. 1998) 1998 U.S. App. LEXIS 3648, one of the key "filed rate" decisions relied on by PREMERA at pp. 19-20 in its brief. The *Marcus* opinion at page 62 cites three cases two of which are claims under the Federal Communications Act analyzing whether they are barred by the filed rate doctrine and concluding as follows: "Thus, it appears that if the appellants can establish the substance of their state and federal fraud claims, the *filed rate doctrine* would not bar them." (Emphasis

The PREMERA brief confuses this at p. 18 by stating the "primary issue in *Tenore* is whether the Federal Communications Act preempted the plaintiff's claims." Further, at pp. 29 and 30 PREMERA erroneously claims the primary issue in the three cases cited was "whether the plaintiffs' state law claims were preempted by the Federal Communications Act--not whether they were precluded by the filed rate doctrine." This attempt to mischaracterize the applicability of these cases fails.

C. Blaylock V. First American Title Insurance Co., 504 F.Supp.2d 1091 (2007)

District Judge James L. Robart discussed the *Tenore* decision in *Blaylock*. As he stated in rejecting the defense request to apply the filed rate doctrine at p. 1101:

> Washington has little case law on the filed rate doctrine. The parties have not cited, nor is the court aware of, a decision discussing the application of the doctrine to challenges to insurance rates, let alone title insurance rates, nor even rates set by a state regulatory agency.

---

supplied.) The foregoing is an example of a court citing three cases two of which are under the Federal Communications Act cases with the *Marcus* court referring to the three collectively as the "filed rate doctrine". Conduct that is challenged under the Federal Communications Act may be a violation of the filed rate doctrine as well. If the issue is a violation of the filed rate doctrine the force of a decision cannot be dismissed by contending, as PREMERA is attempting: "oh, that's an FCA case; it doesn't apply."

And Judge Robart continued,

> . . . the *Tenore* court ultimately determined that the filed rate doctrine was not implicated since cellular telephone service providers are specifically exempted from the FCC's filing requirements, and therefore do not file rates. Therefore, the only guidance this court has, from the highest court in Washington is a statement of the primary purposes of the doctrine and a cautionary note that it should not be applied rigidly in situations that do not advance its central purposes.[11]

Filed rate cases around the country demonstrate a maze of conflicting decisions and differing viewpoints as to it meaning and effect. On the issue of deceptive and misleading advertising, see:

Ohio: *Phillips and Associates v. Ameritech Corporation*, 144 Ohio App.3d 149, 759 N.E.2d 833 (2001) (fraudulent and misleading advertising practices do not violate filed rate doctrine; trial court's dismissal order reversed.).

---

[11] The PREMERA brief at page 16 misstates Judge Robart's decision in *Blaylock* by claiming that he "relied on the doctrine to dismiss claims related to the reasonableness of rates filed with the OIC." Make no mistake. Judge Robart rejected the filed rate doctrine in its entirety stating at page 1103 of the decision "Considering the gradual erosion of the rationale for the doctrine, the cautionary note of the Washington Supreme Court in the only case discussing the doctrine, and the uneasy fit between the animating purposes of the doctrine and the facts of this case, the Court declines to extend Washington law to apply the filed rate doctrine to bar Plaintiffs' claims."

California: *Kellerman v. MCI Telecommunications Corporation*, 112 Ill.2d 428, 493 N.E.2d 1045 (1986). (State law fraudulent and deceptive advertising claims against carrier do not concern reasonableness of rates.)[12]

D. Exhaustion of Administrative Remedies

Plaintiffs were not required to exhaust administrative remedies because the OIC provides no redress to plaintiffs' Consumer Protection Act claims. PREMERA continues its attempt to narrow plaintiffs' lawsuit to a challenge of PREMERA's rates. (Brief of Respondent, p. 33.)

The only administrative remedy cited is RCW 48.04.010(1) which provides that the Commissioner shall hold a hearing upon written demand by any person "aggrieved by any act, threatened act or failure of the Commissioner to act, if such failure is deemed an act under any provision of ths Code, or by any report, promulgation or order of the Commissioner. . . " Any such demand for hearing shall specify "in what respects such person is

---

[12] Some of the cases rejecting application of the filed rate doctrine to fraudulent practices are even more instructive. See the Oklahoma decision in *Satellite System Inc. v. Birch Telecom of Oklahoma Inc.*, 2002 OK 61; 51 P.3d 585 (2002) and the Delaware decision in *Brown v. United Water Delaware, Inc.*, 3 A.3d 253 (2010). Both of these contain the following statement: "*Courts overwhelmingly reject attempts to limit liability either by contract or by tariff for gross negligence, wilful misconduct and fraud.*" (Emphasis supplied.)

so aggrieved and the grounds to be relied upon as a basis for the relief to be demanded at the hearing." RCW 48.04.010(2).

