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COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

SKAGIT COUNTY PUBLIC HOSPITAL
DISTRICT NO. 1, d/b/a SKAGIT
VALLEY MEDICAL CENTER,

Appellant,

vs.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,

Respondent.

APPELLANT'S BRIEF

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ORIGINAL

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 2

III. ISSUES ON APPEAL 4

A. Medicare Revenue. 4

B. Interest on Tax Assessment. 4

IV. STATEMENT OF THE CASE 5

V. ARGUMENT 11

A. Skagit May Deduct Medicare Copayments and Deductibles and Payments from Medigap Insurers from its Gross Income Subject to the B&O Tax Because These Amounts are Received from an Instrumentality of the U.S. Government. 11

1. The plain-language meaning of the term "instrumentality" as used in RCW 82.04.4297 includes payments from Medicare beneficiaries 12

a. Medicare uses Medicare patient copayments and deductibles as a means to pay costs incurred by Skagit in treating Medicare patients. 15

b. Medicare uses Medigap insurers as a means to pay costs incurred by Skagit in treating Medicare patients. 16

2. Even assuming the term "Instrumentality" is ambiguous, the legislative history of RCW 82.04.4297 indicates that

TABLE OF CONTENTS

Page

deductions apply to Medicare copayments and deductibles and payments from Medigap insurers. 18

B. Skagit is Not Subject to Interest and Penalties on the Department's Assessments. 21

1. Skagit shares in the Sovereign Immunity of the State and is Not Subject to Interest Absent Statutory Authorization. 21

2. Interest is Waived Because Payment was Delayed for Reasons Other than Skagit's Inaction. 26

C. Skagit is Entitled to Attorneys' Fees and Costs on Appeal. 33

VI. CONCLUSION 33

TABLE OF AUTHORITIES

Page

CASES

Architectural Woods, Inc. v. State, 92 Wn.2d 521, 598 P.2d 1372 (1979) 23

City of Spokane ex rel. Wastewater Mgmt. Dept. v. State Dept. of Revenue, 145 Wash.2d 445, 38 P.3d 1010 (2002) 12

Columbia Steel Co. v. State, 34 Wn.2d 700, 209 P.2d 482 (1949) 23

Fosbre v. State, 76 Wn.2d 255, 456 P.2d 335 (1969) 24

Homestreet, Inc. v. State, Dept. of Revenue, 166 Wn.2d 444, 210 P.3d 297 (2009) 13

HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth., 155 Wn.2d 612, 121 P.3d 1166 (2005) 22

Jenkins v. Washington State Dep't of Soc. & Health Svcs., 160 Wn.2d 287, 157 P.3d 388 (2007) 23

Kelso v. City of Tacoma, 63 Wn.2d 913, 390 P.2d 2 (1964) 22

Our Lady Lourdes Hosp. v. Franklin County, 120 Wn.2d 439, 842 P.2d 956 (1993) 23, 24, 25, 26

Pac. Nw. Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 144 P.3d 276 (2006) 12

R.D. Merrill Co. v. Pollution Control Hearings Bd., 137 Wn.2d 118, 969 P.2d 458 (1999) 18

State v. Bash, 130 Wn.2d 594, 925 P.2d 978 (1996) 18

State v. Keller, 143 Wn.2d 267, 19 P.3d 1030 (2001) 13

State v. Thiessen, 88 Wn. App. 827, 946 P.2d 1207 (1997) 24, 25

W. Telepage, Inc. v. City of Tacoma Dept. of Fin., 140 Wn.2d 599, 998 P.2d 884 (2000) 13, 18

Washington Hosp. Liability Ins. Fund v. Public Hosp. Dist. No. 1 of Clallam County, 58 Wn. App. 896, 795 P.2d 717 (1990) 22

TABLE OF AUTHORITIES

Page

STATUTES

42 U.S.C. § 1395mm 18
42 U.S.C. § 1395ss 18
42 U.S.C. § 1395ss(a)(1) 17, 18
42 U.S.C. § 1395ss(b) 17
42 U.S.C. § 1395ss(d) 17
42 U.S.C. § 1395u(h)(3) 17
RCW 4.56.110 ..... 23, 25
RCW 70.44.003 21
RCW 70.44.010 22
RCW 70.44.060 22
RCW 70.44.171 32
RCW 82.04.4297 ..... passim
RCW 82.04.4311 21
RCW 82.04.4311(1) 21
RCW 82.32.050 24
RCW 82.32.050(1) 30
RCW 82.32.105(1) 26
RCW 82.32.105(3)(b) 26
RCW 82.32.160 30
RCW 9A.16.110(2) 25
WAC 458-20-100 30

OTHER AUTHORITIES

American Heritage Dictionary (4th ed. 2000) 14
Black's Law Dictionary (8th ed. 2004) 14
Laws of 2001, 2nd Spec. Sess., ch. 23, § 1 19
Laws of 2002, ch. 314, § 2 21
Webster's Third New International Dictionary (1981) 13

TABLE OF AUTHORITIES

Page

RULES

42 C.F.R. § 413.1 15
42 C.F.R. § 413.5 15
42 C.F.R. § 413.89 ..... 15, 16
42 C.F.R. § 489.21 15
42 C.F.R. § 489.3 15
42 C.F.R. § 489.30 ..... 15, 16
RAP 14.2 33
RAP 14.3 ..... 2, 33
RAP 14.4 33
RAP 18.1 ..... 2, 33
RAP 9.7(c) 7

I. INTRODUCTION

Skagit County Public Hospital District No. 1 d/b/a Skagit Valley Medical Center ("Skagit" or "Hospital"), appellant in this tax refund case, raises two issues in seeking reversal of the Board of Tax Appeals ("Board" or "BTA") final decision affirming the Department of Revenue's ("Department") assessments issued against Skagit for Washington's business and occupation ("B&O") tax and interest.

The first issue is whether a hospital may deduct federal money it receives from Medicare patients and Medigap insurers from gross income subject to the B&O tax. RCW 82.04.4297 allows a hospital to deduct money it receives from "instrumentalities" of the federal government as compensation for providing healthcare services from its gross income subject to taxes. Because Medicare patients and Medigap insurers are acting as instrumentalities of the federal government, RCW 82.04.4297 is applicable and Skagit is entitled to the tax refund it seeks.

The second issue is whether the Department may collect interest and penalties on tax assessments against hospital districts, which are municipal corporations, absent express statutory authority to collect these amounts. Because the Department purports to derive authority to collect interest and penalties on the assessments against Skagit from a statute of general application

lacking specific authorization, Skagit is entitled to the refund it seeks for payment of interest. Even if the Department was acting under specific statutory authority, the interest must be waived because payment was delayed for reasons other than Skagit's inaction.

In deciding these issues, the Board ruled in favor of the Department's assessments and interest charges. Skagit petitioned the Thurston County Superior Court for review of this decision, but the Superior Court affirmed the Board's decision. Skagit requests that this Court reverse the Board and Superior Court on these two issues and order a refund of the taxes and interest in dispute. Finally, Skagit asks for an award of any applicable appellate costs and attorney's fees under RAP 14.3 and RAP 18.1.

II. ASSIGNMENTS OF ERROR

1. The Thurston County Superior Court erred in affirming the Board of Tax Appeals final decision issued on October 1, 2008. CP 415.

2. The Board of Tax Appeals erred in sustaining the Department of Revenue's final determination No. 07-0046. CP 40.

3. The Board of Tax Appeals erred in entering finding of fact No 2: "Medicare patients are personally obligated to pay deductibles and coinsurance (copayments) themselves." CP 38.

4. The Board of Tax Appeals erred in entering finding of fact No. 3: "Medicare patients voluntarily pay for

supplemental insurance policies that cover the patients' obligation to pay deductibles and coinsurance (co-payments)." Id.

5. The Board of Tax Appeals erred in entering finding of fact No. 5: "The periods between the initial assessments and the Hospital's payments for the various audits vary: less than one month for the 2000 audit, one year for the 1999 audit, two years for the 1998 audit, three years for the 1997 and five years for the 1994-1996 audit (which included both a short extension requested by the Hospital, followed by a request to put that audit on hold in February of 1999)." Id.

6. The Board of Tax Appeals erred in entering finding of fact No. 6: "The Hospital was fully informed of its right to stop the accrual of interest by paying the initial assessments by their due dates, but it chose to delay payment for its own reasons, i.e., to reconcile the assessments to its general ledger or summary trial balances, and to convince the auditors that it was not liable for several of the taxes assessed." Id.

7. The Board of Tax Appeals erred in entering finding of fact No. 8: "The Hospital's claimed reliance on the Department's delays in providing revised assessments acceptable to the Hospital for the Hospital's decision to delay payment and accrue additional interest was not reasonable." Id.

8. The Board of Tax Appeals erred in entering finding of fact No. 9: "The Hospital's claim for a waiver of even partial interest would require the Board to micro-manage the Department." Id.

9. The Board of Tax Appeals erred in entering finding of fact No. 10: "The record is insufficient to permit the Board to determine how much of the extension was either at the request of the taxpayer or for the sole discretion of the Department." Id.

10. The Board of Tax Appeals erred in entering conclusions of law Nos. 1-10, finding in pertinent part that monies received from patients enrolled in the Medicare program are taxable, monies received from insurance companies for services rendered to patients covered by the Medicare program are taxable, and that the Department properly assessed interest on the tax underpayment determined in the audit. CP 39-40.

III. ISSUES ON APPEAL

A. Medicare Revenue.

The government relies on various parties to pay Medicare costs incurred by healthcare providers. Medicare patients and Medigap insurers pay a portion of these costs through copayments and deductibles, but Medicare is liable to pay these amounts to the Hospital, and has established a process to pay these amounts if the patients and insurance companies do not. Under RCW 82.04.4297, hospitals may deduct money received from the federal government "or any instrumentality thereof" from their gross income subject to the B&O tax. Are Medicare patients and Medigap insurers "instrumentalities" of the U.S. government when they pay amounts that Medicare is otherwise obligated to pay?

B. Interest on Tax Assessment.

Whether Skagit, as a hospital district and municipal corporation, must pay interest on tax assessments when the State has not specifically consented to such charges and when Skagit

delayed payment of such charges because the Department issued a tax assessment as a placeholder to forestall the expiration of the statute of limitations and only thereafter completed an actual tax audit. In addition, Skagit was constrained from paying the assessment until after the audit was completed, because as a hospital district, it could not expend government funds until the Department assessment was supported by an assertion of facts (whether actually existing or reasonably deemed to have existed) supporting the assessment.

IV. STATEMENT OF THE CASE

Skagit is a municipal corporation organized and chartered by State statute to provide hospital services and other healthcare services to people within the hospital district. CP 86-87. In addition, Skagit is an enrolled Medicare provider, which means that the Hospital contracts with the federal government to deliver services to Medicare beneficiaries in return for payment for these services. CP 100-01. Skagit, however, does not receive all of its Medicare payments directly from Medicare. CP 101-103.

Instead, Medicare relies in part on a series of third parties acting between the government and healthcare providers to pay the Hospital. Id. This payment system is administered by Medicare and captured in a complex maze of regulations and billing

instructions that are designed to lead the Hospital to total recovery of Medicare cost. Id.

Under one component of cost recovery, Medicare directs its beneficiaries to pay a copayment or deductible to Skagit for the care they receive. Id. Under another component, Medicare authorizes MediGap insurers to pay certain Medicare claims. CP 110-11. Medigap refers to supplemental health insurance sold by Medicare-contracted insurance companies to Medicare beneficiaries. CP 111. In the event that a patient or Medigap insurer does not pay Skagit, Medicare takes ultimate responsibility for the unpaid Medicare costs and reimburses the Hospital for its so-called "bad debt." VRP 10:25-12:15.

The funds that Skagit received from Medicare patients, Medigap insurers, as well as other sources of revenue, were the subject of six separate tax audits conducted by the Department for the tax years of 1993, 1994-96, 1997, 1998, 1999, and 2000. CP 11. The impetus, in part, for the audits was a change to the tax code that subjected hospitals such as Skagit to B&O taxes for the first time. CP 11. The Department found tax deficiencies for the audit years and issued assessments against Skagit for underpaid taxes, including interest and penalties. CP 11. The assessments totaled

$429,889. CP 12, BTA Doc. 214.[1] The Department waived interest on the 1993 assessment from March 9, 1999 to April 26, 2004 because the due date for payment of the assessment was extended for the convenience of the Department. CP 12.

Because many factual and legal questions remained, Skagit appealed the Department's assessments to the Board and a formal hearing was held on July 17, 2008. CP 10. At the hearing, Skagit presented testimony from its Reimbursement Manger, Tamara Cesena, that the Department's assessments were not accurate. CP 93. The following exchange between Ms. Cesena and Skagit's counsel is indicative of her belief:

> **Ms. Cesena**: We received an assessment in October of '97 for close to $35,000.
>
> **Ms. DewBerry**: And did the hospital pay the assessment at that time?
>
> **Ms. Cesena**: No, we did not.
>
> **Ms. DewBerry**: What happened next?

---

[1] The record on appeal consists of the Clerk's papers ("CP") as designated by Skagit as well as the administrative record developed by the Board. Because this appeal involves primarily a review of an administrative agency's final decision, the clerk of the Superior Court has numbered and transmitted the certified record of administrative adjudicative proceedings to this Court. See RAP 9.7(c). Accordingly, when the Hospital cites to the administrative record, it will identify those documents as "BTA Doc. X," where "X" is the page number assigned by the clerk of the Superior Court.

> **Ms. Cesena**: Well, you know, one of the things we do when we receive any audit assessment, is whether from Department of Revenue or any other audit source, is we attempt to validate the numbers and make sure that the assessment is an accurate assessment. We also have a history of actually using auditors as consultants for us. If we're doing something wrong, we want to know about it and we want to fix it and move forward. So, we look at the assessment to be sure it's valid and also to see if there's anything we can learn from it to improve our processes. But we were unable to understand anything, I shouldn't say anything. The majority of the assessment did not tie to our records and made no sense to us.
>
> **Ms. DewBerry**: Could you explain what you mean when you say, "The majority of the assessment did not tie to our records"?
>
> **Ms. Cesena**: Well, we have what's called a summary trial balance, which is a reflection of the dollar amount in every category from revenues to expenses. And basically all your financial statements are derived from the summary trial balance. It has your balance sheet items and your profit and loss items, and your whole financial statement is basically broken down into great detail on your summary trial balance. So, it gives you all the subcategories of revenue, subcategories of expenses. And we weren't able to tie the revenue that was listed on the audit assessment to the revenue in our summary trial balance.

CP 113-14 (emphasis added). In addition, Ms. Cesena prepared a table summarizing Skagit's "significant correspondence" with the Department that detailed the months-and-years-long delay in completing each audit and attendant assessment. BTA 73.

Skagit also presented evidence from its own auditor and tax expert, Al Hansen, that the Department was not diligent in finalizing the audits:

> **Mr. Hansen**: Well, we knew that they were continuing to add audits. It was like they were trying to extend this thing for a long time. I mean I had my suspicions about things that I can't [sic], but it was like they weren't trying to get the audit done, they were just trying to extend it. There was no, like no attempt to finish the audit, just an attempt to add another year.

CP 193 (emphasis added). Later during the hearing, Mr. Hansen testified as follows:

> **Ms. Dew Berry**: And in terms of the difficulties of getting this audit finished from beginning to end, how does the audit process for this hospital compare to the audit process for other hospitals?
>
> **Mr. Hansen**: It was a nightmare.
>
> **Ms. DewBerry**: In what way?
>
> **Mr. Hansen**: The auditor did not respond to information we provided. They did not give us information about what they were thinking, about what they were talking about. They never, I mean there should have been no, it should not have been a problem to be able to finalize and get good numbers that they worked with the hospital and with me on a regular basis and they did not. They pretty much ignored the hospital. We'd give them information and not hear from them for months at a time. So, it was just purely a lack of ... you know, if you look at their audit manual, they're supposed to be diligent and purse audits to conclusion in a professional manner, and they didn't do that.

CP 197 (emphasis added). Likewise, the Department's audit manager, John Rapp, testified during the Board hearing that audits took an unusually long amount of time to finish and issues with the audit were not resolved in a timely fashion:

> **Ms. DewBerry**: If Ms. Savage [the Department's auditor] received information from a taxpayer in 2002, but didn't use

> that information until 2004, in your mind, would that be an unreasonable delay?
>
> **Mr. Rapp**: If she had just received it and not done any work on it whatsoever, assuming that the only reason was that she was working on other things and there was an expectation on both sides that it would be done sooner, then I would say yes.
>
> . . .
>
> **Ms. DewBerry**: If there was no significant interaction between the auditor and the taxpayer, would it have been good audit practice to have waited a year?
>
> **Mr. Rapp**: Typically, not. That's a long period of time to have initiated something and not have been working on it.

CP 235-238.

On October 1, 2008, the Board issued a final decision sustaining the Department's assessments and ordered Skagit to pay interest and penalties from the dates set forth in the initial assessments. CP 40. Skagit petitioned the Thurston County Superior Court for judicial review of the Board's decision, claiming (1) that it was entitled to deduct copayments and deductibles received from Medicare patients and Medigap insurers from its B&O taxes under RCW 82.04.4297, and (2) that the hospital was not subject to interest and penalties on the tax assessments as a municipal corporation and that the hospital was not the reason for delays in paying the assessments. CP 7-8. The Superior Court

affirmed the Board decision and Skagit filed this appeal on August 10, 2009. CP 412-413.

V. ARGUMENT

A. Skagit May Deduct Medicare Copayments and Deductibles and Payments from Medigap Insurers from its Gross Income Subject to the B&O Tax Because These Amounts are Received from an Instrumentality of the U.S. Government.

Washington allows a deduction from gross income subject to the B&O tax for amounts received from the federal government or any "instrumentality thereof" as compensation for providing health services:

> In computing tax there may be deducted from the measure of tax amounts received from the United States or any instrumentality thereof or from the state of Washington or any municipal corporation or political subdivision thereof as compensation for, or to support, health or social welfare services rendered by a health or social welfare organization or by a municipal corporation or political subdivision, except deductions are not allowed under this section for amounts that are received under an employee benefit plan.

RCW 82.04.4297.

There is no dispute that Skagit is a "health or social welfare organization" or that it receives amounts from the United States as compensation for providing "health or social welfare services." The only question is whether payments from Medicare patients and Medigap insurers are deductible because the patients and insurance companies are acting as instrumentalities of the Medicare program.

1. The plain-language meaning of the term "instrumentality" as used in RCW 82.04.4297 includes payments from Medicare beneficiaries.

The primary objective in analyzing whether Medicare patients and Medigap insurers are acting as "instrumentalities" of the federal government within the meaning of RCW 82.04.4297 is to determine and carry out the Legislature's intent. See e.g., Pac. Nw. Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 354, 144 P.3d 276 (2006). Because this is a question of law and statutory interpretation, the Board's conclusions are subject to de novo review. City of Spokane ex rel. Wastewater Mgmt. Dept. v. State Dept. of Revenue, 145 Wash.2d 445, 451, 38 P.3d 1010 (2002). Accordingly, this Court must grant relief from the BTA's order if the agency erroneously interpreted or applied the law. Id. at 451.

Courts begin with the statute's language to ascertain the Legislature's intent. Id. When the statute's language is unambiguous, it is the sole means of determining the Legislature's intent:

> Courts should assume the Legislature means exactly what it says. Plain words do not require construction. The courts do not engage in statutory interpretation of a statute that is not ambiguous. If a statute is plain and unambiguous, its meaning must be derived from the wording of the statute itself.

State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001); see also Homestreet, Inc. v. State, Dept. of Revenue, 166 Wn.2d 444, 452, 210 P.3d 297 (2009) (holding that plain-language meaning of statute entitled business to B&O tax refund).

Related statutes or other provisions of the same act in which the provision is found are not considered when the statute's meaning is clear on its face. Homestreet, 166 Wn.2d at 455. Thus, the plain language of a statute will control even if the Court believes that "the legislature intended something else but failed to express it adequately." Id.

Moreover, a "statute is not ambiguous merely because different interpretations are conceivable." Id. Courts are not "obliged to discern an ambiguity by imagining a variety of alternative interpretations." W. Telepage, Inc. v. City of Tacoma Dept. of Fin., 140 Wn.2d 599, 608, 998 P.2d 884 (2000).

Here, the term "instrumentality" is unambiguous. The Legislature did not see fit to define this term, however, for purposes of RCW 82.04.4297. An undefined statutory term is given its common and ordinary meaning as found in a regular dictionary. Homestreet, 166 Wn.2d at 451.

Webster's Third New International Dictionary (1981) defines "instrumentality" as "something by which an end is achieved:

MEANS." Webster's defines the word "instrumental" as "serving as a means or intermediary determining or leading to a particular result: being an instrument that functions in the promotion of some end or purpose."

The definition set forth in the American Heritage Dictionary (4th ed. 2000) for "instrumentality" is largely the same: "the state or quality of being instrumental ... [a] means; an agency...." "Instrumental," means "serving as a means or agency...."

Finally, Black's Law Dictionary (8th ed. 2004) defines "instrumentality" as "a thing used to achieve an end or purpose" or "a means or agency through which a function of another entity is accomplished."

These definitions share the same language and a common theme—an instrumentality is a person or an entity used to accomplish the ends of another.

Here, compensating Skagit for the costs it incurred while caring for Medicare beneficiaries was the "end" that Medicare—the U.S. government—sought to accomplish. The "means"—or instrumentality—used by Medicare to accomplish this end were the payments made by Medicare beneficiaries and Medigap insurers.

RCW 82.04.4297's deduction applies here because under the plain-language meaning of the term, Medicare copayments and

deductibles and payments from Medigap insurers are the government's means, or instrumentality, used to compensate Skagit for a portion of the health and social welfare services rendered.

a. Medicare uses Medicare patient copayments and deductibles as a means to pay costs incurred by Skagit in treating Medicare patients.

As one component of cost recovery, Medicare directs its beneficiaries to pay a copayment or deductible for the care they receive. Skagit may, but is not required to, collect these costs from its patients. See 42 C.F.R. § 489.30 ("The provider may charge the beneficiary or other person on his or her behalf..."); see also 42 C.F.R. § 489.21. Medicare will pay this portion of the Hospital's Medicare costs, however, if the Hospital is unable to collect from the patient. 42 C.F.R. § 413.89.

To summarize, the salient portions of the Medicare payment process with respect to individual Medicare beneficiaries may be summarized as follows:

- Medicare contracts with hospitals and agrees to pay rates based on the hospital's costs of caring for Medicare patients (see 42 C.F.R. § 489.3; see also 42 C.F.R. § 413.89; 42 C.F.R. § 413.1; 42 C.F.R. § 413.5);

- Hospitals may, but are not required to, collect inpatient hospital deductibles and coinsurance payments from patients (see 42 C.F.R. § 489.30);
- Medicare regulations provide that Medicare covered service costs are not to be borne by others; thus, Medicare provides an additional funding mechanism used to pay the Hospital if a Medicare beneficiary fails to pay copayments and deductibles (see 42 C.F.R. § 413.89).

Medicare sets the price it will pay Skagit for Medicare services, dictates what portion of the price third parties will pay, and if those payments are not received, reimburses Skagit for the remainder. Medicare uses patient copayments and deductibles as a component in the larger cost-recovery process for Medicare providers.

b. Medicare uses Medigap insurers as a means to pay costs incurred by Skagit in treating Medicare patients.

Medicare administers and funds a portion of its liability to Skagit for Medicare costs through creating relationships with Medigap insurers. The following points demonstrate how Medicare uses Medigap insurers to pay Medicare claims:

- Medigap policies are authorized and certified by the Centers for Medicare and Medicaid services (i.e. the

agency which administers the Medicare program) in accordance with provisions of the Social Security Act (see 42 U.S.C. § 1395ss(a)(1));

- Medicare dictates the minimum standards for the Medigap policy (see 42 U.S.C. § 1395ss(b));
- Medicare approves the premium, restricts the type of benefits that can be included in a Medigap policy, and requires Medigap insurers to secure certain statements concerning other health benefits to which the individual Medicare enrollee is entitled prior to issuing the policy (see 42 U.S.C. § 1395ss(d));
- Medicare prohibits advertising of these policies unless certain requirements are met (see id.);
- Medicare prohibits the sale of policies that are not certified by the federal government (see id.);
- Insurers are required to coordinate their payment process with Medicare and to pay Medicare a user fee to receive payment data from Medicare (see id.; 42 U.S.C. § 1395u(h)(3));
- Medicare "authorize[s] the insurer to have printed on ... [the] policy . . . an emblem which the Secretary shall cause to be designed for use as an indication that the

policy has received the Secretary's certification" (42 U.S.C. § 1395ss(a)(1));

- Federal Medicare law imposes significant fines for non-compliance by insurance companies with the above rules (see 42 U.S.C. §§ 1395ss, 1395mm).

Like the Medicare patient copayments and deductibles, Medicare uses Medigap insurers as a component in the overall cost-recovery process for Medicare providers.

2. *Even assuming the term "Instrumentality" is ambiguous, the legislative history of RCW 82.04.4297 indicates that deductions apply to Medicare copayments and deductibles and payments from Medigap insurers.*

If a statute is subject to multiple "reasonable interpretations," it is ambiguous. W. Telepage, Inc. v. City of Tacoma, 140 Wn.2d 599, 608, 998 P.2d 884 (2000). When presented with an ambiguous statute, the Court must look beyond the text to interpret it. State v. Bash, 130 Wn.2d 594, 601, 925 P.2d 978 (1996).

While tax exemptions are narrowly construed, "it is important to bear in mind that ... exceptions to statutory provisions are narrowly construed in order to give effect to legislative intent underlying the general provisions." R.D. Merrill Co. v. Pollution Control Hearings Bd., 137 Wn.2d 118, 140, 969 P.2d 458 (1999).

Going beyond the plain language of RCW 82.04.4297 in the event that the Court determines the term "instrumentality" is ambiguous, the Legislative findings at the time RCW 82.04.4297 was revised in 2001 to clarify that Medicare copayments and deductibles and payments from Medigap insurers qualify for the deduction:

> The legislature finds that the deduction under the business and occupation tax statutes for compensation from public entities for health or social welfare services was intended to provide government with greater purchasing power when government provides financial support for the provision of health or social welfare services to benefited classes of persons ... [and] that this objective would be thwarted to a significant degree if the business and occupation tax deduction were lost by health or social welfare organizations solely on account of their participation in managed care for government-funded health programs. In keeping with the original purpose of the health or social welfare deduction, it is desirable to ensure that compensation received from government sources through contractual managed care programs also be deductible.

Laws of 2001, 2nd Spec. Sess., ch. 23, § 1 (emphasis added).

The Legislative intent behind RCW 82.04.4297's deduction is clear. The goal is to give the government more purchasing power when it pays, or directs others to pay, for the health care of designated beneficiaries. Medicare is the exact type of "government-funded health program" the Legislature had in mind when enacting the deduction. Payments from Medigap insurers

clearly fall within the type of revenue intended to be deductible under RCW 82.04.4297.

Finding that Skagit could not claim the B&O tax deduction for Medicare copayments and deductibles and payments from Medigap insurers would thwart the Legislature's intent to provide the government with more purchasing power for programs like Medicare. If the money that the federal government pays, or directs others to pay, to healthcare providers is subject to the B&O tax, then that healthcare will increase in cost. Providers will pass off the B&O tax costs to the government in the form of higher prices for healthcare services; thus, increasing the costs Medicare will be obligated to pay. The increased cost of healthcare will reduce the federal government's purchasing power, when the Legislature actually intended to increase it.

More than statements of legislative intent, though, the Legislature's amendment to RCW 82.04.4297 also reveals the full original scope of the statute's deduction. In 2001, the Legislature amended RCW 82.04.4297 to make plain its intent that compensation for Medicare related health services received from both the government and Medicare-contracted insurers not be

subject to the B&O tax.[2] Moreover, the Department limits refund and deduction to payments from Medicare HMO's (i.e., a full wrap policy of insurance and will not allow a deduction for MediGap polices), which are not a full-wrap insurance coverage for Medicare beneficiaries

To be consistent with the Legislature's intent, the Court should find that Medicare copayments and deductibles paid by Medicare beneficiaries are deductible under RCW 82.04.4297.

B. Skagit is Not Subject to Interest and Penalties on the Department's Assessments.

1. Skagit shares in the Sovereign Immunity of the State and is Not Subject to Interest Absent Statutory Authorization.

Skagit is a municipal corporation organized and chartered by State statute to provide hospital services and other healthcare services to people within the hospital district. RCW 70.44.003,

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[2] In 2002, the Legislature broadened RCW 82.04.4297's exemption by amending the statute and adopting a more generous deduction that included amounts received from any third party as compensation for services "covered under the federal medicare [sic] program...." Laws of 2002, ch. 314, § 2 (codified at RCW 82.04.4311). In addition, the Legislature explicitly ordered a "refund of [B&O] tax paid between January 1, 1998, and [April 2, 2002]" to taxpayers on amounts that would be deductible under the new law. Granted, this new statute does not apply to amounts received from patient copayments or deductibles. RCW 82.04.4311(1). Because this new limitation did not take effect until after April 2, 2002, however, it does not destroy St. Joseph's claimed deduction for patient copayments and deductibles between the years 1997 and 2000.

.010. As a municipal corporation, Skagit is "a body politic established by law as an agency of the state..." HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth., 155 Wn.2d 612, 627, 121 P.3d 1166 (2005). Its powers and duties are limited to those expressly and fairly implied by the State, as well as "those essential to the declared objects and purposes of the corporation." Washington Hosp. Liability Ins. Fund v. Public Hosp. Dist. No. 1 of Clallam County, 58 Wn. App. 896, 898, 795 P.2d 717 (1990).

Skagit shares in the sovereign immunity of the State "in the exercise of those governmental powers and duties imposed upon [it] as representing the state." Kelso v. City of Tacoma, 63 Wn.2d 913, 916, 390 P.2d 2 (1964). The State delegated to Skagit by statute the power to operate a public hospital and, thus, activities failing within the ambit of this power fall within the scope of Skagit's sovereign immunity. See RCW 70.44.060. Because the B&O tax was assessed on activities that were carried out under the State's delegated power, the scope of Skagit's sovereign immunity will include the taxed activities.

Our Supreme Court has "consistently held that the doctrine of governmental immunity is a matter of State policy which can be changed only by the legislature." Kelso, 63 Wn.2d at 915. When afforded by statute, however, this "right to sue the state ... extends

no farther than to grant the plaintiff the right to bring his action and ... to recover against the state a judgment for the amount due, not including interest unless the payment of interest by the state is also authorized by statute." Columbia Steel Co. v. State, 34 Wn.2d 700, 712, 209 P.2d 482 (1949) (emphasis added).

Washington courts have acknowledged the general rule that the State is not liable for interest on a debt absent specific legislative consent. See, Our Lady Lourdes Hosp. v. Franklin County, 120 Wn.2d 439, 455-56, 842 P.2d 956 (1993) ("The general rule is that as a matter of sovereign immunity, the state cannot, without its consent, be held to interest on its debts."); see also, Jenkins v. Washington State Dep't of Soc. & Health Svcs., 160 Wn.2d 287, 302, 157 P.3d 388 (2007) (citing Our Lady Lourdes for the rule that RCW 4.56.110 does not apply to the State, under the general rule that "the State cannot be held to interest on its debts without its consent."); Architectural Woods, Inc. v. State, 92 Wn.2d 521, 526, 598 P.2d 1372 (1979) ("By our present ruling, we reinstate the rule ... that the state without its consent cannot be held to interest on its debts [and] decline to abrogate the doctrine of sovereign immunity ... adher[ing] to our position [] that governmental immunity is a matter of state policy which can be changed only by the legislature.") (internal quotations omitted);

Fosbre v. State, 76 Wn.2d 255, 256, 456 P.2d 335 (1969) ("[T]he state is not liable for interest on judgments rendered against it unless payment thereof has been authorized by statute [] or by a reasonable construction of a contract or statute, it has placed itself in a position of liability.") (internal quotations omitted); State v. Thiessen, 88 Wn. App. 827, 829, 946 P.2d 1207 (1997) ("A statutory waiver of sovereign immunity as to interest will apply only in those circumstances specifically delineated by statute. We do not read into a statute provisions that are not there; nor do we modify a statute by construction.").

These cases make plain the fact that, as a matter of law, the State cannot be held to interest on a debt unless it has specifically consented otherwise. And as a "political subdivision" of the State, this general rule applies to Skagit. Our Lady of Lordes Hosp., 120 Wn.2d at 456.

Here, there is no statute embodying the State's consent for the Department to assess interest against a State agency. The Department will argue that 82.32.050 provides for imposing interest on a municipal corporation, but this provision is a statute of general application and applies in broad stroke to "taxpayers" and, therefore, lacks the necessary specificity to waive sovereign immunity on the subject of interest. Washington courts have long

held that laws of general applicability do not apply to the State or its agencies.

For instance, in Our Lady of Lourdes, a hospital sued Franklin County for the cost of medical care for two inmates. 120 Wn.2d at 441-42. The County, in turn, sued DSHS as a third-party defendant for reimbursement of the liability to the hospital. Id. Although liability for the cost of care was upheld, the Supreme Court reversed the trial court decision awarding postjudgment interest because RCW 4.56.110—a statute imposing postjudgment interest on all judgments—lacked the express or implied consent of the State to pay postjudgment interest.

Likewise, in Thiessen, a defendant who successfully defended against an assault charge on the basis of self-defense, was awarded reimbursement of his defense costs pursuant to RCW 9A.16.110(2), as well as postjudgment interest. Thiessen, 88 Wn. App. at 828. The statute in question provided that the State would reimburse a person found not guilty by reason of self-defense of "all reasonable costs" and "other expenses involved in his or her defense." Id. at 829

This Court reversed the trial court's award of interest, citing Our Lady of Lourdes, and held that

> A statutory waiver of sovereign immunity as to interest will apply only in those circumstances specifically delineated by statute. We do not read into a statute provisions that are not there; nor do we modify a statute by construction.

Id. (emphasis added).

In this case, nothing suggests that the State has waived sovereign immunity as to interest on B&O tax assessments against a public hospital district. Indeed, the discussion above makes clear that the statutes relied upon by the Department apply to taxpayers generally. Because these statutes lack a waiver of sovereign immunity, the Department cannot assess or collect interest or penalties related to the tax assessments from Skagit as a municipal corporation.

2. Interest is Waived Because Payment was Delayed for Reasons Other than Skagit's Inaction.

Even in the absence of sovereign immunity, however, Washington law provides a mandatory waiver or cancellation of interest if "the extension of a due date for payment of an assessment of deficiency was not at the request of the taxpayer and was for the sole convenience of the department" or if failure to make timely payment was the result of "circumstances beyond the control of the taxpayer." RCW 82.32.105(3)(b), .105(1).

Here, the Department's unreasonable dalliance in completing the audits is the cause of Skagit's delay in paying the assessments. The Department repeatedly issued assessments knowing that its figures were not based on facts, rather the assessments were placeholders used to preserve claims that might otherwise be determined in subsequent audits from being timebarred. Thereafter, the Department did not diligently pursue its audits, forestalling the possibility that Skagit's tax liability could be determined accurately and in a timely fashion. The Department acknowledged as much by waiving the interest on its 1993 assessment, but has remained steadfast in opposing waivers of interests on other assessments despite the fact that its dilatory conduct was the same on all of the assessments.

During the Board hearing, Skagit presented testimony from its Reimbursement Manger and auditor detailing their frustration with the audit and appeal process and the fact that the assessments were in many ways detached from the Hospital's actual finances and revenue, even though this revenue was the basis for properly computing a B&O tax. Department documents and correspondence with Skagit confirm the following uncontroverted facts and demonstrate that the Board's findings of fact with respect to the

cause of Skagit's delay in making payment <u>are not</u> supported by substantial evidence:

- The Department issued assessments without regard to whether the facts would support the assessment, BTA Doc. 712 (e-mail from Department auditor to the Hospital - "Schedule 7 includes many accounts that are 'Grant/Donation Revenue.' These are not subject to tax if there isn't a service performed or property exchanged for the grant. Please let me know which accounts, if any, are not taxable and we will take them out of the taxable total.");
- The Department was aware that its work was incomplete and inaccurate, but issued flawed assessments because the statute of limitations was expiring, BTA Doc. 751 ("The 1993 portion of the tax due was assessed prior to completion of the field work for the full audit period due to statute of limitations.");
- The Department delayed the audit process for several years, despite the timely receipt of requested information from the Hospital, BTA Doc. 712 (e-mail exchange in October of 2004 in which the Department's auditor acknowledges with respect to the audit of the year 2000,

that "this is the first schedule written for the adjustment in your audits." The Hospital responded, "by my records the Department has had this information for over two years." The auditor replied, stating that timeliness is not a concern, "the limitation for assessment or providing tax credit is the statute of limitations. . . . ." In that same email the auditor also addresses the 1997 audit, stating: "FYI, It looks like we will get the 1997 adjustments to you by the end of the week." Id. The 1997 audit began in 2001, nearly 3 years before this e-mail exchange.);

- The Department adopted legal positions that were inconsistent with the taxation of other hospitals; BTA Doc. 698 (Letter from Clark Nuber to Department voicing its concern that, among other things, the Department did not apply the B&O tax to Medicare copayments and deductibles received by other Hospitals even though it sought to tax Skagit for this revenue.).

The Department's audit of Skagit for tax years 1994-96 is an exemplar of the Department's delay in completing the audit process. The assessment for 1994-1996 was issued before the Department undertook any review of the facts and was knowingly incorrect. The Department had a duty to examine Skagit's tax

returns and base its assessment on that factual information. See RCW 82.32.050(1) ("If upon examination ...it appears that a tax or penalty has been paid less than properly due....). In order to resolve the facts, Skagit petitioned the Department for a correction.

Once Skagit petitioned for a correction, the Department could grant or deny the petition. See RCW 82.32.160. The Department granted the Hospital's petition. At that point, the Department had a duty to schedule a hearing before one of the Department's administrative law judges. WAC 458-20-100 ("The appeals division will acknowledge receipt of the petition and identify the administrative law judge ("ALJ") assigned to the appeal."). "If a conference is granted, the Department shall fix the time and place therefore and notify the petitioner thereof." RCW 82.32.160.

Instead of conducting a review, in 1999, the matter was referred back to the auditors. BTA Doc. 527. This is when the correction process ground to a standstill. Preliminary schedules for a post-assessment adjustment were not distributed to the Hospital until three years later, on December 12, 2002. BTA Doc. 532-546. An amended audit assessment was not issued for another year and a half (April 22, 2004). BTA Doc. 892.

The timing was completely within the Department's control. Similar delays were experienced with the audits for the other years: as mentioned earlier, interest on the 1993 audit was waived due to the Department's delays; the 1997 and 1998 audits were issued on November 26, 2002 and later adjusted by separate post-adjustment assessments in November 24, 2004 before an administrative law judge who heard the dispute concerning the assessment. BTA Doc. 460-61.

The Department's delays in completing the audits, and attendant assessments, revisions and appeals were for the benefit of the Department as it endeavored to correct previous errors. The Department's delays have negatively impacted the Hospital and imposing interest would impermissibly burden the taxpayers of Skagit County. Moreover, the Board's assertion, masked as a finding of fact, that "waiver of even partial interest would require the Board to micromanage the Department" does injury to justice. The Department did not present evidence that it would be cumbersome to waive, either in full or in part, the interest in question. The Department should not escape waiver of interest as required by law and equity simply because it would require more work than it is willing to muster.

Further, Skagit's failure to make payment was beyond the control of the Hospital because it could not pay the tax bill until the bill was supported by a clear claim of liability. The audits assessed taxes without regard to the underlying facts. Thus, when the Department issued a tax assessment which overstated the actual tax liability, and based the assessment on non-existent facts (even if the Department later assessed an equal amount of taxes on a different revenue stream), the Department created a legal conundrum. RCW 70.44.171 provides that the Hospital's auditor must certify the appropriateness of each bill to be paid and must ask the county treasurer to pay the bill.[3] The Hospital was legally constrained from directing the county treasurer to pay the assessment because the audit assessment was not supported by the facts laid out in the assessment.

Here, interest must be waived because: (1) the Department's failure to complete accurate and timely audits occasioned the Hospital's delay in paying the assessments, and (2) the Hospital

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[3] RCW 70.44.171 reads as follows:

> The treasurer of the county in which a public hospital district is located shall be treasurer of the district . . . All district funds shall be paid to the treasurer and shall be disbursed by him only on warrants issued by an auditor appointed by the commission, upon orders or vouchers approved by it."

could not instruct the county auditor to pay the tax until a proper assessment had been prepared.

C. Skagit is Entitled to Attorneys' Fees and Costs on Appeal.

Skagit is entitled to its costs. RAP 14.2. The recoverable costs are set out in RAP 14.3. Skagit will file its cost bill with the appellate court within 10 days after the decision terminating review, as provided in RAP 14.4. Skagit is also entitled to an award of reasonable attorney fees, and will submit the required affidavit of fees and expenses at the appropriate time. RAP 18.1.

VI. CONCLUSION

For the reasons discussed above, the Board of Tax Appeals final decision should be reversed and a refund of the taxes and interest in dispute should be ordered.

DATED this 9th day of November, 2009.

GARVEY SCHUBERT BARER

By _____
Carla M. DewBerry, WSBA #15746
Roger L. Hillman, WSBA #18643
Jamal N. Whitehead, WSBA #39818
Attorneys for Appellant Skagit County Public Hospital

CERTIFICATE OF SERVICE

I, Stacy R. Maxwell, certify under penalty of perjury under the laws of the State of Washington that I caused the original of the foregoing APPELLANT'S BRIEF to be filed with the Washington State Court of Appeals, Division Two, via U.S. mail, first class, postage prepaid, on November 9, 2009, at the address listed below:

Clerk/Administrator
Washington State Court of Appeals,
Division Two
950 Broadway, Suite 300
Tacoma, WA 98402-4454

I further certify under penalty of perjury under the laws of the State of Washington that I caused a copy of the foregoing APPELLANT'S BRIEF to be served, via U.S. mail, first class, postage prepaid, on November 9, 2009, on the Attorneys for Respondent listed below:

Peter Gonick, AAG
David Hankins, AAG
AG Office – Revenue Division
7141 Cleanwater Drive S.W.
P.O. Box 40123
Olympia, WA 98504-0123

CLERK
COURT OF APPEALS
DIVISION II
09 NOV 10 AM 11:58
STATE OF WASHINGTON
BY
DEPUTY

Dated at Seattle, Washington, this 9th day of November, 2009.

Stacy R. Maxwell

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APPENDIX

CASES

Supreme Court of Washington, En Banc.
ARCHITECTURAL WOODS, INC., Appellant,
v.
The STATE of Washington, Respondent.
No. 45186.

Aug. 24, 1979.

Assignee of claim for funds due on contract for construction of facilities at state college, which received judgment for principal sum, appealed from order of Superior Court, Thurston County, Robert J. Doran, J., which denied its request for prejudgment and postjudgment interest. The Supreme Court, adopting an opinion by Hamilton, J., held that by entering into construction contract, state college waived its sovereign immunity to be sued on contract claim and such waiver extended to every aspect of its contractual liability including liability for the prejudgment and postjudgment interest.

Reversed.

West Headnotes

[1] States 360 171

360 States
360V Claims Against State
360k171 k. Interest. Most Cited Cases
Doctrine of sovereign immunity prohibits a state from being held to interest on its debts without its consent.

[2] States 360 171

360 States
360V Claims Against State
360k171 k. Interest. Most Cited Cases
The necessary consent by State to be liable for interest on its debt may be implied, and is not limited to express statutory or contractual consent.

[3] States 360 171

360 States
360V Claims Against State
360k171 k. Interest. Most Cited Cases
By entering into an authorized contract, State impliedly consents to liability for interest on same basis as a private party; overruling *Pape v. Armstrong*, 47 Wash.2d 480, 287 P.2d 1018.

[4] States 360 171

360 States
360V Claims Against State
360k171 k. Interest. Most Cited Cases

States 360 191.9(1)

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.9 Particular Actions
360k191.9(1) k. In General. Most Cited Cases
(Formerly 360k191(1.19))
Statute authorizing state colleges and universities to enter into contracts for acquisition and construction of facilities impliedly consents to interest liability against State as well as to suits against State on contract claims. RCWA 28B.10.300.

[5] States 360 171

360 States
360V Claims Against State
360k171 k. Interest. Most Cited Cases

States 360 191.6(1)

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.6 Mode and Sufficiency of Consent
360k191.6(1) k. In General. Most Cited Cases
(Formerly 360k191(1.12))

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By entering into construction contract, state college waived its sovereign immunity to be sued on contract claim and such waiver extended to every aspect of its contractual liability including liability for prejudgment and postjudgment interest; overruling *Pape v. Armstrong*, 47 Wash.2d 480, 287 P.2d 1018. RCWA 4.92.010, 28B.10.300.

***522 **1373** Kane, Vandeberg & Hartinger, Harold Hartinger, Tacoma, for appellant.

Slade Gorton, Atty. Gen., Larry Schrieter, Richard Montecucco, Sally Austin, Michael Flynn, Asst. Attys. Gen., for respondent.

PER CURIAM.

This case presents the issue of whether a private litigant who has been awarded judgment arising out of a contract with a state agency may recover prejudgment and postjudgment interest from the agency. We answer that question in the affirmative.

The facts and procedural history of this case can be summarized as follows:

On March 10, 1971, The Evergreen State College at Olympia (Evergreen), an agency of the State, entered into a contract with the Didco Corporation (Didco) for the construction of student room furnishings in a student dormitory. Architectural Woods, Inc., Didco's assignee as to funds due on the contract, brought an action against Evergreen to recover an amount of the assigned funds still owing under the assignment, claiming that Evergreen paid the funds to the wrong party. The action was dismissed by the trial court. Architectural Woods appealed, and we reversed the trial court's decision, remanding the cause to superior court for entry of judgment on behalf of Architectural Woods. Architectural Woods, Inc. v. State, 88 Wash.2d 406, 562 P.2d 248 (1977). When the case returned to the superior court for judgment, Architectural Woods proposed a judgment for the principal sum due and for prejudgment and postjudgment interest.

***523** Judgment after the appeal was entered October 26, 1977, awarding plaintiff $34,226.90, but denying plaintiff prejudgment and postjudgment interest. The trial court denied the interest on the ground that such an award is barred by the doctrine of sovereign immunity. Plaintiff then brought this appeal challenging the denial of its request for interest.

The legislature has passed statutes which set the rate of interest for prejudgment interest [FN1] and postjudgment interest.[FN2] Neither****1374** of these statutes expressly exempts the State from their operation. An early case, Brewster v. State, 170 Wash. 422, 16 P.2d 813 (1932), held that a contractor who obtained a judgment against the State on a contract claim could not be awarded prejudgment interest on the ground that such interest would only be awarded on liquidated claims. In its opinion, the court did not mention the doctrine of sovereign immunity as a ground for withholding interest.

FN1. "Every loan or forbearance of money, goods, or thing in action shall bear interest at the rate of six percent per annum where no different rate is agreed to in writing between the parties. The discounting of commercial paper, where the borrower makes himself liable as maker, guarantor or indorser, shall be considered as a loan for the purposes of this act." RCW 19.52.010.

FN2. "Interest on judgments shall accrue as follows:

"(1) Judgments founded on written contracts, providing for the payment of interest until paid at a specified rate, shall bear interest at the rate specified in such contracts, not in any case, however, to exceed ten percent per annum: Provided, That said interest rate is set forth in the judgment.

"(2) Except as provided under subsection (1) of this section, judgments shall bear interest at the rate of eight percent per annum from the date of entry thereof: Provided, That in any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered: Provided, However, That in any case where notice of appeal or petition for writ

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> of review is filed prior to June 12, 1969, interest shall accrue from the date of entry of judgment and shall not date back to the date the verdict was rendered." RCW 4.56.110.

The doctrine was first used in this state as a bar to the award of postjudgment interest in a case involving a workman's compensation claim. ***524**Spier v. Department of Labor & Indus., 176 Wash. 374, 29 P.2d 679 (1934). This court stated the general rule that "the state cannot, without its consent, be held to interest on its debts." Spier at 376-77, 29 P.2d at 680. This rule has been restated in subsequent cases involving various types of claims, including: tort actions under the tort claims act,[FN3] Fosbre v. State, 76 Wash.2d 255, 456 P.2d 335 (1969); workman's compensation claims, Horton v. Department of Labor & Indus., 199 Wash. 212, 90 P.2d 1009 (1939); claims for illegally exacted taxes, Columbia Steel Co. v. State, 34 Wash.2d 700, 209 P.2d 482 (1949); an action in mandamus arising under the veteran's preference act, Bond v. State, 70 Wash.2d 746, 425 P.2d 10 (1967); and contract claims, Pape v. Armstrong, 47 Wash.2d 480, 287 P.2d 1018 (1955); Moen v. State, 17 Wash.App. 35, 560 P.2d 728 (1977).

> FN3. Notably, after Fosbre v. State, 76 Wash.2d 255, 456 P.2d 335 (1969), was decided, the legislature passed a statute to allow the recovery of interest from the state in tort actions. RCW 4.56.115. Following the decisions of Spier v. Department of Labor & Indus., 176 Wash. 374, 29 P.2d 679 (1934), and Columbia Steel Co. v. State, 34 Wash.2d 700, 209 P.2d 482 (1949), the legislature had likewise enacted laws which allowed interest to be recovered from the state in workman's compensation cases, RCW 51.32.080, and claims for illegally exacted taxes, RCW 82.32.060.

However, successive cases have expanded this rule considerably since its inception in Spier. In Columbia Steel Co. v. State, Supra, a case in which plaintiffs sought interest on illegally exacted taxes, the court followed the rule of Spier but modified the rule to fit the facts and law of the case. The court stated, 34 Wash.2d at page 713, 209 P.2d at page 489, that

In the absence of a statute providing that the state shall be liable for interest upon amounts awarded to private parties by judgments for the refund of taxes, . . . interest upon the amounts which the taxpayers may recover will not be allowed.

(Italics ours.)

It is noteworthy that up to and including the decision in Columbia Steel, none of the cases which had been decided on the question of recovery of interest from the state had involved contract claims. Due to the statutory schemes ***525** underlying those cases, it was logical to interpret the "consent" requirement of the Spier rule to mean "statutory consent." By the time Pape v. Armstrong, Supra, was decided, the requirement of statutory consent had been firmly engrafted into the rule of Spier, which merely held that a state cannot be held to interest without its consent. Therefore, in Pape, the first one in this line of cases in which the plaintiff sought interest on a contract claim, the court denied the claim, holding:

The state cannot be sued without its consent, and Then only in the manner and to the extent provided by statute. Spier v. Dept. of Labor & Industries, 176 Wash. 374, 29 P.2d 679; Columbia Steel Co. v. State, 34 Wash.2d 700, 209 P.2d 482. Since no applicable statute consenting to ****1375** the state's being held liable for interest has been called to our attention, we hold that the trial court erred in including the provision for interest in the judgment.

Pape v. Armstrong, Supra, 47 Wash.2d at 489, 287 P.2d at 1023. (Italics ours.)

In applying the "statutory consent" standard of Columbia Steel as opposed to the general "consent" standard enunciated in Spier, the court in Pape was constrained to find that no such consent to liability for interest was given.

Subsequently, in Bond v. State, Supra 70 Wash.2d at 748, 425 P.2d at 11, this court stated that Washington has followed the "generally recognized rule" that a state is not liable for interest in any case "except where expressly, or By a reasonable construction of a contract or statute, it has placed itself in a position of liability." (Italics ours.) These requirements have been strictly followed. In Fosbre v. State, Supra, the court was presented with the question of whether the state is liable for interest under the Tort Claims Act,

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which provides:

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent As if it were a private person or corporation.

(Italics ours.) RCW 4.92.090.

***526** The court held, over Justice Weaver's dissent, that this provision did not create liability for interest on the part of the State. In his dissent, Justice Weaver wrote, 76 Wash.2d at page 258, 456 P.2d at page 336:

It is apparent that when the state consented to submit to tort liability, as it is authorized to do by article 2, section 26 of the state constitution, it placed itself in the same position as other litigants, and, like them, rendered itself liable upon any judgment the court might determine from the facts.

Most recently, in Moen v. State, 17 Wash.App. 35, 560 P.2d 728 (1977), Division Three of the Court of Appeals denied a claim of postjudgment interest on a judgment against the State based on a contract claim. The court held that the failure of the statute to expressly exclude the State from its provisions did not entitle the plaintiff to interest, following the rule articulated in Bond that a state " 'is not liable for interest in any case except where expressly, or by a reasonable construction of a contract or statute, it has placed itself in a position of liability.' " Moen v. State, Supra at 37, 560 P.2d at 729.

[1][2][3] By our present ruling, we reinstate the rule of Spier that the state without its consent cannot be held to interest on its debts. As such, we decline to abrogate the doctrine of sovereign immunity as plaintiff has urged, and we adhere to our position in Kelso v. Tacoma, 63 Wash.2d 913, 390 P.2d 2 (1964), that governmental immunity is a matter of state policy which can be changed only by the legislature. However, we depart from those cases which have modified and qualified the rule of Spier to the point that it cannot be justly applied. It is our opinion that the consent to liability for interest which was required under the rule of Spier can be an implied consent, and is not limited to the express statutory or contractual consent, which was required by subsequent cases. It is our further opinion that by the act of entering into an authorized contract with a private party, the State, absent a contractual provision to the contrary, thereby waives its sovereign immunity in regard to the transaction and impliedly consents to the ***527** same responsibilities and liabilities as the private party, including liability for interest. Therefore, we specifically overrule the decisions of Pape v. Armstrong, Supra, and Moen v. State, Supra, which held that the State is not liable for interest on a written contract.

Pursuant to RCW 4.92.010:

Any person or corporation having any claim against the state of Washington shall have a right of action against the state in the superior court . . . .

The word "claim" as used in the statute means "cause of action." ****1376**Northwestern & Pac. Hypotheek Bank v. State, 18 Wash. 73, 50 P. 586 (1897); Systems Amusement, Inc. v. State, 7 Wash.App. 516, 500 P.2d 1253 (1972). By this statute, the State has waived its sovereign immunity from lawsuits of various types.

[4][5] However, we believe that this statute is only one expression of the legislature's consent to suit on a Contract claim. The State also Impliedly waived immunity for Evergreen here by the legislature's enactment of RCW 28B.10.300,[FN4] which authorized Evergreen to engage in contracts such as the one in the present case and by Evergreen's actual entry into such a contract. We hold that this implied waiver of sovereign immunity includes not only consent for Evergreen to be sued, but also consent for Evergreen to be held to the same responsibilities and liabilities as a contracting individual. This includes liability for prejudgment and postjudgment interest.

FN4. RCW 28B.10.300 states, in part:

"The boards of regents of the state universities and the boards of trustees of the state colleges are severally authorized to:

"(1) Enter into contracts with persons, firms or corporations for the construction, installation, equipping, repairing, renovating and betterment of buildings and facilities for the following:

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"(a) dormitories"

This statute, which was in effect at the time of the contract between the parties to this case, was amended in 1973. The amended version does not significantly differ from the former statute in relation to the issues discussed here.

In finding an implied consent by the State to be sued on authorized contracts, we agree with the reasoning of the ***528** Idaho Supreme Court in Grant Constr. Co. v. Burns, 92 Idaho 408, 443 P.2d 1005 (1968). In that case, the state of Idaho claimed that it could not be held liable for damages arising from its breach of contract because the State had not expressly waived its immunity from suit. There existed no express statute under which the State could be sued for breach of contract. However, the Idaho Supreme Court held that a waiver of sovereign immunity in such a situation could be implied.

In regard to the scope of this implied waiver, the court cited from the case Carr v. State ex rel. Coetlosquet, 127 Ind. 204, 26 N.E. 778 (1891), in which the Supreme Court of Indiana stated, at pages 206-07, 26 N.E. at page 779:

In entering into the contract it (the state) laid aside its attributes as a sovereign and bound itself substantially as one of its citizens does when he enters into a contract. Its contracts are interpreted as the contracts of individuals are, and the law which measures individual rights and responsibilities measures, with few exceptions, those of a state whenever it enters into an ordinary business contract.

A similar approach was taken by the Supreme Court of Kansas, which held that since the State Public Employees Retirement System may be sued on its contractual obligations, prejudgment and postjudgment interest was allowable as a proper element of damages for breach of its contract. That court considered the legislative authorization for the Retirement System to engage in and carry out contracts and concluded that the legislature has given its consent that the system be sued on its authorized contract. The court then reasoned:

Where the state legislature has consented that one of its agencies may be sued on its express contracts, the waiver of sovereign immunity should extend to every aspect of its contractual liability including the right to the other contracting party to recover interest where it is customarily included as a part of the damages to be awarded for breach of contract. As we stated in Carroll v. Kittle, 203 Kan. 841, 457 P.2d 21, if the government is to ***529** enter into business ordinarily reserved to the field of private enterprise, it should be held to the same responsibilities and liabilities.

Shapiro v. Kansas Pub. Employees Retirement System, 216 Kan. 353, 357, 532 P.2d 1081, 1084 (1975).

We consider this reasoning to be sound and to accord with principles of fairness. ****1377** In regard to public works contracts, we recognize that costs of financing are very important, and that the loss of the use of money is likely to have serious effects on the financial status of a contractor. See Vance, Fully Compensating the Contractor for Delay Damages in Washington Public Works Contracts, 13 Gonzaga L.Rev. 410, 454 (1978). Furthermore, our decision is harmonious with the reasoning of early cases of this court which expressed the principle that the State must not expect more favorable treatment than is fair between men in its business relations with individuals. State ex rel. Washington Paving Co. v. Clausen, 90 Wash. 450, 156 P. 554 (1916). In State ex rel. Gillette v. Clausen, 44 Wash. 437, 87 P. 498 (1906), this court held that the state auditor had no power to set aside an authorized employment contract on the ground that the compensation was unreasonable and excessive. The court reasoned:

"There is not one law for the sovereign and another for the subject; but, when the sovereign engages in business and the conduct of business enterprises, and contracts with individuals, although an action may not lie against the sovereign for a breach of the contract, whenever the contract in any form comes before the courts, the rights and obligations of the contracting parties must be adjusted upon the same principles as if both contracting parties were private persons. Both stand upon equality before the law, and the sovereign is merged in the dealer, contractor and suitor." People v. Stephens, 71 N.Y. 527, 549.

State ex rel. Gillette v. Clausen, Supra at 441, 87 P. at 499-500.

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We therefore reverse the trial court's denial of interest to the plaintiff based on sovereign immunity and hold that any sovereign immunity possessed by Evergreen was waived ***530** by its entry into an authorized contract. We further hold that such waiver extended to every aspect of its contractual liability including liability for interest. The case is remanded with instructions to determine the proper amount of prejudgment and postjudgment interest.

The foregoing opinion was prepared by Justice ORRIS L. HAMILTON prior to his retirement and is adopted by the court as its opinion.

WILLIAMS, J., did not participate in the disposition of this case.
Wash., 1979.
Architectural Woods, Inc. v. State
92 Wash.2d 521, 598 P.2d 1372

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H

Supreme Court of Washington,
En Banc.
CITY OF SPOKANE, by and through its WASTE-WATER MANAGEMENT DEPARTMENT, as Taxpayer, Petitioner,
v.
WASHINGTON STATE DEPARTMENT OF REVENUE, Respondent.
No. 70765-1.

Jan. 24, 2002.

City sewer department sought review of Department of Revenue's decision denying its request for a refund of excise taxes on income city derived from sewer services, alleging that lower business and occupation tax (B & O tax) for sewer transfer services, rather than public utility tax rate for sewer collection services, applied. The Board of Tax Appeals affirmed, and city appealed. The Superior Court, Spokane County, Richard Schroeder, J., reversed the Board, and the Department appealed. The Court of Appeals, 104 Wash.App. 253, 17 P.3d 1206, reversed. City appealed. The Supreme Court, Chambers, J., held that B & O tax applied to interceptors in sewerage system.

Reversed.

West Headnotes

[1] Administrative Law and Procedure 15A ⚷744.1

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak744 Trial De Novo
15Ak744.1 k. In General. Most Cited Cases
Review by the appellate court of an agency's decision is de novo.

[2] Statutes 361 ⚷219(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(1) k. In General. Most Cited Cases

Statutes 361 ⚷245

361 Statutes
361VI Construction and Operation
361VI(B) Particular Classes of Statutes
361k245 k. Revenue Laws. Most Cited Cases
The reviewing court shows considerable deference to the interpretation of an agency charged with interpreting a statutory scheme; however, if there is any doubt as to the meaning of a tax statute, it must be construed against the taxing power.

[3] Statutes 361 ⚷192

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k192 k. Technical Terms. Most Cited Cases
When interpreting a statute, technical language should be given its technical meaning when used in its technical field.

[4] Statutes 361 ⚷188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases

Statutes 361 ⚷208

361 Statutes

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361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k208 k. Context and Related Clauses. Most Cited Cases
When interpreting a statute, a word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

[5] **Municipal Corporations 268 ⚷710**

268 Municipal Corporations
268XI Use and Regulation of Public Places, Property, and Works
268XI(B) Sewers, Drains, and Water Courses
268k710 k. Private Sewers and Drains. Most Cited Cases
(Formerly 371k1062)

Taxation 371 ⚷3526

371 Taxation
371VIII Income Taxes
371VIII(F) Rates of Taxation, Surtaxes, and Additional Taxes
371k3526 k. Gross Income Tax Rates. Most Cited Cases
(Formerly 371k1062)
Business and occupation services tax rate for transfer of sewage, rather than the higher public utility tax for collection of sewage, applied to portion of sewerage system utilizing large interceptor pipes; under substantial use test, interceptors served a delivery or conducting function to transfer sewage, regardless of whether some houses were hooked directly into the interceptors rather than other sewage lines. West's RCWA 82.16.020; Wash. Admin. Code § 458-20-251.
**1010 Short, Cressman & Burgess, *447 Brian L. Comstock, Andrew William Maron, Seattle, Amicus Curiae.

Robert Gerard Beaumier, Jr., Assistant Spokane City Attorney, Spokane, Counsel for Petitioner.

Christine Gregoire, Attorney General, Anne Elizabeth Egeler, Asst., Olympia, Counsel for Respondent.

CHAMBERS, J.

This case concerns the apportionment of sewerage [FN1] between collection sewerage subject to the 3.6 percent public utility tax and sewerage concerned with the transportation and treatment of sewage, which is subject to the business and occupation (B & O) services tax rate. The B & O tax rate varies, but is always lower than the public utility tax rate, and at the time of the complaint was 2.0 percent. At an administrative hearing, the Board of Tax Appeals (BTA) concluded that **1011 collection (subject to the higher tax rate) continues up to the point where no new sewage is introduced into the system. The superior court reversed, concluding that collection occurs only in the small lateral pipes, but the Court of Appeals reversed again and found for the Department of Revenue (DOR). The City of Spokane sought review of the decision of the Court of Appeals, which we granted. Spokane argues here that its large interceptor pipes should be taxed at the lower rate applicable to transfer. We reverse the Court of Appeals and affirm the superior court.

FN1. "Sewerage" refers to the physical facilities (pipes, lift stations, treatment and disposal facilities) through which sewage flows.

FACTS

Two different tax rates apply to sewerage. At the time under appeal, the gross income attributable to the portion *448 involved in collection of sewage was taxed at 3.6 percent under the public utility tax, RCW 82.16.020 (1)(a), while the portion involved in transport of sewage was taxed at 2.0 percent under the generic B & O statute, former RCW 82.04.290(4) (1996). [FN2] WASHINGTON STATE Is the only state to identify a separate tax applicable to sewage collection. *See* 3 St. Tax Guide (CCH) 9401-606 (2001).

FN2. The B & O tax rate varies, but at that time was 2.0 percent.

Prior to 1985, the entire sewer system was taxed at the lower rate, the generic B & O tax. However, in 1985, the Legislature imposed a new 3.6 percent public utility tax on the gross income of businesses in-

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volved in "sewerage collection:"

> **Public utility tax imposed-Additional tax imposed-Deposit of moneys.** (1) There is levied and there shall be collected from every person a tax for the act or privilege of engaging within this state in any one or more of the businesses herein mentioned. The tax shall be equal to the gross income of the business, multiplied by the rate set out after the business, as follows:
>
> (a) Express, sewerage collection, and telegraph businesses: Three and six-tenths percent;

RCW 82.16.020. The goal was to increase revenue in order to help fund the newly created public works assistance account.

Pursuant to this statute, the DOR promulgated a regulation imposing the public utility tax on all income derived from sewage collection and transport. WAC 458-20-179. At that point, no confusion existed because all sewerage was taxed at the same rate. However, the following year DOR reinterpreted the law and promulgated WAC 458-20-251 (Rule 251) restricting the tax to the portion derived from collection and leaving the remainder to be taxed at the lower rate applicable to the generic B & O statute:

> The department has determined that, within the intent of the law, only the portion of gross receipts from customer billings attributable to the "collection" portion of services *449 rendered should be taxed under the public utility tax classification.

WAC 458-20-251(2). Although neither the rule nor the statute from which it was derived defines the term "collection," Rule 251 specifies that collection does not include transfer, treatment, or disposal of sewage. WAC 458-20-251(3)(a). However, a difference of opinion arose about where sewage collection ends and sewage transfer begins.

Spokane manages hundreds of miles of sewer pipes, which take sewage from the customers to a sewage treatment and disposal plant. The pipes range in diameter from 4 inches to 135 inches, with 358 miles at 8 inches or less, and 397.42 miles at more than 8 inches, totaling 755.52 miles.[FN3] Sewage from each property empties into a lateral pipe, and these laterals run along the street. Each lateral pipe is up to 8 inches in diameter and collects sewage from up to 72 homes. The largest building in Spokane uses 8 inch laterals, and of the 80,000 sewer connections maintained by the City of Spokane, only 1-2 percent have lateral lines exceeding 8 inches in diameter. A lateral has no other common tributary to it. For accounting convenience, Spokane classifies all pipes of 8 inches or less as laterals and those over 8 inches as interceptors or trunks.[FN4]

> FN3. Some estimates suggest the total is closer to 800 miles.
>
> FN4. Interceptors or trunks are large sewers into which other sewers discharge. Howard E. Babbitt & E. Robert Baumann, *Sewerage and Sewage Treatment* 4 (8th ed.1967). Spokane claims that because a few laterals are over 8 inches, this accounting favors the state.

**1012 Until the 1950s, the laterals emptied directly into the nearest convenient river or lowland area. When treatment plants became prevalent, however, large interceptor pipes were installed to transport sewage from the point where the sewage was formerly discharged from laterals to exit the system. These interceptors carried the sewage to the treatment facility. Interceptors are at least 8 inches in diameter and are often up to 12 feet in diameter.

Bill Peacock, Senior Engineer for Spokane's Wastewater Department, testified at the BTA hearing that from the *450 point where the lateral feeds into the interceptor, the primary function of the sewerage is transfer of the sewage to the plant:

> [O]nce that sewage hits here, it's on its freeway to the plant, and it doesn't care how many cars or how many people flush their toilet; it's moving that direction and moving there only.

Tr. of Hr'g Before BTA at 70.

About 1,600 (1 or 2 percent) of Spokane's customers are located along an interceptor line, and their sewage empties directly into the interceptor. Installation of laterals from these buildings would be an unnecessary duplication.

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At certain points in the system, where gravity is inadequate to propel the sewage, lift stations propel the sewage uphill through pressurized pipes called force mains. After the hill is overcome, force mains reconnect to the gravity flow system. This process may be repeated several times until the sewage reaches the treatment facility. A pressurized pipe is unable to collect sewage, but can only transfer it. No such pumps are found in the laterals.

When Rule 251 was adopted, Spokane defined 23.99 percent of its assets as collection sewerage, with the remaining 76.01 percent engaged in transfer and treatment. A DOR audit that year concluded that Spokane owed $70,000 in taxes, assuming that collection continues until the point where no further collection lines enter the system prior to entry into the treatment plant. If one home emptied into an interceptor pipe, DOR considered the pipe to be a collection line rather than a transfer line. This definition labeled 99.39 percent of Spokane's pipes as collection sewerage, leaving less than 1 percent as transfer sewerage. The remainder of the noncollection income was from the treatment plant, which is the most expensive component of sewerage.

After paying, Spokane petitioned DOR for a refund, arguing that neither interceptor lines nor pressurized lines should be counted as collection lines, and that they should therefore be taxed at the lower B & O rate. The BTA upheld ***451** DOR's ruling, and the superior court reversed. The Court of Appeals upheld the original ruling, holding that a sewerage system collects sewage until the last point at which new sewage is introduced, and only after that point is the sewerage devoted to transfer. Spokane seeks review.

ANALYSIS

[1] The Administrative Procedure Act, chapter 34.05 RCW, governs appeals from BTA. Spokane does not challenge any of BTA's findings of fact, so they are verities on appeal. *Tapper v. Employment Sec. Dep't*, 122 Wash.2d 397, 407, 858 P.2d 494 (1993). When reviewing a question of law, the appellate court grants relief if the agency "erroneously interpreted or applied the law." RCW 34.05.570(3)(d). Review is de novo. *Enter. Leasing, Inc. v. City of Tacoma*, 139 Wash.2d 546, 551, 988 P.2d 961 (1999). Spokane has the burden of showing that BTA's decision was erroneous. RCW 34.05.570(3)(e).

RCW 82.16.020, the statute imposing the public utility tax, does not define the term "collection" for the purpose of determining where "sewerage collection" ends. Spokane urges a substantial use test, arguing that collection ends at the point where the sewerage is used primarily for the purpose of sewage transfer. DOR, on the other hand, urges a sole use test, arguing that collection continues until the point at which the sewerage is used exclusively for sewage transfer.

****1013** When attempting to determine where collection ends and where transfer begins, DOR incorporated a definition of "collection" into Rule 251:

> "Sewerage collection business" means the activity of receiving sewage deposited into and carried off by a system of sewers, drains, and pipes to a common point, or points, for disposal or for transfer to treatment for disposal, but does not include such transfer, treatment, or disposal of sewage.

WAC 458-20-251(3)(a).

[2] The State argues that if collection includes "carry[ing] off" as well as receiving sewage, then collection must have ***452** a transportation component. Thus, deferring to the agency, BTA accepted DOR's proposition that the pipes are involved in collection up to the point where the last customer hookup enters the system. The Court of Appeals, in affirming the BTA, concluded that although RCW 82.16.020 does not define the term "collection," Rule 251 unambiguously defines the term. We agree that Rule 251 and RCW 82.16.020 are unambiguous, but conclude that the Court of Appeals erred in holding that collection necessarily occurs until the last common point. [FN5]

> FN5. The parties devoted extensive briefing to an apparent conflict between two legal principles. This Court shows considerable deference to the interpretation of an agency charged with interpreting a statutory scheme. *Impecoven v. Dep't of Revenue*, 120 Wash.2d 357, 363, 841 P.2d 752 (1992) (citing *State v. Elgin*, 118 Wash.2d 551, 555, 825 P.2d 314 (1992)). However, "if there is any doubt as to the meaning of a tax statute, it must be construed against the taxing

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power." *Duwamish Warehouse Co. v. Hoppe*, 102 Wash.2d 249, 254, 684 P.2d 703 (1984). Because we hold that the statute is unambiguous, this is not an issue.

[3] DOR argues that because the word collection has a well-accepted, ordinary meaning, we should turn to a regular dictionary for its definition. However, the term "collection" as used in this context is a technical term. Technical language should be given its technical meaning when used in its technical field. *Keeton v. Dep't of Soc. & Health Servs.*, 34 Wash.App. 353, 361, 661 P.2d 982 (1983). In other contexts, courts have turned to the technical definition of a term of art even where a common definition is available. *See, e.g., Hickle v. Whitney Farms, Inc.*, 107 Wash.App. 934, 945, 29 P.3d 50 (2001) (holding that in the context of designated dangerous wastes, the word "designate" is broader than its common meaning and covers wastes other than those listed by name in the regulation); *Blue Mountain Mem'l Gardens v. Dep't of Licensing*, 94 Wash.App. 38, 42, 971 P.2d 75 (1999) (holding that the word "vault" is a term of art in the burial industry); *San Juan County v. Ayer*, 24 Wash.App. 852, 854, 604 P.2d 1304 (1979) (interpreting "obliterated" as a surveying term of art). *But see City of Seattle v. Richard Bockman Land Corp.*, 8 Wash.App. 214, 217, 505 P.2d 168 (1973) (declining to define "floating *453 home," "floating home site," and "floating home moorage" as terms of art).

A "collecting sewer" is defined by the industry as a "lateral," which in turn is defined as "[a] branch *sewer* buried in the street, collecting *sewage* from the house drains, and delivering into an *intercepting sewer*." John S. Scott & Paul G. Smith, *Dictionary of Waste and Water Treatment* 63, 174 (1983). An "intercepting sewer" is "[a] main *sewer*, one that receives its flow from *laterals*. It delivers either to another main sewer or to a treatment plant or an *outfall*. Intercepting sewers were originally so called because they intercepted polluting drains flowing to a river." [FN6] Scott & Smith, *supra*, at 166. Another definition of intercepting sewer is " 'a sewer which receives dry-weather flow from a number of transverse sewers or outlets ... and conducts such waters to a point for treatment and disposal.' " Howard E. Babbitt & E. Robert Baumann, *Sewerage and Sewage Treatment* 4 (8th ed.1967) (quoting Am. Pub. Health Assoc. et al., *Glossary of Water and Sewage Control Engineering* (1949)).

FN6. An outfall is the point of discharge into a river, lake, sea, etc.

A third source defines collector and interceptor sewerage as mutually exclusive. A collector sewer is "[a] sewer located in the public way that collects wastewater discharged**1014 through building sewers and conducts such flows to larger interceptor sewers." Joint Task Force of the Water Envtl. Fed'n & the Am. Soc'y of Civil Eng'rs, *Existing Sewer Evaluation and Rehabilitation, WEF Manual of Practice FD-6, ASCE Manuals and Reports on Engineering Practice No. 62*, at 242 (2d ed.1994). An interceptor sewer is "[a] sewer that receives the flow from collector sewers and conveys the wastewater to treatment facilities." *Id.* at 250.

Thus, under either the technical or the nontechnical definition, laterals are clearly collection sewerage, a point over which there is no dispute. However, in contrast with the nontechnical meaning, the technical definition of "collecting sewer" does not extend to interceptors, which are *454 defined in terms of a "delivery" or conducting function. The historical note on interceptors included within the Scott & Smith definition lends further support. If interceptors were introduced for the express purpose of transferring sewage from its original polluting outlet to a treatment plant, their original purpose was purely transfer. DOR does not cite to any evidence to support a change in that function.

This Court has frequently held that when a word has a well-accepted, ordinary meaning, we should turn to a regular dictionary for its definition. *See, e.g., State v. Pacheco*, 125 Wash.2d 150, 154, 882 P.2d 183 (1994); *Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wash.2d 1, 8, 802 P.2d 784 (1991); *State v. Fjermestad*, 114 Wash.2d 828, 835, 791 P.2d 897 (1990). However, where an otherwise common word is given a distinct meaning in a technical dictionary or other technical reference and has a well-accepted meaning within the industry, and when the word is used in a rule promulgated by an expert agency familiar with the technical meaning, courts should turn to a technical rather than a general purpose dictionary to resolve ambiguities in its definition. In this case, much turns on the definition of the word "collection" in Rule 251. In view of the fact that "collecting sewer" has a distinct definition in the technical field

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of sewerage, it is a term of art and must be interpreted in the technical context. As a term of art within the sewage industry, a lateral should be defined as a "collecting sewer." Interceptor sewers are, according to the technical definition and the accepted usage, involved in transfer of sewage, regardless of whether an occasional house hooks into them.

Adoption of the substantial use test avoids several practical problems. Under the position taken by the Court of Appeals, a portion of pipe that is classified as transfer one day can be transformed to a collection pipe merely by having another house hook into it. This could create complicated accounting problems, necessitating different accounting ***455** every time a new house is hooked into an interceptor.[FN7]

FN7. Taken to its extreme, a bathroom facility at the sewage treatment plant would render all sewerage upstream of that point "collection" sewerage and would give Spokane a strong economic incentive to create unnecessary laterals rather than allowing houses close to the treatment plant to hook up to the interceptor. While by no means dispositive, this is one further reason to favor the substantial use test.

CONCLUSION

[4][5] As Justice Holmes said, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner,* 245 U.S. 418, 425, 38 S.Ct. 158, 62 L.Ed. 372 (1918). In this case, the word "collection" has a distinct meaning when used in the context of sewerage. When imposing the tax, the Legislature used the term "sewerage" which, unlike the commonly used term "sewer," is a technical term. We adopt the substantial use test for determining where collection ends and transfer begins, holding that a lateral is a collection sewer, whereas an interceptor is involved in transfer of sewage. Such a test is consistent with common usage and industrial usage. Using Bill Peacock's analogy, a freeway remains a freeway even though an occasional street intersects it. Accordingly, we reverse the Court of Appeals and reinstate the decision of the superior court, which adopted the substantial use test.

****1015** ALEXANDER, C.J., and SMITH, JOHNSON, MADSEN, SANDERS, IRELAND, BRIDGE, OWENS, JJ., concur.
Wash.,2002.
City of Spokane ex rel. Wastewater Management Dept. v. Washington State Dept. of Revenue
145 Wash.2d 445, 38 P.3d 1010

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Supreme Court of Washington, en Banc.
COLUMBIA STEEL CO.
v.
STATE.
No. 30950.

Sept. 3, 1949.

Columbia Steel Company sued the State of Washington to recover business and occupation taxes paid for 1943, 1944, and 1945.

On remand after reversal of judgment by Supreme Court, 192 P.2d 976, the Superior Court of Thurston County, D. F. Wright, J., entered judgment for the plaintiff. Defendant appealed, and plaintiff cross-appealed from that part of the judgment denying interest

The Supreme Court, Beals, J., affirmed the judgment as to defendant holding that the prior decision became the law of the case and questions decided therein would not be reconsidered. It also affirmed the judgment as to plaintiff holding that in absence of a statute authorizing interest on amounts awarded to private parties by judgments for refund of taxes, interest would not be allowed.

Mallery and Steinert, JJ., dissented.

West Headnotes

[1] Appeal and Error 30 ⚷1097(1)

30 Appeal and Error
30XVI Review
30XVI(M) Subsequent Appeals
30k1097 Former Decision as Law of the Case in General
30k1097(1) k. In General. Most Cited Cases
On a second appeal, Supreme Court will not review questions decided on former appeal.

[2] Appeal and Error 30 ⚷1097(1)

30 Appeal and Error
30XVI Review
30XVI(M) Subsequent Appeals
30k1097 Former Decision as Law of the Case in General
30k1097(1) k. In General. Most Cited Cases
Where assignments of error presented no question which was not determined on a previous appeal of action and no new question was raised by pleadings or evidence, prior decision on appeal became the "law of the case" and questions would not be reconsidered by Supreme Court.

[3] Appeal and Error 30 ⚷1096(3)

30 Appeal and Error
30XVI Review
30XVI(M) Subsequent Appeals
30k1096 Scope and Extent of Review
30k1096(3) k. Errors Existing, But Not Presented or Considered, on Former Review. Most Cited Cases
Question not considered by Supreme Court on first appeal of case did not fall within rule of the "law of the case" and would be considered on second appeal.

[4] Taxation 371 ⚷2791

371 Taxation
371III Property Taxes
371III(J) Payment and Refunding or Recovery of Tax Paid
371k2782 Actions and Proceedings for Recovery of Taxes Paid
371k2791 k. Trial, Relief Awarded, and Amount of Recovery. Most Cited Cases
(Formerly 371k543(8))
Term "interest" within statute providing for recovery of tax interest, penalties and costs, paid in error to tax commission, refers to any interest which taxpayer may have paid when paying the tax. Rem.Rev.Stat. § 8370-189.

[5] States 360 ⚷191.4(1)

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360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.4 Necessity of Consent
360k191.4(1) k. In General. Most Cited Cases
(Formerly 360k191(1.5))
A sovereign state cannot be sued without its consent, particularly in connection with exercise of its governmental functions, and right to sue when accorded by statute extends no farther than to grant plaintiff right to bring his action, and if evidence introduced before trial court is sufficient to establish state's liability, to recover against state a judgment for amount due, not including interest, unless payment of interest by the state is also authorized by statute.

[6] Counties 104 ⚷208

104 Counties
104XII Actions
104k208 k. Capacity to Sue or Be Sued in General. Most Cited Cases
Counties are subdivisions of state and do not enjoy immunity from suit which controls in regard to claims against a sovereign state.

[7] States 360 ⚷171

360 States
360V Claims Against State
360k171 k. Interest. Most Cited Cases
Certain state agencies may be held liable for interest upon debts without express statutory authority but such liability must be based upon some statute establishing and regulating particular agency in question.

[8] Licenses 238 ⚷34

238 Licenses
238I For Occupations and Privileges
238k27 License Fees and Taxes
238k34 k. Refunding or Recovering. Most Cited Cases
Where state collected business and occupation tax and it was later held that statutes providing for collection of such tax were inapplicable to taxpayer in connection with activities pursuant to which tax was claimed by state, interest upon amounts which taxpayer could recover would not be allowed. Rem.Rev.Stat. §§ 8370-1 et seq.

***701 **483** Smith Troy, Max Kaminoff, William C. Klein, Olympia, for appellant.

Evans, McLaren, Lane, Powell & Beeks, Seattle (Walter Shelton, San Francisco, Cal., Thomas Ashby, David J. McDaniel, San Francisco, Cal., of counsel), for respondent.

BEALS, Justice.

Plaintiff in this action, Columbia Steel Company, is a corporation organized and existing under the laws of the state of Delaware, maintaining its principal place of business in the city and county of San Francisco, state of California, and a sales office in the state of Washington, where it has engaged in both intrastate and interstate business. Plaintiff has qualified, under the laws of the state of Washington, to carry on that portion of its business which consists of the sale of iron and steel products in this state.

In its amended complaint filed before the superior court for Thurston county, plaintiff alleged that, October 3, 1947, the tax commission of the state of Washington levied a deficiency or additional assessment against the plaintiff taxpayer, in the sum of $101,105.23, together with interest and ****484** penalties in the sum of $17,176.15, attaching a copy of the deficiency assessment to its complaint. The assessment covered the years 1943, 1944, and 1945, and was based upon Laws of 1935, chapter 180, p. 706, Rem.Rev.Stat. (Sup.), § 8370-1 et seq., as amended, which imposes a business and occupation tax upon persons or corporations engaged, within the state of Washington, in the business of making sales at wholesale.

The amended complaint alleged that the plaintiff paid the tax demanded, together with penalties and interest, October 22, 1947. Paragraph No. 5 of the amended complaint reads as follows: 'The aforesaid deficiency assessment is based upon a tax upon amounts derived from business which the State of Washington is prohibited from taxing under Article I, Section 8, Clause 3 of the Constitution of the United States of America.'

***702** By the prayer of its amended complaint, plaintiff appealed to the superior court, and demanded that

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the deficiency assessment which had been levied against it be vacated; that the tax, penalties, and interest represented by the assessment be abated; and that the plaintiff taxpayer recover judgment against the state of Washington for the amount of the tax and penalties thereon paid by the plaintiff, together with interest from October 22, 1947.

The defendant filed a general demurrer to the amended complaint, which the trial court sustained. Plaintiff having refused to plead further, the trial court entered an order dismissing the appeal to the superior court, and also dismissing plaintiff's amended complaint with prejudice.

From this order of dismissal, plaintiff appealed to this court and, the cause having been heard, this court filed its En Banc opinion, May 6, 1948, reversing the order of the superior court from which the plaintiff had appealed, and remanding the proceeding to the trial court with instructions to overrule the demurrer interposed by the state of Washington to the complaint. Columbia Steel Co. v. State, 30 Wash.2d 658, 192 P.2d 976.

Upon remand to the superior court, defendant state of Washington filed its answer, denying the material allegations of the amended complaint and alleging that the tax which had been paid by the plaintiff, together with penalties and interest, was due to the state of Washington, and that there was no statutory or other authority for the payment by the state of interest on refunds of business and occupation taxes or similar impositions. The state asked that the action be dismissed at plaintiff's cost.

The parties stipulated that the action might be tried before the Honorable D. F. Wright, a member of the bar of the state of Washington and formerly a judge of the superior court for Thurston county, and an order of the superior court was entered appointing Judge Wright as such judge pro tempore to hear and determine the issues presented upon the trial of the action.

After the hearing, the trial court entered findings of fact ***703** and conclusions of law in favor of the plaintiff, to the effect that the plaintiff was entitled to judgment against the defendant state of Washington for $118,281.38, also concluding that the plaintiff was not entitled to a judgment for interest on that amount from the date the plaintiff paid the same to the defendant to and including the date of the judgment in the action. The plaintiff proposed a conclusion of law to the effect that it was entitled to recover such interest, which conclusion the court refused.

February 1, 1949, the superior court entered judgment in accordance with its findings of fact and conclusions of alw, from which judgment the defendant state of Washington has appealed to this court.

Respondent has cross-appealed from that portion of the judgment refusing to allow respondent interest upon the amount for which judgment in its favor was entered against the appellant.

Appellant assigns error upon the entry of the court's conclusions of law holding that appellant was prohibited from levying the tax which was the subject matter of ****485** the action, and that the respondent was entitled to judgment for the amount referred to above. Appellant also assigns error upon the entry of the judgment in respondent's favor, and upon the refusal of the trial court to dismiss respondent's amended complaint.

Cross-appellant (respondent) assigns error upon the court's ruling that it was not entitled to recover interest on the amount paid to the state from the date of such payment, and upon the refusal of the trial court to enter conclusions of law and judgment accordingly.

Upon the trial of the action after remand, the only witness who testified was Mr. T. M. Jenner, a tax commissioner of the state of Washington, who was called by the appellant. Mr. Jenner testified as to the procedure followed by the tax commission and the adoption of certain rules by that body.

The record before us and appellant's assignments of error show beyond question that, in entering the judgment appealed from, the trial court was following the opinion of ***704** this court in the previous appeal and the law as laid down therein.

We are, therefore, confronted with the question of whether the law as stated in our opinion in the first appeal has become 'the law of the case,' in so far as a determination of this appeal is concerned. If it be

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held that the decision of this court does establish the law of this case, we may not, at this time, consider any questions involving the merits as argued by appellant.

Appellant recognizes the doctrine of 'the law of the case,' but argues that certain matters material to the facts of the case were not clearly set forth in the record before this court upon the previous appeal; that, since the previous appeal was decided, these items have in some respects been clarified; and that, for this reason, we should again consider the question presented upon its merits.

Appellant's arguments pertain to the question of whether, in so far as the facts of this case are concerned, respondent is a manufacturer or a wholesaler. Appellant contends that it is apparent from our opinion that this court considered respondent to be a manufacturer and not a wholesaler, and that, because of this misunderstanding, the court was led to an erroneous conclusion.

All of the facts relied upon by appellant in this connection were clearly set forth in the pleadings which were before us on the previous appeal, and that these facts were understood by the court, and considered, clearly appears from the following quotation from the opinion, 30 Wash.2d 658, 659, 192 P.2d 976: '* * * Twenty per cent of the interstate business consists of the handling of iron and steel products and by-products manufactured by plaintiff in the states of California and Utah, which, when sold, are delivered from those states into the state of Washington by common carriers, who transport the products from the state of origin into this state on straight bills of lading to various customers in the state. Dealing in products purchased from manufacturers in Massachusetts, Pennsylvania, Ohio, Indiana, Illinois, Minnesota, Alabama, and other states and then shipped by common carrier from ***705** the states of manufacture into this state, comprised eighty per cent of plaintiff's business upon which the deficiency assessment was based.'

The opinion of this court rendered on the previous appeal is specific and definite. Each question presented was considered and decided. The testimony of Mr. Jenner, on the second trial of the action, contained nothing which calls for any different result than that reached by the trial court in rendering the judgment now before us.

[1] We have several times considered the doctrine of 'the law of the case.' In Baxter v. Ford Motor Co., 179 Wash. 123, 35 P.2d 1090, 1092, we said:

'The law is well settled in this state that on a second appeal we will not review questions decided by us on the former appeal. Collins v. Terminal Transfer Co., 98 Wash. 597, 168 P. 174; Pacific Power & Light Co. v. White, 104 Wash. 528, 177 P. 313; Ecuyer v. New York Life Insurance Co., 107 Wash. 411, 181 P. 871, 186 P. 327.

****486** 'Upon the retrial the parties and the trial court were all bound by the law as made by the decision on the first appeal. On appeal therefrom the parties and this court are bound by that decision unless and until authoritatively overruled.'

In Miller v. Sisters of St. Francis, 5 Wash.2d 204, 105 P.2d 32, 33, appears the following: 'The case having been here upon a former appeal, as to every question that was determined upon that appeal and as to every question that might have been determined, the opinion became what is called the law of the case upon the second trial, and cannot again be considered by this court upon a second appeal.'