Plaintiffs' claims in this proceeding on behalf of the large group market (Class A), the small group market (Class B) and the individual market (Class C) do not challenge the actions of the Commissioner in approving rates under the standards mandated by existing statutes. The OIC has no authority to order a company to use surplus to subsidize or lower its rates. (CP 128.)

Since the Insurance Commissioner has no authority to direct the company to use surplus to subsidize or lower its rates, plaintiffs must look to the courts for damages based upon violation of Washington's Consumer Protection Act, non-profit corporation statutes, and insurance law. Plaintiffs' claims including false advertising, selective underwriting through defendant WAHIT, and accumulation of investment income all contributing to a massive surplus, are issues with no remedy at the administrative level.

PREMERA fails to differentiate between any potential administrative relief available to the large group plaintiffs from the relief available to the small group and individual market plaintiffs. Plaintiff would have extremely limited information to challenge large group contract rates as previously set

forth herein. The OIC reviews the Large Group Rating Model not the negotiated rate with large groups. Any OIC disapproval relates to inconsistency with the Large Group Rating Model not individual large group rates. (CP 346-347; Blaine Declaration at ¶¶ 7-8.) No reference to surplus levels is before the OIC in assessing the Large Group Rating Model.

Additionally, in the large group context, many of the submittals to the OIC are not public because they contain proprietary and confidential trade secrets of PREMERA. The limited information which is publicly available contains no explanation how rates are calculated or the justification for rate increases. (CP 346-47; Blaine Declaration ¶¶ 6-8.)

Where the agency has no power to assess penalties, either generally or with reference to violations of the Consumer Protection Act, the remedy is not adequate and exhaustion of remedies is not required. *State v. Multiple Listing Service,* 95 Wn.2d 280, 622 P.2d 1190 (1980). In the present action the OIC has no authority to order reduction of PREMERA's exorbitant surplus. In the large group context, the OIC has no authority to even consider surplus. In the small group and individual plan context, rate approval cannot be used to reduce existing surplus. WAC 284.43.915 limits

the OIC in the rate approval process by providing that contributions to surplus will not be required to be less than zero.

PREMERA relies upon *Taylor v. Bankers Life & Cas. Co.*, 2008 U.S. Dist. LEXIS 108102 (W.D. Wash. August 29, 2008) which is readily distinguishable. Plaintiffs alleged they were mislead as to the long-term stability of the premium rates on convalescent care policies and the circumstances under which rates might increase. Judge Coughenour dismissed the plaintiff's claims of improper premium rate increases, citing the fact that plaintiff had not sought relief from the OIC as the reason for dismissal. In doing so, he noted the circumstances unique to that case. For instance, he held that the Insurance Code "prohibits the precise behavior plaintiffs allege and extensively regulates the particular contractual relationship at issue . . ." *Taylor, supra* at *14.[13]

---

[13] The *Taylor* decision was distinguished in *Su Chin v. Esurance Ins. Co.*, 2009 U.S. Dist. LEXIS 21736 (W.D. Wash. March 13, 2009). In that case Judge Leighton concluded that plaintiff had adequately shown that administrative remedies were not available through the OIC. The opinion illustrates that the OIC is empowered to issue cease-and-desist orders, and seek injunctive relief from the courts when an insurer violates the Insurance Code. RCW 48.02.080(3). Any person aggrieved by an act of the Insurance Commissioner or by the Commissioner's failure to act is entitled to a public hearing before the OIC. RCW 48.04.010(1). But Judge Leighton pointed out that the defendants (as in the present case) had not and could not show that any alleged harm claimed by plaintiff was traceable to the Insurance Commissioner's actions or failure to act. *Shin, supra* at *8.

See RCW Ch. 48.84 which provides a unique statutory scheme for long-term care insurance.