In State ex rel. City of Seattle v. Department of Public Utilities, Wash., 207 P.2d 712, 715, we said:

'When this court denied the petition for recall of remittitur and correction of the judgment, it in effect approved the judgment entered by the superior court.

'Regardless of any other consideration, it is our opinion that the judgment of the superior court, entered upon the remittitur in obedience to the order of this court, became the law of this case.'

***706** The court then cited several of our decisions which referred to the doctrine in question.

By its assignments of error, appellant presents no question which was not determined on the previous appeal in this action, and no new question was raised by the pleadings or the evidence.

In entering its findings of fact, conclusions of law,

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and judgment, the trial court evidently recognized that the case was then controlled by our previous decision and, the case having been remanded by this court to the trial court for further proceedings, that court meticulously followed our opinion.

[2] In so far as questions here presented by appellant state of Washington are concerned, the doctrine of 'the law of the case' applies, and appellant's assignments of error are not well taken. In accordance with this principle of law, we refuse to again consider the questions argued by appellant.

We shall now consider the question raised by respondent's cross-appeal, namely, did the trial court err in holding that respondent was not entitled to recover interest from the date of payment on the amount which it had paid to the state.

The question presented by respondent upon its assignments of error is, when the state collects a tax such as that here in question and it is later held that the statutes providing for the collection of such a tax were not applicable to the taxpayer, in connection with the activities pursuant to which the tax was claimed by the state; that the taxpayer was not indebted to the state in the amount claimed by the taxing authorities or in any amount, and that the taxpayer should recover judgment against the state for the taxes paid, should the taxpayer recover not only the principal amount he was unlawfully required to pay but also interest on that amount at the legal rate?

[3] This question was not considered by this court upon the first appeal, and we hold that respondent is not precluded from now raising the question, which does not fall within the rule of 'the law of the case.'

***707** Decisions throughout the United States, both Federal and state, are in considerable conflict upon questions concerning the recovery of interest by a taxpayer, when the money paid for taxes is ordered returned.

Laws of 1931, chapter 62, p. 201, Rem.Rev.Stat. §§ 11315-1 to 11315-8, both inclusive, provided the method for recovery of certain taxes. The act was amended by Laws of 1937, chapter 11, p. 19, Rem.Rev.Stat.(Sup.), §§ 11315-2, 11315-4, 11315-5, and Laws of 1939, chapter 206, §§ 48, 49, p. 772, Rem.Rev.Stat.(Sup.), §§ 11315-6, 11315-7. By Laws of 1937, chapter 11, § 1, p. 19, Rem.Rev.Stat.(Sup.), § 11315-2, it was provided that a taxpayer might pay, under written protest, any tax which he deemed unlawful, and might thereafter bring an action against the state, before the superior court, for the recovery of taxes so paid under protest. The first sentence of Laws of 1931, chapter ****487** 62, § 3, p. 202, Rem.Rev.Stat. § 11315-3, reads as follows: 'In case it be determined in such action that said tax, or any portion thereof, so paid under protest, was unlawfully collected, judgment for recovery thereof and lawful interest thereon from date of payment, together with costs of suit, shall be entered in favor of plaintiff. * * *'

Laws of 1931, chapter 62, supra, was enacted prior to the Revenue Act of 1935, which provides for the collection of excise, business and occupation, and similar taxes.

In the case of Great Northern R. Co. v. State, 200 Wash. 392, 93 P.2d 694, 704, we held that a taxpayer who had paid illegally exacted excise taxes was not required to make a formal protest at the time the taxes were paid, as a condition precedent for maintaining an action against the state to recover the same. The case cited concerned the Revenue Act of 1935, the statute with which we are here concerned. Referring to chapter 62, Laws of 1931, we said:

'Chapter 62, Laws of 1931, was intended, a reading of that statute clearly shows, to apply exclusively to ad valorem taxes. * * *

'Statutes should be construed as a whole. The intention of the legislature may not be shown by taking one section ***708** or sentence of a statute. If we are mindful of that rule we plainly see, in reading all of Chapter 62, Laws of 1931, that the legislature intended that statute to apply solely to advalorem taxes. * * *

'Section 1 would have no meaning if Chapter 62, Laws of 1931, were meant to apply to excise taxes. * * *

'Section 2, Chapter 62, p. 201, Laws of 1931, provides that in all cases of the levy of taxes for public revenues which are deemed unlawful or excessive by the person, firm or corporation whose property is taxed, or from whom such tax is demanded or en-

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forced, such person may pay such tax under written protest; and thereupon the person so paying may bring an action in the superior court against the state, county, or municipality by whose officers the same was collected to recover such tax or any portion thereof so paid under protest. Attention is again directed to the fact that it is only the person whose property is taxed that is permitted to pay the tax under protest and recover a refund. The property of a person paying the fuel oil tax is not taxed; that tax is an excise tax. The omission by the legislature of any reference to 'licenses,' or any term which would clearly include the fuel oil tax, evinces the intention of the legislature that Chapter 62, Laws of 1931, should not apply to an excise tax.'

The opinion continues by stating other reasons for the court's holding that the act of 1931 referred only to ad valorem taxes.

The tax paid by respondent herein was exacted pursuant to Laws of 1935, chapter 180, p. 706, Rem.Rev.Stat.(Sup.), § 8370-1 et seq., the Revenue Act of 1935, as abended, providing for the collection of business and occupation taxes. Section 189 of the act (Rem.Rev.Stat.(Sup.), § 8370-189), reads as follows:

'Any money paid to the tax commission through error and not in payment of any tax due hereunder, upon the request of the person by whom such payment was made, shall be refunded as provided in the foregoing section.

'Any judgment for which a recovery is granted by any court of competent jurisdiction, not appealed from, for tax, interest, penalties, and costs in a suit by any taxpayer shall be paid in like manner, upon the filing with the tax commission of a certified copy of the order or judgment of the court.'

***709** [4] The 'interest' which the taxpayer may recover pursuant to the section quoted refers to any interest which the taxpayer may have paid when paying the tax.

By Laws of 1949, chapter 228, § 21, p. 847, Rem.Supp.1949, § 8370-189, § 189 of the statute of 1935 was amended in several particulars, the amendment providing, in part, that '* * * Interest at the rate of three per cent (3%) per annum shall be allowed by the Tax Commission and by any Court on the amount of any refund or recovery allowed to a taxpayer for taxes, penalties or interest paid by him after May ****488** 1, 1949, and interest at the same rate shall be allowed on any judgment recovered by a taxpayer for taxes, penalties or interest paid after said date.'

This amendment, of course, nowise affects respondent's rights in the case at bar, but initiates a new legislative policy in connection with excise taxes.

Our attention has been called to no statute of this state which expressly confers upon one in the position of respondent, who recovers the principal amount paid (by way of an excise like that paid by respondent) as the result of an illegal exaction by the taxing authorities, the right to also recover interest upon the amount paid from the date of such payment.

Our decisions concerning this matter are, upon cursory examination, not entirely harmonious.

In Great Northern R. Co. v. Stevens County, 1919, 108 Wash. 238, 183 P. 65, 67, this court reversed a judgment in favor of the defendant, in an action by the railroad brought for the recovery of a portion of an excessive levy made by the county commissioners, and remanded the case, with directions to enter a judgment in favor of the railway company in a specified amount, 'with legal interest' from the date on which the railroad company had paid the excessive tax. The question of the right of the taxpayer to recover interest was not discused in the opinion.

In Byram v. Thurston County, 1926, 141 Wash. 28, 251 P. 103, 252 P. 943, a judgment in favor of the taxpayer for taxes paid under protest, by the receivers of a railroad ***710** corporation, was considered. The judgment against the county apparently included interest from the date of payment upon the amount paid. This court cited the case of Great Northern R. Co. v. Stevens County, supra, and affirmed the judgment, including the provision for the payment of interest.

In the case of Alaska Steamship Co. v. State, Wash., 196 P.2d 1001, this court affirmed a judgment in favor of the taxpayer for the return of an illegally exacted sales tax collected by the taxing authorities in connection with the sale of a steamship. The judg-

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ment rendered by the superior court provided for the payment of interest upon the amount of the illegal exaction for which the taxpayer was granted judgment, but, on appeal to this court, no question was argued or suggested by the appellants concerning that portion of the judgment which provided for the recovery of interest upon the amount of tax paid. The case was submitted to this court upon an agreed record on appeal, under Rule of Supreme Court 10, 18 Wash.2d 11-a, and a statement of points of error relied upon by the appellants (the state of Washington and the members of the tax commission). In appellants' brief, under the heading 'Statement of the Case,' it is stated, inter alia: 'The only question involved in each case and presented herein is whether the said retail sales tax constituted a tax on an export and was therefore prohibited by Article I, section 9, clause 5 and section 10, clause 2 of the constitution of the United States.'

Appellants assigned error upon the entry of the judgment, which, of course, as above stated, included the payment of interest by the state upon the tax that had been collected. Appellants' brief was devoted entirely to argument that the tax upon the sale of the steamship was lawfully due.

The same action was taken in connection with two other cases between the same parties, Alaska Steamship Co. v. State, Wash., 196 P.2d 1011; Alaska Steamship Co. v. State, Wash., 196 P.2d 1013, and, ***711** in the case of Manila Steamship Co. v. State, Wash., 196 P.2d 1015, which covered an identical question, the judgment was reversed, with instructions to the superior court to enter judgment in plaintiff's favor for the amount paid, together with lagal interest from the date of payment.

The decisions of this court in the cases cited are not pertinent here, as no question was raised by the state (appellant in three cases and respondent in one) concerning the allowance of interest upon the tax paid, the only question presented being whether or not the sales tax was lawfully due the state upon transfer of the steamships. In the Alaska Steamship Co. cases, the judgments rendered were affirmed, while in the ****489** Manila Steamship Co. case the judgment appealed from was reversed, with instructions to enter a judgment similar to those rendered in Alaska Steamship Co. cases in favor of the appellant steamship company.

This court has several times considered the question of the allowance of interest upon the amount for which plaintiffs have been granted judgment against the state.

In Spier v. Department of Labor and Industries, 176 Wash. 374, 29 P.2d 679, 680, in affirming a judgment of the superior court in favor of the plaintiff (after reducing the amount of the award), we said: 'The judgment of the trial court carries interest at 6 per cent. The general rule is that the state cannot, without its consent, be held to interest on its debts. 15 R.C.L. 17; United States ex rel. Angarica de la Rua v. Bayard, 127 U.S. 251, 8 S.Ct. 1156, 32 L.Ed. 159; United States v. North Carolina, 136 U.S. 211, 10 S.Ct. 920, 34 L.Ed. 336. It is contended by respondent that the judgment is essentially not against the state. To this we cannot agree. The department of labor and industries is a state agency, exercising functions which, under the declarations of the Workmen's Compensation Act, are governmental.'

We cited and followed the Spier case in Horton v. Department of Labor and Industries, 199 Wash. 212, 90 P.2d 1009.

***712** In State ex rel. Pacific Bridge Co. v. Washington Toll Bridge Authority, 8 Wash.2d 337, 112 P.2d 135, 139, this court directed that a writ of mandate issue to require the toll bridge authority to draw warrants in payment of the balance due the relator, together with interest. The Spier and Horton cases were distinguished upon the ground that the toll bridge authority was 'a distinct legal entity separate and apart from the state', and did not enjoy 'the immunity which protects a sovereign state from liability for interest on its debts without contractual or statutory authorization.'

As to the questions determined in the three cases last cited, it appeared that there was no statute providing that interest should be either allowed or disallowed upon such claims.

Similar questions have been presented to courts of other states, which have reached various conclusions thereon. These authorities are discussed in 57 A.L.R. 357 and 76 A.L.R. 1012.

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[5] We are of the opinion that a sovereign state cannot be sued without its consent, particularly in connection with the exercise of its governmental functions. The right to sue the state, when accorded by statute, extends no farther than to grant the plaintiff the right to bring his action and, if the evidence introduced before the trial court is sufficient to establish the state's liability, to recover against the state a judgment for the amount due, not including interest unless the payment of interest by the state is also authorized by statute.

[6] Counties are subdivisions of the state and do not enjoy the immunity from suit which controls in regard to claims against a sovereign state. No question concerning judgment against a county for interest is here presented.

[7] Certain state agencies may be held liable for interest upon debts without express statutory authority, State ex rel. Pacific Bridge Co. v. Washington Toll Bridge Authority, supra, but such liability must be based upon some statute establishing and regulating the particular agency in question.

***713** [8] In the absence of a statute providing that the state shall be liable for interest upon amounts awarded to private parties by judgments for the refund of taxes, such as those here in question, interest upon the amounts which the taxpayers may recover will not be allowed.

The judgment appealed from is affirmed upon appellant's appeal and is also affirmed upon respondent's cross-appeal. No costs will be allowed in this court to either party.

SIMPSON, C. J., and JEFFERS, ROBINSON, SCHWELLENBACH, and GRADY, JJ., concur.
****490** MALLERY and STEINERT, JJ., dissent.
HILL, Justice.
I concur without reservation in the holding that the Columbia Steel Company was not entitled to interest on the amounts which the majority holds were illegally exacted from it.

I concur also in the holding that no issue is presented here that was not previously presented to this court and decided in Columbia Steel Co. v. State, 30 Wash.2d 658, 192 P.2d 976. I am still of the opinion that that case was erroneously decided, for the reasons stated in my dissent. See 30 Wash.2d at page 664, 192 P.2d at page 979. The holding therein, right or wrong, is the law of the case, and the trial court correctly interpreted and followed it and should be affirmed, unless we are willing to overrule our holding in the cited case, and that the majority is unwilling to do.

WASH. 1949
Columbia Steel Co. v. State
34 Wash.2d 700, 209 P.2d 482

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Supreme Court of Washington, En Banc.
Marilee FOSBRE, a Minor, by William M. Fosbre, her Guardian ad Litem, Respondent,
v.
The STATE of Washington, Appellant.
No. 39697.

June 12, 1969.
Rehearing Denied Aug. 8, 1969.

The Superior Court, Thurston County, Charles T. Wright, J., entered judgment against state in action under State Tort Claims Act and awarded interest on judgment, and state appealed. The Supreme Court, Hill, J., held that state is not liable for interest on tort judgments entered against it pursuant to State Tort Claims Act.

Judgment for interest set aside and trial court directed to dismiss motion for interest on judgment with prejudice.

Weaver, J., Hunter, C.J., Finley, J., and Armstrong, J. pro tem., dissented.

West Headnotes

States 360 ⚷171

360 States
360V Claims Against State
360k171 k. Interest. Most Cited Cases
State is not liable for interest on tort judgments entered against it pursuant to State Tort Claims Act. RCWA 4.92.090.
****335** Slade Gorton, ***256** Atty. Gen., Charles F. Murphy, Richard A. Mattsen, Asst. Attys. Gen., Olympia, for appellant.

Foster & Foster, Stanbery Foster, Olympia, Bassett, Donaldson & Hafer, Samuel B. Bassett, Seattle, for respondent.

HILL, Judge.

The sole question on appeal is whether the state is liable for interest upon a judgment entered against it pursuant to the state 'Tort Claims Act,' which provides:

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation. RCW 4.92.090.

June 28, 1965, respondent recovered a judgment of $157,164 against the state in an action under the statute. March 2, 1967, the judgment was affirmed. Fosbre v. State, 70 Wash.2d 578, 424 P.2d 901 (1967). May 19, 1967, the state paid the amount of the judgment into the registry of the court.

May 9, 1967, the Superior Court for Thurston County entered a supplemental judgment against the state awarding respondent interest upon the judgment at the rate of 6 per cent per annum from date of entry to date of payment, an amount in excess of $17,000.

It is well established in this jurisdiction that the sovereign state cannot be sued without its consent and then only in the manner and to the extent provided by statute. Further, the state is not liable for interest on judgments rendered against it unless payment thereof has been authorized by statute (Pape v. Armstrong, 47 Wash. 480, 287 P.2d 1018 (1955)), or 'by a reasonable construction of a contract or statute, it has placed itself in a position of liability.' Bond v. State, 70 Wash.2d 746, 748, 425 P.2d 10, 11 (1967).

***257** A judgment for damages against the state has never in any other area or context been interpreted to be subject to interest.

The respondent urges that the words of the statute providing that the state shall be liable for its tortious conduct 'to the same extent as if it were a private person or corporation' establish that the legislature intended the state to be liable for interest on a tort judgment, since a private person or a corporation would be liable for interest.

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However, the statute says nothing about liability for interest. Some statutes removing governmental tort immunity have placed limitations on the amounts for which the state or other governmental subdivision could be liable. The language relied on by the respondent indicates only **336 that the state is to be liable for damages to the same extent as if it were a private person or corporation.

The respondent interprets it as though it read:

The state of Washington * * * shall be liable for damages arising out of its tortious conduct (together with interest on judgments for such damages) to the same extent as if it were a private person or corporation.

The addition of such italicized words to the statute would be a legislative and not a judicial function.

Our conclusion-that the statute is not liable for interest on tort judgments-is in accord with the administrative construction placed upon the act by the Central Budget Agency and the office of the attorney general in processing tort judgments for payment. The Superior Court for King County has heretofore held that the state was not liable for interest on a tort judgment. In King County cause No. 613129, the plaintiff sought a writ of mandamus to compel certification by the Attorney General to the Central Budget Agency of interest claimed to be owing upon a $10,105.40 tort judgment against the state. The writ was denied by Judge Stanley C. Soderland on March 2, 1967. He held that RCW 4.92.090 rendered the state liable for damages only and not interest, and that such statute being in derogation of common law should be strictly construed.

*258 Now for the first time since the adoption of the tort claims act in 1961 there comes to this court a claim that the state is liable for interest on a judgment for damages under the tort claims act until it is paid. We find nothing in the act, the state's administrative interpretation of it, or the experience under it, to support the respondent's interpretation.

The judgment for interest is set aside, and the trial court is directed to dismiss the motion for interest on the judgment with prejudice.

ROSELLINI, HAMILTON, NEILL and McGOVERN, JJ., concur.
WEAVER, Judge (dissenting).
Counsel have been most diligent. They have made available to us a plethora of statutes, constitutional provisions, and judicial decisions of other jurisdictions that have considered the problem before us. It would be a futile task, extending this dissent beyond reasonable bounds, and would serve no useful purpose to make a detailed analysis of the authorities because of the myriad differences among them.

As this court pointed out in Kelso v. Tacoma, 63 Wash.2d 913, 918, 390 P.2d 2 (1964), the legislature has clearly indicated its intention to change the public policy of the state by its adoption of the state's Tort Claims Act; and we noted in Evangelical United Brethren Church of Adna v. State, 67 Wash.2d 246, 252, 407 P.2d 440, 443 (1965), that 'the legislature intended to abolish on a broad basis the doctrine of sovereign tort immunity in this state' for the doctrine 'is no longer desirable or acceptable.' Finch v. Matthews, 74 Wash.Dec.2d 163, 177, 443 P.2d 833, 842 (1968).

It is apparent that when the state consented to submit to tort liability, as it is authorized to do by article 2, s 26 of the state constitution, it placed itself in the same position as other litigants, and, like them, rendered itself liable upon any judgment the court might determine from the facts.

Although the state's power to control and regulate the right of suit against it is plenary, and it may annex such *259 conditions thereto as it deems wise (State ex rel. Pierce County v. Superior Court, 86 Wash. 685, 688, 151 P. 108 (1915)), I do not find that it has excluded interest upon a judgment from its liability.

A different question might have been presented had a period been placed after the word 'conduct' so that the statute (RCW 4.92.090) would have read: 'The state of Washington * * * shall be liable for damages arising out of its tortious conduct.' We believe, however, that the phrase 'to the same extent as if it were a private person or corporation' is meaningful. I cannot read it out of the statute.

**337 A judgment founded upon tort liability of a 'private person or corporation' bears interest pursuant to statute (RCW 4.56.110); so should such a judg-

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ment against the state.

Thus, I believe that the state of Washington, pursuant to RCW 4.92.090, is liable for the payment of interest on a tort judgment entered against it.

The judgment should be affirmed.

HUNTER, C.J., FINLEY, J., and ARMSTRONG, J. pro tem., concur.
WASH 1969.
Fosbre v. State
76 Wash.2d 255, 456 P.2d 335

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Supreme Court of Washington,
En Banc.
HOMESTREET, INC., Homestreet Capital Corporation, and Homestreet Bank, Petitioners,
v.
STATE of Washington, DEPARTMENT OF REVENUE, Respondent.
No. 80544-0.

Argued Sept. 16, 2008.
Decided June 18, 2009.

Background: Mortgage lender that serviced loans it sold or securitized to secondary lenders sued the Department of Revenue (DOR) for a refund of business and occupation (B & O) taxes, alleging that it could deduct the interest it retained from the loans and securitized interests as a servicing fee. The Superior Court, Thurston County, H. Christopher Wickham, J., granted DOR's motion for summary judgment. Mortgage lender appealed. The Court of Appeals, 139 Wash.App. 827, 162 P.3d 458, affirmed. Mortgage lender petitioned for review.

Holding: The Supreme Court, En Banc, Sanders, J., held that amounts that mortgage lender retained when servicing loans or securitized interests it sold to secondary lenders on a service-retained basis were amounts derived from interest received, and thus such amounts could be deducted in computing lender's B & O tax obligation.

Judgment of Court of Appeals reversed.

Madsen, J., dissented and filed opinion in which Chambers, J., concurred in result only.

West Headnotes

[1] Appeal and Error 30 ⚷893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Statutory interpretation is a question of law reviewed de novo.

[2] Statutes 361 ⚷181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most Cited Cases
The primary objective of any statutory construction inquiry is to ascertain and carry out the intent of the Legislature.

[3] Statutes 361 ⚷188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases
When interpreting a statute, courts first look to its plain language.

[4] Statutes 361 ⚷190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases
If the plain language of statute is subject to only one interpretation, court's inquiry ends because plain language does not require construction.

[5] Statutes 361 ⚷190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction

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361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases
Where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself.

[6] Statutes 361 ⚷188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases
Absent ambiguity or a statutory definition, courts give the words in a statute their common and ordinary meaning.

[7] Statutes 361 ⚷188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases
To determine the plain meaning of an undefined term in a statute, courts may look to the dictionary.

[8] Statutes 361 ⚷190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases

Statutes 361 ⚷219(2)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(2) k. Existence of Ambiguity. Most Cited Cases
Where statutory language is plain and unambiguous, courts will not construe the statute but will glean the legislative intent from the words of the statute itself, regardless of contrary interpretation by an administrative agency.

[9] Statutes 361 ⚷190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases
A statute that is clear on its face is not subject to judicial construction.

[10] Statutes 361 ⚷190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases
If a statute remains subject to multiple interpretations after analyzing the plain language, it is ambiguous.

[11] Statutes 361 ⚷190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases
A statute is ambiguous if susceptible to two or more reasonable interpretations.

[12] Statutes 361 ⚷190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases
A statute is not ambiguous merely because different interpretations are conceivable.

[13] Statutes 361 ⚷206

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361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k206 k. Giving Effect to Entire Statute. Most Cited Cases
Each word of a statute is to be accorded meaning.

[14] Statutes 361 ⚷206

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k206 k. Giving Effect to Entire Statute. Most Cited Cases
Whenever possible, statutes are to be construed so no clause, sentence or word shall be superfluous, void, or insignificant.

[15] Statutes 361 ⚷212.7

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k212 Presumptions to Aid Construction
361k212.7 k. Other Matters. Most Cited Cases
A court is required to assume the Legislature meant exactly what it said and apply the statute as written.

[16] Interest 219 ⚷9

219 Interest
219I Rights and Liabilities in General
219k8 Compensation for Use of Money
219k9 k. In General. Most Cited Cases
"Interest" is merely a charge for the use or forbearance of money.

[17] Interest 219 ⚷1

219 Interest
219I Rights and Liabilities in General
219k1 k. Nature and Grounds in General. Most Cited Cases

Interest 219 ⚷19(1)

219 Interest
219I Rights and Liabilities in General
219k19 Demands Not Liquidated
219k19(1) k. In General. Most Cited Cases
For an amount to constitute "interest," it must be paid or received on an existing, valid, and enforceable obligation.

[18] Licenses 238 ⚷29

238 Licenses
238I For Occupations and Privileges
238k27 License Fees and Taxes
238k29 k. Amount. Most Cited Cases
Amounts that mortgage lender retained when servicing loans or securitized interests it sold to secondary lenders on a service-retained basis were "amounts derived from interest received," and thus such amounts could be deducted in computing lender's business and occupation (B & O) tax obligation; amounts at issue were taken from the interest the borrowers paid on their loans. West's RCWA 82.04.4292.

[19] Statutes 361 ⚷206

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k206 k. Giving Effect to Entire Statute. Most Cited Cases
All words in a statute must be accorded their meaning.

[20] Constitutional Law 92 ⚷2473

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2472 Making, Interpretation, and Application of Statutes
92k2473 k. In General. Most Cited Cases
Courts have no power to change a statute as written even if they believe the legislature intended some-

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thing else but failed to express it adequately.

[21] Taxation 371 ⚷2300

371 Taxation
371III Property Taxes
371III(F) Exemptions
371III(F)1 In General
371k2298 Construction and Operation of Exemptions in General
371k2300 k. General Rules of Construction. Most Cited Cases

Taxation 371 ⚷3501

371 Taxation
371VIII Income Taxes
371VIII(E) Deductions, Credits, and Exemptions
371k3500 Deductions
371k3501 k. In General. Most Cited Cases
Tax exemptions and deductions must be narrowly construed.

[22] Taxation 371 ⚷2300

371 Taxation
371III Property Taxes
371III(F) Exemptions
371III(F)1 In General
371k2298 Construction and Operation of Exemptions in General
371k2300 k. General Rules of Construction. Most Cited Cases

Taxation 371 ⚷3501

371 Taxation
371VIII Income Taxes
371VIII(E) Deductions, Credits, and Exemptions
371k3500 Deductions
371k3501 k. In General. Most Cited Cases
Taxation is generally the rule and deductions or exemptions are the exceptions.

[23] Taxation 371 ⚷3544

371 Taxation
371VIII Income Taxes
371VIII(G) Assessment
371k3543 Evidence
371k3544 k. In General. Most Cited Cases
The burden is on the party asserting the deduction to show it qualifies for a tax deduction.

****298** Robert Lee Mahon, III, Scott M. Edwards, Gregg D. Barton, Perkins Coie LLP, Seattle, WA, for Petitioners.

Donald F. Cofer, Attorney General's Office, Olympia, WA, for Respondent.

SANDERS, J.

***447** ¶ 1 HomeStreet, Inc., is a residential mortgage lender that services loans it sells or securitizes [FN1] to secondary lenders. It received tax deductions for the interest retained from these loans under RCW 82.04.4292 until the Department of Revenue (DOR) issued an order requiring HomeStreet, Inc., to pay business and occupation (B & O) taxes. HomeStreet, Inc., paid the taxes but then sued DOR for a refund. The trial court granted DOR's motion for summary judgment of dismissal, which was affirmed by the Court of Appeals. We now reverse the Court of Appeals and order DOR to refund the taxes to HomeStreet, Inc., plus statutory interest and costs.

FN1. Securitizing is the process of issuing mortgage-backed or mortgage-related securities. *HomeStreet, Inc. v. Dep't of Revenue*, 139 Wash.App. 827, 831, 162 P.3d 458 (2007).

FACTS AND PROCEDURAL HISTORY

¶ 2 HomeStreet Capital Corporation,[FN2] HomeStreet Bank,[FN3] and HomeStreet, Inc.[FN4] (collectively HomeStreet) are corporations organized and existing under the laws of the State of Washington, each with corporate headquarters in Seattle. HomeStreet Capital Corporation and HomeStreet Bank are ****299** wholly owned subsidiaries of HomeStreet, Inc.

FN2. Formerly Continental Mortgage Company, Inc.

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FN3. Formerly Continental Savings Bank.

FN4. Formerly Continental, Inc.

¶ 3 HomeStreet originates mortgage loans by lending money to borrowers to purchase residential property. HomeStreet sells or securitizes about 90 percent of these loans on ***448** the secondary market to lenders such as the Federal National Mortgage Association (Fannie Mae), the Government National Mortgage Association (Ginnie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), the Oregon Housing Authority, and the Federal Home Loan Bank. HomeStreet sells the loans or securitized interests two ways: (1) it sells the *whole* loan or security in its entirety (servicing released) or (2) it sells a *portion* of the loan while retaining the right to service the loan or security and receive a portion of the interest (servicing retained). HomeStreet also sells securities backed by mortgages or deeds of trust (mortgage-backed securities) guaranteed by Fannie Mae, Freddie Mac, or Ginnie Mae.

¶ 4 For mortgage-backed securities and loans sold on a service-retained basis, borrowers continue to make principal and interest payments to HomeStreet because HomeStreet still owns a portion of the loan and services the loans for the secondary market lenders. Borrowers usually do not know a secondary market transaction has occurred. HomeStreet collects the payments from the borrowers, pays the investors the principal and a portion of the interest, and retains a portion of the interest as a servicing fee. HomeStreet retains a portion of the interest only if the borrowers make interest payments. The money HomeStreet receives is not a flat fee but varies according to the size and length of the loan, interest rate fluctuations, and whether the borrower prepays or defaults on the loan.

¶ 5 When a loan is sold in its entirety the borrower makes principal and interest payments to the purchaser of the loan, and HomeStreet no longer receives any compensation for these loans from the borrower or the purchaser. This case does not involve service-released loans, and this is where the confusion arises for the dissent. The dissent conflates loans sold on a service-retained basis with loans sold on a service-released basis. HomeStreet does not maintain any connection with loans sold on a service-released basis. Unfortunately the dissent fails to distinguish***449** between these two very different ways in which HomeStreet sells loans on the secondary market. The dissent, in fact, fails to even mention this important difference. The dissent simply says HomeStreet "assigns" and sells the loans to third parties. Dissent at 305. In essence the dissent simplifies and misstates the facts.

¶ 6 The State imposes B & O tax on the privilege to do business in Washington. RCW 82.04.220. One statutory deduction is found in RCW 82.04.4292; however HomeStreet and DOR dispute the meaning of "amounts derived from interest." RCW 82.04.4292 provides,

> In computing tax there may be deducted from the measure of tax by those engaged in banking, loan, security or other financial businesses, *amounts derived from interest* received on investments or loans primarily secured by first mortgages or trust deeds on nontransient residential properties

(Emphasis added.) RCW 82.04.4292 contains five elements:

1. The person is engaged in banking, loan, security, or other financial business;

2. The amount deducted was derived from interest received;

3. The amount deducted was received because of a loan or investment;

4. The loan or investment is primarily secured by a first mortgage or deed of trust; and

5. The first mortgage or deed of trust is on nontransient residential real property.

Clerk's Papers (CP) at 99. All five elements of the statute must be met for the taxpayer to receive a deduction. The second element is the only element in dispute herein.

¶ 7 In 1992 Continental, Inc., HomeStreet's predecessor, brought a petition seeking correction of a tax assessment and a refund of the taxes it paid to DOR. DOR ****300** issued Determination No. 92-403,[FN5] stating the five requirements of ***450** RCW 82.04.4292 were met and Continental should have

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received a deduction for the interest. DOR issued other determinations, including Determination No. 92-392,[FN6] which held that other financial institutions qualified for deductions on their retained interest. However in 1999 DOR issued Determination No. 98-218, which overruled Determination No. 92-392 "to the extent it states the portion of the interest income stream retained by the seller of a qualifying mortgage continues to be deductible under RCW 82.04.4292 despite the seller's lack of risk of interest rate fluctuation," changing its position on the deductions allowed under RCW 82.04.4292. CP at 112. HomeStreet was then audited by DOR and ordered to pay $20,224.72 in B & O tax on interest retained from 1997 through 2001 on mortgages it sold on a service-retained basis and mortgage-backed securities. HomeStreet paid DOR, and both parties entered into an agreement allowing HomeStreet to dispute the retained interest at a later date.

FN5. Determination No. 92-403 states, "[t]he payments of the retained interest at issue arises out of a relationship between the borrower and the taxpayers which is completely independent of the investors' purchase of a security representing another portion of the loan. We conclude that the amounts in question constitute interest within the meaning of RCW 82.04.4292." CP at 153.

FN6. In Determination No. 92-392, the taxpayer originated, pooled, and sold the loans on the secondary market backed "under federal mortgage-backed guarantee programs." CP at 59.

¶ 8 HomeStreet sued DOR for a refund of the B & O tax it paid. In January 2006 the trial court granted DOR summary judgment of dismissal, opining DOR's interpretation of the statute was more consistent with the legislature's intent because the statutory deduction was intended to be limited.

¶ 9 The Court of Appeals affirmed the trial court, holding the income was "derived from interest" in its broadest sense but due only to the "*contractual relationship* with the purchaser of the loan for servicing the loans and that it is merely allowed to pay itself by 'retaining' part of the contract purchaser's interest payment in return." *HomeStreet, Inc. v. Dep't of Revenue*, 139 Wash.App. 827, 843, 162 P.3d 458, 460 (2007). It also held HomeStreet's interpretation of the statute was "overbroad, unreasonable, and ignores the ***451** requirement that we construe tax deduction statutes narrowly." *Id.* at 844, 162 P.3d 458. We granted review. 163 Wash.2d 1022, 185 P.3d 1194 (2008).

STANDARD OF REVIEW

[1][2] ¶ 10 Statutory interpretation is a question of law reviewed de novo. *City of Seattle v. Burlington N. R.R.*, 145 Wash.2d 661, 665, 41 P.3d 1169 (2002). The primary objective of any statutory construction inquiry is "to ascertain and carry out the intent of the Legislature." *Rozner v. City of Bellevue*, 116 Wash.2d 342, 347, 804 P.2d 24 (1991).

ANALYSIS

¶ 11 We are asked to determine what "amounts derived from interest" means in RCW 82.04.4292 and whether HomeStreet qualifies for a deduction under the statute. We hold that HomeStreet is entitled to a tax deduction under RCW 82.04.4292 because the amounts it receives are derived from interest.

[3][4][5][6][7][8][9] ¶ 12 When interpreting a statute, we first look to its plain language. *State v. Armendariz*, 160 Wash.2d 106, 110, 156 P.3d 201 (2007). If the plain language is subject to only one interpretation, our inquiry ends because plain language does not require construction. *Id.*; *State v. Thornton*, 119 Wash.2d 578, 580, 835 P.2d 216 (1992). "Where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself." *Wash. State Human Rights Comm'n v. Cheney Sch. Dist. No. 30*, 97 Wash.2d 118, 121, 641 P.2d 163 (1982). Absent ambiguity or a statutory definition, we give the words in a statute their common and ordinary meaning. *Garrison v. Wash. State Nursing Bd.*, 87 Wash.2d 195, 196, 550 P.2d 7 (1976). To determine the plain meaning of an undefined term, we may look to the dictionary. *Id.* "Where statutory language is plain and unambiguous,****301** courts will not construe the statute but will glean the legislative intent from ***452** the words of the statute itself, regardless of contrary interpretation by an administrative agency." *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wash.2d 392, 396, 103 P.3d 1226 (2005). "A statute that is clear on its face is not sub-

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ject to judicial construction." *State v. J.M.*, 144 Wash.2d 472, 480, 28 P.3d 720 (2001).

[10][11][12] ¶ 13 If the statute remains subject to multiple interpretations after analyzing the plain language, it is ambiguous. *Burton v. Lehman*, 153 Wash.2d 416, 423, 103 P.3d 1230 (2005). A statute is ambiguous if "susceptible to two or more reasonable interpretations," but "a statute is not ambiguous merely because different interpretations are conceivable." *State v. Hahn*, 83 Wash.App. 825, 831, 924 P.2d 392 (1996).

[13][14][15] ¶ 14 "[E]ach word of a statute is to be accorded meaning." *State ex rel. Schillberg v. Barnett*, 79 Wash.2d 578, 584, 488 P.2d 255 (1971). Whenever possible, statutes are to be construed so " 'no clause, sentence or word shall be superfluous, void, or insignificant.' " *Kasper v. City of Edmonds*, 69 Wash.2d 799, 804, 420 P.2d 346 (1966) (quoting *Groves v. Meyers*, 35 Wash.2d 403, 407, 213 P.2d 483 (1950)). A court "is required to assume the Legislature meant exactly what it said and apply the statute as written." *Duke v. Boyd*, 133 Wash.2d 80, 87, 942 P.2d 351 (1997). The dissent would have us believe that words in fact do not mean what they say. Dissent at 303-04. However we believe the better practice is to look at the words in the statute at issue to determine what the statute means.[FN7]

> FN7. The dissent engages in a lengthy analysis of other statutes in chapter 82.04 RCW but fails to actually analyze the statute at issue here. The dissent states, "[w]ith these statutes [(RCW 82.04.290(2), RCW 82.04.080)] in mind, it is obvious that the deduction in RCW 82.04.4292 does not apply to the amounts that HomeStreet claims are 'amounts derived from interest.' " Dissent at 305.

[16][17] ¶ 15 The term "interest" is not defined in RCW 82.04.4292 or in any tax statute in chapter 82.04 RCW but has been defined in several cases. "Interest is merely a charge for the use or forbearance of money." *Security Sav. Soc'y v. Spokane County*, 111 Wash. 35, 37, 189 P. 260 (1920). "[F]or ***453** an amount to constitute interest, it must be paid or received on an existing, valid, and enforceable obligation." *Thompson v. Comm'r*, 73 T.C. 878, 1980 WL 4596 (1980) (citing *Meilink v. Unemployment Reserves Comm'n*, 314 U.S. 564, 570, 62 S.Ct. 389, 86 L.Ed. 458 (1942)).

¶ 16 "Interest" is defined as "[t]he compensation fixed by agreement or allowed by law for the use or detention of money, or for the loss of money by one who is entitled to its use; esp., the amount owed to a lender in return for the use of borrowed money." BLACK'S LAW DICTIONARY 829 at para. 3. (8th ed.1999). "Interest" is also defined as "the price paid for borrowing money generally expressed as a percentage of the amount borrowed paid in one year." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1178 (2002).

[18] ¶ 17 The revenue at issue here is interest. It is the charge or price borrowers pay HomeStreet for borrowing money from HomeStreet. It is the amount owed to HomeStreet in return for the use of the borrowed money. The amount the borrowers pay to HomeStreet is on existing, valid, and enforceable contracts. The amount of money HomeStreet receives is not set but rather changes with the size and length of the loans, interest rate fluctuations, and the borrowers' ability to pay back the loan.

¶ 18 DOR argues HomeStreet is paid for the services it provides to the secondary lenders and not for the borrowers' use of the money. DOR asserts the revenue HomeStreet receives is a servicing fee even though it comes from the interest payments. This is incorrect. Although the loans have been partially sold to secondary market lenders, the borrowers still borrowed the money from HomeStreet and HomeStreet still collects the payments, including the interest.

¶ 19 "Derived from" is not defined in the B & O tax statutes either. "Derived" is defined as "to take or receive esp. from a source." WEBSTER'S, *supra*, at 608. The ****302** Court of Appeals states the revenue at issue "is, in the broadest sense, 'derived from interest' because HomeStreet deducts it directly from the interest stream the loans generate." ***454** *HomeStreet*, 139 Wash.App. at 843, 162 P.3d 458. The State's expert witness, Earl Baldwin, said the income is " 'derivative' of mortgage interest because the fee is deducted from the interest portion of the loan as provided by the agency-seller contract." CP at 748.

¶ 20 The revenue at issue here is received from a

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source, and the source is interest. The revenue is therefore "derived from interest" because it is taken from the interest the borrowers pay on their loans. When DOR argues the revenue is taken from the interest by HomeStreet as a servicing fee, it goes too far. Under the statute it is not essential to determine why the money is received or taken from a source. *See* RCW 82.04.4292. The statute requires that the amount only be "*derived* from interest." RCW 82.04.4292 (emphasis added). The statute does not say the amount must not be used for a servicing fee either. The plain meaning of the statute allows deductions for amounts received from interest, and HomeStreet qualifies for this deduction because it receives interest from the loans.

¶ 21 Since the statute is unambiguous and subject only to one interpretation, it is unnecessary to look any further. DOR argues the legislature intended the statute to apply only to interest while asserting the words "derived from" are unnecessary and meaningless. Verbatim Report of Proceedings (VRP) at 27-28. DOR also argues "amounts derived from interest" means only interest-income based on other cases that interpret other statutes with similar wording. *Id.* at 32-33. But DOR fails to acknowledge that the legislature's purpose in enacting RCW 82.04.4292 " 'was to stimulate the residential housing market by making residential loans available to home buyers at lower cost through the vehicle of a B & O tax [deduction] on interest income received by home mortgage lenders.' " *Dep't of Revenue v. Sec. Pac. Bank of Wash.*, 109 Wash.App. 795, 804, 38 P.3d 354 (2002) (alteration in original) (quoting CP at 33).

[19][20] ¶ 22 Moreover, "amounts derived from" is not meaningless or surplusage, as all words in a statute must be *455 accorded their meaning. DOR cannot simply delete these three words from the statute to suit the meaning it wishes it to convey, nor should the dissent. *See* dissent at 307. This leads to an incorrect and gross misapplication of the statute as written. The legislature wrote the statute as it did, and we have no power to change it "even if we believe the legislature intended something else but failed to express it adequately." *Vita Food Prods., Inc. v. State*, 91 Wash.2d 132, 134, 587 P.2d 535 (1978). If the legislature meant only interest then it would not have included the words "amounts derived from."

[21][22][23] ¶ 23 Tax exemptions and deductions must be narrowly construed. *Dep't of Revenue v. Schaake Packing Co.*, 100 Wash.2d 79, 83-84, 666 P.2d 367 (1983). Taxation is generally the rule and deductions or exemptions are the exceptions. *Budget Rent-A-Car of Wash.-Or. v. Dep't of Revenue*, 81 Wash.2d 171, 174, 500 P.2d 764 (1972) (citing *Fibreboard Paper Prods. Corp. v. State*, 66 Wash.2d 87, 401 P.2d 623 (1965)). The burden is on the party asserting the deduction to show it qualifies for a tax deduction. *Group Health Coop. of Puget Sound, Inc. v. Wash. State Tax Comm'n*, 72 Wash.2d 422, 433 P.2d 201 (1968).

¶ 24 DOR argues HomeStreet does not qualify for a deduction under RCW 82.04.4292 because tax statutes are to be narrowly construed, so the statute only applies to interest income received by the owners of first mortgage loans. However DOR, attempting to narrowly construe the statute, improperly deletes words from the statute. HomeStreet has met its burden to show it qualifies for a tax deduction because the revenue HomeStreet receives is clearly derived from interest.

CONCLUSION

¶ 25 Under the plain meaning of RCW 82.04.4292 tax deductions are allowed for "amounts derived from interest," and the amount HomeStreet retained when servicing the loans is derived from the interest of the **303 loans. We reverse *456 the Court of Appeals and order DOR to refund the taxes at issue, plus statutory interest and costs.

WE CONCUR: ALEXANDER, C.J., C. JOHNSON, OWENS, J. JOHNSON and STEPHENS, JJ.
MADSEN, J. (dissenting).
¶ 26 The court must decide the meaning of the words "derived from interest" in RCW 82.04.4292. Unfortunately, the majority determines the meaning of these words without regard to the context in which they are used and the related statutes that give them meaning. The majority thus disregards the numerous cases in which this court has explained how to determine the plain meaning of a statutory term. In addition, the majority says that it is not essential to determine why the money is received, but it is not only essential, it is the *first step* in applying this taxing scheme. Moreover, the majority fails to apply the principle that deduction and exemption tax statutes are to be narrowly construed. To top it all off, the

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majority also misstates the facts.

¶ 27 When the proper analysis is applied, it is apparent that the deduction in RCW 82.04.4292 applies only to income that is received by the taxpayer as interest income. It does not apply to fees received by HomeStreet, Inc., in exchange for servicing mortgages that have been transferred to third parties. Accordingly, HomeStreet is not entitled to the deduction.

Analysis

¶ 28 The goal when determining the meaning of statutory language is to understand what the legislature intended and then carry out that intent. *Densley v. Dep't of Retirement Sys.*, 162 Wash.2d 210, 231, 173 P.3d 885 (2007). The starting point is the plain language and ordinary meaning of the language used, because if the meaning of the language is plain, then it must be given effect as an expression of the legislature's intent. *Id.*

***457** ¶ 29 But this does not mean that the language is examined in a vacuum. Rather, as part of the inquiry into whether there is a plain language meaning to be ascertained, the statutory context in which the particular language appears must be considered, as well as related statutes. The majority fails to engage in this analysis, instead applying a "plain meaning" approach that this court *explicitly* abandoned in favor of an approach that better reflects legislative intent.