Any remedy before the OIC in the present action would be legally inadequate because the OIC lacks authority to provide the remedy sought by plaintiffs. *State v. Multiple Listing Service, supra* at 283-84; *Zylstra v. Piva*, 85 Wn.2d 743, 745, 539 P.2d 823 (1975).

E. The Primary Jurisdiction Doctrine Does Not Bar Plaintiffs' Claims

Respondent repeats its theme that plaintiffs' claims are an attack on PREMERA's OIC-approved rates; without those rates there would be no allegedly excess surplus. (Brief of Respondent at p. 39.)

The three-factor test for determining when the primary jurisdiction doctrine should be applied under Washington law is not met. The OIC has no authority to resolve the issues that would be referred to it by the court. Specifically, the OIC has no authority to order PREMERA to reduce its existing surplus.

Secondly, the OIC does not have "special competence" over the issues rendering it better able than the court to resolve the issues. Unfair and deceptive acts and practices of PREMERA leading to an excessive surplus are properly before the court and not the agency.

Plaintiffs' claim does not involve issues within the scope of a pervasive regulatory scheme so that a danger exists that judicial action would conflict with a regulatory scheme. The case does not involve a reconsideration of approved rates by the OIC and the OIC has conceded that it has no control over existing surplus levels.

In *Blalock, supra* at p. 1104, Judge Robart, in concluding that the primary jurisdiction doctrine did not bar plaintiffs' claims, noted that "any special competence the agency has over this controversy has been exhausted by the agency's concluded investigation. . ." on the issues. In the present action, Commissioner Kreidler has concluded the PREMERA surplus is excessive and the OIC has no authority to control the existing surplus in the rate approval process. (CP 128, CP 214.)

PREMERA claims the OIC has jurisdiction over claims of false, deceptive or misleading advertising and misrepresentations of the terms and benefits of contracts. Citing RCW 48.44.020(2)(c), 48.44.110, and 48.44.120. PREMERA also points out the OIC has powers of enforcement through adjudicative proceedings, cease-and-desist orders, or by filing suit, citing RCW 44.02.080, 48.04.010, and 48.44.180. (Brief of Respondent at p. 41.)

However, the foregoing statutes require action by the OIC and are not administrative remedies available to plaintiffs The only administrative remedy available to plaintiffs is found at RCW 48.04.010 as previously discussed herein. Plaintiffs would be required to show a failure of the Commissioner to act under any provision of the Code. Additionally, the demand for hearing must specify the grounds to be relied upon as a basis of the relief demanded at the hearing. Since the Commissioner has no authority to afford the relief plaintiffs seek, such a hearing would be futile. RCW 48.04.010(6) provides that any such hearing is presided over by an administrative law judge. RCW 34.12.080 provides that all hearings shall be conducted in conformance with the Administrative Procedure Act, RCW Ch. 34.05. RCW 34.05.534 states that exhaustion of remedies is not required if the remedies would be "patently inadequate . . . futile;" or "grave irreparable harm that would result from having to exhaust administrative remedies would clearly outweigh the public policy requiring exhaustion of administrative remedies."[14]

---

[14] PREMERA in its footnote 5 at p. 32, Brief of Respondent, misstates the law in this regard. PREMERA erroneously states "the APA and its exhaustion standard is irrelevant." PREMERA is incorrect based upon the cited statutes. Additionally, WAC 284-02-070(1)(a) provides that "Hearings of the OIC are conducted according to chapter 48.04 RCW and chapter 34.05 RCW, the Administrative Procedure Act."

IV. CONCLUSION

The Office of Insurance Commissioner ("OIC") cannot control PREMERA's billion dollar surplus through the rate approval process. The OIC remedy for Insurance Code Violations is limited to cease-and-desist orders or injunctive relief. There is no OIC scrutiny of surplus for large group plans. The OIC has no authority to order PREMERA to use surplus to subsidize or lower its rates. Preclusive doctrines of filed rate, exhaustion of remedies, and primary jurisdiction do not apply in this action.

The trial court's decisions should be reversed and the case remanded for trial.

Respectfully submitted this 4th day of September, 2013.

Frank R. Siderius WSBA 7759

Ray Siderius, WSBA 2944

C.R. Lonergan, Jr., WSBA 1267
SIDERIUS LONERGAN & MARTIN LLP
Attorneys for Appellant/Plaintiff

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

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

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

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

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

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

Dated this 4th day of September, 2013.

Mary Berghammer