¶ 30 In *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 43 P.3d 4 (2002), we recognized that there were two existing lines of cases from this court that described the "plain meaning rule" in quite different ways. Under the first line of cases, a court would endeavor to determine plain meaning solely from the wording of the statute itself. *Id.* at 10, 43 P.3d 4. If the language was found to be unclear or ambiguous, then, as a part of the inquiry into legislative intent and to resolve the ambiguity, the court would consider the statutory scheme as a whole and related statutes. *Id.*

¶ 31 However, in another long line of cases, this court said that to determine plain meaning a court should examine the statute in which the language in question appears "as well as related statutes or other provisions of the same act in which the provision is found." *Id.* "Under this second approach, the plain meaning is still derived from what the Legislature has said in its enactments, but that meaning is discerned from *all that the Legislature has said in the statute and related states which disclose legislative intent about the provision in question.*" *Id.* at 11, 43 P.3d 4 (emphasis added). "[I]f, after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids to construction, including legislative history." *Id.* at 12, 43 P.3d 4. We deliberately chose the second line of cases as representing "the better approach because it is more likely to carry out legislative intent." *Id.*

458** ¶ 32 We have reiterated this test of plain meaning in numerous cases. *E.g.*, *Densley*, 162 Wash.2d at 231 ¶ 47, 173 P.3d 885; *Cornhusker Cas. Ins. Co. v. Kachman*, 165 Wash.2d 404, 409, 198 P.3d 505 (2008); ****304Tesoro Ref. & Mktg. Co. v. State, Dep't of Revenue*, 164 Wash.2d 310, 319 ¶ 12, 190 P.3d 28 (2008) (plurality); *Christensen v. Ellsworth*, 162 Wash.2d 365, 373 ¶ 12, 173 P.3d 228 (2007); *City of Olympia v. Drebick*, 156 Wash.2d 289, 295 ¶ 6, 126 P.3d 802 (2006); *Advanced Silicon Materials, LLC v. Grant County*, 156 Wash.2d 84, 89 ¶ 10, 124 P.3d 294 (2005); *Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wash.2d 790, 797 ¶ 15, 802 ¶ 24, 123 P.3d 88 (2005); *State v. Jacobs*, 154 Wash.2d 596, 600 ¶ 7, 115 P.3d 281 (2005); *Dep't of Labor & Indus. v. Gongyin*, 154 Wash.2d 38, 45 ¶ 9, 109 P.3d 816 (2005); *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wash.2d 226, 242, 88 P.3d 375 (2004); *State v. J.P.*, 149 Wash.2d 444, 450, 69 P.3d 318 (2003); *City of Seattle v. Allison*, 148 Wash.2d 75, 81, 59 P.3d 85 (2002); *see also, e.g.*, *State v. Krall*, 125 Wash.2d 146, 148, 881 P.2d 1040 (1994) (the meaning of words in a statute is determined from " 'all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another' " (quoting *State v. Huntzinger*, 92 Wash.2d 128, 133, 594 P.2d 917 (1979))); *Burns v. City of Seattle*, 161 Wash.2d 129, 146, 164 P.3d 475 (2007).

¶ 33 Nevertheless, the majority declines to follow our precedent and instead reverts to the formulation of the plain meaning rule that we deliberately discarded on the ground that it is not the best method for deter-

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mining and applying legislative intent. I believe we should adhere to our precedent. When we are faced with a complex statutory scheme, as we are here, it is imperative that we use the best tools at our disposal.

¶ 34 When RCW 82.04.4292 is examined in the context of the entire statutory scheme and related statutes, its meaning is apparent. The statute is not ambiguous, but its plain meaning is not what the majority says.

***459** ¶ 35 We begin with the broad rule under RCW 82.04.290(2) that financial businesses must pay a business and occupation tax (B & O tax) on the "gross income of the business" at a rate of 1.5 percent. RCW 82.04.4292, the statute at issue, then provides for a deduction from income for purposes of B & O tax. It provides in relevant part that "amounts derived from interest received on investments or loans primarily secured by first mortgages" may be "deducted from the measure of tax" by taxpayers in financial businesses. RCW 82.04.4292. The "measure of tax" referred to in RCW 82.04.4292 is thus the "gross income of the business." The "gross income of the business" is a statutorily defined term, and in the definition of the term the legislature identified and distinguished many *types* of income that a financial business might obtain. The "gross income of the business" means:

> The value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, *compensation for the rendition of services,* gains realized from trading in stocks, bonds, or other evidence of indebtedness, *interest,* discount, rents, royalties, *fees,* commissions, dividends, and other emoluments however designated.

RCW 82.04.080 (emphasis added).

¶ 36 Thus, under the B & O tax scheme pertaining to financial businesses, "compensation for rendition of services," "fees" and "interest" are all defined types of potential gross income of a financial business, and each is distinguishable from the others. By defining what constitutes the gross income of a financial business, which includes all of these forms of income, and then providing in RCW 82.04.4292 that "amounts derived from interest" may be deducted from the measure of tax, the legislature set up a general rule of taxable income and a deduction from taxable income in the case of "amounts derived from interest."

¶ 37 The definition of "gross income of the business" provides other information that is important to understanding the deduction in RCW 82.04.4292. It begins with ***460** (1) "[t]he value proceeding or accruing" (2) "by reason of the transaction of the business engaged." The first of these phrases is also a defined term, and it is a critical definition for understanding the taxing scheme. RCW 82.04.090 states that " '[v]alue proceeding or accruing' means the consideration, whether money, credit, rights, or other property expressed in terms of money, actually received or accrued." Among other things, this means ****305** that the types of gross income listed in RCW 82.04.080 are identified by the character of the consideration *as it is received by or accrued to* the taxpayer.[FN1] The types of income are *not* identified by the character of the consideration as it is *paid* by the other party (or parties) to the business transaction. Rather, the character of the income is determined by how it *is received by the taxpayer.* This concept is elementary; we look to the income in the hands of the taxpayer to determine its character and whether it is subject to taxation.

> FN1. Taxpayers generally employ either a cash or accrual basis of accounting, and RCW 82.04.090 provides that the term "value proceeding or accruing" is to apply, "in each case, on a cash receipts or accrual basis according to which" of these methods of accounting is used.

¶ 38 The majority is thus absolutely incorrect when it states that "it is not essential to determine why the money is received." Majority at 302. Notably, the majority's error occurs because it fails to consider all the statutes that are relevant to the meaning of RCW 82.04.4292.

¶ 39 The second phrase means that the consideration that is subject to tax is received by the taxpayer (or accrues to the taxpayer) by reason of the business transaction in which the taxpayer engaged.

¶ 40 With these statutes in mind, it is obvious that the deduction in RCW 82.04.4292 does not apply to the amounts that HomeStreet claims are "amounts de-

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rived from interest." HomeStreet originates first mortgage loans but then assigns them to third parties. Pursuant to contracts entered into with the third party mortgage assignees, HomeStreet keeps the rights to service the mortgages. Servicing the mortgages involves a number of responsibilities,***461** including the responsibility to collect amounts due from the borrowers and remit them to the mortgage assignees. The contracts between HomeStreet and the third party mortgage assignees provide that, in exchange for these services, HomeStreet is paid for these services (servicing the mortgages) from the amount of interest paid and generally calculated as a percentage of the outstanding principle balance.

¶ 41 The amounts in dispute are thus servicing fees paid to HomeStreet. The majority asserts, however, that it is incorrect to say that the revenue that HomeStreet receives consists of servicing fees, because the borrowers still borrowed the money from HomeStreet and HomeStreet still collects the payments, including interest. Majority at 301. This is a misstatement of what occurs. The loans themselves have been sold to third parties, with HomeStreet having the contractual right to service the mortgages, a service for which it is paid. HomeStreet collects the payments because that is one of its obligations in servicing the mortgages. It does not collect them as the lender. It remits the payments to the third party mortgage assignees, after retaining the contractual fees that it is due for servicing the mortgages. [FN2]

FN2. The majority is also mistaken about which transactions are addressed in this dissent. Majority at 299. The service-released loans are irrelevant for present purposes. Instead, the loans at issue are those that have been assigned to third parties, with HomeStreet retaining, by contract with those third parties, a portion of the amount the borrower pays as a fee for the services that HomeStreet provides to that third party assignee. As the Court of Appeals correctly put it:

> When HomeStreet or any mortgage lender originates a mortgage loan, it creates a relationship between itself and the borrower by allowing the borrower to use its money in return for interest on its capital. This relationship falls squarely within the statutory tax deduction. But when HomeStreet sells the loan on the secondary market, it recovers the capital it invested and the borrower is no longer paying HomeStreet for using its money. And, *in servicing retained sales, HomeStreet retains only the right to provide loan servicing for the purchaser of the loan and to be compensated for those services.*

HomeStreet, Inc. v. Dep't of Revenue, 139 Wash.App. 827, 843, 162 P.3d 458 (2007) (emphasis added). It is the compensation for those services that is actually at issue here.

¶ 42 HomeStreet contends that its servicing fees are deductible under RCW 82.04.4292 as "amounts derived ***462** from interest." But these servicing fees are not received by HomeStreet as "amounts derived from interest," as explained below.

¶ 43 A deduction from the income that is otherwise subject to B & O tax requires that ****306** the income first be identified. Since the business in which HomeStreet is engaged is financial business, RCW 82.04.080 is the statute that defines gross income. As explained, this statute distinguishes between consideration received in the form of *compensation for rendition of services, interest,* and *fees.* The legislature plainly intended that "compensation for rendition of services" and "fees" are different forms of gross income from "interest" and must be analyzed separately. In addition, under this statute and RCW 82.04.090, the character of the income is determined as it is received by (or accrues to) the taxpayer and the income is received by (or accrues to) the taxpayer by reason of the business transaction.

¶ 44 Under these statutes, the income that would be taxed absent the deduction, if it were to apply, consists of the fees that HomeStreet is paid for servicing the mortgages it has assigned to third parties. That is, the income to HomeStreet as it is received (or accrued) consists of fees paid to it for mortgage servicing. HomeStreet does not receive interest income from the payments made by the borrowers. In addition, the business transaction from which HomeStreet obtains the amounts in dispute is the contract between HomeStreet and the third party-*it is not the lending of money to the borrower.* Thus, the particular "gross income from business" at issue here con-

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sists of the *fees* paid to HomeStreet for its servicing the mortgages.

¶ 45 The deduction in RCW 82.04.4292 is for "amounts derived from interest received on investments or loans primarily secured by first mortgages or trust deeds on nontransient residential properties." The legislature's differentiation between types of income that constitutes "gross income" shows that *if* it meant the deduction in *463RCW 82.04.4292 to apply to other types of gross income than interest, it would have explicitly said so.

¶ 46 This conclusion is reinforced by other statutes authorizing deductions from B & O taxation. For example, RCW 82.04.4282 allows a deduction for "[a]mounts derived from bona fide (1) initiation fees, (2) dues, (3) contributions, (4) donations, (5) tuition fees, (6) charges made ... for operation of privately owned kindergartens, and (8) endowment funds." This is a detailed, precise list of income that may be deducted from income for B & O tax purposes. The legislature clearly listed the specific items that may be deducted, that is, the deduction is in the amount of money from these specific types of income when received by the business.

¶ 47 And in fact, this is what this court held when it was faced with this particular statute [FN3] and a claim involving payments made to the Red Cedar Shingle Bureau, a nonprofit corporation in the business of promoting trade and in particular working to prevent antishingle legislation and discriminatory insurance differentials. *Red Cedar Shingle Bureau v. State*, 62 Wash.2d 341, 382 P.2d 503 (1963). Under its bylaws, members were charged " 'in consideration of the services rendered and to be rendered by the corporation' " an amount based on the number and type of shingles they manufactured. *Id.* at 346, 382 P.2d 503. The court rejected the corporation's claim that it was entitled to deduct these amounts paid as "dues" or "contributions," stating that " 'dues,' given its ordinary everyday meaning does not connote payments" like those at issue made "to 'trade associations' " for the kind of services rendered.[FN4] *Id.* at 346-47, 382 P.2d 503 (emphasis omitted).

FN3. The statute was codified at former RCW 82.04.430(2) (1979), *repealed by* Laws of 1980, ch. 37, § 81.

FN4. The court added that if there was any doubt about this conclusion, "and we believe there is none" the Board's argument was untenable "for another reason"-a proviso in the statute. *Red Cedar Shingle Bureau*, 62 Wash.2d at 346-47, 382 P.2d 503.

¶ 48 By comparison to RCW 82.04.4286 (and analogy to *Red Cedar Shingle Bureau*), it is apparent that by listing *464 only "interest" as the source of income that may be deducted, the legislature meant in RCW 82.04.4292 to limit the deduction to income received as "interest."

¶ 49 Other statutes also reinforce this conclusion and help explain the legislature's use of the words "amounts derived from" in **307 RCW 82.04.4292 because, unlike a deduction from income based on its character *as income* (as in this case), they provide for nontaxability based on the character of amounts *paid from income*. For example, RCW 82.04.285 requires B & O taxes on gross income from operating games of chance, but subsection (4) states that " '[g]ross income of the business' does not include the monetary value or actual cost of any prizes that are awarded, amounts paid to players for winning wagers," and so forth. Thus, nontaxability depends on what is paid for.

¶ 50 The distinction is that nontaxability based on what the taxpayer is paying money for is different from nontaxability based on the kind of income received. By using the words "amounts derived from" in connection with interest, the legislature indicated that the deduction it intended is for interest income and not for amounts paid by the taxpayer as interest. Therefore, the words "amounts derived from" are not superfluous-they have meaning-but they do not have the meaning argued for by HomeStreet.

¶ 51 The words "amounts derived from" do not mean the income that may be deducted is of any type at all when received, so long as it was *paid* somewhere along the line as interest. And any such conclusion is counter to the provisions in RCW 82.04.080 (defining gross income) and RCW 82.04.090 (defining "value proceeding or accruing").

¶ 52 Finally, in interpreting RCW 82.04.4292, the majority fails to apply the principle that courts should narrowly construe statutes setting out deductions and

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exemptions. *O'Leary v. Dep't of Revenue*, 105 Wash.2d 679, 682, 717 P.2d 273 (1986); *Evergreen-Washelli Mem'l Park Co. v. Dep't of Revenue*, 89 Wash.2d 660, 663, 574 P.2d 735 (1978). At a very minimum, the related statutes in chapter 82.04 RCW *465 render the majority's reading of the statute highly questionable. This, at a minimum, should trigger the court's obligation to narrowly construe the statute and hold that it applies by its terms only to interest.

¶ 53 When RCW 82.04.4292 is read in the context of the B & O taxing scheme as a whole, and in light of related statutes, its plain meaning is that the servicing fees that HomeStreet received for servicing the assigned mortgages are not deductible under the statute. It is also apparent that the statute applies only to interest income received on "investments or loans primarily secured by first mortgages or trust deeds on nontransient residential properties." RCW 82.04.4292.

Conclusion

¶ 54 The majority fails to follow settled precedent for determining whether statutory language has a discernable plain meaning. When our precedent is followed, it is clear that RCW 82.04.4292 has a plain meaning, but it is not the meaning accorded the statute by the majority. Rather, the statute pertains only to interest and, more particularly for purposes of this case, it clearly does not apply to fees that are received for servicing mortgages conveyed to third parties.

¶ 55 The fact that the source of the fees is or may have been interest when paid by the borrower is irrelevant, because characterizing income, and therefore deductions of amounts derived from income, for B & O taxing purposes depends on its nature *when received by the taxpayer*. Here, the amounts were received by HomeStreet in the form of fees under the contracts between HomeStreet and the third party mortgage assignees.

¶ 56 I dissent.

WE CONCUR: CHAMBERS, J., result only.
Wash.,2009.
Homestreet, Inc. v. State, Dept. of Revenue
166 Wash.2d 444, 210 P.3d 297

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Supreme Court of Washington,
En Banc.
In the Matter of the Petition of the Seattle Popular Monorail Authority, a City Transportation Authority, to Acquire by Condemnation Certain Real Property for Public use as Authorized by Resolution No. 04-16.
HTK MANAGEMENT, L.L.C., Appellant,
v.
SEATTLE POPULAR MONORAIL AUTHORITY, a/k/a Seattle Monorail Project, Respondent.
No. 76462-0.

Argued March 17, 2005.
Decided Oct. 20, 2005.

Background: City transportation authority filed petition for condemnation of private property to be used for a monorail station. Property owner filed motion to dismiss case for lack of subject matter jurisdiction, and the Superior Court, King County, Jeffrey M. Ramsdell, J., denied the motion. The Superior Court subsequently denied property owner's motion for reconsideration, and property owner appealed. The Supreme Court accepted certification from the Court of Appeals.

Holdings: The Supreme Court, Madsen, J., held that:
(1) city's condemnation powers applied by inference to transportation authority;
(2) transportation authority's condemnation of property owner's entire property was necessary for construction, operation, and maintenance of monorail station; and
(3) property owner was not entitled to attorney fees.

Affirmed.

J.M. Johnson, J., filed a dissenting opinion, in which Sanders, J., joined.

Chambers, J., concurred in result only.

West Headnotes

[1] Eminent Domain 148 ⚷9

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k6 Delegation of Power
148k9 k. To Municipality. Most Cited Cases
City's condemnation powers also applied by inference to transportation authority created by city; although statute setting forth transportation authority's condemnation powers did not specify the procedures that transportation authority was required to use, transportation authority was subject to all standard requirements of a governmental entity, and taking such requirements into account, the condemnation powers followed by a city could be applied by implication to transportation authority. West's RCWA 35.95A.020, 35.95A.040, 35.95A.050.

[2] Eminent Domain 148 ⚷9

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k6 Delegation of Power
148k9 k. To Municipality. Most Cited Cases
A municipal corporation does not have inherent power of eminent domain and may exercise such power only as is expressly authorized by the legislature.

[3] Eminent Domain 148 ⚷8

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k6 Delegation of Power
148k8 k. Construction and Operation of Legislative Acts in General. Most Cited Cases
Statutes granting the power of eminent domain are to be strictly construed.

[4] Eminent Domain 148 ⚷9

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k6 Delegation of Power
148k9 k. To Municipality. Most Cited Cases

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While the legislature's grant of the eminent domain power to a municipality is to be construed strictly, it is not to be construed so strictly as to defeat the purpose of the legislative grant.

[5] Eminent Domain 148 ⚷8

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k6 Delegation of Power
148k8 k. Construction and Operation of Legislative Acts in General. Most Cited Cases
Even though a power of eminent domain is not given in specific words, it may be implied if its existence is reasonably necessary to effect the purpose of the condemning authority.

[6] Eminent Domain 148 ⚷8

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k6 Delegation of Power
148k8 k. Construction and Operation of Legislative Acts in General. Most Cited Cases
The legislature must confer not only the power to condemn, but must also prescribe the method by which it is to be done.

[7] Eminent Domain 148 ⚷8

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k6 Delegation of Power
148k8 k. Construction and Operation of Legislative Acts in General. Most Cited Cases
Where the legislature has failed to provide a procedure for condemnation, either directly or by implication or by reference to other acts having a similar purpose, the condemning entity has no authority to condemn.

[8] Eminent Domain 148 ⚷55

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k54 Exercise of Delegated Power
148k55 k. In General. Most Cited Cases
As a general rule, when a state delegates to a municipality the right to condemn private property for a public use but the statute delegating that authority does not provide a method for its exercise, the general law of the state prescribing the procedure, and the method of ascertaining the damages is, by implication, a part of the law delegating the power.

[9] Eminent Domain 148 ⚷45

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k44 Property Subject to Appropriation
148k45 k. In General. Most Cited Cases
A municipality has no power to condemn outside its limits in the absence of express authority to do so.

[10] Statutes 361 ⚷301

361 Statutes
361IX Initiative
361k301 k. Initiative in General. Most Cited Cases
An initiative passed by the electorate is the same exercise of sovereignty as that exercised by the legislative authority.

[11] Appeal and Error 30 ⚷893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
The meaning of a statute is inherently a question of law and the Supreme Court's review is de novo.

[12] Statutes 361 ⚷181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most Cited Cases

Statutes 361 ⚷184

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361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 k. Policy and Purpose of Act. Most Cited Cases
The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose.

[13] Statutes 361 ⚷205

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k205 k. In General. Most Cited Cases

Statutes 361 ⚷206

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k206 k. Giving Effect to Entire Statute. Most Cited Cases

Statutes 361 ⚷223.2(.5)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.2 Statutes Relating to the Same Subject Matter in General
361k223.2(.5) k. In General. Most Cited Cases
Courts interpret a statute by considering the statute as a whole, giving effect to all that the legislature has said, and by using related statutes to help identify the legislative intent embodied in the provision in question.

[14] Statutes 361 ⚷190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases
If a statute can reasonably be interpreted in more than one way, then it is ambiguous, and courts may resort to principles of statutory construction to assist in interpreting it.

[15] Eminent Domain 148 ⚷13

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k12 Public Use
148k13 k. In General. Most Cited Cases

Eminent Domain 148 ⚷56

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k54 Exercise of Delegated Power
148k56 k. Necessity for Appropriation. Most Cited Cases
For a proposed condemnation to be lawful, the condemning authority must prove that (1) the use is really public, (2) the public interest requires it, and (3) the property appropriated is necessary for that purpose. West's RCWA Const. Art. 1, § 16.

[16] Eminent Domain 148 ⚷67

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to Validity of Exercise of Power
148k67 k. Conclusiveness and Effect of Legislative Action. Most Cited Cases
Although the legislature may declare that a particular use of property is a "public use" for purposes of condemnation, that determination is not dispositive; however, a legislative declaration is entitled to great weight. West's RCWA Const. Art. 1, § 16.

[17] Eminent Domain 148 ⚷56

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k54 Exercise of Delegated Power
148k56 k. Necessity for Appropriation.

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Most Cited Cases

Eminent Domain 148 ⚷68

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to Validity of Exercise of Power
148k68 k. Conclusiveness and Effect of Exercise of Delegated Power. Most Cited Cases
In a condemnation case, the question of necessity, and thus the standard of judicial review of a declaration of public necessity, differs from that applied to a declaration of public use; a declaration of necessity by a proper municipal authority is conclusive in the absence of actual fraud or arbitrary and capricious conduct, as would constitute constructive fraud. West's RCWA Const. Art. 1, § 16.

[18] Eminent Domain 148 ⚷68

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to Validity of Exercise of Power
148k68 k. Conclusiveness and Effect of Exercise of Delegated Power. Most Cited Cases
City transportation authority's determination to condemn a fee interest in the entire amount of property owner's property was a legislative question, reviewed under the legislative standard for necessity.

[19] Eminent Domain 148 ⚷58

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k54 Exercise of Delegated Power
148k58 k. Extent of Appropriation. Most Cited Cases
City transportation authority's condemnation of a fee interest in property owner's entire property was "necessary" for the construction, operation, and maintenance of a public monorail station; record supported transportation authority's contention that it needed all of the property for a substantial period of time to build and construct the monorail station, and might need all of the property indefinitely.

[20] Eminent Domain 148 ⚷68

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to Validity of Exercise of Power
148k68 k. Conclusiveness and Effect of Exercise of Delegated Power. Most Cited Cases
If a condemning authority has conducted its deliberations on an action honestly, fairly, and upon due consideration for facts and circumstances, that action will not be considered arbitrary and capricious, even though there be room for a difference of opinion upon the course to follow, or a belief by the reviewing authority that an erroneous conclusion has been reached.

[21] Eminent Domain 148 ⚷265(1)

148 Eminent Domain
148III Proceedings to Take Property and Assess Compensation
148k265 Costs, Fees, and Expenses
148k265(1) k. In General. Most Cited Cases
Property owner was not entitled to attorney fees in proceedings to challenge condemnation of property by city transportation authority to build a monorail, where it was determined that transportation authority could acquire the property. West's RCWA 8.25.075(1).

****1168** George Kresovich, Timothy D. Benedict, Hillis Clark Martin & Peterson, Seattle, for Appellant.

P. Stephen DiJulio, Roger Duane Mellem, Foster Pepper & Shefelman PLLC, Seattle, for Respondent.

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County of Finance).

Larry John Smith, Graham & Dunn PC, Seattle, for Other Party (Rokan Partners).

MADSEN, J.

615** ¶ 1 HTK Management, L.L.C. (HTK), a property owner in downtown Seattle, challenges a trial court order adjudicating public use and necessity that authorizes Seattle Popular Monorail Authority, a/k/a Seattle Monorail Project (SMP), a city transportation authority, to condemn its property to build a monorail station. In this case, both parties agree that the use of the property here for construction of public transportation is a fundamental616** "public use." [FN1] However, HTK alleges that SMP lacks statutory authority to condemn property in the first place and, alternatively, that the adjudication of public use and necessity was improper because, HTK contends, while SMP permissibly condemned a fee interest in the property comprising the monorail footprint, it should have been limited to a multiyear lease on the remainder.

FN1. Contrary to the dissent's view, the facts and legal issues in this case bear no resemblance to the recent decision in the United States Supreme Court in *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005). In *Kelo*, the City of New London condemned property in order to develop a certain area of the city, which included the condemnation of property in order to build a private hotel and new private residences to be owned by new home owners. *Id.* In contrast, in this case, the property is being condemned to build a public monorail, an undisputed, historic public use.

¶ 2 We hold that SMP has statutory authority to condemn property and affirm the trial court's order adjudicating public use and necessity.

FACTS

¶ 3 Traffic is a significant problem in the state of Washington. In 2002, the Washington Alliance for a Competitive Economy reported that "[t]ransportation remains the dominant infrastructure concern in the state, particularly in the Central Puget Sound region" and provided the following data: (1) congestion in the Seattle-Everett Corridor ranks second only to Los Angeles, (2) Washington ranks 32nd on per capita state disbursements for highways and local roads, (3) Washington's 23-cent gas tax, unchanged since 1991, ranks 14th in the nation, and (4) Seattle ranked just 64th on *Expansion Management* magazine's September 2001 evaluation of the "100 Most Logistics Friendly Cities." [FN2]

FN2. Ass'n of Wash. Business, *WashACE 2002 Competitiveness Report:* "Will Washington Shrug?", Transportation at *http://www.awb.org /policy/competitiveness/2002reportmain .htm* (last visited Oct. 18, 2005).

¶ 4 The 2002 report concludes that "[w]ith most business in Washington eventually involving the movement of goods and people through the congested metropolitan Puget ***617** Sound corridor, gridlock puts the economic competitiveness of all communities at risk." [FN3]

FN3. *Id.*

¶ 5 Since 1997, Seattle residents have voted four times in favor of building an expanded monorail public transportation system within the city of Seattle. [FN4] In November 1997, voters in the city of Seattle passed Initiative 41, creating a public development****1169** authority, the Elevated Transportation Company, to build, maintain, and operate an elevated, electrically powered mass transit system consisting of specified stations and terminals serving the four quadrants of Seattle and running through downtown. The system would be generally "X" shaped and would lie entirely within Seattle. [FN5]

FN4. Currently there is a one-mile monorail system in Seattle, operating between Seattle Center and downtown Seattle. This monorail was built for the World's Fair held in Seattle in 1962.

FN5. City of Seattle Proposition No. 2 (Initiative 53: The Monorail), *City Attorney's Explanatory Statement* (Nov. 7, 2000), King County Records, Elections & Licensing

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Servs. Div., *King County On-Line Voter's Pamphlet, available at http://www.metrokc.gov/elections/2000 nov/pamphlet/pamph.htm* (as of Oct. 18, 2005).

¶ 6 In July 2000, the Seattle City Council passed Ordinance 120049, amending Initiative 41. Among other things, the ordinance dissolved the Elevated Transportation Company and deleted the requirement that the city council make funds available for the system if necessary by either issuing bonds or raising the city's business and occupation tax.[FN6]

FN6. *Id.*

¶ 7 In November 2000, voters in Seattle voted the second time for the monorail, passing Seattle Proposition No. 2 (Initiative 53), which reestablished the Elevated Transportation Company. The Elevated Transportation Company would have up to two years to complete a plan for a monorail system in Seattle. Once the monorail plan was completed, Initiative 53 provided that the Seattle City Council would be required to place the monorail plan before Seattle voters at the next election. Initiative 53 also provided***618** for the repeal of any ordinance that had repealed or amended prior Initiative 41 and that was inconsistent with Initiative 53, and for reinstatement of that part of Initiative 41 that had been repealed or amended.[FN7]

FN7. *Id.*

¶ 8 In 2002, the Washington State Legislature enacted an enabling statute which authorized voters from cities with a population over 300,000 to create a "city transportation authority" to build a public monorail within that city. Ch. 35.95A RCW. RCW 35.95A.050 provides that a city transportation authority will have a number of powers including the power to "acquire by purchase, condemnation, gift, or grant and to lease, construct, add to, improve, replace, repair, maintain, operate, and regulate the use of public monorail transportation facilities." RCW 35.95A.050(1).

¶ 9 A city transportation authority may fix rates, tolls, fares, and charges for use of facilities and may establish various routes and classes of service. RCW 35.95A.050(2). Additionally, a city transportation authority may "[n]otwithstanding the provision of any law to the contrary, and in addition to any other authority provided by law," contract with one or more vendors for the design, construction, operation, or maintenance or other service related to the development of a monorail public transportation system. RCW 35.95A.050(3)(a).

¶ 10 Finally, among other powers, a city transportation authority will have "all other powers necessary and appropriate to carry out its responsibilities, including without limitation the power to sue and be sued, to own, construct, purchase, lease, add to, and maintain any real and personal property or property rights necessary for the conduct of the affairs of the authority, to enter into contracts, and to employ the persons as the authority deems appropriate. An authority may also sell, lease, convey, or otherwise dispose of any real or personal property no longer necessary for the conduct of the affairs of the authority." RCW 35.95A.050(8).

619** ¶ 11 Seattle residents voted for the third time in favor of the monorail in November 2002, passing Citizen Petition No. 1: Proposed Seattle Monorail Authority. Citizen Petition No. 1 created a Seattle city transportation authority, now named Seattle Popular Monorail Authority, a/k/a Seattle Monorail Project, (SMP), respondent in this case. Citizen Petition No. 1 implemented the initial phase of a five-line city monorail system by authorizing the construction and operation of a 14-mile monorail line, the "Green Line." The Green Line will connect Ballard, Key Arena, Seattle Center, Belltown,*1170** downtown Seattle, Pike Place Market, Benaroya Hall, the ferry terminal, Pioneer Square, the Chinatown-International District, the King Street train station, Safeco Field, the Qwest Field, and West Seattle. The Green Line will have 19 monorail stations and is intended to connect with buses, ferries, light rail, and trains. Construction is scheduled to begin in 2005.

¶ 12 In November 2004, Seattle residents voted again, for the fourth time, for the monorail, defeating Initiative 83. Initiative 83, if enacted into law, would have forbidden the city of Seattle from allowing the use of its city rights-of-way for any new monorail transit facilities, such as the Green Line. [FN8]

FN8. City of Seattle Initiative No. 83, *City Attorney's Explanatory Statement* (Nov. 2, 2004), King County Records, Elections &

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Licensing Servs. Div., *Voter's Pamphlet-Ballot Measures, General and Special Elections, available at http://www.metrokc.gov/elections/ pamphlet/1204/ index.htm* (as of Oct. 18, 2005).

¶ 13 Seattle residents voted overwhelmingly in favor of the monorail-63.52 percent voted "no" for Initiative 83.[FN9]

FN9. *Official Final Results,* City of Seattle Initiative No. 83 (Nov. 2, 2004), *King County General and Special Election Results, available at http://www.metr okc. gov/elections/2004 nov/resPage16.htm* (as of Oct. 18, 2005).

¶ 14 On April 7, 2004, SMP passed Resolution No. 04-16 to acquire by condemnation certain property for the Second and Yesler station, the Pioneer Square station, in downtown Seattle. The property is currently a parking garage, commonly referred to as "the sinking ship garage" (the property). The property is owned in fee by the appellant, HTK. The property is also subject to a long-term ground ***620** lease. The tenant's ground lease ends in 2010, with the tenant possessing a 10-year option to extend the lease through 2020. The Second and Yesler station will be constructed on a triangle of property bounded by Second Avenue, Yesler Way, and James Street in downtown Seattle. The Second and Yesler station will provide an intermodal transportation function with connections to the ferry system, the waterfront street car, buses, and light rail.

¶ 15 SMP has not yet approved a final design for the Second and Yesler station. Some preliminary designs show the station footprint covering the entire property, other more recent designs show a smaller footprint. The final design will be determined by the "Design, Build, Operate, and Maintain" contractor, with the approval of SMP's board and the city of Seattle. The parties agree that regardless of the ultimate size of the Second and Yesler station, SMP needs the entire property for construction of the staging and development of the Green Line alignment in the vicinity of the Second and Yesler station. After construction of the station, SMP currently has no planned use for any portion of the property that may remain uncovered by the final station design. SMP states that it would be premature to make definitive plans for the property that may possibly fall outside of the footprint. For example, a portion of the property may be used for loading and unloading passengers from paratransit vehicles, taxis, and tour buses. After the monorail is completed, SMP may lease or sell the unused portions of the property, if any.

¶ 16 On April 28, 2004, SMP filed a petition for condemnation in King County Superior Court and gave notice to HTK. On July 19, 2004, HTK entered into a stipulated order with SMP regarding the public use and necessity and preliminary possession of the subject property. HTK and SMP stipulated that the proposed use for the property is a public use, that the portion of the property covered by the station footprint is necessary for that use, and that the portion of the property not covered by the station footprint is necessary for that use until construction of the Green Line is complete.

***621** ¶ 17 On August 13, 2004, HTK filed a motion to dismiss the case for lack of subject matter jurisdiction. The trial court denied that motion, ruling that because the eminent domain procedures set forth in chapter 8.12 RCW govern condemnation actions brought by SMP, SMP has statutory authority to condemn property, and therefore the trial court had subject matter jurisdiction over the condemnation action.

****1171** ¶ 18 On September 13, 2004, the hearing on public use and necessity was held. The trial court denied HTK's motion for reconsideration of the order denying the motion to dismiss and entered an order adjudicating public use and necessity. HTK filed a notice of appeal and a motion for accelerated review. On October 1, 2004, the Court of Appeals granted HTK's motion for accelerated review.

¶ 19 This court accepted certification from the Court of Appeals.[FN10]

FN10. Amicus curiae briefs were submitted by the Institute for Justice Washington Chapter and by Paul and Josephine Fiorito.

ANALYSIS

1. Statutory Authority for SMP to Condemn

[1] ¶ 20 HTK first contends that chapter 35.95A

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RCW, the statute authorizing creation of SMP, does not specify the procedure for SMP to exercise its condemnation power. Accordingly, HTK argues that SMP is precluded from exercising that power.

¶ 21 RCW 35.95A.020(1) authorizes every city with a population greater than 300,000 to create a city transportation authority "to perform a public monorail transportation function." A city transportation authority created under the statute "is a municipal corporation, an independent taxing 'authority' within the meaning of Article 7, section 1 of the state Constitution, and a 'taxing district' within the meaning of Article 7, section 2 of the state Constitution." RCW 35.95A.020(1).

[2][3][4][5] ***622** ¶ 22 A municipal corporation does not have inherent power of eminent domain and may exercise such power only as is expressly authorized by the legislature. *In re Pet. of Seattle*, 96 Wash.2d 616, 638 P.2d 549 (1981) (*Westlake*); *City of Des Moines v. Hemenway*, 73 Wash.2d 130, 437 P.2d 171 (1968); *City of Tacoma v. Welcker*, 65 Wash.2d 677, 399 P.2d 330 (1965). Statutes granting the power of eminent domain are to be strictly construed. *City of Seattle v. State*, 54 Wash.2d 139, 338 P.2d 126 (1959). However, while the legislature's grant of the eminent domain power to a municipality is to be construed strictly, it is not to be construed so strictly as to defeat the purpose of the legislative grant. *Welcker*, 65 Wash.2d at 683, 399 P.2d 330. "[I]t is not necessary that [eminent domain statutes] cover in minute detail everything which may be done to carry out their purpose. Even though a power is not given in specific words, it may be implied if its existence is reasonably necessary to effect the purpose of the condemning authority." *In re Pet. of Port of Grays Harbor*, 30 Wash.App. 855, 862, 638 P.2d 633 (1982) (citing *State ex rel. Hunter v. Superior Court*, 34 Wash.2d 214, 217, 208 P.2d 866 (1949)); *see also Chem. Bank v. Wash. Pub. Power Supply Sys.*, 99 Wash.2d 772, 792, 666 P.2d 329 (1983) ("a municipal corporation's powers are limited to those conferred in express terms or those necessarily implied").

[6][7][8] ¶ 23 The legislature must confer not only the power to condemn but must "prescribe the method by which it is to be done." *City of Tacoma v. State*, 4 Wash. 64, 66, 29 P. 847 (1892). Where the legislature has failed to provide a procedure, "either directly or by implication or by reference to other acts having a similar purpose," the condemning entity has no authority to condemn. *State ex rel. Mower v. Superior Court*, 43 Wash.2d 123, 131, 260 P.2d 355 (1953). As a general rule,

> [w]hen a state delegates to a municipality the right to condemn private property for a public use but the statute delegating that authority does not provide a method for its exercise, the general law of the state prescribing the procedure, and the ***623** method of ascertaining the damages is, by implication, a part of the law delegating the power.

11A EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 32.117, at 207-08 (3d ed.2000).

¶ 24 SMP's condemnation powers are set forth in RCW 35.95A.050(1). As HTK correctly states, RCW 35.95A.050(1) does not specify the procedure that SMP must use when exercising its condemnation power. ****1172** The question then is whether a method or procedure can be inferred from the statute.

¶ 25 Relying primarily on one case, *Mower*, HTK claims that condemnation procedures cannot be inferred and that the legislature must incorporate a particular Title 8 RCW procedure by reference or prescribe an alternative procedure to be used by the condemning entity in the authorizing statute. In *Mower*, a metropolitan park district brought a condemnation action pursuant to RCW 35.61.130, which granted the district that authority. The property owners resisted the condemnation, claiming that the statute failed to prescribe a condemnation procedure and, therefore, the district lacked authority to condemn. *Mower*, 43 Wash.2d at 127, 260 P.2d 355. On appeal, this court reiterated the constitutional requirement that before private property may be taken or damaged for a public or private use, just compensation must be made or be ascertained "in the manner prescribed by law." CONST. art. 1, § 16. The court noted that although a number of statutes set forth condemnation procedures for particular entities, none provided procedures for park districts. The court then observed that the general procedural statute upon which the park district relied had been repealed and opined that the legislature had intended to provide specific statutory procedures for specific condemning entities. Turning to RCW 35.61.130, the court found nothing

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in the district's authorizing statute "either directly or by implication or by reference to other acts having a similar purpose" setting forth the procedure for condemnation by a metropolitan park district. *Mower*, 43 Wash.2d at 131, 260 P.2d 355. Accordingly, the court held that the district had no ***624** authority to condemn the property at issue. *Id.* HTK claims that, as with the park district in *Mower*, SMP has no authority to condemn because the legislature did not provide a method for the exercise of its eminent domain power as required by article I, section 16 of the Washington Constitution.

[9] ¶ 26 SMP contends that HTK's reading of *Mower* is too broad, pointing to the language quoted above to the effect that a condemnation procedure may be implied. Further, SMP points to a distinction between RCW 35.95A.050(1) and the statute at issue in *Mower*. The park district statute in that case authorized a metropolitan park district to condemn territory outside the territorial limits of the proposing city, including areas of the unincorporated county.[FN11] Since condemnation procedures for both cities and counties might be implicated and because the court in *Mower* could not reasonably infer the procedure to be used by a park district from the authorizing statute or from other statutes relating to condemnation, the court declined to "make up such procedures out of whole cloth." *Mower*, 43 Wash.2d at 130, 260 P.2d 355.

FN11. A municipality has no power to condemn outside its limits in the absence of express authority to do so. *Hemenway*, 73 Wash.2d at 138, 437 P.2d 171.

[10] ¶ 27 In contrast, SMP points out that RCW 35.95A.050(1) authorizes SMP to condemn property only within the physical confines of the proposing city. Thus, unlike the authorizing statute in *Mower*, SMP argues that it can reasonably be inferred from RCW 35.95A.050 that the legislature intended SMP to use the general condemnation procedures prescribed for cities in chapter 8.12 RCW. SMP reasons that RCW 35.95A.050 authorizes the city to establish a "city transportation authority" that will operate within the boundaries of the city and provides that the transportation authority is to be created by city ordinance or by petition of the city's residents. RCW 35.95A.030(1), (2).[FN12] As such, SMP is a creature of the city. Accordingly, SMP contends, by ***625** necessary implication, the condemnation procedure for cities, chapter 8.12 RCW, is applicable to SMP.

FN12. An initiative passed by the electorate is the same exercise of sovereignty as that exercised by the legislative authority. *Maleng v. King County Corrs. Guild*, 150 Wash.2d 325, 330, 76 P.3d 727 (2003).

¶ 28 HTK claims that *Mower* requires that a method or procedure for condemnation must be express. First, HTK argues that there is little difference between the park district in *Mower* and SMP because, as with a transportation authority under chapter ****1173** 35.95A RCW, a park district is a municipal corporation that can be formed by only a first class city. Further, HTK contends both the park district statute and SMP's authorizing statute authorize condemnation outside their respective territorial limits. Finally, HTK argues that even if there is a distinction to be made on the scope of the condemnation power, territorial boundaries were not even mentioned by the *Mower* court.

¶ 29 We agree with SMP that HTK is reading *Mower* too broadly. In *Mower*, the court distinguished an earlier decision, *Town of Redmond v. Perrigo*, 84 Wash. 407, 146 P. 838 (1915). In *Perrigo* the property owner argued that the city of Redmond was without power to condemn because no procedure had been provided in the act authorizing condemnation. *Perrigo* was proceeding under the authority of the public utilities act, authorizing cities to condemn property for the purposes of supplying water. However, that statute did not include a method of condemnation. *Perrigo*, 84 Wash. at 409, 146 P. 838. The court rejected the challenge to the town's condemnation authority, stating that "[w]here the power is given, a method will be accorded." *Id.* at 409, 146 P. 838. The court then turned to the general condemnation statute and held that the statute provided the proper method for the town to follow. *Id. Mower* noted that the general condemnation statute referenced in *Perrigo* had been repealed and, therefore, the park district could not rely on that general authority. *Mower*, 43 Wash.2d at 130-31, 260 P.2d 355. *Perrigo*, like *Mower*, indicates that a procedure need not be expressly referenced in the authorizing statute and that general procedural statutes may impliedly provide the method for exercising the condemnation power.

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***626** ¶ 30 Recent cases also suggest that procedures need not be expressly referenced in condemnation statutes. In *Port of Edmonds v. Northwest Fur Breeders Cooperative, Inc.*, 63 Wash.App. 159, 816 P.2d 1268 (1991), the property owners appealed an order of public use and necessity contending that the Port of Edmonds had failed to give proper statutory notice of the condemnation, which was authorized at a port hearing. The port argued that RCW 53.08.010, which authorizes ports to exercise the eminent domain power, requires the port to follow the procedure applicable to first-class cities and references chapter 8.12 RCW. The port contended that since it followed the procedures of chapter 8.12 RCW, it had satisfied statutory requirements. The Court of Appeals disagreed. It reasoned that because the condemnation was established by ordinance, the port was also required to comply with RCW 35.22.288, governing the adoption of ordinances by first-class cities. Although the port's authorizing statute, RCW 53.08.010, did not reference RCW 35.22.288, the Court of Appeals nevertheless concluded that compliance with RCW 35.22.288 was required.

¶ 31 Similarly, *Silver Firs Town Homes, Inc. v. Silver Lake Water District*, 103 Wash.App. 411, 12 P.3d 1022 (2000), lends weight to SMP's argument. There the property owner claimed that the water district was required to give public notice of proposed rate changes, pursuant to RCW 35.22.288, which apply to first-class cities. The owner reasoned that because the district's authorizing statute, RCW 57.08.010, requires water districts to follow eminent domain procedures for cities, it should be required to follow the notice requirements for cities when engaging in rate setting. The court declined to imply a requirement that the district comply with the notice requirements of RCW 35.22.288 because water districts are not first-class cities. The court did, however, imply a requirement that the district follow the notice requirements under the Open Public Meetings Act of 1971 (OPMA), chapter 42.30 RCW, ***627** even though the water district statute, RCW 57.08.010, did not mention the OPMA.[FN13]

FN13. We cite the case of *Fur Breeders* only to demonstrate that other statutes might provide the method or procedure necessary to carry out the condemnation authority.

¶ 32 Considering case law both before and since *Mower*, we hold that powers reasonably necessary to carry out a grant of the eminent domain power may be inferred from the authorizing statute or from other statutes.

[11][12][13][14] ¶ 33 The next step is to determine whether chapter 35.95A RCW implies ****1174** such procedures. The meaning of a statute is inherently a question of law and our review is de novo. *King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 142 Wash.2d 543, 555, 14 P.3d 133 (2000); *Dioxin/Organochlorine Ctr. v. Pollution Control Hr'gs Bd.*, 131 Wash.2d 345, 352, 932 P.2d 158 (1997). The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose. *Am. Cont'l Ins. Co. v. Steen*, 151 Wash.2d 512, 518, 91 P.3d 864 (2004); *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 9, 43 P.3d 4 (2002). This is done by considering the statute as a whole, giving effect to all that the legislature has said, and by using related statutes to help identify the legislative intent embodied in the provision in question. *Campbell & Gwinn*, 146 Wash.2d at 11, 43 P.3d 4. If, after this inquiry, the statute can reasonably be interpreted in more than one way, then it is ambiguous and resort to principles of statutory construction to assist in interpreting it is appropriate. *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wash.2d 226, 242-43, 88 P.3d 375 (2004); *Campbell & Gwinn*, 146 Wash.2d at 12, 43 P.3d 4.

¶ 34 Looking first to the language of the statute, a transportation authority can be created under RCW 35.95A.030 through a legislative act only by a city. RCW 35.95A.020 provides that a transportation authority created under the statute is a municipal corporation. A municipal corporation is defined as "a body politic established by law as an agency of the state-partly to assist in the civil government of the country, but chiefly to regulate and ***628** administer the local and internal affairs of the incorporated city, town, or district." *Lauterbach v. City of Centralia*, 49 Wash.2d 550, 554, 304 P.2d 656 (1956). Further, RCW 35.95A.040 provides that the transportation authority is "subject to all standard requirements of a governmental entity pursuant to RCW 35.21.759," which imposes on public corporations the general laws regulating the local government that created the entity. Taking these provisions into account and consid-

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ering the fact that the legislature intended to grant condemnation powers to an entity created pursuant to chapter 35.95A RCW, we hold that, by implication, chapter 8.12 RCW, the procedure to be followed by a city, applies to SMP.

¶ 35 Next, HTK argues that merely because a transportation authority can be created only by a city does not mean that chapter 8.12 RCW is the obvious statute to be applied to SMP. HTK cites *Fur Breeders* for the proposition that condemnation procedures for cities are not limited to chapter 8.12 RCW. However, *Fur Breeders* suggests that chapter 8.12 RCW, in addition to other notice statutes specifically applying to cities, provides the requirements for the exercise of the eminent domain power. SMP does not contend that it is subject only to the requirements of chapter 8.12 RCW.

¶ 36 Finally, SMP argues that the procedures provided for an exercise of eminent domain are necessary to satisfy due process and that due process does not require the legislature to expressly designate the procedure to be followed when there is a statutory procedure available and is implied. SMP is correct. Due process concerns are at the core of article I, section 16's requirement that a method for condemnation be provided by law. HTK does not complain that its due process rights have been violated, and it has cited no case holding that due process requires the method of condemnation to be cross-referenced in legislation authorizing condemnation. Accordingly, we hold that SMP properly followed the condemnation method prescribed for cities in chapter 8.12 RCW.

***629** *2. Public Use and Necessity Determination*

[15] ¶ 37 Washington's constitution provides that "[n]o private property shall be taken or damaged for public or private use without just compensation having first been made." CONST. art. I, § 16. Under long standing Washington jurisprudence, this court has developed a three-part test to evaluate eminent domain cases. *State ex rel. Wash. State Convention & Trade Ctr. v. Evans*, 136 Wash.2d 811, 817, 966 P.2d 1252 (1998) (*Convention Center*). For a proposed condemnation to be lawful, the condemning authority must prove that (1) the use is really ****1175** public, (2) the public interest requires it, and (3) the property appropriated is necessary for that purpose. *Convention Ctr.*, 136 Wash.2d at 817, 966 P.2d 1252 (citing *Westlake*, 96 Wash.2d at 625, 638 P.2d 549; *King County v. Theilman*, 59 Wash.2d 586, 593, 369 P.2d 503 (1962)).

[16] ¶ 38 A determination that an acquisition is for a "public use" is not precisely the same thing as determining it is a "public necessity," even though the two terms do overlap to some extent. *Hemenway*, 73 Wash.2d at 138, 437 P.2d 171. The "question [as to] whether the contemplated use be really public shall be a judicial question." CONST. art. I, § 16; *Dickgieser v. State*, 153 Wash.2d 530, 535, ¶ 10, 105 P.3d 26 (2005). Although the legislature may declare that a particular use of property is a "public use," that determination is not dispositive. *Dickgieser*, 153 Wash.2d at 535-36, ¶ 10, 105 P.3d 26. However, a legislative declaration is entitled to great weight. *Westlake*, 96 Wash.2d at 624-25, 638 P.2d 549 (citing *Hemenway*, 73 Wash.2d 130, 437 P.2d 171).

[17] ¶ 39 In contrast, the question of necessity, and thus the standard of judicial review of a declaration of public necessity, differs from that applied to a declaration of public use. *Convention Ctr.*, 136 Wash.2d at 823, 966 P.2d 1252. A declaration of necessity by a proper municipal authority is conclusive in the absence of actual fraud or arbitrary and capricious conduct, as would constitute constructive fraud. *Hemenway*, 73 Wash.2d at 139, 437 P.2d 171 (citing *Welcker*, 65 Wash.2d 677, 399 P.2d 330; ***630** *State ex rel. Church v. Superior Court*, 40 Wash.2d 90, 91, 240 P.2d 1208 (1952)). [FN14]

FN14. The dissent concedes that this test is the proper test to be used by this court in eminent domain proceedings.

a. Public use of property to build a public monorail

¶ 40 Unlike in *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005), in this case it is undisputed that the use to which the property is to be put-public transportation-is a clear public use. Clerk's Papers (CP) at 15 (stipulation by the parties). Indeed, public transportation has been determined to be public use for nearly 100 years in Washington. *City of Seattle v. Byers*, 54 Wash. 518, 103 P. 791 (1909); *State ex rel. Thomas v. Superior Court*, 42 Wash. 521, 85 P. 256 (1906). [FN15]

FN15. The dissent concedes that construc-

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tion of the public monorail is a public use.

b. Whether the determination of the property to be condemned is a judicial or legislative question

[18] ¶ 41 HTK claims that SMP's decision to condemn a fee interest in the entire property should be analyzed under the first prong of the test for "public use," rather than under the third prong of the test for "necessity." HTK asserts that SMP should have decided to condemn a fee interest in only the portion of the property that was likely to contain the monorail station and to condemn an easement interest in the remainder of the property that is to be used for construction staging and development of the Green Line alignment.

¶ 42 SMP correctly states that determinations by the condemning authority as to the type and extent of property interest necessary to carry out the public purpose have historically been considered legislative questions and are thus analyzed under the third prong of the test. In *City of Tacoma v. Humble Oil & Refining Co.*, 57 Wash.2d 257, 356 P.2d 586 (1960), property owners appealed an order of public use and necessity. In that case, the city sought to condemn a fee simple interest in the land, which would ***631** include the mineral rights. This court noted that the property owners recognized the rule that " 'the action of a public agency or a municipal corporation having the right of eminent domain in selecting land for a public use will not be controlled by the courts' " and is thus a legislative question. *Id.* at 258, 356 P.2d 586 (quoting *State ex rel. Tacoma Sch. Dist. No. 10 v. Stojack*, 53 Wash.2d 55, 64, 330 P.2d 567 (1958)). *See also Port of Grays Harbor*, 30 Wash.App. 855, 638 P.2d 633 (the court finding that it was a legislative question as to whether a fee ****1176** or easement property interest should be condemned). These cases providing deference to legislative questions are rooted in long standing Washington law. Since the turn of the century, Washington courts have provided significant deference to legislative determinations of necessity in the context of eminent domain proceedings. *See, e.g., State ex rel. Thomas v. Superior Court*, 42 Wash. 521, 524-525, 85 P. 256 (1906).

¶ 43 Other states agree that a condemning authority's decision as to the type and extent of property interest is a legislative question. *See, e.g., Westrick v. Approval of Bond of Peoples Natural Gas Co.*, 103 Pa. Comwlth. 578, 581, 520 A.2d 963 (1987) ("administrative decisions of a condemnor concerning the amount, location, or type of estate condemned are not subject to judicial review unless such decisions are in bad faith, arbitrary, capricious, or an abuse of power"; it is the condemnee's burden to prove an administrative abuse, and this burden is a heavy one to meet); *City of New Ulm v. Schultz*, 356 N.W.2d 846, 849 (1984) (finding that acquiring a fee interest in property was reasonably necessary; city need only show that acquiring a fee interest rather than an easement was a reasonable means of acquiring airport protection privileges); *Concept Capital Corp. v. Dekalb County*, 255 Ga. 452, 453, 339 S.E.2d 583 (1986) (court following the rule that, " '[i]n the absence of bad faith, the exercise rights of the right of eminent domain rests largely in the discretion of the authority exercising such right, as to the necessity and what and how much land shall be taken' ") (quoting *City of Atlanta v. Heirs of Champion*, 244 Ga. 620, 621, 261 S.E.2d 343 (1979)); ***632***St. Andrew's Episcopal Day Sch. v. Miss. Transp. Comm'n*, 806 So.2d 1105, 1111 (2002) (selection of the particular land to condemn as well as the amount of land necessary are legislative questions to be determined by the condemning authority). *City of Phoenix v. McCullough*, 24 Ariz.App. 109, 114, 536 P.2d 230 (1975) ("we believe the rule to be that a condemnor's determination of necessity should not be disturbed on judicial review in the absence of fraud or arbitrary and capricious conduct"); *Regents of Univ. of Minn. v. Chi. & NW Transp. Co.*, 552 N.W.2d 578 (Minn.Ct.App.1996) (analyzing whether university demonstrated that proposed taking is "necessary," reviewed under the legislative standard of review).[FN16]

FN16. The dissent criticizes the majority for citing out-of-state cases. Contrary to the dissent's claims, under long standing Washington jurisprudence out-of-state cases, while not controlling, are instructive. *See, e.g., Welcker*, 65 Wash.2d at 683, 399 P.2d 330 (citing out-of-state cases on eminent domain that follow Washington principles); *Thomas*, 42 Wash. at 525, 85 P. 256 (same).

¶ 44 HTK claims, though, that *Convention Center* changes the standard of review for this case and that SMP's decision to condemn a fee interest is thus a judicial question. In *Convention Center*, this court

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addressed a proposed expansion of the Washington State Trade and Convention Center. The legislature appropriated $111.7 million for the expansion but, as a condition, required the convention center to contribute $15 million. The convention center developed a plan that involved condemning property across the street from the existing convention center. The proposed expansion would sit four stories above street level. The three floors below were to be sold to a private developer at the same time as the condemnation. The private developer would contribute $15 million and would build the outer shell of the convention center. In return, the private developer would take a fee simple title to the remaining three floors for construction of retail and parking. The court determined that the condemnation was a "public use," within the meaning of the Washington Constitution, and that the private development was "merely incidental." Convention Ctr., 136 Wash.2d at 822-23, 966 P.2d 1252.

***633** ¶ 45 HTK claims that because the court in Convention Center held that a private use was merely incidental when it was within the "footprint" of the convention center, this court is required to undertake a "public use" examination because, in this case, property may be sold to a private party that is outside the "footprint" of the proposed monorail station.

¶ 46 HTK's reliance on Convention Center is misplaced and does not alter the rule, as ****1177** stated in Humble Oil and in Port of Grays Harbor, that decisions as to the amount of property to be condemned are legislative questions, reviewed under the legislative standard for necessity. Moreover, in Convention Center, the court was faced with a very different situation-condemnation of property on which a significant part was *never* going to be put to a public use. As SMP points out here, in contrast, the entire property will be put to a public use. As discussed above, public transportation has been determined to be a public use for nearly 100 years in Washington. City of Seattle v. Byers, 54 Wash. 518, 103 P. 791 (1909); State ex rel. Thomas v. Superior Court, 42 Wash. 521, 85 P. 256 (1906). Although the monorail station is not likely to take up the entire footprint of the property, the record indicates that the remaining portion of the property could be used for at least 10 years for construction and remediation of property in downtown Seattle. Report of Proceedings (RP) at 12. Additionally, unlike in Convention Center, whether any portion of the property will ever be sold or leased is not known. In contrast, in Convention Center, a private developer immediately took ownership of three floors of retail space. In this case, for the first 5-10 years, a substantial portion of the property will be put to public use and only after that time is there a possibility that the property may be sold. Furthermore, the record indicates that in other cities that have constructed public monorail transportation systems, surrounding land may need to be owned permanently by the condemning authority due to the particular traffic pattern of monorail stations.

¶ 47 HTK counters, however, that since SMP might sell or lease surplus property, if any, after the monorail is ***634** completed, the court is required to undertake a searching judicial review of the necessity of SMP's determination to condemn a fee interest in the property.[FN17] HTK points to no authority that requires a condemning authority to have a public use planned for property *forever*. Indeed, long standing Washington law is to the contrary. In Reichling v. Covington Lumber Co., 57 Wash. 225, 106 P. 777 (1910), a property owner brought suit to enjoin logging activity on land that had been condemned earlier by the city of Seattle. Under the original condemnation, the city condemned a separate parcel of the property owner's land for purposes of its Cedar River water system. Nine years later, the city passed an ordinance whereby it granted a license to a private party to construct a logging road on the land. The property owner brought suit to enjoin the private party from entering the land. The court noted, " '[w]here a fee simple is taken, the weight of authority is that there is no reversion, but, when the particular use ceases, the property may, by authority of the state, be disposed of for either public or private uses.' " Id. at 228, 106 P. 777 (quoting JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN § 596, at 765 (2d ed. 1888) and citing 2 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 589, at 690 (4th ed. 1890)).

FN17. The dissent concedes that the Washington Constitution article I, section 16 contains the term "public use" and does not include the term "public necessity."

¶ 48 The court in Reichling also cited Seattle Land & Improvement Co. v. City of Seattle, 37 Wash. 274, 79 P. 780 (1905), finding that " '[w]here property is

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taken, ... with the intention of using it for a certain purpose specified in the ordinance authorizing the taking, as was done in this case, the city, doubtless, has the authority to change said contemplated use to another and entirely different use, whensoever the needs and requirements of the city suggest.' " *Reichling*, 57 Wash. at 228, 106 P. 777 (quoting 37 Wash. at 277, 79 P. 780).

¶ 49 Given long standing, well-settled case law in Washington, providing that decisions as to the type of property interest to be acquired are reviewed under the deferential ***635** legislative standard, we hold that SMP's determination to condemn a fee interest in HTK's property is a legislative question. [FN18]

FN18. The dissent criticizes the majority and claims that the majority is "blurring" the distinctions between the constitutionally mandated inquiry into whether the use is a "public use" and the judicial corollary determining whether the condemnation is "necessary." But, it is the dissent that blurs the distinction. The dissent agrees that this court employs a three-part test to determine whether a condemnation is constitutional. Yet, in derogation of its own statement of law, it conflates the third prong of the test-the necessity question-into the first prong of the test. The dissent would read the "public use" prong to make two inquiries: (1) is the use public and, if so, (2) is the government condemning more real property than is "needed." However, as discussed above, under long standing Washington case law including *Convention Center*, *Westlake*, *Humble Oil*, *Welcker*, *Hemenway*, and *Dickgieser*, these two inquiries are separate questions and are analyzed by this court under two different standards.

In a similar vein, the dissent cites *Humble Oil*, claiming that *Humble Oil* contains a "universal rule" which is separate from the three-prong test discussed above. The dissent is again mistaken. The dissent artfully fails to explain this court's holding in *Humble Oil*, that "manifest abuse of discretion was not found" with this court providing the same deference given to legislative questions of "necessity." *See also State ex rel. Tacoma Sch. Dist. No. 10 v. Stojack*, 53 Wash.2d 55, 330 P.2d 567 (1958) (dissent again fails to mention this court's deference to legislative determinations as to the selection of land "reasonably necessary" and that manifest abuse of discretion was not found). Furthermore, the dissent fails to explain the context and holding of *Neitzel v. Spokane International Ry. Co.*, 65 Wash. 100, 117 P. 864 (1911). Unlike in this case and other cases cited by the majority above, *Neitzel* involved a determination years after the fact of whether a railroad had obtained a fee interest or an easement in property at a time when the extent of interests railroads could acquire in property was unclear.

****1178** *c. Whether a fee interest is reasonably necessary*

[19][20] ¶ 50 The next step is to determine whether the condemnation of a fee interest in the entire property is "necessary" for the public use. SMP correctly cites *Welcker*, 65 Wash.2d at 684, 399 P.2d 330, for the general rule that if a condemning authority has conducted its deliberations on an action "honestly, fairly, and upon due consideration" for facts and circumstances, that action will not be considered arbitrary and capricious, "even though there be room for a difference of opinion upon the course to follow, or a belief by the reviewing authority that an erroneous conclusion has been reached." Courts will consider costs of the project as a ***636** relevant factor. *See e.g.*, *Port of Grays Harbor*, 30 Wash.App. 855, 638 P.2d 633; *Schultz*, 356 N.W.2d 846.[FN19]

FN19. The dissent concedes that this court has upheld various determinations of what constitutes necessity. "Necessity" requires only that the condemning authority show that the condemned property was "reasonably necessary" for the public use, not that it was absolutely necessary or indispensable. *See, e.g.*, *Welcker*, 65 Wash.2d at 684, 399 P.2d 330 (the necessity requirement "embraces the right of the public to expect and demand the service and facilities to be provided by a proposed acquisition or improvement"; "[r]easonable necessity for use

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in a reasonable time is all that is required"). Thus, the property here is "reasonably necessary" for the public transportation project given that all of the property will be used initially for the construction of the monorail and a significant portion, and perhaps all, of the property will be used indefinitely for the monorail station and access to the station.

¶ 51 In this case, SMP determined that acquisition of the fee interest in property was reasonably necessary and required for the construction, operation, and maintenance of the monorail station on HTP's property and for related construction staging and development of the Green Line alignment in the vicinity of the station. SMP asserts that the SMP board of directors determined that this use was of an intensity and duration to justify the taking of the fee interest.

¶ 52 HTK points to a number of documents that indicate that SMP plans "Associated Development." Associated Development is defined by SMP to mean "a free standing project not connected to a station, built by a third party on land that SMP has fee ownership or some development rights and is most likely built after a station is built. The land can be sold outright or ground leased." CP at 358. HTK notes that SMP has specifically indicated that a portion of HTK's property might yield "surplus property," suitable for Associated Development. The record supports HTK's contention. At a community hearing about this monorail station, "SMP told the community that the residual property would be sold and it did not know yet how the property would be used." Resp't's Ex. 15. The revenue generated from possible transfers of "excess property" was included in SMP's earlier budgets. RP at 102. However, SMP noted in testimony that in a similarly situated property (in downtown Vancouver), the entire footprint outside that monorail ***637** station was ****1179** used as a park and not developed separately due to the ongoing need for access. RP at 101.

¶ 53 Amicus cite the case *City of Cincinnati v. Vester*, 33 F.2d 242 (6th Cir.1929), in part for the proposition that excess condemnation, taking more land than is necessary, in order to help recoup the cost of public projects is impermissible. In *Vester*, the city condemned property to widen a street by 25 feet. The city condemned land within that strip of land and attempted to condemn land outside of the 25-foot strip. The city was prohibited from condemning the excess property. The Sixth Circuit held that the property was only taken in order to sell it (for a private use) at a later date in order to capture the increased value that the widened street would bring. *Id.* [FN20]

FN20. The United States Supreme Court affirmed, on narrower grounds. *City of Cincinnati v. Vester*, 281 U.S. 439, 50 S.Ct. 360, 74 L.Ed. 950 (1930) (concluding that the proceedings for excess condemnation of the properties involved in the suits were not taken in conformity with the applicable law of the state and affirming the decrees below upon that ground.)

¶ 54 SMP argues that *Vester*, 33 F.2d 242, is distinguishable since the city had no public use at all for the property except for possible recoupment. In contrast, in this case, SMP is only condemning property that it has determined is necessary for public use. SMP contends that the evidence demonstrates that the entire property will be used for the construction, maintenance, and operation of the monorail station and the construction staging. Moreover, the proposed station designs include plans encompassing the entire parcel. Given the cost of this undisputed present need of indefinite length and the permanent need for at least a significant portion of the property, SMP contends that the SMP board justifiably determined that the cost of the construction easement could easily eclipse the cost of a fee interest. Testimony as to fair market value of construction easements was undisputed at the hearing. Furthermore, SMP contends that a condemning body may consider financial implications when determining what interests are necessary to condemn, citing *Convention Center.*

***638** ¶ 55 The record supports SMP's contentions that it needs all of the property for a substantial period of time to build and construct a monorail station and may need all of it indefinitely. It is significant that testimony was undisputed that the cost of the temporary construction easement combined with likely cost of damages due to a ground lessee could eclipse the cost of a fee interest. Given the absence of actual or constructive fraud, we hold that SMP's determination to condemn a fee interest in the entire property was necessary to the public use of public transportation.[FN21]

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FN21. The dissent erroneously claims that SMP has engaged in arbitrary and capricious conduct. First, as discussed above, an action taken by a municipality after proper procedural consideration is not arbitrary or capricious, even though a reviewing court may believe it is erroneous. *See* Welcker, 65 Wash.2d at 684, 399 P.2d 330. In this case, HTK is not alleging that SMP's decision-making process was improper. Second, the dissent's reliance on *Port of Everett v. Everett Improvement Co.*, 124 Wash. 486, 214 P. 1064 (1923) is misplaced. Unlike the condemning authority in that case in which there was no plan for any type of current or future construction or improvement, SMP has developed a plan for using the entire property-building the monorail. Moreover, nothing in *Everett Improvement* requires this court to find that the failure to have in place a definitive use plan for the entire life of the property makes the condemning authority's actions arbitrary and capricious. Second, the fact that SMP may sell or lease a part of the condemned property at some future point does not show an unconstitutional improper motive. As discussed above, in *Convention Center*, this court upheld the condemning entity's agreement, up front, to sell three of the four floors of the convention center to private commercial interests. Here, there is no agreement for sale and, in contrast, there is an immediate use of the entire property for construction, staging, alignment, and future operation of a monorail station.

ATTORNEY FEES

[21] ¶ 56 HTK requests attorney fees. RCW 8.25.075(1) provides that a superior court having jurisdiction of a proceeding instituted by a condemnor to acquire real property shall award the condemnee costs including reasonable attorney fees and reasonable expert witness fees if there is a "final adjudication that the condemnor cannot acquire the real property by condemnation." Because we conclude that SMP, the condemnor, can ****1180** acquire the property, HTK, the condemnee, is properly denied attorney fees.

***639** CONCLUSION

¶ 57 Consistent with our case law and public policy, courts ensure that property condemned is put to a public use, and the legislature/local governments ensure that such projects are developed in a cost effective manner. This division provides deference to local governments to determine what property is necessary to implement projects that a court has determined are for a public use. This court is both preserving important property ownership rights and ensuring that when a municipal authority condemns property for a public project, such project is truly for the "public use" within the meaning of the Washington State Constitution. Unlike in the recent United States Supreme Court case, *Kelo*, this case involves one of the most fundamental public uses for which property can be condemned-public transportation. Accordingly, the trial court's finding of public use and necessity is affirmed.

ALEXANDER, C.J., C. JOHNSON, BRIDGE, OWENS and FAIRHURST, JJ., concur.
CHAMBERS, J., concurs in result only.
J.M. JOHNSON, J. (dissenting).

¶ 58 In a recent and highly publicized opinion, the United States Supreme Court justified its denial of federal constitutional protections against eminent domain abuse by acknowledging the states' power to afford their citizens greater protection against such abuse.

> [N]othing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.

Kelo v. City of New London, 545 U.S. 469, 125 S.Ct. 2655, 2668, 162 L.Ed.2d 439 (2005) (footnote omitted).

***640** ¶ 59 In the wake of *Kelo*, legal scholars and citizens exulted that Washingtonians were insulated from such abuses because the plain language of the Washington Constitution, as previously enforced by this court, afforded broader protection against eminent domain abuse than its federal counterpart. *See*

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CONST. art. I, § 16. Unfortunately, the majority of this court is less enlightened than the citizenry or less inclined to restrain public agencies in their taking of private property. I side with the citizens and our Washington Constitution. I therefore dissent.

I. FACTS

¶ 60 Special protection against taking of private property is found in our constitution's article I, section 16 "Declaration of Rights." These protections were enacted to protect citizens from abuse of government powers. The settlers of Washington came here drawn by the opportunity to own their own property and many fled from abusive governments. In this case, we have a good example.

¶ 61 In 1941 an immigrant railroad laborer, Henry T. Kubota, purchased the Seattle Hotel that was situated on real property in Seattle's Pioneer Square, the subject of the present litigation.[FN1] In the wake of Pearl Harbor, and pursuant to President Franklin D. Roosevelt's Executive Order 9066, 7 Fed.Reg. 1407 (Feb. 25, 1942), Kubota was displaced to a Japanese-American internment camp. *See generally Toyosaburo Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944) (upholding constitutionality of military order implementing Executive Order 9066). Although many internees lost all their possessions during this period, a loyal friend managed Kubota's property, returning it to him after his release.

FN1. The parcel in question is located in historic Pioneer Square and is triangular in shape. *See* Pet'rs' Ex. 2, at 5. It is bordered by 2nd Avenue, James Street, and Yesler Way. *Id.*

¶ 62 The Seattle Hotel suffered extensive damage during the earthquake of 1949. Despite Kubota's repairs, the ***641** hotel's useful life ****1181** had been exhausted by 1960, and it was demolished. Kubota then entered into a long-term lease that proposed the construction of a six-story office building atop a parking garage. To Kubota's disappointment, only the parking garage was constructed, which is now commonly referred to as the Sinking Ship garage. Kubota retained the long-term dream of a larger development. Since Kubota's death in 1989, his descendents have managed the property under his namesake, HTK Management, L.L.C. (HTK).

¶ 63 In 2002, the predecessor of the Seattle Monorail Project [FN2] (hereinafter Monorail) identified the Sinking Ship parcel as a potential monorail station site. HTK learned this information from a local newspaper rather than being contacted directly by the agency.

FN2. The Elevated Transportation Company is the predecessor of Monorail. *See* City of Seattle Proposition No. 2 (Initiative 53: The Monorail). Although Monorail operates entirely within the City of Seattle, the agency is an independent municipal corporation. *See* majority at 1171; RCW 35.95A.020.

¶ 64 Shortly thereafter, HTK expressed its willingness to collaborate with Monorail so that both parties could implement their visions for the parcel-Monorail's station on a fraction of the block, coupled with HTK's redevelopment of the remainder of the parcel. The parties began planning for this complementary development. It appears HTK was more sincere than Monorail, and the agency plans took a different direction.

¶ 65 On April 7, 2004, Monorail passed Resolution 04-16 to acquire the entire Sinking Ship parcel by condemnation. Resp't's Ex. 13, at 8. Three weeks later, on April 28, 2004, Monorail filed a petition against HTK for condemnation in King County Superior Court, seeking a fee interest in the entirety of the parcel. Clerk's Papers (CP) at 3.

¶ 66 On August 13, 2004, HTK filed a motion to dismiss the condemnation action for lack of subject matter jurisdiction on the grounds that Monorail's enabling legislation failed to prescribe the agency's condemnation procedure. CP at 41. The trial court denied both HTK's motion and a ***642** subsequent motion for reconsideration. CP at 199-202, 215-16.

¶ 67 On September 13, 2004, the trial court held a hearing on public use and necessity in which Monorail sought to justify its condemnation of the entire parcel. Monorail conceded that the station footprint would occupy only approximately one-quarter to one-third of the parcel.[FN3] The following diagram is typical of the preliminary designs entered into evidence:

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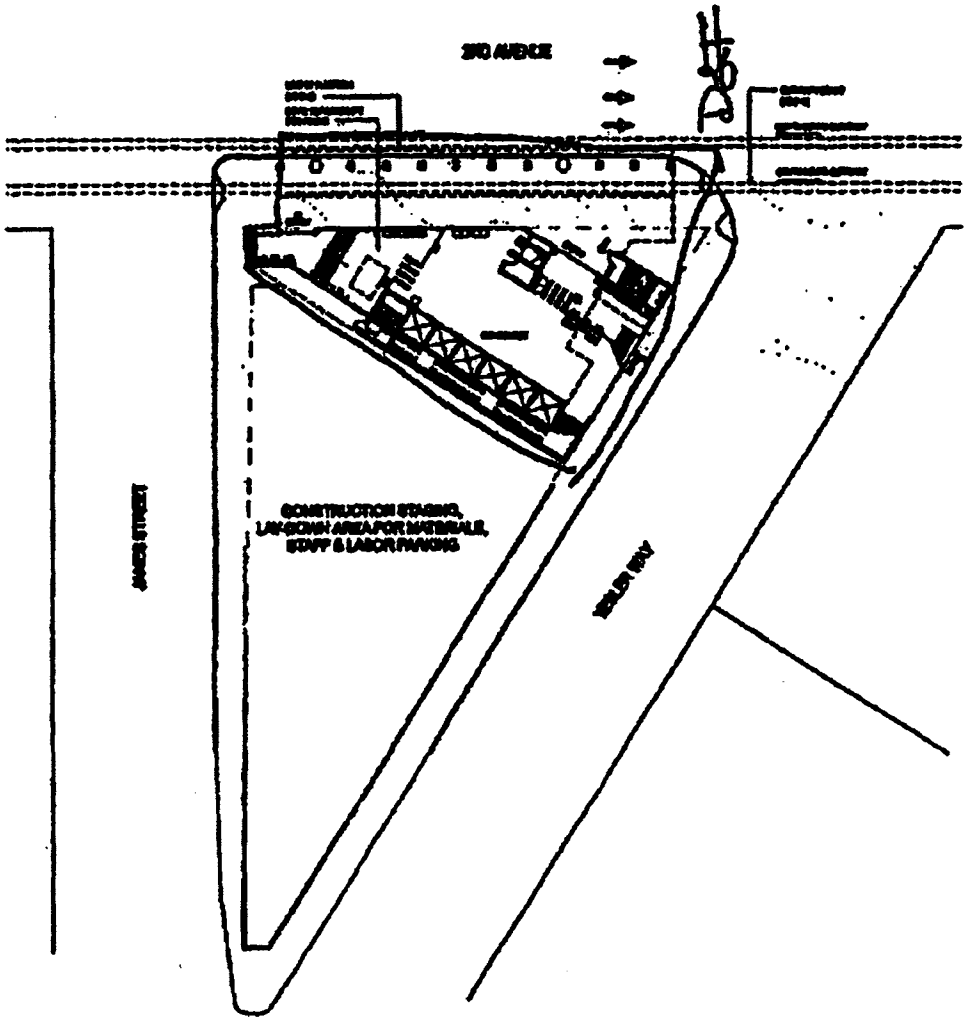
FN3. The majority's fact section states that "preliminary designs show the station footprint covering the entire property, other more recent designs show a smaller footprint." Majority at 1170. Although technically correct, this statement is misleading. The former are unquestionably no longer under any serious consideration. *See* Br. of Resp't at 7 n.13 ("depending on the ultimate station design, approximately 6,500 to 10,000 square feet of the approximately 20,000 square foot parcel will be covered by the station footprint."). *See also* Report of Proceedings (RP) at 54 ("THE COURT: The bottom line is the footprint of the Yesler station is not going to take the entire triangle of the Yesler property? THE WITNESS: That's correct.").

****1182**



***643** ¶ 68 Monorail asserted that condemnation of the parcel outside the footprint of the monorail station (remainder property) was needed for construction staging and staff parking activities. Thus, Monorail argued that these purposes of its condemnation constituted a public use.

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¶ 69 HTK conceded that both the station and construction staging may be public uses. However, they countered that because construction staging and parking [FN4] is inherently temporary, Monorail was not justified in condemning a fee interest in the remainder property. Accordingly, HTK urged the court to grant Monorail a fee interest in the station footprint and at most a construction easement on the remainder property.

FN4. This is temporary parking and not long-term parking for monorail patrons. *See* "staff and labor parking" on preceding diagram. There will be substantially less parking than the present public garage.

¶ 70 At the hearing, HTK presented evidence to demonstrate that Monorail sought to condemn more property than necessary in order to profit from the increased value of the parcel after monorail construction. The concept of agency profit from such land transactions was discussed by Monorail from its very inception. The petition creating the monorail noted:

> Rights of Way: Market value paid on the limited number of properties that must be acquired, some easements to be purchased, ****1183** and *high-value properties resold when construction is completed.*

Resp't's Ex. 20, at 44 (emphasis added).

¶ 71 Monorail subsequently adopted an internal development policy that anticipated selling "remainder property" to private developers. Referred to as "associated development," Monorail defines it as:

> a free standing project not connected to a station, built by a third party on land that SMP has fee ownership or some development rights and is most likely built after a station is built. The land can be sold outright or ground leased.

***644** Resp't's Ex. 12, at 1. After adopting this "associated development" policy, Monorail even sought out "site specific recommendations for [associated] types of development opportunities." *Id.*

¶ 72 Monorail also emphasized its "associated development" policy in the Design-Build-Equip Contract-the contract to be awarded to the winning bidder for construction of the monorail.[FN5]

FN5. There was actually only one bidder.

> The SMP has and will be acquiring property for Stations and is *interested in maximizing the development potential* of such properties. In some instances, the SMP will be required to acquire a complete site and may, once the Station is complete, *sell or lease a portion of the site to private parties who would develop this excess property for commercial use.* This type of development is referred to as "Associated Development."

Resp't's Ex. 26, at DBEC-222 (emphasis added).

¶ 73 In addition to these monorail policies, HTK provided specific evidence that Monorail planned "associated development" for this Sinking Ship parcel. The Transit Way Agreement [FN6] planned for "[a]ssociated development of the unused portion of the parcel bounded by 2nd Avenue, James Street and Yestler Way (a.k.a., 'Sinking Ship Garage.')." Ex. C (Resp't's Ex. 23), at 4. The agreement set "associated development" for the Sinking Ship parcel as a "priority." *Id.* Moreover, at a Pioneer Square community meeting, the "SMP told the community that the residual property would be sold and it did not know yet how the property would be used." Resp't's Ex. 15.

FN6. The Transit Way Agreement between the City of Seattle and Monorail establishes conditions under which Monorail may use the city's rights-of-way.

¶ 74 To this evidence Monorail responded that it had no definitive postconstruction plans for the remainder property and that absent a demonstration of fraud or bad faith, the agency was entitled to condemn the parcel in its entirety. The trial court entered a judgment of public use and necessity. HTK now appeals.

***645** II. ANALYSIS

A. *Procedures for Condemnation*

¶ 75 Petitioners first assert that the trial court lacked jurisdiction over this matter because Monorail's enabling act fails to expressly prescribe the procedures by which the agency exercises its eminent domain authority. *See* State ex rel. Mower v. Superior Court,

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43 Wash.2d 123, 260 P.2d 355 (1953). With respect to this argument, however, I reluctantly conclude with the majority that lack of such procedures did not deprive the trial court of jurisdiction.

¶ 76 The statute does specify that Monorail could "acquire by ... condemnation." RCW 35.95A.050(1) [FN7]. Our case law establishes that condemnation procedures may be fairly implied if necessary to effectuate the Legislature's intent. *See In re Pet. of Seattle,* 96 Wash.2d 616, 629, 638 P.2d 549 (1981) (*Westlake*). In addition, the differences between procedural statutes are largely inconsequential and "embrace the same procedural theory, namely ... the entry of three separate and distinct judgments during the course of a proceeding." *Pub. Util. Dist. No. 1 v. Wash. Water Power Co.,* 43 Wash.2d 639, 641, 262 P.2d 976 (1953). The determination that Monorail's condemnation procedures may be fairly implied from an express grant of authority does not address the scope of the ****1184** condemnation authority. This is a constitutional issue that I believe is determinative here.

FN7. Fully quoted *infra* p. 1184.

B. *Scope of Condemnation Authority*

¶ 77 Municipal corporations do not possess an inherent power of eminent domain and thus may exercise such power only when expressly authorized to do so by the state legislature. *See, e.g., State ex rel. Tacoma Sch. Dist. No. 10 v. Stojack,* 53 Wash.2d 55, 60, 330 P.2d 567 (1958). Statutes conferring such power are in derogation of the common right, ***646***State ex rel. King County v. Superior Court,* 33 Wash.2d 76, 82, 204 P.2d 514 (1949), and "must be strictly construed, both as to the extent of the power and as to the manner of its exercise." [FN8] *State ex rel. Postal Tel.-Cable Co. v. Superior Court,* 64 Wash. 189, 193, 116 P. 855 (1911).

FN8. All delegations of state authority are to be construed strictly, and this is " 'especially true with respect to the power of eminent domain, which is more harsh and peremptory in its exercise and operation than any other.' " *State ex rel. Chesterley v. Superior Court,* 19 Wash.2d 791, 800, 144 P.2d 916 (1944) (quoting JOHN LEWIS, 1 A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 388, at 708 (3d ed.1909)).

¶ 78 Monorail is a special purpose district that performs a single, narrowly circumscribed function: construction and operation of a monorail.[FN9] The extent of Monorail's condemnation powers are set forth in RCW 35.95A.050(1), which authorizes city transportation authorities:

FN9. The majority suggests, for example, that the agency could create a park out of the excess Sinking Ship property. However, under our cases, construction of a park likely exceeds Monorail's enabling legislation.

> To acquire by purchase, condemnation, gift, or grant and to lease, construct, add to, improve, replace, repair, maintain, operate, and regulate the use of public monorail transportation facilities, including passenger terminal and parking facilities and properties, and other facilities and properties as may be necessary for passenger and vehicular access to and from public monorail transportation facilities, together with all lands, rights of way, and property within or outside the authority area, and together with equipment and accessories necessary or appropriate for these facilities ....

RCW 35.95A.050(1). Although Monorail is entitled to acquire property by "condemnation," the purposes of the condemnation must be for the purpose of "public monorail transportation facilities." In addition, any condemnation must not violate our constitutional prohibition against the taking of private property for private purposes.

> Private property shall not be taken for private use .... No private property shall be taken or damaged for public or private use without just compensation having been first made .... *Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and* ****647*** *determined as such, without regard to any legislative assertion that the use is public.*

CONST. art. I, § 16.

¶ 79 To determine whether the use of the eminent domain power is allowed by our constitution, we employ a three-part test:

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(1) that the use is really public,

(2) that the public interests require it, and

(3) that the property appropriated is necessary for the purpose.

Westlake, 96 Wash.2d at 625, 638 P.2d 549 (quoting *King County v. Theilman*, 59 Wash.2d 586, 593, 369 P.2d 503 (1962)). *See also* *State ex rel. Wash. State Convention & Trade Ctr. v. Evans*, 136 Wash.2d 811, 817, 966 P.2d 1252 (1998) (*Convention Center*).

¶ 80 As we are dealing with constitutional rights of the legal owner, the burden of proof is on the condemning agency, not on the condemnee, to demonstrate that the condemnation is for a public use and that it is necessary for that public use. *Convention Ctr.*, 136 Wash.2d at 822-23, 966 P.2d 1252; *Theilman*, 59 Wash.2d 586, 369 P.2d 503; *State ex rel. Sternoff v. Superior Court*, 52 Wash.2d 282, 325 P.2d 300 (1958).

¶ 81 As the majority correctly states, the determination that a condemnation is for a ****1185** public use is not the same thing as public necessity. *See, e.g.*, *Theilman*, 59 Wash.2d at 594, 369 P.2d 503 (" 'Public use' and 'necessity' cannot be separated with scalpellic precision, for the first is sufficiently broad to include an element of the latter."). In article I, section 16 our state constitution directly addresses only the "public use" inquiry. *See* *State ex rel. Puget Sound Power & Light Co. v. Superior Court*, 133 Wash. 308, 311, 233 P. 651 (1925). The remaining two inquiries regarding public interest and necessity are judicial corollaries to enforce the constitutional mandate. Unfortunately, the majority errs by greatly blurring the distinctions between the constitutionally mandated inquiry into public use and the judicial corollary of necessity. There are two inquiries: Is this property necessary for the public purpose? Is *all* this property necessary for the public purpose? Here, the wrong answer to the latter ***648** inquiry is given, and a violation of constitutional rights results.

C. *Public Use*

¶ 82 As previously stated, the inquiry into public use is constitutional in nature. As an initial matter, the majority states that a legislative declaration of public use is "entitled to great weight." Majority at 1175 (citing *Hemenway*, 73 Wash.2d 130, 437 P.2d 171). It is stupefying that the majority claims that we must give "great weight" to such determinations when our constitution mandates that this "*shall* be a judicial question, and determined as such, *without regard to any legislative assertion* that the use is public." CONST. art. I, § 16.

¶ 83 Use of the word "shall" is imperative and operates to create a duty rather than to confer discretion. *See, e.g.*, *Crown Cascade, Inc. v. O'Neal*, 100 Wash.2d 256, 668 P.2d 585 (1983). Moreover, "regard" is defined as "to look at," "show respect or consideration for," "to take into consideration or account," or "to pay attention." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1911 (2002).

¶ 84 Thus, when our constitution states that the courts *must* make this determination "without regard to any agency's legislative assertion," it means that we must not show deference to the legislative assertion of public use; we decide the question independently. The plain language of our constitution does not require any deference and in fact mandates exactly the opposite. To the extent that this assertion by the majority is based on erroneous jurisprudence, it defies the plain language of our constitution and should be overruled. Not surprisingly, more persuasive case law also supports the contrary conclusion, that the question is judicial.[FN10]

FN10. We have stated on numerous occasions that "[s]tate cases and statutes from the time of the constitution's ratification, rather than recent case law, are more persuasive in determining" the protections of a constitutional provision. *Ino Ino, Inc. v. City of Bellevue*, 132 Wash.2d 103, 120, 937 P.2d 154 (1997). Our early jurisprudence demonstrates that legislative determinations of public use are not entitled to great weight. *See, e.g.*, *Decker v. State*, 188 Wash. 222, 227, 62 P.2d 35 (1936) ("[W]hether the use be 'really public' is for the courts to determine, and in the determination of that question they will 'look to the substance rather than the form, to the end rather than to the means.' " (quoting *State ex rel. Puget Sound*

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Power & Light Co. v. Superior Court, 133 Wash. 308, 233 P. 651 (1925))); *State ex rel. Andersen v. Superior Court,* 119 Wash. 406, 410, 205 P. 1051 (1922) ("The legislature can declare in the first instance that the purpose is a public one, and it remains the duty of the court to disregard such assertion if the court finds it to be unfounded."); *Langdon v. City of Walla Walla,* 112 Wash. 446, 456, 193 P. 1 (1920) ("We shall assume that the question of public use is a judicial question in Oregon, as it is in our state, and that such question has been and will be decided by the courts of that state ...."); *Healy Lumber Co. v. Morris,* 33 Wash. 490, 501, 74 P. 681 (1903) ("Under such circumstances the case comes to the court without any presumption one way or the other on the subject of public use, but is to be tried by the court like any other question that is submitted to its discretion.").

***649** ¶ 85 Although we have not settled onto one single definition of public use, we have always indicated it means more than mere beneficial use. *Westlake,* 96 Wash.2d at 627, 638 P.2d 549. In *Convention Center,* we explained the constitutional test for adjudicating public use.

> Article I, section 16 prohibits the taking of private property for private use. Thus, *this court must ensure that the entire parcel subject to the eminent domain proceedings will be employed by the public use.* *****1186*** *The relevant inquiry is whether the government seeks to condemn any more property than would be necessary* [FN11] *to accomplish the purely the public component of the project.* If the anticipated public use alone would require taking no less property than the government seeks to condemn, then the condemnation is for the purpose of a public use and any private use is incidental.
>
> FN11. The use of the term "necessary" is unfortunate because it is also a term of art in eminent domain jurisprudence. However, there can be no equivocation that this analysis in *Convention Center* was regarding public use and not necessity. This analysis was completed specifically under the header of "public use" and was later followed by a separate section on "necessity."

Convention Ctr., 136 Wash.2d at 822, 966 P.2d 1252 (emphasis added). In other words, our constitutionally mandated public use inquiry seeks to determine whether the government is condemning any more real property than needed for the project.

¶ 86 The rule as articulated in *Convention Center* has deep roots in our eminent domain jurisprudence. For example, in *Stojack,* 53 Wash.2d at 63-64, 330 P.2d 567, we stated that:

> ***650** [p]ublic education is a public use for which private property may be appropriated under the power of eminent domain. If an attempt is made to take more property than is reasonably necessary to accomplish the purpose, then the taking of excess property *is no longer a public use,* and a certificate of public use and necessity must be denied.

Accord 9 NICHOLS ON EMINENT DOMAIN § 32.05 (3d ed.2005); *City of Pullman v. Glover,* 73 Wash.2d 592, 595, 439 P.2d 975 (1968) ("[T]he extent of the taking may be no greater than is reasonably necessary for the stated public purpose.").

¶ 87 This same rule has also been reiterated with respect to the interest to be acquired.

> When a legislature delegates to any subordinate agency, *such as a municipality* or a public service corporation, the right and authority to exercise the power of eminent domain, it ordinarily defines the estate or interest to be appropriated, having power to authorize the taking of a complete fee simple title, a qualified fee, or an easement only. When it has prescribed by statute the extent of interest to be vested, none further can be taken. *Courts in construing statutes which grant the power, and authorize the taking of a certain estate or interest, enforce the rule of strict construction, permitting no greater title or interest to vest than has been expressly authorized or may be necessary to the contemplated public use. When an easement will be sufficient, no intendment or rule of liberal construction will be indulged to support an attempt to obtain any greater interest or estate.*

Neitzel v. Spokane Int'l Ry. Co., 65 Wash. 100, 105, 117 P. 864 (1911) (emphasis added). We have also

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stated the rule as follows:

"Inasmuch as property cannot constitutionally be taken by eminent domain except for the public use, *it follows that no more property shall be taken than the public use requires; and this rule applies both to the amount of property and the estate or interest in such property to be acquired by the public. If an easement will satisfy the requirements of the public, to take the fee would be unjust to the owner, who is entitled to retain whatever the public needs do not require, and to the public, which should not be obliged to pay more than it needs.*"

***651** City of Seattle v. Faussett, 123 Wash. 613, 618, 212 P. 1085 (1923) (emphasis added) (quoting 10 Ruling Case Law 88). *Accord* State v. Larson, 54 Wash.2d 86, 89, 338 P.2d 135 (1959) ("no greater estate or interest should be taken than is reasonably necessary to accomplish the public use or necessity."); State ex rel. Eastvold v. Superior Court, 48 Wash.2d 417, 294 P.2d 418 (1956).

¶ 88 The above case law is unequivocally clear: if a government entity seeks to condemn more property than is needed, the excess property is not for a public use and may not be lawfully condemned. This rule is so well engrained that we have called it a "universal rule." City of Tacoma v. Humble Oil & Ref. Co., 57 Wash.2d 257, 356 P.2d 586 (1960).

****1187** ¶ 89 Unfortunately, the majority disregards this "universal rule" of our eminent domain jurisprudence. The majority correctly states that a legislature's grant of eminent domain power to a municipality is to be strictly construed but immediately backpedals to avoid construing that authority so strictly as to actually restrict the agency. Majority at 1171. The majority cannot show that following our "universal rule" here, by allowing Monorail to condemn only the property interests necessary to accomplish its purposes (a fee in the station footprint and, at most, construction easement in the remainder), would "defeat the purpose of the legislative grant." The contrary conclusion is further supported by the fact that other monorail station sites do not require an entire block for "staging and staff and labor parking."

¶ 90 More importantly, however, the majority would destroy our "universal rule" by stating that "decisions as to the amount of property to be condemned are legislative questions, reviewed under the legislative standard of necessity." [FN12] Majority at 1176-77. It finally concludes that declarations of necessity by a condemning agency are conclusive ***652** absent fraud or arbitrary and capricious conduct. This is abdication of the court's constitutional duty.

FN12. Remarkably, the majority does this after attempting to distinguish Convention Ctr., 136 Wash.2d 811, 966 P.2d 1252. As previously quoted, Convention Center held the correct test for inquiries into public use: "[T]his court must ensure that the entire parcel subject to the eminent domain proceedings will be employed by the public use. The relevant inquiry is whether the government seeks to condemn any more property than would be necessary to accomplish purely the public component of the project." Convention Ctr., 136 Wash.2d at 822, 966 P.2d 1252. The majority attempts to distinguish Convention Center by observing that it dealt with alleged permanent public use within the footprint of the project. The majority cannot explain, however, why these observations change our "universal rule" that determining whether excess property has been condemned is analyzed under a constitutionally mandated inquiry into public use, and not the deferential judicial construct of necessity.

¶ 91 If, as the majority suggests, decisions as to the extent of property to be condemned fall under necessity, and judicial review is properly characterized by deference, there are no effective means by which the courts may carry out the constitutionally mandated independent inquiry into public use. If the majority seeks to overrule our "universal rule," it should do so explicitly.

¶ 92 Moreover, precedential support for the majority's conclusion is lacking. Specifically, the majority's reliance on Humble Oil and In re Port of Grays Harbor, 30 Wash.App. 855, 638 P.2d 633 (1982), for the proposition that decisions as to the amount of property to be condemned as legislative questions, reviewed under the deferential standard are misplaced. Nor are these cases controlling as the majority suggests.

¶ 93 In Humble Oil, 57 Wash.2d at 257, 356 P.2d

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586, the city of Tacoma developed a hydroelectric project on the Cowlitz River in order to meet the city's electricity needs. Because the reservoir behind the dam would inundate the condemnee's land, the city sought to condemn a fee interest in the portion to be inundated. Although the condemnee stipulated that the hydroelectric project was a public use, he argued that he should be able to retain the mineral rights under the inundated land. In contrast, the city argued for a fee simple on the grounds that without a fee it could not "operate and control the reservoir satisfactorily," including concerns over pollution, subsidence, loss of fish life, among others. *Id.* at 259, 356 P.2d 586. The court granted an order of public use and necessity. The reason that the court determined that it ***653** would not interfere with the "selection" of land was precisely because doing so would interfere with the very purpose of the project, by creating pollution, etc. The same cannot be said for the instant case.

¶ 94 The majority also relies on *Port of Grays Harbor.* Not only is *Port of Grays Harbor* a Court of Appeals case that is not binding on this court, the case doesn't even purport to construe article I, section 16 of our state constitution. Rather, it interprets article VIII, section 8, which is a separate broad constitutional grant of condemnation authority only to *port* districts. That grant is so broad that the condemnation of property for industrial development and trade, normally understood as private uses, is often ****1188** argued to be public use when part of a port development.

¶ 95 Because *Humble Oil* and *Port of Grays Harbor* offer insufficient support for their proposition, the majority relies on case law from various other states to support its claim that the condemning authority's decision as to the extent of the property interest is a legislative question. Majority at 1176. It appears that the majority is not interested in *our* Washington Constitution but would rather cite to cases from other states that support its conclusion, even though those states have *different* constitutional provisions.

¶ 96 Because Washington Constitution article I, section 16 is clearly unique, we have previously refused to apply case law from other states to interpret it. *See Westlake,* 96 Wash.2d at 627, 638 P.2d 549 (rejecting the use of cases from other jurisdictions to interpret article I, section 16 because such cases "are not helpful."). The plain language of our constitution was chosen by our settler forefathers to provide one of the strongest mandates against the taking of private property for private use in the nation.

The judicial determination clause in the Washington Constitution is a clause currently existing in only four other states.[FN13] At the time of the 1889 Washington Convention, only Colorado ***654** and Missouri had similar provisions. It is not entirely clear why such a provision was included in Washington's only constitutional restriction on the sovereign's otherwise limitless eminent domain power .... The only motion relative to this provision in the convention was an attempt to strike out any reference to the legislature. It failed. However, the clear language of the provision, with its difference from most other constitutions and early cases, shows that the constitutional framers sought to place a limit on the legislature by assigning the judiciary the duty to determine the character of proposed public uses.

FN13. Ariz. Const. art. II, § 17 ("Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.").

Colo. Const. art. II, § 15 ("[W]henever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public."). *See also Pub. Serv. Co. of Colo. v. City of Loveland,* 79 Colo. 216, 245 P. 493 (1926).

Miss. Const. art. III, § 17 ("[W]henever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public.").

Mo. Const. art. I, § 28 ("[W]hen an attempt is made to take private property for

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> a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public.").

James M. Dolliver, *Condemnation, Credit, and Corporations in Washington: 100 Years of Judicial Decisions-Have the Framers' Views Been Followed?,* 12 U. Puget Sound L.Rev. 163, 175-76 (1989) (footnotes omitted).

¶ 97 The majority cites Reichling v. Covington Lumber Co., 57 Wash. 225, 106 P. 777 (1910) for the proposition that an immediate public use, even if only temporary, justifies the condemnation of a fee. However, in Reichling, the property had already been condemned years prior to the action, and the real issue was whether collateral attack on the condemnation was proper. In Reichling, as in all other cases addressing this matter, the use intended was not inherently temporary and at least had the potential to be of indefinite duration. Here, construction use is clearly, and admittedly, temporary.

***655** ¶ 98 Finally, the majority also reasons that Monorail was entitled to take a fee in the remainder property because it determined that it would be less expensive to do so. However, the amount that property costs does not determine whether it is a public use. *Cf.* Westlake, 96 Wash.2d at 627, 638 P.2d 549 ("A beneficial use is not necessarily a public use."). Moreover, no actual cost figures were given, and this opinion was ****1189** lay testimony-neither qualified nor admitted as expert opinion.

¶ 99 Our "universal rule" states that when a government agency seeks to condemn more property than required for legitimate public purpose, the excess is not for a public use. Here, not only does Monorail have an "associated development" policy that encourages excess condemnation for subsequent resale for private use at a profit, but the agency has made such condemnation a "priority" for the Sinking Ship parcel. Monorail's sole justification for condemning a fee in this portion of the parcel is the inherently temporary use of construction staging and staff and labor parking. The real purpose is to profit from the later sale.[FN14]

FN14. Providing Monorail staff free parking in Pioneer Square is unlikely to be a public use.

¶ 100 The majority cannot point to a single case approving the condemnation of a fee interest for an inherently temporary use where the condemning agency has a policy of condemning excess property for subsequent resale for private use. The proposition is most reminiscent of Westlake, in which this court disapproved such a condemnation proposal.

¶ 101 I would hold that under article I, section 16, anything beyond a fee simple in the footprint of the monorail station is not a public use. The constitution of our forefathers and Kubota's legacy requires this conclusion. The order of public use and necessity should be reversed on this basis alone.

***656** D. *Necessity for this public use*

¶ 102 Even assuming that Monorail had proved a public use in the entirety of the parcel, it still cannot prove necessity. The majority's analysis regarding necessity is as flawed as its public use analysis.

¶ 103 Unlike the inquiry into "public use," which is a constitutional mandated inquiry, the inquiry into necessity is a corollary judicial construct. As stated by the majority, several determinations of necessity have been upheld absent actual fraud. Majority at 1175. Yet, the majority fails to note other grounds upon which we overturn findings of necessity. Besides fraud, a declaration of necessity is not upheld where there is arbitrary or capricious conduct, manifest abuse of discretion, violation of law, improper motives, or collusion. Stojack, 53 Wash.2d 55, 330 P.2d 567. Here, I would hold that the record establishes that Monorail's action is arbitrary and capricious and based upon improper motives.

¶ 104 Arbitrary and capricious conduct is defined as " "willful and unreasoning [action] and taken without regard to the attending facts or circumstances." " Wash. Indep. Tel. Ass'n v. Wash. Utils. Transp. Comm'n, 149 Wash.2d 17, 26, 65 P.3d 319 (2003) (quoting Rios v. Dep't of Labor Indus., 145 Wash.2d 483, 501, 39 P.3d 961 (2002) (quoting Hillis v. Dep't of Ecology, 131 Wash.2d 373, 383, 932 P.2d 139 (1997))). Monorail has unquestionably engaged in arbitrary and capricious conduct as evidenced by the fact that it seeks to condemn the Sinking Ship prop-

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erty before it has even finalized plans for the station and where the agency has admitted that the station footprint will use only one-quarter to one-third of the parcel. *See supra* note 3.

¶ 105 In *Port of Everett v. Everett Improvement Co.*, 124 Wash. 486, 214 P. 1064 (1923), the newly formed Port of Everett sought to condemn property to carry out its purposes but had not formed any definitive plans for property to be condemned. The enabling statute of the port stated that it could condemn only property "necessary for the purposes of the port district." The court reasoned that:

> ***657** where the grant is of power to acquire only necessary property, there must be a showing that the particular property sought to be acquired is thus necessary, and without some definite stated plan of improvement, this necessity cannot be shown. So here, *since there is no such definite plan, it is impossible for the court or anyone to know whether all or what particular part of the property here sought to be condemned is necessary for the use of the port district, and the right of condemnation must fail for this reason.*

Everett Improvement, 124 Wash. at 494, 214 P. 1064 (emphasis added).

****1190** ¶ 106 Here, Monorail argued that there "is no requirement that a condemning authority must have a final design demonstrating use of the entire site before a condemnation can proceed forward." Br. of Resp't at 37. Monorail's argument is answered by *Everett Improvement.*

¶ 107 Like the *Everett Improvement*, the monorail enabling legislation authorizes the agency to condemn only that property which is "necessary or appropriate for [its] facilities." RCW 35.95A.050(1). Monorail repeated numerous times at the public use hearing that it had no definitive plans for the entirety of the Sinking Ship parcel except for the inherently temporary purpose of construction.[FN15]

> FN15. *See, e.g.,* RP at 22 ("We haven't done any planning."); RP at 23 ("There has been no determination at all in our minds at this point .... There are no plans for development on this site."); RP at 77 ("I think the way I would word that is that we are trying to leave our options open...."); RP at 78 ("We have no intention at this time of doing anything with the property specific .... One of the possibilities could be access, one could be a park, one could possibly be selling off residuals sometime in the future."); RP at 122 ("At the moment no uses appear to me if there is a remainder, what our use of that would be").

¶ 108 By allowing premature condemnation of the remainder property, the majority implicitly approves the practice of an agency maintaining plans as vague as possible in the hopes of acquiring excess property to generate additional revenue. The lack of a definitive plan alone is fatal to the attempted condemnation and should be held arbitrary and capricious.

¶ 109 I would also find that Monorail's policies for associated development (by private parties), combined with the ***658** agency's insistence on a fee interest even in the absence of a definitive plan, show improper motives. Monorail intended to infringe the constitutional rights of the property owner here to take property which would appreciate and then be resold by the agency in order to help finance its troubled project. This is not a proper motive since the enabling legislation specified the authorized funding sources and did not authorize Monorail to finance its project through real estate speculation (nor could it constitutionally).

III. CONCLUSION

¶ 110 The court has, until today, upheld a "universal rule," which states that if a government agency seeks to condemn more private property than required for its *public* purposes, the excess is not for a public use. Under our constitution, "[w]henever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public." CONST. art. I, § 16.

¶ 111 By upholding Monorail's decision to take far more property than it needs from a lawful private owner, and by erroneously applying a deferential standard to the agency's grab of this property, the majority overrules this court's "universal rule" sub silentio. I would uphold our constitution and agree

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with the property owner that Monorail (and other agencies of its ilk) should be restrained from abusing private property rights. As demonstrated by Kubota and his legacy, such rights are of exceptional import to our citizens. I believe the authors of our constitution understood this vital principle and drafted and overwhelmingly approved article I, section 16 to protect against such abuse. I dissent.

Wash.,2005.
HTK Management, L.L.C. v. Seattle Popular Monorail Authority
155 Wash.2d 612, 121 P.3d 1166

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H

Supreme Court of Washington,
En Banc.
David J. JENKINS, Respondent,
v.
WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Appellant.
Venetta Gasper, and Tommye Myers, Respondents,
v.
Washington State Department of Social and Health Services, Petitioner.
Nos. 78652-6, 78931-2.

Argued Nov. 9, 2006.
Decided May 3, 2007.

Background: Three disabled Medicaid recipients challenged the Department of Social and Health Services' (DSHS) implementation of the "shared living rule," which automatically reduced funding of their in-home care hours by 15 percent because the recipients were living with their paid caregivers. With respect to two recipients, the Superior Court, Thurston County, Richard D. Hicks, J., found the shared living rule to be invalid under federal law. DSHS appealed. The Court of Appeals, 132 Wash.App. 42, 129 P.3d 849, affirmed. Review was granted. With respect to third recipient, the Superior Court, King County, Bruce Hilyer, J., found the shared living rule to be invalid under federal law. Direct review was granted.

Holding: The Supreme Court, C. Johnson, J., held that "shared living rule" violates federal Medicaid comparability requirement.

Court of Appeals affirmed, and remanded; trial court affirmed in part, reversed in part, and remanded.

Fairhurst, J., filed a dissenting opinion, in which Madsen and Bridge, JJ., joined.

West Headnotes

[1] Administrative Law and Procedure 15A ⚷796

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak796 k. Law Questions in General. Most Cited Cases
The court reviews an administrative agency's interpretation of federal law de novo under an "error of law" standard.

[2] Health 198H ⚷473

198H Health
198HIII Government Assistance
198HIII(B) Medical Assistance in General; Medicaid
198Hk472 Benefits and Services Covered
198Hk473 k. In General. Most Cited Cases
Federal Medicaid comparability requirement, that the medical assistance a state provides for any categorically needy individual shall not be less in amount, duration, or scope than assistance provided to any other categorically needy individual, focuses on parity between individuals, rather than parity between groups. Social Security Act, § 1902(a)(10)(B), 42 U.S.C.A. § 1396a(a)(10)(B); 42 C.F.R. § 440.240.

[3] Health 198H ⚷473

198H Health
198HIII Government Assistance
198HIII(B) Medical Assistance in General; Medicaid
198Hk472 Benefits and Services Covered
198Hk473 k. In General. Most Cited Cases
Department of Social and Health Services' (DSHS) "shared living rule," which automatically reduced, without individualized determination of need, funding of disabled Medicaid recipients' in-home care hours by 15 percent because recipients were living with their paid caregivers, violated federal Medicaid comparability requirement, that the medical assistance a state provides for any categorically needy individual shall not be less in amount, duration, or scope than assistance provided to any other categorically needy individual. Social Security Act, §

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1902(a)(10)(B), 42 U.S.C.A. § 1396a(a)(10)(B); 42 C.F.R. § 440.240; WAC 388-106-0130(3)(b).

[4] States 360 171

360 States
360V Claims Against State
360k171 k. Interest. Most Cited Cases
The general rule is that the State cannot be held to interest on judgments against it, absent its consent. West's RCWA 4.56.110.

****388** William Lee Williams, Michael Mackaman Young, Attorney General's Office, Olympia, for Appellant.

Meagan J. MacKenzie, Amy Louise Crewsdon, Northwest Justice Project, Olympia, Gregory A. McBroom, Livengood Fitzgerald & Aslkog, Kirkland, Rajiv Nagaich, Law Offices of Johnson & Nagaich, Federal Way, for Respondent.

Dmitri L. Iglitzin, Schwerin Campbell Barnard & Iglitzin LLP, Seattle, for Amicus ****389** Curiae (Service Employees International Union, Local 775).

C. JOHNSON, J.

***290** ¶ 1 This case involves a challenge to a Washington State Department of Social and Health Services (DSHS) regulation that reduces disabled recipients' benefits because they live with their paid caregivers. Under the regulation, amended and codified as WAC 388-106-0130(3)(b), formerly WAC 388-72A-0095 (2005), and referred to as the "shared living rule," DSHS reduces recipients' benefits by 15 percent if they live with their caregiver.

¶ 2 The three disabled recipients, David Jenkins, Vennetta Gasper, and Tommye Myers, challenge the shared living rule on several grounds, including challenges based on (1) the federal Medicaid comparability requirements under 42 U.S.C. § 1396; (2) the federal Medicaid free choice provider guaranty under 42 U.S.C. § 1396; (3) Title II of the Americans with Disabilities Act of 1990 under 42 U.S.C. § 12132; (4) the privileges and immunities clause under article I, section 12 of the Washington Constitution; (5) the equal protection clause under the fourteenth amendment to the United States Constitution; and (6) the due process clause under the fourteenth amendment to the United States Constitution.

¶ 3 In two cases consolidated in this appeal, the regulation was invalidated by the trial courts. In one case, the Court of Appeals affirmed and we granted direct review of the other case and consolidated the cases. We hold that DSHS's program, codified as WAC 388-106-0130(3)(b), to ***291** reduce benefits to eligible disabled recipients, violates federal comparability requirements under 42 U.S.C. § 1396. Because we find WAC 388-106-0130(3)(b) is invalid based on the federal comparability requirements, we find it unnecessary to reach or decide any other issues. The decisions of the courts below are affirmed in part and reversed in part.[FN1]

FN1. We also grant Jenkins' motion passed to the merits, pursuant to RAP 10.3(8), and permit him to include as an appendix to his appellate brief excerpts from the federal guidance document on Medicaid waivers. We deny DSHS's motion passed to the merits to include as an appendix to its appellate brief documents illustrating how the shared living rule operates with respect to hypothetical recipients.

FACTUAL AND PROCEDURAL HISTORY

¶ 4 All three recipients in this case are functionally disabled individuals who receive paid in-home personal care services to help them with basic activities of daily living such as bathing, dressing, shopping, housekeeping, and meal preparation. The three recipients challenge the shared living rule, which is one component of an assessment tool used by DSHS. This assessment tool, entitled "Comprehensive Assessment Reporting Evaluation" or CARE, is used to determine an individual's eligibility for in-home care under one of four programs.[FN2] *See* WAC 388-106-0045 through -0140.

FN2. The four programs are (1) medical personal care; (2) the community options program entry system (COPES) waiver program; (3) the medically needy in-home waiver program; and (4) the chore program. WAC 388-106-0015.

¶ 5 In a CARE evaluation, the individual is scored on factors such as an individual's ability to perform daily

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activities and an individual's mental status. The resulting numerical scores are put into a formula that calculates the individual's base assistance level in hours of care, and places the individual into one of 14 residential classification groups. CARE classification groups range from "Group A Low" (level 1, requiring the least amount of assistance) to "Group E High" (level 14, requiring the most assistance). WAC 388-106-0125.

***292** ¶ 6 Once the individual qualifies as a recipient, the department determines whether informal supports, like friends or family members, are helping the recipient meet certain needs. If the recipient lives with a caregiver, a second formula is applied to reduce the number of care hours for which the recipient qualifies. This second formula, or shared living rule, was implemented on the theory that if caregivers must clean their own houses, go shopping, and cook meals for ****390** their own benefit, certain duplication of efforts are presumed, and, the theory goes, a state should not pay for those tasks that benefit the entire household despite the absence of any specific determination that these tasks are shared.

¶ 7 This second formula was largely derived from the development of the CARE assessment tool which included a "time study report" of caregivers in different settings. DSHS confirmed that it relied on the study to conclude that the percentage of time devoted by live-in caregivers to household tasks ranged from 33 percent to 42 percent. Based on this study, DSHS decided to reduce any recipient's qualified level of care hours by 15 percent if a caregiver resides with a recipient.

¶ 8 The 15 percent reduction is applied without any individual determination of a recipient's needs and is applied as an irrebuttable presumption. DSHS determined 15 percent was appropriate based on the study's conclusion that the percentage of time devoted by live-in caregivers to household tasks ranged from 33 percent to 42 percent but, DSHS does not explain in the study or elsewhere how it arrived at the 15 percent figure. In separate administrative hearings, the 15 percent reduction in care hours, or shared living rule, was challenged by Jenkins, Gasper, and Myers, who are disabled Medicaid recipients living with their paid caregivers.

¶ 9 Jenkins suffers from human immunodeficiency virus/acquired immune deficiency syndrome (HIV/AIDS), hepatitis, and liver failure. He has been evaluated by DSHS as "totally dependent" for meal preparation and housework; ***293** hence, Jenkins' condition requires that he have a caregiver. His partner, Paul Racchetta, has been Jenkins' caregiver for nine years. According to a CARE assessment, Jenkins requires 185 hours of care per month. Before the shared living rule was implemented, Jenkins received 185 hours of paid care per month. After DSHS applied the shared living rule (because Jenkins lives with his caregiver) Jenkins' 184 hours were cut to 153 hours of paid care per month. Jenkins Decl. (Sept. 15, 2004) at 1-2.

¶ 10 Like Jenkins, Gasper's condition requires that she have a caregiver. Gasper is a 66-year-old severely developmentally disabled woman who has been evaluated by DSHS as "totally dependent" for meal preparation and housework. According to the assessment, Gasper requires 184 hours of care per month. After the shared living rule was applied, her hours were reduced initially to 116 and later changed to 152 hours per month.[FN3] Gasper lives with Linda Green, an unrelated paid caregiver. Green estimates she spends more than 184 hours per month caring for Gasper, and after the reduction to 152 hours, Green said she is unwilling to provide additional unpaid care. In her declaration, Green stated that she must supervise Gasper constantly because of her developmental delays; Gasper is unable to perform basic tasks without assistance, such as eating and toileting. Green Decl. (May 13, 2004) at 1-5.

FN3. DSHS does not provide its reasons in the record for its initial reduction in Gasper's hours from 184 to 116 nor does it give reasons for its subsequent increase in Gasper's hours from 116 to 152 per month.

¶ 11 Like Jenkins and Gasper, Myers has been evaluated by DSHS as "totally dependent" for meal preparation and housework. Myers is an elderly woman with kidney disease; she is on dialysis three times per week. Additionally, Myers is an insulin dependent diabetic. She lives with her disabled son Ricky, her son John, and John's wife. John is Myers' caregiver. Before the shared living rule was implemented, Myers was entitled to receive 184 hours of paid care per month. The CARE assessment set Myers base hours at 190, but after applying the shared living rule,

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***294** DSHS reduced her hours initially to 116 and then to 153 hours.[FN4] Myers' caregiver, John, estimates that he spends more than 184 hours per month on his mother's care. In addition to the chores he performs for his family, he spends an extra eight hours per month shopping for his mother's special diet, 100 hours per month extra on housekeeping, and 45 hours per ****391** month extra on meal preparation. Myers Decl. (May 27, 2004) at 1-5.

FN4. Like Gasper, DSHS does not provide its reasons in the record for its initial reduction in Myer's hours from 184 to 116 nor does it give reasons for its subsequent increase in Myer's hours from 116 to 152 per month.

¶ 12 All three Medicaid recipients challenge the shared living rule, asserting that it does not recognize the additional hours their caregivers provide that do not benefit the caregivers or the household in general. None of the recipients here asked for additional reimbursement in excess of what their classifications allowed, only that their benefits not be reduced. In Jenkins' case, based on the classifications, he was "assessed" to receive 185 hours and in Gasper's and Myer's cases, based on the classifications, they were "assessed" to receive 184 hours. After unsuccessful administrative hearings, the three recipients appealed. The trial court in each case invalidated the shared living rule, WAC 388-106-0130(3)(b),[FN5] finding it violated federal comparability requirements.

FN5. Effective June 17, 2005, former WAC 388-72A-0095 (2004) was amended and recodified as WAC 388-106-0130(3)(b).

¶ 13 In Jenkins' case, DSHS appealed the King County Superior Court decision to Division One of the Court of Appeals. In May 2006, the Jenkins case was certified to this court for direct review.

¶ 14 The appeals of Gasper and Myers were consolidated by Thurston County Superior Court. Division Two of the Court of Appeals affirmed the superior court decision that the shared living rule violates federal Medicaid comparability requirements. *Gasper v. Dep't of Soc. & Health Servs.*, 132 Wash.App. 42, 129 P.3d 849 (2006). We granted review (157 Wash.2d 1017, 143 P.3d 598 (2006)), and consolidated the cases.

***295** ISSUE

¶ 15 Whether the shared living rule, WAC 388-106-0130(3)(b), violates the federal Medicaid comparability requirement.

ANALYSIS

Standard of Review

¶ 16 The Administrative Procedure Act, chapter 34.05 RCW, sets out the standard of review for decisions involving administrative rules. The relevant portion of the statute provides:

> In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

RCW 34.05.570(2)(c).

¶ 17 Here, the question is whether DSHS exceeded its statutory authority by promulgating a rule that conflicts with federal law, namely 42 U.S.C. § 1396a(a)(10)(B). The DSHS shared living rule, codified as WAC 388-106-0130(3)(b), establishes an irrebuttable presumption that the recipient's need for assistance is met for instrumental activities of daily living (IADL) of meal preparation, housekeeping, shopping, and wood supply. If a need is met under the DSHS assessment, it receives a score that is put into a mathematical formula that translates the sum of scores into a cumulative percentage by which the recipient's base hours are adjusted. Here, after making an initial assessment of each recipient's hours of need, DSHS reduced each recipient's hours of care by 15 percent after applying this mathematical formula.

¶ 18 No one disputes that the exact mathematical formula used by DSHS results in an across-the-board 15 ***296** percent reduction where a recipient lives with a caregiver, despite the fact that WAC 388-106-0130 does not have, verbatim, the 15 percent amount; rather, the 15 percent reduction can be demonstrated by manually performing the complex calculations

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described under WAC 388-106-0130. The relevant portion of the DSHS rule, or WAC, provides:

(a) The CARE tool determines the adjustment for informal supports by determining the amount of assistance available to meet your needs, assigns it a numeric percentage, and reduces the base hours assigned to the classification group by the numeric percentage....

**392 ....

(b) If you and your paid provider live in the same household, the status under subsection (2)(a) of this section must be met for the following IADLs:

(i) Meal preparation,

(ii) Housekeeping,

(iii) Shopping, and

(iv) Wood supply.

WAC 388-106-0130(2)(a), (3)(b).

[1] ¶ 19 We review an agency's interpretation of federal law de novo under an " 'error of law' " standard. *Skamania County v. Columbia River Gorge Comm'n*, 144 Wash.2d 30, 42, 26 P.3d 241 (2001) (citing *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wash.2d 169, 175-76, 4 P.3d 123 (2000)).

Comparability Requirement

¶ 20 The federal Medicaid comparability requirement mandates that the medical assistance a state provides for any categorically needy individual "shall not be less in amount, duration, or scope" than the assistance provided to any other categorically needy individual. The relevant portion of the federal Medicaid comparability statute provides:

(B) that the medical assistance made available to any individual described in subparagraph (A)-

*297 (i) shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual and

(ii) shall not be less in amount, duration, or scope than the medical assistance made available to individuals not described in subparagraph (A);

42 U.S.C. § 1396a(a)(10).

¶ 21 The agency rule that interprets the federal Medicaid comparability statute provides:

(b) The plan must provide that the services available to any individual in the following groups are equal in amount, duration, and scope for all recipients within the group:

(1) The categorically needy

(2) A covered medically needy group

42 C.F.R. § 440.240.

¶ 22 Courts have consistently recognized this requirement and found that states violated the comparability requirement when some recipients are treated differently from other recipients where each has the same level of need. *Schott v. Olszewski*, 401 F.3d 682, 688-89 (6th Cir.2005) (finding treatment was not comparable when Medicaid did not reimburse recipient for medical expenses she paid out of pocket after she was wrongfully denied coverage); *White v. Beal*, 555 F.2d 1146, 1151-52 (3d Cir.1977) (finding statute was illegal when it covered eyeglasses for those suffering from eye diseases but did not cover glasses for patients when refractive error caused poor eyesight).

¶ 23 Here, DSHS asks that we defer to its interpretation of the Medicaid statute's comparability provision because of its expertise in administering that law. We reject this argument because the Medicaid comparability provision is specific in demonstrating Congress' intent to provide comparable services to similarly situated recipients. 42 U.S.C. § 1396a(a)(10)(B); *Martin v. Taft*, 222 F.Supp.2d 940, 977 (S.D.Ohio 2002) (finding concepts of comparability and equality are neither vague nor ambiguous). Medicaid's *298 manifest purpose is to provide for an individual recipient's needs; thus, the comparability provision requires comparable services when individuals have comparable needs. The question here is whether the

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three respondents were offered the same amount of medical assistance available to "any other such individual." 42 U.S.C. § 1396a(a)(10)(B)(i).

[2] ¶ 24 The respondents argue that the comparability provision focuses on parity between individuals. We agree. The requirement of comparability is not merely for parity between groups as argued by DSHS. On the contrary, the plain language of the comparability statute provides that "assistance made available to *any other such individual* ... shall not be less [than that] made available to *individuals.* 42 U.S.C. § 1396a(a)(10)(B)(i), (ii).

¶ 25 Also, respondents argue that DSHS violates comparability when it allocates paid ****393** services using the presumption of the shared living rule, rather than an individualized determination of each recipient's need for paid services. In fact, DSHS has promulgated a rule where recipients like Jenkins, Gasper, and Myers will have certain needs unmet while others with comparable disabilities will receive adequate services. This is so because DSHS neither addresses nor evaluates the variation of individual situations where caregivers perform household tasks that may benefit both the recipient and the household generally. Without such an evaluation, DSHS cannot automatically reduce, in shared living situations, a recipient's need for assistance with housekeeping, shopping, meal preparation, and wood supply; rather, DSHS must assess those needs in the same way and to the same extent that services are provided to the meet the needs of other recipients who do not live in a shared living situation. Individual households may differ in both the total number of hours spent on chores and in each household member's ability to do the work, but this does not change an individual's overall need for assistance.

¶ 26 DSHS argues there is no provision of Medicaid law requiring an individualized determination of public assistance benefits and cites to ***299***Weinberger v. Salfi,* 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975) to support its contention. In *Weinberger,* the central issue concerned a law designed to bar social security payments to surviving spouses when the only purpose of the marriage was to obtain those benefits. The court stated that administrative difficulties of individual eligibility determinations are matters which policy makers may consider when determining whether to rely on rules which sweep broadly. *Weinberger,* 422 U.S. at 784-85, 95 S.Ct. 2457.

¶ 27 *Weinberger* is distinguishable because the present case does not deal with individuals who are attempting to *qualify* for federal benefits; rather, the individuals here are already eligible recipients of Medicaid. Moreover, DSHS decided on individualized determinations of public assistance benefits for this categorically needy group of Medicaid recipients; yet, DSHS's refusal to consider the individual needs of Jenkins, Gasper, and Myers for assistance with housekeeping, shopping, and meal preparation violates their right to be treated in the same manner as all other categorically needy Medicaid recipients who are individually assessed for the same needs.

¶ 28 Also, DSHS argues that the shared living rule is a valid part of their CARE assessment in determining the level of need for public assistance. We agree that DSHS may use the CARE assessment program to initially classify, rate, and determine a recipient's level of need because this process is consistent with the Medicaid program's purpose. DSHS violates the comparability requirement when it reduces a recipient's benefits based on a consideration other than the recipient's actual need. A 15 percent reduction across the board for all recipients who live with their caregivers does not address, and in fact ignores, the realities of the recipients' individual situations.

¶ 29 Neither DSHS nor the study provides any explanation of how the 15 percent amount is derived from the study's data. Furthermore, the study does not provide data to distinguish clients who are clinically complex from clients who are not. In each case before us, the evidence ***300** established that before any reduction, the hours required to provide for the needs of the individual plaintiffs greatly exceeded the hours actually reimbursed.

¶ 30 Once a person is assessed to require and receive a certain number of care hours, the assessment cannot be reduced absent a specific showing that fewer hours are required. To "presume" some recipients need fewer hours of care without individualized determination violates the comparability requirement. A recipient who *does not* live with a caregiver is assessed an amount needed for meal preparation, housekeeping, and shopping under WAC 388-106-0130. Likewise, a recipient who *does* live with a caregiver should also be assessed with the same crite-

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ria for those same needs on an individualized basis. The needs of a recipient are *not* presumed met without an individual assessment.

[3] ¶ 31 We conclude that no reduction is justified unless an individual determination is **394 made supporting that reclassification. Accordingly, we invalidate WAC 388-106-0130(3)(b) to the extent that it presumes certain needs of the recipient are met without an individualized determination, and, the presumption results in an automatic 15 percent reduction in the recipient's assessed number of allotted care hours based only on the fact that the recipient lives with a caregiver.

No Exemptions from Comparability Requirement

¶ 32 DSHS argues that the Court of Appeals erred in holding the comparability requirement applies to Washington's two Medicaid waiver programs, community options program entry system (COPES) and medically needy in-home waiver (MNIW). The COPES program, through which Myers and Jenkins receive services and the MNIW program are authorized by the legislature.[FN6] As waiver programs, both COPES and MNIW operate under a waiver *301 granted by authority of the Social Security Act. 42 U.S.C. § 1396n(c)(1). As part of the framework for home and community-based services (HCBS) waivers, Medicaid law provides that a waiver granted pursuant to its authority "may include a waiver of the requirements of [42 U.S.C. § 1396a(a)(10)(B)] (relating to comparability)." 42 U.S.C. § 1396n(c)(3). Here, DSHS did not provide any information regarding the CARE assessment tool or the shared living rule in its COPES waiver application. In fact, the application language requested a waiver of requirements "in order that services not otherwise available under the approved Medicaid State plan may be provided to individuals served on the waiver." Jenkins Br. of Resp't App.1 at 4. Therefore, we hold the COPES waiver program is not exempt from the federal comparability requirement.

FN6. The MNIW waiver application is not present in the record, nor is it discussed by the parties in their briefing so we limit our finding to the COPES program.

Attorney Fees

¶ 33 Respondents request attorney fees on appeal under RCW 74.08.080(3). [FN7] Because they prevail, we grant their request pursuant to RAP 18.1 and remand for determination of reasonable fees.[FN8] Additionally, DSHS disputes the $1,552 in costs awarded to Jenkins by the trial court that included, "photocopying, postage, telecommunication, and 'other'." Jenkins Br. of Appellant at 70. DSHS argues that Washington courts have consistently limited cost awards under RCW 4.84.010 to those items specifically recoverable under the statute.

FN7. RCW 74.08.080(3) states: "When a person files a petition for judicial review ... of an adjudicative order entered in a public assistance program, no filing fee shall be collected ...; the event that the superior court, the court of appeals, or the supreme court renders a decision in favor of the appellant, said appellant shall be entitled to reasonable attorneys' fees and costs."

FN8. Jenkins asks this court to review the trial court's ruling denying fees and costs for co-counsel. However, Jenkins did not cross-appeal any of the superior court's rulings; thus, the issue is not properly before this court.

¶ 34 RCW 4.84.010 lists particular types of expenses and defines "costs" as the "prevailing party's expenses in the action ... including, in addition to costs otherwise authorized by law." The superior court's order stated that the cost *302 awards made under RCW 74.08.080(3) are not limited to statutory costs. We agree. RCW 74.08.080(3) provides that the appellant who prevails "shall be entitled to reasonable attorneys' fees and costs." Because RCW 4.84.010 includes costs "otherwise authorized by law" and RCW 74.08.080(3) awards the prevailing party reasonable costs, we affirm the superior court's order awarding reasonable costs to Jenkins.

Interest on Award

[4] ¶ 35 DSHS argues that the superior court's award of interest on Jenkins' award of back benefits was improper. RCW 4.56.110 provides that judgments shall bear interest from the date of entry. We have held this statute does not apply to public agencies absent a clear waiver of sovereign immunity. Specifi-

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cally, the general rule is that the State cannot be held to interest on its debts without its consent, despite the fact that RCW 4.56.110 does not expressly exempt**395 the state from its operation. *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wash.2d 439, 455-56, 842 P.2d 956 (1993). While this general rule is different in the context of contracts between a state agency and a private entity, here the parties, or Medicaid recipients, did not contract with the State. The recipients argue that their caregivers contracted with the State to provide the care hours awarded; however, the caregivers are not parties in this action. Therefore, we find no basis to support an award of interest.

CONCLUSION

¶ 36 We affirm in part and reverse in part. We affirm both the Court of Appeals decision and the trial court decision that WAC 388-106-0130(3)(b) violates the federal comparability requirement. We remand for determination, consistent with this opinion, of the amount of personal care hours DSHS wrongfully withheld from the respondents for their unmet need for assistance with housekeeping, shopping, meal preparation services, and wood supply, retroactive to ***303** the date the shared living rule was applied to their cases. We affirm the trial court's award of costs but reverse the trial court's award of interest to Jenkins and remand for re-computation. We grant respondents' reasonable attorney fees and costs on appeal.

WE CONCUR: Chief Justice GERRY L. ALEXANDER, Justice TOM CHAMBERS, Justice SUSAN OWENS, and Justice RICHARD B. SANDERS.
FAIRHURST, J. (dissenting).
¶ 37 Pursuant to legislative mandate, the Department of Social and Health Services (DSHS) developed the comprehensive assessment reporting evaluation (CARE) tool. The CARE tool provides a mechanism for uniformly assessing functional disability and allocating state-paid personal care services to individuals seeking such services. One component of the CARE tool, the shared living rule,[FN1] adjusts the allocation of services when an individual lives with his or her paid caregiver. The majority concludes that the shared living rule violates the federal Medicaid comparability provision, which requires a state to make available to an individual the same "amount, duration, [and] scope [of] medical assistance" as it makes available "to any other such individual." 42 U.S.C. § 1396a(a)(10)(B)(i). I disagree.

FN1. Former WAC 388-72A-0095 (2004), *amended and recodified at* WAC 388-106-0130(3)(b) (2005).

¶ 38 First, I disagree with the majority's position that DSHS should be accorded no administrative deference in our review of the shared living rule. Unlike the majority, I do not believe that the comparability provision clearly indicates Congress's intent with respect to the specific question before us. Properly framed, that question is-what factors may be considered when assessing the relative needs of individuals seeking Medicaid assistance? On this question the comparability provision is silent. Given that silence, I would accord DSHS some measure of deference based on its expertise in administering the State's Medicaid program.

***304** ¶ 39 Second, I disagree with the majority's claim that the shared living rule is invalid because " 'presum[ing]' some recipients need fewer hours of care without individualized determination violates the comparability requirement." Majority at 393. While I agree that the shared living rule operates as a presumption, it is just one of the many presumptions in the CARE tool. Furthermore, properly understood, the CARE tool does not produce any individualized determinations of the need for services.

¶ 40 Accepting the majority's premise that the shared living rule violates the comparability provision because it reduces services without an individualized determination establishes a sweeping precedent that could affect not only the CARE tool but the way all public assistance benefits are allocated. The majority's reasoning does not distinguish a principled basis upon which this court should substitute our judgment for that of DSHS in this instance with respect to the shared living rule, but refrain from doing so with respect to other similar presumptions in the CARE ****396** tool. As a properly promulgated administrative rule, the shared living rule is presumptively valid and should be upheld if it is reasonably consistent with the comparability provision. In my opinion, because the majority has not demonstrated a principled basis for distinguishing between the shared living rule and other CARE tool rules, the majority has not overcome that presumption of validity. This conclusion is strengthened by granting even the most minimal def-

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erence to DSHS's expertise. I would hold that the shared living rule does not violate the comparability provision. Accordingly, I respectfully dissent.

ANALYSIS

A. *Administrative Deference*

¶ 41 The majority concludes, almost without discussion, that DSHS should be accorded no deference to its interpretation of the comparability provision. Majority at 392. I disagree. Whether DSHS should be accorded any deference ***305** requires a more robust analysis of the comparability provision than the majority puts forth. While I agree that "the comparability provision requires comparable services where individuals have comparable needs," majority at 392, the needs of individuals can be compared only after they have been assessed and quantified. Because the comparability provision is silent on that specific question, *Chevron* deference [FN2] is warranted to the reasonable interpretation of the provision by the federal agency charged with administering it. That agency has determined that states may consider shared living circumstances in assessing needs and allocating services. Pursuant to state legislative mandate to ensure a uniform system for assessing needs and allocating services, DSHS developed the CARE tool and included a component that considers an individual's shared living circumstances. While not required to consider such circumstances, DSHS in its expertise determined that doing so was appropriate. That determination is entitled to some measure of administrative deference from this court.

FN2. *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

¶ 42 The majority suggests that no deference is warranted to DSHS "because the Medicaid comparability provision *is specific* in demonstrating Congress' intent to provide comparable services to similarly situated recipients." Majority at 392 (emphasis added). The comparability provision mandates simply that the medical assistance that a state makes available to an individual under its Medicaid plan shall not be less "in amount, duration, or scope" than that made available to others who qualify for medical assistance under that plan.[FN3] 42 U.S.C. § 1396a(a)(10)(B)(i). ***306** The comparability provision does not mandate that a state provide all qualifying individuals with identical quantities of services, regardless of their needs for services. Such a requirement would defy logic. Rather, as the majority agrees, "the comparability provision requires comparable services [only where] individuals have comparable needs." Majority at 392. However, what the majority fails to note is that the comparability provision is silent as to *how* states should quantify the relative needs of those to whom it must provide comparable services.

FN3. The comparability provision requires that a state Medicaid plan must provide:

> (B) that the medical assistance made available *to any individual described* in subparagraph (A)-
>
> (i) shall *not be less* in amount, duration, or scope *than* the medical assistance made available *to any other such individual,* and
>
> (ii) shall *not be less* in amount, duration, or scope *than* the medical assistance made available *to individuals not described* in subparagraph (A).
>
> 42 U.S.C. § 1396a(a)(10)(B) (emphasis added).

Subparagraph A defines the categories of individuals to whom a state must provide medical assistance as part of its Medicaid plan, 42 U.S.C. § 1396a(a)(10)(A)(i), and to whom a state may provide assistance if it chooses. 42 U.S.C. § 1396a(a)(10)(A)(ii).

¶ 43 The Centers for Medicare & Medicaid Services (CMS), the federal agency charged with administering the Medicaid program,[FN4] has promulgated regulations interpreting the comparability provision. ****397** When a court reviews a federal statute, "if the statute is silent or ambiguous with respect to the specific issue," and the federal agency administering the statute has promulgated a regulation construing it, the "court may not substitute its own construction ... for a reasonable interpretation made by" the agency. *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 81

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L.Ed.2d 694 (1984). One CMS regulation interpreting the comparability provision essentially paraphrases it.[FN5] A second CMS regulation interpreting sufficiency of "amount, duration, and scope" of services provides that, while "[e]ach service must be sufficient in amount, duration, and scope to reasonably achieve its purpose[,] ... [t]he agency may place appropriate limits ***307** on a service based on such criteria as ... utilization control procedures." 42 C.F.R. § 440.230(a)(2)(b), (d). By clarifying that a state may appropriately limit its provision of a service, CMS indicates that such service limitations do not per se violate the comparability provision. Using the language "on such criteria as" indicates that "utilization control procedures" are illustrative, not exhaustive, of the type of criteria by which a state may permissibly limit the provision of services.

FN4. *Pharm. Research & Mfrs. of Am. v. Walsh,* 538 U.S. 644, 651 n. 3, 123 S.Ct. 1855, 155 L.Ed.2d 889 (2003).

FN5. 42 C.F.R. § 440.240 provides:

(b) The plan must provide that the services available to any individual in the following groups are equal in amount, duration, and scope for all recipients within the group:

(1) The categorically needy.

(2) A covered medically needy group.

¶ 44 CMS has provided further guidance specifically addressing a state's provision of Medicaid state-paid personal care services in shared living situations. "When an agency construes its own regulations, [judicial] deference is particularly appropriate, and even more appropriate where, as here, [the court] consider[s] a small corner of a labyrinthine statute." *Skandalis v. Rowe,* 14 F.3d 173, 178 (2d Cir.1994) (deferring to interpretation of Medicaid statutes and regulations advanced by the secretary of the Department of Health and Human Services). In its guide to the provision of Medicaid home care services, CMS states that, to be Medicaid-reimbursable, "services must address the beneficiary's needs. This means that services cannot be furnished if they principally benefit the 'family unit.' " U.S. Dep't of Health & Human Servs., *Understanding Medicaid Home and Community Services: A Primer* 131 (Oct.2000) (located in Rule Making File, *Gasper v. Dep't of Soc. & Health Servs.,* No. 04-2-01400-7, at SHS-0005 to 06). States may take into account the amount of informal care available to an individual. *Id.* Consideration may also be given to "the kinds of household tasks family members typically expect to share ... when they live in the same household." *Id.*

¶ 45 Because the comparability provision is silent on the specific question here-what factors may be considered when assessing the relative needs of individuals seeking Medicaid assistance-I believe that the CMS regulations and guidance interpreting the provision should be accorded this court's deference. Thus, as CMS clarifies, a state does not violate the comparability provision by giving appropriate***308** consideration to individuals' shared living circumstances when allocating state-paid personal care services.

¶ 46 At the state level, this court interprets the meaning of statutes de novo and may substitute its interpretation for that of an agency, but if the statute is ambiguous, " '[w]here a statute is within [an] agency's special expertise, the agency's interpretation is accorded great weight.' " *Port of Seattle v. Pollution Control Hearings Bd.,* 151 Wash.2d 568, 593, 90 P.3d 659 (2004) (alterations in original) (quoting *Postema v. Pollution Control Hearings Bd.,* 142 Wash.2d 68, 77, 11 P.3d 726 (2000)).

¶ 47 The legislature expressly charged DSHS with developing a uniform system for comprehensively assessing the need of functionally disabled individuals for medical services. *See* RCW 74.09.520(4); RCW 74.39.005(2). In response, DSHS developed the CARE tool, through which it evaluates eligibility for and allocates state-paid personal care services to functionally disabled individuals.****398** WAC 388-106-0005 to -0130.[FN6] DSHS incorporated into the CARE tool a formula for adjusting an individual's allocation of state-paid personal care services to reflect the amount of informal support that individual receives. Built into the informal support formula is consideration of the individual's shared living circumstances. Given that CMS's authoritative interpretation of the comparability provision permits consideration of such circumstances, I believe that DSHS's decision to consider shared living circumstances and its mechanism for such consideration is entitled to some measure of administrative deference. However,

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administrative deference, while warranted, does not itself resolve whether the shared living rule violates the comparability provision, the question to which I now turn.

FN6. The WAC provisions dealing with long-term care services, including the CARE assessment tool, former chapter 388-72A WAC (2004), were recodified at chapter 388-106 WAC. Wash. St. Reg. 05-11-082 (June 17, 2005). This opinion cites to the current WAC provisions which are substantially the same as the provisions in place when respondents were evaluated.

***309** B. *Shared Living Rule Presumption*

¶ 48 "[T]he question is whether DSHS exceeded its statutory authority by promulgating a rule that conflicts with federal law, namely [the shared living rule]." Majority at 391. " '[A]dministrative rules adopted pursuant to a legislative grant of authority are presumed to be valid and should be upheld on judicial review if they are reasonably consistent with the statute being implemented.' " *Campbell v. Dep't of Soc. & Health Servs.*, 150 Wash.2d 881, 892, 83 P.3d 999 (2004) (alteration in original) (quoting *Fahn v. Cowlitz County*, 93 Wash.2d 368, 374, 610 P.2d 857, 621 P.2d 1293 (1980)). The burden of demonstrating the invalidity of an agency rule is on the party asserting the invalidity. RCW 34.05.570(1)(a); *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wash.2d 637, 645, 62 P.3d 462 (2003).

¶ 49 The majority reasons that the shared living rule violates the comparability provision because, as an irrebuttable presumption, the rule operates without making an individualized determination of each individual's actual need for services. Majority at 391-94. However, as I discuss below, the shared living rule is just one of the many irrebuttable presumptions in the CARE tool, a tool that does not make any individualized determinations of actual need. The majority does not articulate a principled basis upon which this court should substitute our judgment for that of DSHS in this instance with respect to the shared living rule, but refrain from doing so with respect to other presumptions in the CARE tool. In my opinion, absent that principled basis, the majority has not demonstrated that the rule's presumptive validity is overcome.

¶ 50 The majority states that the shared living rule "establishes an irrebuttable presumption that the recipient's need for assistance is met for instrumental activities of daily living (IADL) of meal preparation, housekeeping, shopping, and wood supply." Majority at 391. I agree that the shared living rule "establishes an irrebuttable presumption." However, the majority implies that in this ***310** respect the shared living rule is unique and therefore suspect. Unlike the majority, I recognize that the CARE tool is built on a framework of irrebuttable presumptions, of which the shared living rule is merely one.

¶ 51 DSHS developed the CARE tool pursuant to a legislative mandate that DSHS "[e]nsure that functional ability shall be the determining factor in defining long-term care service needs and that these needs will be determined by a *uniform system* for comprehensively assessing functional disability." RCW 74.39.005(2) (emphasis added). Each functionally disabled individual is unique in both disabilities and need for long-term care services. Nevertheless, DSHS was charged with developing a uniform system for assessing functional disability to support the equitable allocation of the State's all-too-limited resources across the pool of eligible recipients. The price of uniformity is that fit may be imprecise in a particular individual's circumstances.

¶ 52 In a CARE evaluation, an individual is assessed in each of four areas: "[c]ognitive performance," "[c]linical complexity," ****399** "[m]ood/behaviors symptoms," and ability to perform "[a]ctivities of daily living (ADLs)." WAC 388-106-0085. Cognitive performance is scored from "zero (intact) to six (very severe impairment)." WAC 388-106-0090. Clinical complexity and mood/behaviors are each answered either yes or no. WAC 388-106-0095, -0100. Ability to perform ADLs is scored from 0 to 28. WAC 388-106-0105. Using an individual's scores in each of the four areas, the CARE tool assigns the individual to one of 14 classification groups.[FN7] WAC 388-106-0125. By administrative rule DSHS has assigned to each classification group a base number of ***311** hours per month for personal care services, ranging from 29 to 420 hours. WAC 388-106-0125.

FN7. The majority states that the CARE "scores are put into a formula that calculates the individual's base assistance level in

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hours of care, and places the individual into one of 14 residential classification groups." Majority at 389. This explanation suggests, inaccurately, that a base number of required care hours is calculated for each individual directly from that individual's CARE scores, through an individualized determination process. To the contrary, CARE scores are used to assign an individual to one of the 14 groups. Each group has been designated a base number of hours. That base number is then adjusted depending on the individual's circumstances.

¶ 53 Assigning an individual to a classification group is only the initial step in determining how many hours of state-paid personal care services per month the state can provide to an individual. WAC 388-106-0130. DSHS then "deducts from the base hours to account for informal supports." [FN8, FN9] WAC 388-106-0130(2). The adjustment is based upon "the amount of [informal] assistance available to meet [the recipient's] needs" in performing each of nine ADLs [FN10] and four IADLs [FN11] during the seven days immediately preceding the assessment. WAC 388-106-0130(2)(a). For each of the ADLs and IADLs, the available informal support is deemed to have not met, partially met,[FN12] or fully met the individual's need. As with other components in the CARE tool, the gathered information is translated into scores.

FN8. An " '[i]nformal support' " is "a person or resource that is available to provide assistance without home and community program funding." WAC 388-106-0010.

FN9. DSHS may also add hours based on an individual's living environment, in consideration of the individual's distance from essential services (laundry, shopping) and exclusive reliance on wood for heat. WAC 388-106-0130(4).

FN10. The nine ADLs assessed for the availability of informal support are (1) self-administration of medications, (2) bed mobility, (3) transfer, (4) walk in room, (5) eating, (6) toilet use, (7) dressing, (8) personal hygiene, and (9) bathing. WAC 388-106-0010. This list shares ADLs in common with, but is not identical to, the activities considered in assessing an individual's ADL score, used in assigning an individual to a classification group. WAC 388-106-0105.

FN11. The four IADLs assessed are meal preparation, ordinary housework (including laundry), essential shopping, and travel to medical. WAC 388-106-0130(2); *see also* WAC 388-106-0010 (defining "[o]rdinary housework" as "doing dishes, dusting, making bed, tidying up, laundry").

FN12. The assessment of partially met is further subdivided into four quartiles of (1) less than one-fourth of the time, (2) between one-fourth and one-half of the time, (3) between one-half and three-fourths of the time, and (4) more than three-fourths of the time. WAC 388-106-0130(2).

¶ 54 The shared living rule operates within the context of the deduction for informal support-where an individual ***312** lives together with his or her paid caregiver,[FN13] the individual's need for housekeeping, essential shopping, and meal preparation are presumed to be met.[FN14] As the majority states, the shared living rule "was implemented on the theory that if caregivers must clean their own houses, go shopping, and cook meals for their own benefit, certain duplication of efforts are presumed, and ... a state should not pay for those tasks that benefit the entire household." Majority at 390; WAC 388-106-0130(2)(a). A mathematical formula ****400** translates an individual's total score for informal support, including the scores determined by the presumption of the shared living rule, into a percentage by which the base number of hours is reduced. WAC 388-106-0130(2)(b). This final adjusted amount, the product of the complete CARE assessment, represents the number of state-paid personal care service hours per month for which the individual qualifies.

FN13. The shared living rule also applies if an individual lives together with another individual receiving state-paid personal services. WAC 388-106-0130(3)(a).

FN14. The majority suggests that "[i]f the recipient lives with a caregiver, a second formula is applied to reduce the number of care hours for which the recipient qualifies."

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' Majority at 389. This is inaccurate. The shared living rule is applied within the adjustment for informal supports, using the same formula. WAC 388-106-0130. '

¶ 55 The enterprise of reducing the infinite variety of a diverse population to a set of numeric scores and yes or no answers intrinsically requires using irrebuttable presumptions. For example, DSHS has determined by rule that an individual is clinically complex only if he or she has one of a designated list of conditions in combination with the ADL score required for that particular condition. WAC 388-106-0095. An individual with cerebral palsy and an ADL score of more than 14 is deemed clinically complex, while with a score of 14 or less he or she is not. *Id.* By contrast, an individual who requires dialysis need only have an ADL score of more than 10 to be deemed clinically complex. *Id.* An individual may request that DSHS review factual error in an assessment, *e.g.,* dialysis is required where the ***313** assessment says it is not. But an individual cannot successfully argue that, in her particular case, having cerebral palsy plus an ADL score of 12 makes her clinically complex. Each determination that a select condition and a requisite ADL score is clinically complex or not is an irrebuttable presumption.

¶ 56 I agree with the majority that the shared living rule operates as an irrebutable presumption, but it is just one of many irrebutable presumptions that comprise the CARE tool. Irrebuttable presumptions delineate the 14 classification groups, provide the framework that translates assessment scores into those groups, and allocate the interim base number of hours to each group. The nature of a presumption is that it will not match precisely the particular circumstances of every individual to whom it is applied. But it is only through the operation of a framework of presumptions that DSHS is able to create a "*uniform system* for comprehensively assessing functional disability." RCW 74.39.005(2) (emphasis added). The majority's implication that the shared living rule is particularly suspect because it is an irrebutable presumption does not withstand scrutiny.

¶ 57 Having established that the shared living rule is an irrebuttable presumption, the majority then claims that the rule is invalid because "[t]o 'presume' some recipients need fewer hours of care without individualized determination violates the comparability requirement." Majority at 393. This claim rests on the majority's inaccurate suggestion that "DSHS decided on individualized determinations of public assistance benefits for this categorically needy group of Medicaid recipients," only to deny individualized determinations to the respondents and others like them by applying the shared living rule. *Id.* at 393. In fact, the respondents *are* treated in the same manner as other Medicaid recipients because *no* recipient is individually assessed as to his or her need for housekeeping, shopping, and meal preparation.

¶ 58 Contrary to the majority's claim that "[a] recipient who *does not* live with a caregiver is assessed an amount ***314** needed for meal preparation, housekeeping, and shopping," but a recipient who *does* live with a caregiver is assessed with different criteria, *id.* at 393, the base number of hours allocated to each of the 14 classification groups incorporates assistance with these tasks. All recipients, whether they do or do not live with their caregivers, uniformly receive the interim base hour allocation assigned to their classification groups. Then that base number of hours is reduced in consideration of the informal support that an individual receives to meet IADL and ADL needs. DSHS never evaluates how many hours of assistance an individual actually requires to meet his or her IADL and ADL needs.

¶ 59 The majority finds it significant that the shared living rule "reduces" the initial allocation of a base number of hours, stating that "[o]nce a person is assessed to require and receive a certain number of care hours, the assessment cannot be reduced absent a specific showing that fewer hours are required." *Id.* at 393. However, the base ****401** number of hours is *not* a number of hours that an individual has been specifically assessed to require-the base number is a nonspecific, interim allocation associated with the classification group, which may or may not be sufficient to meet the individual's actual needs. Additionally, the informal support adjustment likewise "reduces" the base number without a "specific showing that fewer hours are required." For example, the determination that an individual's needs are met between one-half and three-fourths of the time results in a standard percentage reduction of the base number of hours. Just as there is no initial determination of how many hours are actually required to meet the individual's needs absent informal support, there is no subsequent evaluation of whether the reduced hours

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are sufficient to meet the need that is unmet by informal support. Finally, the fact that the shared living rule "reduces" the base number of hours is an artifact of how the CARE tool is programmed. The CARE tool could just as easily have been designed to allocate to each classification group a lower base number of hours that would then be adjusted upward ***315** depending on access to informal support, living circumstances, and other factors.

¶ 60 As part of the informal support evaluation, if an individual lives with a paid caregiver, the shared living rule presumes that housekeeping, shopping, and meal preparation needs are fully met. On the other hand, no adjustment is made for informal support that the paid caregiver provides with ADL needs, notwithstanding that such support could be substantial, especially where the paid caregiver is also a family member or friend of the recipient. The majority's claim that "DSHS's refusal to consider the individual needs of [the respondents] for assistance with housekeeping, shopping, and meal preparation violates their right to be treated in the same manner as all other categorically needy Medicaid recipients who are individually assessed for the same needs," betrays the majority's fundamental misunderstanding of how the CARE tool operates. Majority at 393. The CARE tool does not operate by assessing each individual's particular need for assistance. The entire CARE process is based on presumptions and approximations, regardless of whether an individual does or does not live with his or her caregiver.

¶ 61 The majority even acknowledges that "DSHS may use the CARE assessment program to initially classify, rate, and determine a recipient's level of need because this process is consistent with the Medicaid program's purpose." *Id.* In this the majority seemingly endorses the need to employ the CARE tool's presumption-based system. However, the majority then continues, "DSHS violates the comparability requirement when it reduces a recipient's benefits based on a consideration other than the recipient's *actual need.*" *Id.* (emphasis added). The CARE tool does not-cannot-allocate state-paid personal care services based on individuals' actual need. DSHS is charged with fairly allocating an all too limited pool of resources across a population of individuals whose needs far exceed what the State is able to provide. Each individual is unique, with unique abilities, disabilities, medical conditions, and circumstances.***316** Given the mandate to develop a "uniform system for comprehensively assessing functional disability," RCW 74.39.005(2), DSHS is constrained to proceed by formulating a framework of presumption-defined determinations, which it has encapsulated in the CARE tool.

CONCLUSION

¶ 62 Ultimately, the majority invalidates the shared living rule "to the extent that it presumes certain needs of the recipient are met without an individualized determination and, the presumption results in an automatic 15 percent reduction in the recipient's assessed number of allotted care hours based only on the fact that the recipient lives with a caregiver." Majority at 393-94. This conclusion describes how the shared living rule operates, but not why that mode of operation renders the shared living rule invalid.

¶ 63 The majority's reasoning does not distinguish a principled basis upon which this court should substitute our judgment for that of DSHS in this instance with respect to the shared living rule, but refrain from doing so with respect to other presumptions in the CARE tool. As a properly promulgated administrative****402** rule, the shared living rule is presumptively valid and should be upheld if it is reasonably consistent with the comparability provision. In my opinion, because the majority has not demonstrated a principled basis for distinguishing between the shared living rule and other CARE tool rules, the majority has not overcome the rule's presumptive validity. This conclusion is strengthened by granting even the most minimal deference to DSHS's expertise. Therefore, I would hold that the shared living rule does not violate the comparability provision. Accordingly, I respectfully dissent.

WE CONCUR: Justice BARBARA A. MADSEN and Justice BOBBE J. BRIDGE.
Wash.,2007.
Jenkins v. Washington State Dept. of Social and Health Services
160 Wash.2d 287, 157 P.3d 388, Med & Med GD (CCH) P 302,080

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C

Supreme Court of Washington, En Banc.
David C. KELSO and Wilhelmina S. Kelso, his wife, Appellants,
v.
CITY OF TACOMA, a Municipal Corporation, Respondent.
No. 36625.

March 5, 1964.

Action against city for injuries sustained in automobile collision with vehicle owned by city and operated on streets of city by one who was on duty and acting within the scope of his employment as a police officer for the city. The Superior Court, Pierce County, John D. Cochran, J., entered judgment of dismissal upon a motion for summary judgment, and the plaintiffs appealed. The Supreme Court, Hunter, J., held that a municipal corporation, a subdivision of the state, retains no governmental immunity for tortious acts of its agents while performing a governmental function in view of statute wherein the state has consented to be sued for its tortious conduct.

Reversed and remanded for further proceedings.

Hill and Donworth, JJ., and Dawson, J. pro tem., dissented.

West Headnotes

[1] Municipal Corporations 268 ⚷745.5

268 Municipal Corporations
268XII Torts
268XII(B) Acts or Omissions of Officers or Agents
268k745.5 k. Performance of Governmental or Corporate Functions in General. Most Cited Cases
(Formerly 268k7451/2)
A municipal corporation, a subdivision of the state, retains no governmental immunity for the tortious acts of its agents while performing a governmental function in view of enactment of statute wherein state has consented to be sued for its tortious conduct. RCWA 4.92.090.

[2] States 360 ⚷191.1

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.1 k. In General. Most Cited Cases
(Formerly 360k191(1))
The doctrine of governmental immunity springs from archaic concept that "The King Can Do No Wrong."

[3] Constitutional Law 92 ⚷2513

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2499 Particular Issues and Applications
92k2513 k. Governmental Immunity. Most Cited Cases
(Formerly 92k70.1(12), 92k70(1))
The doctrine of governmental immunity is a matter of state's policy which can be changed only by legislature. RCWA 4.92.090.

[4] Municipal Corporations 268 ⚷1016

268 Municipal Corporations
268XVI Actions
268k1016 k. Capacity to Sue or Be Sued in General. Most Cited Cases
The common-law right of sovereign immunity is not in the municipality but in the sovereign from which the immunity is derived. RCWA 4.92.090.

[5] Statutes 361 ⚷212.1

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k212 Presumptions to Aid Construction
361k212.1 k. Knowledge of Legislature. Most Cited Cases
A statute is presumed to have been enacted in the

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light of existing judicial decisions that have a direct bearing upon it.

[6] Constitutional Law 92 ⚷2513

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2499 Particular Issues and Applications
92k2513 k. Governmental Immunity. Most Cited Cases
(Formerly 92k70.1(12), 92k70(1))

Statutes 361 ⚷212.1

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k212 Presumptions to Aid Construction
361k212.1 k. Knowledge of Legislature. Most Cited Cases
The legislature is presumed to know the theory upon which municipal corporations of the state have been granted immunity under existing law; if it desired to preserve doctrine of governmental immunity for these political subdivisions, it should have so stated; and the legislature, not the courts, must find the remedy for their omission. RCWA 4.92.090.

[7] Statutes 361 ⚷181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most Cited Cases
When a statute is susceptible of reasonable interpretation, it is Supreme Court's duty to carry out manifest intent of legislature.
***913 **3** Sterbick, Manza, Moceri & Sterbick, Tacoma, for appellants.

Brethorst, Fowler, Bateman, Reed & McClure, Seattle, for respondent.

***914** John P. Tracy, Jr., City Atty., Howard A. Anderson, Theodere R. Fournier, and LeRoy C. Kinnie, Spokane, for City of Spokane and Assn. of Wash. Cities, amicus curiae.

HUNTER, Judge.

The plaintiff (appellant), Wilhelmina S. Kelso, was injured in an automobile collision with a vehicle owned by the defendant (respondent), City of Tacoma, on August 30, 1961. At the time of the accident the vehicle was being operated on the streets of Tacoma by Officer Fred D. Mulholland, who was on duty and acting within the scope of his employment as a police officer for the City of Tacoma. The plaintiff appeals from a judgment of dismissal entered upon a motion for summary judgment.

[1] The sole question in this case is whether a municipal corporation, a subdivision of the state, retains governmental immunity for the tortious acts of its agents while performing a governmental function in view of RCW 4.92.090 wherein the state consents to be sued for its tortious conduct.

[2] The doctrine of governmental immunity springs from the archaic concept that 'The King Can Do No Wrong.' We listed categorically reasons in support of the doctrine in Hagerman v. Seattle, 189 Wash. 694, 66 P.2d 1152, 110 A.L.R. 1110 (1937):

'* * * (1) The state is sovereign, and the municipality is its governmental agency; since the state may not be sued without its consent, therefore its agent cannot be. (2) The municipality derives no pecuniary benefit from ****4** the exercise of public functions. (3) Members of municipal departments in the exercise of public governmental duties are agents of the state and not of the city, and hence the doctrine of *respondeat superior* has no application. (4) It is necessary for the proper performance of governmental functions that a municipal corporation should not be liable for the negligence of its agents. (5) Municipalities should not be liable for torts committed in the performance of duties imposed by the Legislature, but only for those voluntarily assumed under general statutes. And (6) taxes raised for specific governmental purposes should not be permitted to be diverted to the payment of damage claims.'

All of these reasons have been subjected to vigorous attacks. Many courts and text writers have branded

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the doctrine a creator of injustice, asserting that the entire ***915** burden of damage resulting from the wrongful acts of the government has been imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any single individual, and where it properly belongs. The criticism directed toward the doctrine is characterized in Holytz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962):

'There are probably few tenets of American jurisprudence which have been so unanimously berated as the governmental immunity doctrine. This court and the highest courts of numerous other states have been unusually articulate in castigating the existing rule; text writers of law reviews have joined the chorus of denunciators. Some examples of the condemnation are here presented.'

See Abolition of Sovereign Immunity in Washington, 36 Wash.L.Rev. 312 (1961); Leflar & Kantrowitz, Tort Liability of the States, 29 N.Y.U.L.Rev. 1363 (1954).

[3] This court has consistently held that the doctrine of governmental immunity is a matter of state policy which can be changed only by the legislature. This established pronouncement was recently stated in Kilbourn v. Seattle, 43 Wash.2d 373, 261 P.2d 407 (1953). We said:

'Appellant strenuously urges that the rule of immunity from liability for negligence by a municipal corporation while engaged in the exercise of a governmental function should be changed, and cites numerous authorities.

'This argument has been considered by this court and rejected. In Hagerman v. City of Seattle, 1937, 189 Wash. 694, 66 P.2d 1152, 1154, 110 A.L.R. 1110, we recognized that all of the reasons for such immunity had been subjected to vigorous attack, but said that

"* * * the doctrine has become fixed as a matter of public policy, regardless of the reason upon which the rule is made to rest, and * * * any change therein must be sought from the legislature.'

'That opinion was written almost sixteen years ago. A review of cases and legal literature dealing with the governmental immunity defense in the intervening years offers convincing evidence of a growing demand for *legislation* that would require municipal corporations, if not the state itself, to bear the same responsibility for their negligence ***916** as do private corporations; but it is generally recognized, as we indicated in the Hagerman case, supra, that the rule of governmental immunity has become so firmly fixed as a part of the law of municipal corporations that it is not to be disregarded by the courts until the legislature announces a change in public policy.'

The legislature made this announcement of a change in the public policy of Washington by enacting Laws of 1961, chapter ****5** 136, § 1 (codified as RCW 4.92.090). It reads as follows:

'The state of Washington, whether acting in its governmental or proprietary capacity, hereby consents to the maintaining of a suit or action against it for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation. The suit or action shall be maintained in the county in which the cause of action arises: *Provided,* That this section shall not affect any special statute relating to procedure for filing notice of claims against the state or any agency, department or officer of the state.'

The defendant contends this statute is in derogation of the common law and must be strictly construed; that only the liability of the state has been affected and not its political subdivisions.

[4] The common-law right of sovereign immunity is not in the municipality but in the sovereign from which the immunity is derived. In Hutton v. Martin, 41 Wash.2d 780, 252 P.2d 581 (1953), we cited with approval City of Seattle ex rel. Dunbar v. Dutton, 147 Wash. 224, 265 P. 729 (1928), and Riddoch v. State, 68 Wash. 329, 123 P. 450, 42 L.R.A.,N.S., 251 (1912), as follows:

"Municipal corporations enjoy their immunity from liability for torts only in so far as they partake of the state's immunity, and only in the exercise of those governmental powers and duties imposed upon them as representing the state. In the exercise of those administrative powers conferred upon, or permitted to, them *solely for their own benefit in their corporate*

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capacity, whether performed for gain or not, and whether of the nature of a business enterprise or not, they are neither sovereign nor immune. They are only sovereign and only immune in so far as they represent***917** the state. *They have no sovereignty of their own*, they are in no sense sovereign *per se*.

Their immunity, like their sovereignty, is in a sense borrowed, and the one is commensurate with the other. Such is, in effect, the conclusion reached in Hill v. Boston, 122 Mass. 344, 23 Am.Rep. 332, after a most exhaustive review of the authorities, both American and English. The same principle underlies our own decisions. Sutton v. [City of] Snohomish, 11 Wash. 24, 39 P. 273, 48 Am.St.Rep. 847; Russell v. Tacoma, 8 Wash. 156, 35 P. 605, 40 Am.St.Rep. 895; Cunningham v. Seattle, 42 Wash. 134, 84 P. 641, 40 L.R.A., N.S., 629; Linne v. Bredes 43 Wash. 540, 86 P. 858, 6 L.R.A.,N.S., 707, 117 Am.St.Rep. 1068."

[5][6] A familiar and fundamental rule for the interpretation of a statute is that it is presumed to have been enacted in the light of existing judicial decisions that have a direct bearing upon it. In re Moffitt's Estate, 153 Cal. 359, 95 P. 653, 20 L.R.A.,N.S. 207 (1908). See State v. Berry, 200 Wash. 495, 93 P.2d 782 (1939); In re Big Blue Min. Co., D.C., 16 F.Supp. 50 (1936); 50 Am.Jur., Statutes § 321. The legislature is presumed to know the theory upon which municipal corporations of the state have been granted immunity under the existing law. If it desired to preserve the doctrine of governmental immunity for these political subdivisions, it should have so stated; and the legislature, not the courts, must find the remedy for their omission.

In 1939, the legislature in the state of New York abrogated the doctrine of governmental immunity by enacting a statute very similar to ours. The New York constitution provides for the establishment of a court of claims to hear claims against the state. New York Const. Art. 6, § 23. The pertinent portion of the New York Court of Claims Act enacted pursuant to that provision reads as follows:

'The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance****6** with the same rules of law as applied to actions in the supreme court against individuals or corporations * * *.' New York Court of Claims Act, Art. 2, § 8.

In Bernadine v. New York 294 N.Y. 361, 62 N.E.2d 604, 161 A.L.R. 364 (1945), the court said:

***918** '* * * On the waiver by the State of its own sovereign dispensation, that extension naturally was at an end and thus we were brought all the way round to a point where the civil divisions of the State are answerable equally with individuals and private corporations for wrongs of officers and employees,-*even if no separate statute sanctions that enlarged liability in a given instance.* * * * ' (Italics ours.)

In Holmes v. Erie County, 266 App.Div. 220, 42 N.Y.S.2d 243, (1943), the New York court stated:

'* * * If the immunity of the State is destroyed, as stated in Bloom v. Jewish Board of Guardians, supra [286 N.Y. 349, 36 N.E.2d 617], there is no basis for holding that the county, as a civil division of the State, is still immune. The sovereign State itself not being immune, there is no immunity to a civil division of the State. When the State waived immunity and assumed liability, the immunity of its civil division, the county, vanished also.'

This reasoning is sound and is consistent with our determination of the instant case.

[7] The defendant further argues that the 1961 Washington statute, supra, specifies that the state merely consents to be sued and this does not create any liability because it is not a clear and unequivocal waiver of governmental immunity. To place such a technical construction on the statutory language does violence to the legislative intent. When a statute is susceptible of a reasonable interpretation, it is our duty to carry out the manifest intent of the legislature. Martin v. Department of Social Sec., 12 Wash.2d 329, 121 P.2d 394 (1942); State v. Asotin County, 79 Wash. 634, 140 P. 914 (1914). If there is any room for doubt as to what was intended by the 1961 statute, it has been removed by the amendment of the 1961 statute in the 1963 legislative session. Laws of 1963, chapter 159, § 2 provides:

'The state of Washington, whether acting in its governmental or proprietary capacity, *shall be liable* for damages arising out of its tortious conduct to the

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same extent as if it were a private person or corporation.' (Italics ours.)

The legislature has clearly indicated its intention to change the public policy of the state. The doctrine of governmental***919** immunity was not preserved to the municipal branches of government. The city of Tacoma was liable for its tortious conduct, if any, at the time of the automobile collision in which the plaintiff was injured.

The summary judgment dismissing the plaintiff's action is reversed, and the cause is remanded for further proceedings. Costs will abide the final determination of the cause.

OTT, C. J., and FINLEY, ROSELLINI, HAMILTON and HALE, JJ., concur. FINLEY, Judge (concurring specially).

In Macy v. Town of Chelan (1962), 59 Wash.2d 610, 369 P.2d 508, I joined the dissent because the views set out therein by Foster, J., were in my judgment most cogent and convincing-in fact, well nigh unanswerable. Thus, in the instant case, agreement with the majority is in order. I have signed it; however, the turn of events here involved requires at least the burning of the above small votive candle, and inspires the highlighting of several considerations which loom large in my evaluation respecting the reasoning and conclusions in the Macy dissent, supra, and the majority opinion herein.

****7** First, of all, in the instant case I do not agree with the position of the dissent that there is some doubt regarding the significance of the action of the legislative branch of state government in enacting (a) Laws of 1961, chapter 136, § 1, RCW 4.92.090, and (b) Laws of 1963, chapter 159. But assuming, arguendo, that there may be some lingering doubt, I would, in what seems to me the cause of more contemporary or perhaps ultimate justice, specifically overrule Kilbourn v. City of Seattle (1953), 43 Wash.2d 373, 261 P.2d 407, and any other decisions of this court *insofar as they may be controlling or may provide support for the summary judgment* entered in the instant case. This, I think, should find convincing support in the following:

The doctrine of sovereign immunity is in essence a common-law type of product, customized or synthesized by the judicial branch of government. In accepting or assuming, as the case may be, the responsibility for initiating judge-***920** made rules of law or precedents in the common-law field, the judiciary (in the best common-law tradition) should also accept or assume some responsibility for re-examining such rules of law or precedents in terms of continuing reasonableness or workability. In other words, judge-made rules in the common-law area of Anglo-American jurisprudence, although consistent with the needs and norms, morals and mores, of a given time, do not necessarily remain so. Failure or refusal of the judiciary to re-examine an established common-law solution of a given problem is not justified automatically and completely by a judicial declaration of deference to legislative handling of the problem. It is more than naive to assume the legislative branch will act affirmatively on matters involving governmental immunity from tort liability simply because the judicial branch defers, and refers the problems to the legislature for handling. In common parlance, the best bill gets nowhere in the legislature without considerable organized support.[FN1] Relative to policy determinations in the common law field, the judicial branch certainly is as capable of expertise and good judgment as the legislative branch and has equal or possibly even greater responsibilites *pro bono publico*. Furthermore, reconsideration of common-law doctrine on an *ad hoc* basis-which of course is *stare decisis* in the best and most enlightened sense and, historically, is the *modus operandi* of the common law-could be less jarring in effect and, perhaps, could be accomplished with more consistency and finesse than if undertaken by less deliberate and more embracing or inclusive legislative action.

FN1. See The Role of the Courts and Legislatures in the Reform of Tort Law by Cornelius J. Peck, 48 Minnestoa Law Review 265 (December 1963).

It has been said by some that the doctrine of sovereign immunity was justified in an earlier and pastoral era as a protection for limited governmental revenues; furthermore, that the doctrine soundly served the best interests of the community as a protective shield against unexpected liability and damages for official negligence which might otherwise necessitate budgetary cut-backs of expanding governmental services in certain other desirable areas.

***921** Despite the fears of other years, the time seems

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propitious for reconsideration of the doctrine of governmental immunity and the theoretical bases therefor, not only by the legislative branch (as witnessed in the recent legislation cited above), but also by the judicial branch (as witnessed by the dissent in Macy and the majority in the instant case). Among other things, liability insurance of all kinds and varieties, modernly, is available to protect the public treasury and to assure the financial stability and continuity of government services in vital categories. Lastly, it is apparently the practice of numerous units of government today to carry public liability insurance (ostensibly upon the payment of reasonable premiums), possibly anticipating substantial deterioration of the protection heretofore afforded by the doctrine of government immunity.

****8** HILL, Judge (dissenting).
The majority says that the legislature has done that which we have said it ought to do,[FN1] and has eliminated in this stage governmental immunity of a city for the tortious acts of its agents while performing a governmental function.

FN1. Kilbourn v. Seattle (1953), 43 Wash.2d 373, 261 P.2d 407; Hagerman v. Seattle (1937), 189 Wash. 694, 66 P.2d 1152, 110 A.L.R. 1110.

As an individual, I am moved to cheers; it is good riddance. As a member of this court, I am compelled to state my opinion: That the legislature did not do any such a thing. I truly regret that, i cannot join with my brethren in their appraisal of what the legislature intended by Laws of 1961, chapter 136, § 1,[FN2] and Laws of 1963, chapter 159, § 2.[FN3]

FN2. 'The state of Washington, whether acting in its governmental or proprietary capacity, hereby consents to the maintaining of a suit or action against it for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation. The suit or action shall be maintained in the county in which the cause of action arises: *Provided,* That this section shall not affect any special statute relating to procedure for filing notice of claims against the state or any agency, department or officer of the state.'

FN3. 'The state of Washington, whether acting in its governmental or proprietary capacity, *shall be liable* for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

***922** The language of these statutes, as set forth in the footnotes, is no more than a waiver by the state of its right to assert the defense of governmental immunity in an action against the state, and it is no more than wishful thinking to say that the legislature thereby intended to waive, for the City of Tacoma or any other city, its right to that defense.

The majority says that the words 'state of Washington,' in the statutes quoted in the footnotes, mean all the cities in the state of Washington too. And then it says:

'* * * If it [the legislature] desired to preserve the doctrine of governmental immunity for these political subdivisions, it should have so stated; and the legislature, not the courts, must find the remedy for their omission.'

It seems to me that the logic is all the other way and that we could more aptly say:

'If it [the legislature] desired to eliminate the doctrine of governmental immunity for these political subdivisions, it should have so stated; and the legislature, not the courts, must find the remedy for their omission.'

Most significant to me is the fact that the quoted 1963 section relied upon (footnote 3), amending the 1961 act (footnote 2), is part of a 12-section act dealing with the handling and payment of tort claims against the state and its agencies, describing the duties of the attorney general and the budget director, et al. These, by no stretch of the imagination, have any application to cities, unless any action against a city for a tort is by this legislation converted into an action against the state on the theory of respondeat superior.

Much as I would like to see the legislature make the cities (and all governmental subdivisions) liable for the torts of ***923** their agents while exercising governmental functions, I do not believe the legislature

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has done so and, therefore, I dissent.

DONWORTH, J., and DAWSON, J. pro tem., concur.
WASH. 1964
Kelso v. City of Tacoma
63 Wash.2d 913, 390 P.2d 2

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Supreme Court of Washington,
En Banc.

OUR LADY OF LOURDES HOSPITAL, Respondent,
v.
FRANKLIN COUNTY, Appellant,
and
Department of Social & Health Services, Respondents.
No. 59246-2.

Jan. 7, 1993.

Hospital brought action against county to recover payment of county jail inmates' medical costs. County asserted third-party claim against Department of Social and Health Services (DSHS) for reimbursement of any costs to be paid by county. The Superior Court, Thurston County, Robert J. Doran, J., granted summary judgment for hospital on its claim against county, and granted in part and denied in part summary judgment motions filed by county and DSHS on third-party claim. County appealed. The Supreme Court, Brachtenbach, J., held that: (1) county had to pay hospital fully for inmates' medical care costs; (2) DSHS had to fully reimburse county for medical costs of its medically indigent jail inmates, provided that inmates were eligible for DSHS's public assistance medical program; and (3) DSHS's evidence failed to raise issue of material fact as to whether legislative appropriations were insufficient to cover jail inmate hospitalization costs.

Affirmed in part, reversed in part, and remanded.

Dore, C.J., filed opinion concurring in part and dissenting in part.

West Headnotes

[1] Appeal and Error 30 ⚷893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Questions of law are review de novo on appeal from summary judgment.

[2] Prisons 310 ⚷192

310 Prisons
310II Prisoners and Inmates
310II(D) Health and Medical Care
310k191 Particular Conditions and Treatments
310k192 k. In General. Most Cited Cases
(Formerly 310k17(2))
Federal Constitution requires county to provide necessary and emergency medical care for its jail inmates.

[3] Statutes 361 ⚷181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most Cited Cases
Main goal in construing statutes is to ascertain and give effect to legislative intent.

[4] Prisons 310 ⚷419

310 Prisons
310VI Costs of Incarceration
310k419 k. Health and Medical Care. Most Cited Cases
(Formerly 310k18(6))
"Governing unit," within meaning of statute providing that "governing unit" shall make payment for emergency and other medical care for its jail inmates, is the county or city responsible for operation, supervision, and maintenance of jail. West's RCWA 70.48.020(7), 70.48.130.

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[5] Prisons 310 ⚷419

310 Prisons
310VI Costs of Incarceration
310k419 k. Health and Medical Care. Most Cited Cases
(Formerly 310k18(7), 310k18(6))
County is required by statute to fully pay hospital for county jail inmates' medical care costs, and county may then seek reimbursement from Department of Social and Health Services (DSHS). West's RCWA 70.48.130.

[6] Prisons 310 ⚷419

310 Prisons
310VI Costs of Incarceration
310k419 k. Health and Medical Care. Most Cited Cases
(Formerly 310k18(7))
Department of Social and Health Services (DSHS) is required by statute to fully reimburse city or county for medical costs of its medically indigent jail inmates, provided that inmates are eligible for DSHS's public assistance medical program. West's RCWA 70.48.130, 74.09.010 et seq.

[7] Statutes 361 ⚷227

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k227 k. Construction as Mandatory or Directory. Most Cited Cases
When used in statute, "shall" generally imposes mandatory duty.

[8] Prisons 310 ⚷419

310 Prisons
310VI Costs of Incarceration
310k419 k. Health and Medical Care. Most Cited Cases
(Formerly 310k18(7))
Reimbursement obligation of Department of Social and Health Services (DSHS) for medical costs of indigent jail inmates of city or county is not limited to what DSHS would pay to nonconfined persons. West's RCWA 70.48.130, 74.09.010 et seq.

[9] Prisons 310 ⚷419

310 Prisons
310VI Costs of Incarceration
310k419 k. Health and Medical Care. Most Cited Cases
(Formerly 310k18(7))
Reimbursement by Department of Social and Health Services (DSHS) for emergency or health care costs incurred by city or county for its jail inmates is not dependent upon terms of DSHS's medical assistance program. West's RCWA 70.48.130.

[10] Health 198H ⚷467

198H Health
198HIII Government Assistance
198HIII(B) Medical Assistance in General; Medicaid
198Hk466 Eligibility for Benefits
198Hk467 k. In General. Most Cited Cases
(Formerly 356Ak241.76, 356Ak241.75)
Jail inmates are not included in reference to "institutionalized persons" in statute stating that medical assistance may be provided in accordance with eligibility requirements established by Department of Social and Health Services (DSHS) as defined in social security state plan for mandatory categorically needy persons and individuals who would be eligible for cash assistance except for their institutional status. West's RCWA 74.09.510.

[11] States 360 ⚷130

360 States
360IV Fiscal Management, Public Debt, and Securities
360k129 Appropriations
360k130 k. Necessity. Most Cited Cases
Agency generally may not make expenditures in excess of legislative appropriations. West's RCWA 70.48.130; West's RCWA Const. Art. 8, § 4; Amend. 11.

[12] Prisons 310 ⚷419

310 Prisons
310VI Costs of Incarceration

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310k419 k. Health and Medical Care. Most Cited Cases
(Formerly 310k18(7))
Discretion set out in statute allowing Department of Social and Health Services (DSHS) generally to set rates of payment does not override, or repeal by implication, mandatory obligation in another statute to fully reimburse county for jail inmates' medical costs. West's RCWA 70.48.130, 74.09.700.

[13] Statutes 361 ⚷158

361 Statutes
361V Repeal, Suspension, Expiration, and Revival
361k158 k. Implied Repeal in General. Most Cited Cases
Repeals of enactments by implication are disfavored.

[14] Statutes 361 ⚷161(1)

361 Statutes
361V Repeal, Suspension, Expiration, and Revival
361k160 Implied Repeal by Act Relating to Same Subject
361k161 In General
361k161(1) k. In General. Most Cited Cases
Two-pronged test is used for repealer of enactment by implication: first, later act must cover entire subject matter of earlier legislation, be complete in itself, and be intended to supersede prior legislation on subject; and, second, the two acts must be so clearly inconsistent and so repugnant to each other that they cannot be reconciled.

[15] Prisons 310 ⚷419

310 Prisons
310VI Costs of Incarceration
310k419 k. Health and Medical Care. Most Cited Cases
(Formerly 310k18(7))
Evidence presented by Department of Social and Health Services (DSHS) failed to raise issue of material fact as to whether legislative appropriations were insufficient to cover jail inmate hospitalization costs so as to allow DSHS to provide less than full reimbursement to county for inmates' hospitalization costs; at most, evidence showed concern about risk of total expenditures in excess of appropriations and DSHS's view of its own discretion. West's RCWA 70.48.130.

[16] Judgment 228 ⚷185.1(6)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.1 Affidavits, Form, Requisites and Execution of
228k185.1(6) k. Execution of Affidavit. Most Cited Cases
Unsigned affidavits should not be considered in ruling on summary judgment motions.

[17] Judgment 228 ⚷185(2)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(2) k. Presumptions and Burden of Proof. Most Cited Cases
Once county established on motion for summary judgment that there was an absence of material fact as to whether it was entitled to full reimbursement from Department of Social and Health Services (DSHS) for county jail inmates' medical costs, burden shifted to DSHS as nonmoving party to produce evidence of inadequacy of legislative appropriations in order to avoid summary judgment requiring full reimbursement in favor of county. West's RCWA 70.48.130.

[18] Prisons 310 ⚷419

310 Prisons
310VI Costs of Incarceration
310k419 k. Health and Medical Care. Most Cited Cases
(Formerly 310k18(7))
County and Department of Social and Health Services (DSHS) could properly stipulate that reimbursement to county from DSHS for jail inmates' medical costs could be paid directly to health care provider, even though statute required reimbursement to governing unit. West's RCWA 70.48.130.

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[19] States 360 171

360 States
360V Claims Against State
360k171 k. Interest. Most Cited Cases
State, as matter of sovereign immunity, cannot be held to interest on its debts without its consent, despite fact that interest statute does not expressly exempt state or its political subdivisions from its operation. West's RCWA 4.56.110.

[20] Counties 104 198

104 Counties
104XI Claims Against County
104k198 k. Interest. Most Cited Cases
Counties, like cities, are political subdivisions of state subject to general rule that state cannot, as matter of sovereign immunity, be held to interest on its debts without its consent.

[21] Counties 104 198

104 Counties
104XI Claims Against County
104k198 k. Interest. Most Cited Cases
Trial court improperly imposed postjudgment interest on judgment that county had to pay to hospital for county inmates' medical costs, where there was nothing to indicate that county had consented to any obligation to pay postjudgment interest, and no statute or contract authorized such interest.
****958 *441** Dennis De Felice, Pros. Atty., and Leavy, Schultz & Sweeney, P.S., George Fearing, Special Deputy, Pasco, for appellant Franklin County.

Johnston & Roache, P.S., Mike Johnston, Pasco, for respondent Our Lady of Lourdes Hosp.

Kenneth Eikenberry, Atty. Gen., Melissa Burke-Cain, Asst. Atty. Gen., Olympia, for respondent State.

****959** BRACHTENBACH, Justice.

At issue in this case is the extent to which the Department of Social and Health Services (DSHS) must reimburse Franklin County (County) for the costs of inpatient medical care of two county jail inmates hospitalized in 1986.

In September and October 1986, two county jail inmates were hospitalized at Our Lady of Lourdes Hospital (Hospital). The hospital bills for the two inmates totaled over $43,000. The County refused to pay these costs. The Hospital sued the County, seeking payment of the inmates' medical costs. DSHS was brought in as a third party defendant, ***442** with the County asserting a claim against DSHS for reimbursement for any costs the County had to pay.

Although DSHS had previously paid for indigent jail inmates' medical care costs, at the time the two Franklin County inmates were hospitalized WAC 388-100-005 excluded inmates from eligibility for DSHS's Limited Casualty Program for the Medically Indigent (LCP-MI). DSHS maintains that the LCP-MI is the only program under which DSHS can pay medically indigent jail inmates' hospital costs.

Cross motions for summary judgment were filed by all three parties. Venue was changed from Franklin County to Thurston County where other similar actions were pending challenging, among other things, the validity of WAC 388-100-005's exclusion of eligibility for jail inmates. This case was joined with the other cases for purposes of oral argument, following which the trial court issued a memorandum opinion on the issues of a city's or county's liability for its jail inmates' health care, and whether DSHS could validly exclude jail inmates from the LCP-MI. The trial court reasoned that under RCW 70.48.130 and this court's opinion in *Harrison Mem. Hosp. v. Kitsap Cy.*, 103 Wash.2d 887, 700 P.2d 732 (1985), a city or county is obliged to fully pay to a hospital the reasonable costs of its inmates' care regardless of whether and to what extent it is reimbursed by DSHS. The trial court further ruled that DSHS could not exclude jail inmates from the LCP-MI and held invalid WAC 388-100-005's exclusion of jail inmates from eligibility.

In this case, the trial court granted summary judgment in favor of the Hospital and against the County for the full costs of the inmates' hospital expenses. The trial court entered judgment against the County in the amount of $43,443. The court also imposed postjudgment interest on this judgment. The trial court granted in part and denied in part the summary judgment motions filed by the County and DSHS. The court ruled that the County was entitled to be

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reimbursed to the extent that the State provides benefits under the LCP-MI ***443** to nonconfined medically indigent people. DSHS was ordered to provide medical benefits under the LCP-MI to medically indigent confined persons at the same rate and under the same conditions as are provided to nonconfined people. The trial court held that DSHS's duty to reimburse the County was limited to DSHS's fee schedule and the legislative appropriation, if any, applicable to the LCP-MI. The trial court entered judgment against DSHS in the amount of $3,933.88.

The County appealed. We accepted certification from the Court of Appeals, Division Two. DSHS has not challenged the trial court's ruling that WAC 388-100-005's exclusion of eligibility for jail inmates was invalid.

The following questions must be resolved: (1) Was summary judgment properly granted in favor of the Hospital, *i.e.,* must the County pay the Hospital in full for the jail inmates' medical care costs; (2) was summary judgment properly granted in favor of DSHS on its claim that if it had to reimburse the County, it only had to do so to the same extent it would provide coverage for nonconfined medically indigent persons; (3) should summary judgment have been granted in favor of the County for full reimbursement from DSHS; and (4) was postjudgment interest properly imposed on the amount which the County must pay the Hospital?

We affirm the trial court's holding that the County must pay the Hospital in full ****960** for the reasonable medical care costs of the inmates. However, we reverse the trial court's holding that DSHS must reimburse the County only to the same extent as it pays for care for nonconfined medically indigent persons. Summary judgment should have been granted in favor of the County for full reimbursement from DSHS. We reverse the decision imposing postjudgment interest.

[1] Deciding who must pay for the inmates' medical care requires construction of RCW 70.48.130. This case thus presents questions of law which are reviewed de novo on this appeal from summary judgment. *Draper Mach. Works, Inc. v. Department of Natural Resources,* 117 Wash.2d 306, 311, 815 P.2d 770 (1991).

***444** [2] Under the federal constitution the County must provide necessary and emergency medical care for its jail inmates. *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), *reh'g. denied,* 429 U.S. 1066, 97 S.Ct. 798, 50 L.Ed.2d 785 (1977). But, "[s]o long as the governmental entity ensures that medical care needed is in fact provided, the constitution does not dictate" who must pay for the care. *Harrison Mem. Hosp. v. Kitsap Cy.,* 103 Wash.2d 887, 889, 700 P.2d 732 (1985) (citing *Revere v. Massachusetts Gen. Hosp.,* 463 U.S. 239, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983)). Who must pay is a matter of state law. *Harrison Mem. Hosp.,* 103 Wash.2d at 889, 700 P.2d 732.

The County argues that under RCW 70.48.130 it is required to pay for emergency or necessary health care for county jail inmates only to the extent that it is reimbursed for the costs by DSHS. The trial court concluded, however, that the statute unambiguously provides that the duty to pay the costs is on the governing unit. RCW 70.48.130, part of the City and County Jails Act passed in 1977, provides:

> Payment for emergency or necessary health care shall be by the governing unit, except that the department of social and health services shall reimburse the governing unit for the cost thereof if the confined person requires treatment for which such person is eligible under the department of social and health services' public assistance medical program.
>
> The governing unit may obtain reimbursement from the confined person for the cost of emergency and other health care to the extent that such person is reasonably able to pay for such care, including reimbursement from any insurance program or from other medical benefit programs available to such person.... PROVIDED, That reimbursement for the cost of such services shall be by the state for state prisoners [under certain circumstances].
>
> ....
>
> Under no circumstance shall necessary medical services be denied or delayed pending a determination of financial responsibility.

RCW 70.48.130.

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[3][4][5] The main goal in construing statutes is to ascertain and give effect to legislative intent. ***445***Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 813, 828 P.2d 549 (1992). We look to the language of the statute itself. The first part of the first sentence of RCW 70.48.130 provides that the governing unit shall make payment for emergency and other necessary medical care for its jail inmates. The governing unit is the county or city responsible for the operation, supervision, and maintenance of the jail. *See* RCW 70.48.020(7). The second part of the first sentence in the statute says that DSHS must reimburse costs if the inmate is eligible for public assistance medical care. The statute is clear: The County has the primary obligation to pay for the medical care, and DSHS must reimburse costs under certain circumstances.

In the only case in which we have addressed the statute, we said that the first sentence of RCW 70.48.130 requires payment by a governing unit for its jail inmates' medical care, and then said:

> Additional provisions providing for possible reimbursement to the County by [the inmate], the Department of Social and Health Services, another governmental unit, or another public assistance agency ****961** are irrelevant to this action between the health care provider ... and the governing unit....

Harrison Mem. Hosp. v. Kitsap Cy., 103 Wash.2d 887, 890, 700 P.2d 732 (1985).

While it is true that in *Harrison Mem. Hosp.* we were not faced with the exact question before us in this case, the reasoning in *Harrison Mem. Hosp.* follows from the plain language of the first sentence in RCW 70.48.130: "Payment for emergency or necessary health care *shall be by the governing unit....*" (Italics ours.)

The trial court correctly ruled that under RCW 70.48.130 the County must pay the Hospital fully for the inmates' medical care costs. There is no dispute as to the amount or reasonableness of the charges. We affirm the trial court's grant of summary judgment in favor of the Hospital.

[6] The next question is *how much* reimbursement is due from DSHS. The County argues that under RCW 70.48.130 ***446** DSHS must fully reimburse the County for the costs of the medical care of its medically indigent jail inmates. DSHS contends that RCW 70.48.130 must be read in light of statutes in RCW 74.09, and especially in light of RCW 74.09.700,[FN1] which grants discretion to DSHS to determine eligibility requirements and the scope and amount of coverage under the LCP-MI. The statute states that medical care "may be provided" under the program "[t]o the extent of available funds...." RCW 74.09.700(1).

FN1. Former RCW 74.09.700 provides:

> "(1) To the extent of available funds, medical care may be provided under the limited casualty program to persons not otherwise eligible for medical assistance or medical care services who are medically needy as defined in the social security Title XIX state plan and medical indigents in accordance with medical eligibility requirements established by the department.
>
> . . . . .
>
> "(2) Determination of the amount, scope, and duration of medical coverage under the limited casualty program shall be the responsibility of the department, subject to the following: [list of certain standards and requirements]
>
> "....
>
> "(3) The department shall establish standards of assistance and resource and income exemptions."

RCW 70.48.130 alone clearly mandates full reimbursement by DSHS. The statute says that payment shall be by the governing unit, "except that the department of social and health services *shall reimburse* the governing unit *for the cost thereof* if the confined person requires treatment for which such person *is eligible* under the department of social and health services' public assistance medical program." (Italics ours.)

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[7] Examination of this statute leads to the conclusion that DSHS must fully reimburse the medical care costs. The statute says that DSHS "*shall reimburse* " the governing unit, here the County. When used in a statute, "shall" generally imposes a mandatory duty. *Department of Ecology v. State Fin. Comm.*, 116 Wash.2d 246, 252, 804 P.2d 1241 (1991).

The statute requires that reimbursement for medical care is to be "*for the cost thereof*", thus commanding full reimbursement***447** for the medical care costs. As the County aptly points out, nothing in the statute suggests that DSHS is to reimburse the County for *partial* costs thereof.

[8][9] The statute states that reimbursement is to be made when a jail inmate "*is eligible* " under the DSHS public assistance medical program. Thus, the determination that a confined person meets eligibility requirements triggers the mandatory obligation of DSHS to reimburse the governing unit. Quite significantly, the statute in no way limits reimbursement to what DSHS would pay for a nonconfined person. While reimbursement is dependent upon whether the inmate meets eligibility requirements for DSHS public assistance medical care, "eligibility" is not the same concept as the *rate* of reimbursement. Thus, the statute does not support DSHS's claim that the Legislature has made reimbursement to cities and counties dependent upon the *terms* of the department's public ****962** assistance medical program. RCW 70.48.130 does *not* make reimbursement for emergency or necessary health care costs dependent upon the *terms* of the department's medical assistance program. Instead, if the inmates are eligible for that program, then, if the County must pay for medical care expenses for the inmates, DSHS "shall reimburse" the County "for the costs thereof".

DSHS argues, however, that RCW 70.48.130 must be read in light of RCW 74.09. To understand DSHS's argument, some review of legislative history is helpful.

Prior to 1970, RCW 74.09.510 excluded inmates of public institutions other than patients in medical institutions from eligibility for public assistance medical care. Laws of 1967, Ex.Sess., ch. 30, § 4; *see also* former RCW 74.08.025, Laws of 1967, Ex.Sess., ch. 31, § 1 (excluding inmates of public institutions from public assistance). In 1970, RCW 74.09.510 was amended to authorize the state to provide medical assistance to inmates in county or city jails and juvenile detention facilities. Laws of 1970, 1st Ex.Sess., ch. 60, § 1. DSHS then adopted a regulation now codified at ***448** former WAC 388-86-060, which then stated that the department "shall provide medical care under the appropriate program for an inmate of a city or county jail or of a juvenile detention facility, unless the local jurisdiction accepts responsibility to provide such care, provided the inmate is financially and medically eligible."

Thus, when the City and County Jails Act, RCW 70.48, was passed in 1977, RCW 74.09.510 authorized the state to pay for eligible inmates' medical care, and RCW 70.48.130, enacted substantially in its present form, [FN2] required the state to pay those costs through reimbursement to the relevant governing unit.

> FN2. The only change to the statute has been the change of "department" to "department of social and health services"; this was not a substantive change, as the Act previously had defined "department" as the "department of social and health services". *See* Laws of 1986, ch. 118, §§ 1, 9.

In 1981, the medical assistance program statutes were modified. RCW 74.09.510 was amended, and provided that

> Medical assistance may be provided in accordance with eligibility requirements established by the department of social and health services ... as defined in the social security Title XIX state plan for mandatory categorically needy persons and: (1) Individuals who would be eligible for cash][FN3]] assistance except for their institutional status....

> FN3. The word is erroneously recorded as "case", but is corrected to "cash" in the statute. *See* RCW 74.09.510.

Laws of 1981, ch. 8, § 19.

[10] DSHS maintains that with the amendment of RCW 74.09.510 in 1981, jail inmates were no longer eligible for the medical assistance program under that

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statute because it became the State's federally controlled Medicaid program. Laws of 1981, ch. 8, § 19. *See* RCW 74.09.010(4) (defining "medical assistance" as the federal aid medical care program for categorically needy persons under Title XIX of the Federal Social Security Act). Federal law prohibits inmates of public institutions from eligibility for Medicaid. 42 C.F.R. §§ 435.1008(1), .1009. Thus, reference to "institutionalized" persons in RCW 74.09.510 does not include jail inmates.

***449** DSHS states that the only possible "public assistance medical program" for which inmates could be eligible is the "medical only" program, the Limited Casualty Program for the Medically Indigent (LCP-MI), RCW 74.09.700. RCW 74.09.700 was enacted in 1981. *See* Laws of 1981, 1st Ex.Sess., ch. 6, § 22. DSHS adopted rules to implement the limited casualty program. The program is entirely funded by the State. RCW 74.09.700 neither expressly includes nor excludes city and county jail inmates.

Following the 1981 amendments and enactments, DSHS continued to provide medical benefits to confined medically indigent persons, as mandated by WAC 388-86-060.

****963** Then, early in 1986, DSHS repealed WAC 388-86-060 and amended WAC 388-100-005 to exclude otherwise eligible persons confined in jails, solely on the basis of their institutional status. The amended version of WAC 388-100-005, which excluded county jail inmates from eligibility, was the WAC challenged in the actions in Thurston County as described above. DSHS states that it attempted to eliminate jail inmate eligibility as part of an effort to reduce expenditures and come within funding limits. The amended WAC came under serious criticism, and in 1989 WAC 388-100-005 was again amended to remove the city and county jail inmate exclusion. However, the inmates whose costs are at issue in this case were treated during the period of time the exclusion was in place.

As noted, the trial court ruled that because of RCW 70.48.130 DSHS did not have authority to exclude jail inmates from eligibility for public assistance medical programs. The court held WAC 388-100-005's exclusion of inmates invalid. DSHS has not appealed that ruling. DSHS also does not argue that the two Franklin County inmates were ineligible for public assistance medical care.

DSHS now maintains that while the City and County Jails Act prevents DSHS from singling out the inmate population to exclude it from the LCP-MI, the LCP-MI has specific funding limits which the jails act cannot supersede. If legislative appropriations are insufficient, DSHS maintains, ***450** DSHS is not permitted to spend funds it does not have. DSHS states that the limited rate structure of the LCP-MI is designed to keep the program within its appropriation.

[11] The flaw in DSHS's reasoning is that it assumes that the discretion afforded it under RCW 74.09.700 permits it to ignore the mandatory obligation set forth in RCW 70.48.130 to reimburse cities and counties for jail inmates' medical care costs. It is true that an agency generally may not make expenditures in excess of legislative appropriations. *See* Const. art. 8, § 4 (amend. 11); RCW 43.88.130. However, DSHS does not simply argue inadequacy of funding for jail inmates; DSHS argues inadequacy of funding for all persons eligible for the LCP-MI. That is, DSHS assumes that if it has discretion to limit coverage rates generally in order to come within funding limitations, it can do so with respect to all eligible persons, including medically indigent jail inmates.

[12][13][14] We conclude, however, that the discretion set out in RCW 74.09.700 allowing DSHS generally to set rates of payment does not override the mandatory obligation in RCW 70.48.130 to fully reimburse the County for the jail inmates' medical costs. Essentially, DSHS's argument is that the 1981 amendments and enactments repealed the language in RCW 70.48.130 requiring full reimbursement by DSHS. Repeals by implication are disfavored. *Local 497, Int'l Bhd. of Elec. Workers v. PUD 2,* 103 Wash.2d 786, 789, 698 P.2d 1056 (1985). Under the 2-pronged test for such repealer, the later act must cover the entire subject matter of the earlier legislation, be complete in itself, and be intended to supersede prior legislation on the subject; and the two acts must be so clearly inconsistent and so repugnant to each other that they cannot be reconciled. *Local 497,* at 789, 698 P.2d 1056. This test is not satisfied here. At the least, it is clearly possible to reconcile RCW 70.48.130 and RCW 74.09 and give each a reasonable construction. While DSHS has discretion generally under RCW 74.09.700, that discretion does not

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extend to providing less than full reimbursement for jail inmates as required by RCW 70.48.130.

***451** The trial court erred in ruling that reimbursement of medically indigent jail inmates' medical care costs must be limited to the rates which DSHS sets under RCW 74.09.700 for nonconfined persons.

Having examined RCW 70.48.130 and RCW 74.09, we hold that RCW 70.48.130 mandates that DSHS must fully reimburse a city or county for the medical costs of its medically indigent jail inmates, provided that the inmates are eligible for the department's public assistance medical program. The trial court erred in ruling that DSHS only had to reimburse to the same extent ****964** as it provided coverage for nonconfined persons and in granting summary judgment in part in favor of DSHS.

As noted, the parties filed cross motions for summary judgment. Should summary judgment have been granted in favor of the County on the full reimbursement issue? As a matter of statutory construction of RCW 70.48.130, the County was entitled to judgment as a matter of law. Under RCW 70.48.130, DSHS had to fully reimburse the County for the inmates' medical care costs.

DSHS maintains, however, that it is "undisputed that DSHS received no appropriation to cover jail inmate hospitalization costs from the Legislature." Brief of Respondent DSHS, at 25. This raises the question whether, despite the mandatory nature of RCW 70.48.130, the Legislature insufficiently funded the inmates' medical care reimbursement program and therefore DSHS was unable to provide full reimbursement. *See generally Ellensburg v. State,* 118 Wash.2d 709, 714-16, 826 P.2d 1081 (1992); *Pannell v. Thompson,* 91 Wash.2d 591, 589 P.2d 1235 (1979).

At this juncture, because we are deciding whether summary judgment should have been granted in favor of the County, we view the County as the moving party and DSHS as the nonmoving party. We engage in the same inquiry as the trial court. ***452***Swanson v. Liquid Air Corp.,* 118 Wash.2d 512, 518, 826 P.2d 664 (1992). Summary judgment is proper if

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

CR 56(c); *Swanson,* at 518, 826 P.2d 664. Facts and the reasonable inferences therefrom are considered in favor of the nonmoving party, and summary judgment should be granted in favor of the moving party only if reasonable minds could reach but one conclusion from all the evidence. *Swanson,* at 518, 826 P.2d 664; *Wilson v. Steinbach,* 98 Wash.2d 434, 437, 656 P.2d 1030 (1982).

[15] From all the evidence, the County is entitled to summary judgment. As explained above, under the statutes, the County is entitled to full reimbursement. Contrary to DSHS's claim, this record does not establish as an undisputed fact that legislative appropriations were insufficient, nor does it even raise an issue of material fact as to whether legislative appropriations were insufficient.

In support of its claim of inadequate appropriations, DSHS cites to the Clerk's Papers, at 244-57. Nothing in the cited pages supports the claim that there was no available appropriation for reimbursement for the Franklin County jail inmates' medical care costs in 1986.

The first item is an unsigned affidavit of the director of the Division of Medical Assistance, Department of Social and Health Services.

[16] Unsigned affidavits should not be considered in ruling on summary judgment motions. *See In re Estates of Hibbard,* 118 Wash.2d 737, 741 n. 7, 826 P.2d 690 (1992). In *Mason v. Clark,* 920 F.2d 493, 495 (8th Cir.1990), the court said:

> We have no hesitation in stating that an unsigned affidavit is not sufficient evidence in support of a motion for summary judgment. *Pension Benefit Guar. Corp. v. Heppenstall Co.,* 633 F.2d 293, 300 (3d Cir.1980). In fact, an "unsigned affidavit" is a contradiction in terms. By definition an affidavit is a "sworn statement in writing made ... under an oath or on affirmation before ... an authorized officer." *Webster's Third New International Dictionary* 35 (1965).

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***453** *See also* Kent v. Lee, 52 Wash.App. 576, 579, 762 P.2d 24 (1988) ("[a]n affidavit is ... a solemn, formal asseveration, under oath, upon which others might rely").

Even if the affidavit were proper and could be considered, it would not preclude summary judgment. The director's affidavit presents DSHS's view that it had authority to decide whether to continue coverage for jail inmates, and that when DSHS was informed in 1986 that cities and counties would expand claims on behalf of jail ****965** inmates, coverage for inmates was eliminated and a 23.7 percent reduction in payments for diagnosis related groups hospital payments were made to address a "deficit potential." Clerk's Papers, at 247. The affidavit also refers to bills in the 1986 and 1987 legislative session which would "clarify the responsibilities for jail inmate medical care...." Clerk's Papers, at 248. In DSHS's view, the affidavit continues, failure of these bills to pass indicated legislative intent in accord with DSHS's view of its discretion and authority.[FN4] The affidavit says absolutely nothing about appropriations available to reimburse Franklin County for the 1986 hospitalization costs.

> FN4. We refuse to speculate about the reasons for nonpassage of the bills. There are simply too many possibilities for us to reach the conclusion which DSHS has advanced.

The second item is a point of inquiry contained in the *1982* house journal regarding a senate bill. Clerk's Papers, at 249-50. It obviously says nothing about legislative appropriations for the relevant period.

The third item at the cited pages is an excerpt of testimony before the Senate Human Services and Corrections Committee on February 17, 1987. Clerk's Papers, at 251-53. The testimony relates to one of the bills referenced above. The testimony again recites DSHS's view of its discretion and the need to reduce expenditures. The testimony further states that the proposed bill contained no appropriation. The testimony also states DSHS's view that if the bill was not passed, DSHS would view nonpassage as concurrence with DSHS's view. Again, this testimony does not establish ***454** lack of appropriations for reimbursement of the County. It is obvious that prior to its amendment of its WAC to exclude jail inmates, DSHS was providing inmate medical care coverage. It is a fair assumption it had some appropriation permitting it to provide that coverage. We reject the implication that because a proposed bill in 1987 carried no appropriation within the proposed bill itself, and that because DSHS thought it could reduce or eliminate inmate coverage, there was therefore no appropriation for inmates' hospitalization in 1986. The latter conclusion simply does not follow.

The final item relied upon for the proposition that there was no appropriation for inmates' hospitalization costs is an unsigned affidavit by the office chief of the office of analysis and medical review within the Division of Medical Assistance, Department of Social and Health Services. Clerk's Papers, at 254-57. As an unsigned affidavit, this item should not be considered. Even if it was properly considered, it would not preclude summary judgment. This affidavit recounts some of the statutory history outlined above, and contains as an exhibit a "chronology of the major changes to the Medically Indigent program ... which occurred either at the direction of the legislature or by DSHS in the exercise of its discretion." Clerk's Papers, at 255. The chronology shows some changes in rates and coverage, but plainly does not speak to claims for jail inmates, says absolutely nothing about legislative appropriations, and does not indicate that in 1986 there were insufficient appropriations for DSHS to reimburse the County for the inmates' costs.

[17] In sum, the materials relied upon by DSHS as showing that there were no legislative appropriations for inmate hospitalization do not do so, nor do they raise a genuine issue of material fact on the matter.[FN5] Once the County established***455** an ****966** absence of material fact as to whether it was entitled to full reimbursement under RCW 70.48.130, the burden shifted to DSHS as the nonmoving party to produce evidence of the inadequacy of appropriations in order to avoid summary judgment requiring full reimbursement in favor of the County. *See generally* Baldwin v. Sisters of Providence in Wash., Inc., 112 Wash.2d 127, 132, 769 P.2d 298 (1989). DSHS failed to submit any evidence about appropriations and claims for inmates which would raise a genuine material issue of fact as to whether appropriations were sufficient in 1986 to reimburse the County for the hospitalization costs. At most, the materials submitted show concern about a risk of total expenditures in excess of appropriations and DSHS's view of its own discretion, but constitute no evidence of lack of legislative appropriations for jail inmates' medical care in

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1986.

FN5. At oral argument counsel for DSHS said that in the 1990 supplemental budget there was a line item appropriation to cover medical costs of jail inmates at DSHS's rate. Materials were later submitted upon this court's request for further information. The materials submitted, however, do not address any appropriations relevant to 1986 and the question whether DSHS then had funds available but chose not to provide coverage for jail inmates. In fact, the supplemental budget, reported in Laws of 1990, 1st Ex.Sess., ch 16, does not contain such a line item. DSHS relies upon Legislative Budget Notes, which allocate something over $1.5 million for "Medical for Jail Inmates" for the *1989-91* biennium. Manifestly the notes do not concern 1986. Further, nothing indicates the funds are to be expended at DSHS's rate. Also, comment 4 states that "Medical for Jail Inmates [i]ncludes funding for the cost of a settlement of litigation to provide coverage for city and county jail inmates under the department's Medically Indigent (MI) program, effective September 1, 1989." That comment is ambiguous, and may suggest, as the County urges, that the Legislature was in fact providing funding so that DSHS could fully reimburse for inmates' medical care costs such as those at issue here.

[18] We therefore conclude that the County is entitled to summary judgment. DSHS must fully reimburse the County for the two jail inmates' medical care costs. We note that the parties evidently stipulated below that reimbursement due from DSHS could be paid directly to the health care provider. Although RCW 70.48.130 requires reimbursement to the governing unit, we perceive no reason why the parties may not stipulate to direct payment, keeping in mind that it is the County's primary obligation to pay the Hospital.

Finally, we address the County's argument that the trial court erroneously imposed postjudgment interest on the judgment which it must pay the Hospital.

[19][20][21] The general rule is that as a matter of **sovereign immunity**, " 'the state cannot, without its consent, be held to ***456** interest on its debts.' " *Architectural Woods, Inc. v. State*, 92 Wash.2d 521, 524, 598 P.2d 1372 (1979) (quoting *Spier v. Department of Labor & Indus.*, 176 Wash. 374, 376-77, 29 P.2d 679 (1934)). This rule is followed despite the fact that RCW 4.56.110 does not expressly exempt the state or its political subdivisions from its operation. Counties, like cities, are political subdivisions of the state to which the rule applies. *See Silvernail v. County of Pierce*, 80 Wash.2d 173, 492 P.2d 1024 (1972). Here, there is no indication of any waiver, *i.e.*, there is nothing to indicate consent to any obligation to pay postjudgment interest. The **Hospital** points to no statute or contract authorizing such interest, nor has the **Hospital** attempted to show implied consent to liability for such interest. *See Architectural Woods*, 92 Wash.2d at 527, 529-30, 598 P.2d 1372.

We reverse the trial court's ruling imposing postjudgment interest on the judgment which the County must pay the Hospital.

Affirmed in part, reversed in part, and remanded for further proceedings consistent herewith.

UTTER, DOLLIVER, ANDERSEN, SMITH, DURHAM, GUY and JOHNSON, JJ., concur.DORE, Chief Justice (concurring in part, dissenting in part)
I concur with the majority on two issues: First, I agree that the trial court properly granted summary judgment on the issue that the County is primarily responsible for an inmate's medical costs. Second, I agree that postjudgment interest cannot be imposed on a sovereign without consent. I dissent, however, on the issue of the Department of Social and Health Services' (DSHS) obligation to reimburse the County. The trial court properly granted summary judgment on DSHS's claim that it need only reimburse the County for the medical care costs to the extent it would provide coverage for nonconfined medically indigent persons. It follows that the County was not entitled to summary judgment for full reimbursement from DSHS.

***457** On the contrary, to say that DSHS must fully reimburse the County for the ****967** medical costs of its prisoners is to have the State write a blank check for the health care of the County's prisoners. The following brief overview of the law and the applicable

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health care programs will clarify the issues.

RCW 70.48.130 mandates that the County is primarily responsible for paying the medical costs of its prisoners. That statute further mandates that DSHS reimburse the county "for the cost thereof" where, and only where, "the confined person requires treatment for which such person is eligible under the department of social and health services' public assistance medical program."

DSHS administers three public assistance medical programs. The first program falls under RCW 74.09.510. As amended in 1970, that program provided full medical coverage to inmates. In 1981, however, the Legislature modified RCW 74.09.510 to fall under the Federal Medicaid program which excludes inmates from coverage. The 1981 modification left only the second and third public assistance medical programs. The second program is controlled by RCW 74.04.005 and provides care for only the unemployed and recipients of drug and alcohol addiction services. The third and final program falling under RCW 74.09.700, is the limited casualty program for the medically indigent (LCP-MI).

LCP-MI is the program of last resort for Washington's medically indigent. The Legislature created LCP-MI at the same time that it modified RCW 74.09.510 to fall under the federal Medicaid program. The Legislature intended LCP-MI to be a spillover program to care for medically indigent persons that did not qualify for federal Medicaid. The program has several distinct characteristics. First, it operates on very limited funds, and because of this, LCP-MI is only capable of covering a portion of a participant's medical costs. Second, because of the limited funds, the Legislature afforded DSHS total authority to set the amount, scope, and duration of medical coverage under LCP-MI. Pursuant to that authority,***458** DSHS instituted a single rate structure designed to limit program spending "to the extent of available funds" as RCW 74.09.700 requires.

Returning to RCW 70.48.130, the majority postulates that when the Legislature enacted that statute in 1977, it used the term "cost thereof" to mean full cost. If this were the case, the Legislature clearly was referring to RCW 74.09.510, the first of the three programs described above. That was the only program providing full coverage for inmates' medical costs at that time. Although that program allotted full coverage until 1981, today neither RCW 74.09.510 nor any other program can fully reimburse the County for prisoner medical costs.

The only possible source of any reimbursement is LCP-MI, and the Legislature probably never intended that program to provide full coverage for the medical care of county prisoners. If the Legislature had intended such a large additional expenditure as full reimbursement for prisoner medical costs it would have appropriated funds earmarked for that purpose or it would have designated such coverage in the enabling legislation. No such appropriation took place. In fact, the Legislature did not designate any appropriations whatsoever for LCP-MI, much less for the medical care of medically indigent prisoners. Rather, the Legislature simply granted DSHS the authority to allocate funds out of its general appropriation to LCP-MI. Moreover, although RCW 74.09.700 lists certain medically needy groups covered under LCP-MI, it neither includes nor excludes prisoners from coverage.

Clearly, the majority's application of RCW 70.48.130 to LCP-MI creates a statutory conflict. In resolving statutory conflicts, the court's role is to defer to legislative intent while attempting to give effect to each statute, harmonizing them with each other. *Draper Mach. Works, Inc. v. Department of Natural Resources*, 117 Wash.2d 306, 311, 815 P.2d 770 (1991). The majority opinion, however, gives full effect to RCW 70.48.130 while gutting the LCP-MI program.

***459** The majority reconciles these two conflicting statutes by modifying LCP-MI to ****968** create full coverage singularly for the medical costs of county prisoners. The majority then dispenses with DSHS authority over the scope of LCP-MI by simply rationalizing that DSHS has that authority except with regard to prison inmates. Finally, the majority ignores the enabling legislation's fundamental requirement that LCP-MI spending not exceed "the extent of available funds". The majority's rewriting of LCP-MI ignores at least these mandates of RCW 74.09.700. In doing so, the majority creates a public assistance medical program that grants inmates full state medical coverage despite very limited funds and limited coverage. Nothing in the facts suggests that the Legislature intended this to happen.

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Rather, the facts persuasively suggest that if the Legislature had intended more reimbursement than allotted by LCP-MI's rate schedule, then it would not have made reimbursement dependent upon the terms of the public assistance medical program. As noted, the Legislature did not designate any appropriations whatsoever for LCP-MI, much less for the medical care of medically indigent prisoners. Rather, the Legislature granted DSHS authority to set the amount, scope and duration of LCP-MI "to the extent of available funds." DSHS has used this authority to implement a rate schedule which provides partial coverage only. Charity care has historically been reimbursed at a rate less than customary fee schedules, and this court has viewed discounted rate schedules as a legislative "fact of life." *Pannell v. Thompson*, 91 Wash.2d 591, 589 P.2d 1235 (1979). The discounted rate schedule was authorized by the Legislature to help DSHS meet budgetary constraints. Meeting these constraints has become especially important since the Legislature enacted the budget and accounting act (Budget Act), RCW 43.88.260-.300. The Budget Act imposes fines on agencies that spend more than they are appropriated. The legislative history and circumstances, thus, suggest that the Legislature did not intend RCW 74.09.700 to exist as the majority construes it.

***460** Like the legislative circumstances leading up to LCP-MI, public policy does not support the majority's interpretation of the issue. As noted, DSHS cannot afford fines under the Budget Act. If fined, LCP-MI would be the first program to experience DSHS cuts because its funding is based on available funds. In turn, if forced to maintain LCP-MI in order to pay the medical costs of prisoners, DSHS would have no choice but to cut coverage for other needy persons under LCP-MI or to cut back on other DSHS services. The program of last resort for Washington's most vulnerable citizens would become a program for medically indigent prisoners only. Thus, any interpretation of RCW 70.48.130 requiring full reimbursement jeopardizes the LCP-MI program as well as threatens the viability of other delicately funded DSHS programs. Still, an alternative exists.

The majority could have avoided crippling LCP-MI by holding that RCW 70.48.130 requires DSHS to reimburse the County for the "full costs" for which it is accountable under the limited coverage of LCP-MI. This is a more plausible reading of the statute than the majority's. First, it is consistent with the language of the statute. Second, it justifies partial reimbursement and maintains the integrity of LCP-MI. Third, it treats confined and nonconfined medically indigent persons equally. Fourth, it maintains DSHS's authority to govern the scope and coverage of the LCP-MI program. Fifth, it arguably gives full effect to both statutes. Sixth and finally, it encourages the County to administer its courts and prison system prudently keeping medical costs in check.

CONCLUSION

In sum, I disagree with the majority on the issue of DSHS's obligation to reimburse the County. I hold that the trial court was correct, and that DSHS is requested only to reimburse the County to the dollar amount it would provide coverage for nonconfined medically indigent persons. The legislature simply did not appropriate the funds necessary to fully reimburse counties for the medical costs of their ***461** prisoners. Besides essentially rewriting the law, the majority's rationalization ****969** flirts with the financialdestruction of the LCP-MI program and jeopardizes the delicate framework of other DSHS services. I dissent.

Wash.,1993.
Our Lady of Lourdes Hosp. v. Franklin County
120 Wash.2d 439, 842 P.2d 956

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Supreme Court of Washington,
En Banc.
PACIFIC NORTHWEST SHOOTING PARK ASSOCIATION, a Washington nonprofit corporation, and Lawrence J. Witt, Petitioners,
v.
CITY OF SEQUIM, a municipal corporation within the State of Washington, and Sequim Police Chief Bryon Nelson, Respondents.
No. 76109-4.

Argued Sept. 27, 2005.
Decided Oct. 12, 2006.

Background: Shooting association filed action against city for tortious interference with contract after city imposed certain conditions on association's use of city convention center for a gun show. The Superior Court, Clallam County, Thomas J. Majhan, J., granted summary judgment for city and association appealed. The Court of Appeals affirmed. Association sought review.

Holdings: The Supreme Court, Fairhurst, J., held that:
(1) association's complaint did not give fair notice of tortious interference claim; and
(2) state law did not preempt city's imposition of conditions.

Affirmed.

Sanders, J., filed dissenting opinion.

J.M. Johnson, J., filed opinion concurring in dissent, in which Chambers, J., concurring.

West Headnotes

[1] Appeal and Error 30 ⚷863

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In General. Most Cited Cases

Appeal and Error 30 ⚷934(1)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k934 Judgment
30k934(1) k. In General. Most Cited Cases
Supreme Court engages in the same inquiry as the trial court when it reviews an order on summary judgment, treating all facts and reasonable inferences from the facts in the light most favorable to the nonmoving party.

[2] Judgment 228 ⚷185(2)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(2) k. Presumptions and Burden of Proof. Most Cited Cases
The burden is on the party moving for summary judgment to demonstrate that there are no genuine issues of material fact.

[3] Judgment 228 ⚷185(6)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(6) k. Existence or Non-Existence of Fact Issue. Most Cited Cases
A party may move for summary judgment by setting out its own version of the facts or by alleging that the nonmoving party failed to present sufficient evidence to support its case.

[4] Judgment 228 ⚷185(2)

228 Judgment
228V On Motion or Summary Proceeding

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228k182 Motion or Other Application
228k185 Evidence in General
228k185(2) k. Presumptions and Burden of Proof. Most Cited Cases

Judgment 228 ⚷185(3)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(3) k. Admissibility. Most Cited Cases
If the moving party for summary judgment alleges that the nonmoving party failed to present sufficient evidence to support its case, it must identify those portions of the record, together with the affidavits, if any, which demonstrate the absence of a genuine issue of material fact; once the moving party has met its burden, the burden shifts to the nonmoving party to present admissible evidence demonstrating the existence of a genuine issue of material fact, and if the nonmoving party cannot meet that burden, summary judgment is appropriate.

[5] Torts 379 ⚷212

379 Torts
379III Tortious Interference
379III(B) Business or Contractual Relations
379III(B)1 In General
379k212 k. Contracts. Most Cited Cases

Torts 379 ⚷213

379 Torts
379III Tortious Interference
379III(B) Business or Contractual Relations
379III(B)1 In General
379k213 k. Prospective Advantage, Contract or Relations; Expectancy. Most Cited Cases
Party claiming tortious interference with a contractual relationship or business expectancy must prove (1) the existence of a valid contractual relationship or business expectancy, (2) that defendants had knowledge of that relationship, (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy, (4) that defendants interfered for an improper purpose or used improper means, and (5) resultant damage.

[6] Judgment 228 ⚷181(11)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(5) Matters Affecting Right to Judgment
228k181(11) k. Sufficiency of Pleading. Most Cited Cases
While inexpert pleadings may survive a summary judgment motion, insufficient pleadings cannot.

[7] Pleading 302 ⚷48

302 Pleading
302II Declaration, Complaint, Petition, or Statement
302k48 k. Statement of Cause of Action in General. Most Cited Cases
Washington is a notice pleading state and merely requires a simple concise statement of the claim and the relief sought; complaints that fail to give the opposing party fair notice of the claim asserted are insufficient. CR 8(a).

[8] Torts 379 ⚷255

379 Torts
379III Tortious Interference
379III(B) Business or Contractual Relations
379III(B)3 Actions in General
379k255 k. Pleading. Most Cited Cases
In action by shooting association against city for imposition of conditions on permit to use city convention center for a gun show, association failed to give the city fair notice of the basis for its claim of tortious interference with contract; it only alleged a contract with the city, did not refer to a relationship with vendors or the general public, and while complaint alluded to losses that association and other participants had sustained, it did not tie those losses to specific relationships between association and identifiable third parties.

[9] Torts 379 ⚷214

379 Torts
379III Tortious Interference

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379III(B) Business or Contractual Relations
379III(B)1 In General
379k214 k. Existence of Valid or Identifiable Contract, Relationship or Expectancy. Most Cited Cases
In a tortious interference claim, a claimant is required to show a relationship between parties contemplating a contract.

[10] Statutes 361 181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most Cited Cases

Statutes 361 184

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 k. Policy and Purpose of Act. Most Cited Cases
In interpreting a statute, court's primary goal is to determine and give effect to the legislature's intent and purpose in creating the statute.

[11] Statutes 361 188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases

Statutes 361 190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases
Supreme Court generally begins its analysis of a statute with the text of the statute; if the statute is clear and unambiguous on its face, court determines its meaning only from the language of the statute and does not resort to statutory construction principles.

[12] Statutes 361 190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases
A statute is ambiguous only if it can be reasonably interpreted in more than one way, not merely because other possible interpretations exist.

[13] Weapons 406 3

406 Weapons
406k3 k. Constitutional, Statutory, and Local Regulations. Most Cited Cases
Because city had authority to regulate possession of firearms in its convention center under firearm statute, it also had authority to regulate sales of firearms in the convention center under the statute. West's RCWA 9.41.300.

[14] Weapons 406 3

406 Weapons
406k3 k. Constitutional, Statutory, and Local Regulations. Most Cited Cases
Gun show at city convention center for the purchase and sale of firearms was not a "showing, demonstration, or lecture involving the exhibition of firearms," and thus did not qualify as an exception to city's authority to regulate possession and sale of firearms by imposing permit conditions on the use of its convention center, which were not laws or regulations of application to the general public. West's RCWA 9.41.290, 9.41.300(2)(b)(ii).

[15] Municipal Corporations 268 592(1)

268 Municipal Corporations
268X Police Power and Regulations
268X(A) Delegation, Extent, and Exercise of Power
268k592 Concurrent and Conflicting Exercise of Power by State and Municipality

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268k592(1) k. In General. Most Cited Cases

Weapons 406 ⚷3

406 Weapons
406k3 k. Constitutional, Statutory, and Local Regulations. Most Cited Cases
When a municipality acts in a capacity in regulating firearms that is comparable to that of a private party, the state preemption clause does not apply. West's RCWA 9.41.290.

[16] Municipal Corporations 268 ⚷57

268 Municipal Corporations
268II Governmental Powers and Functions in General
268k57 k. Powers and Functions of Local Government in General. Most Cited Cases
A municipality acts in a proprietary capacity when it acts as the proprietor of a business enterprise for the private advantage of the municipality, and it may exercise its business powers in much the same way as a private individual or corporation.

[17] Municipal Corporations 268 ⚷226

268 Municipal Corporations
268VII Contracts in General
268k226 k. Capacity to Contract in General. Most Cited Cases
When acting in a proprietary capacity, a city may enter into any contract which is necessary to render the system efficient and beneficial to the public.
**277 John D. Black, John D. Black, PLLC, Port Angeles, WA, Richard M. Stephens, Groen Stephens & Klinge LLP, Bellevue, WA, for Petitioners.

Robert L. Christie, Christie Law Group, PLLC, Seattle, WA, for Respondents.

FAIRHURST, J.

*345 ¶ 1 Petitioners Pacific Northwest Shooting Park Association (PNSPA), a nonprofit corporation, and Lawrence Witt, a federally licensed firearms collector, seek reversal of an unpublished Court of Appeals decision affirming the trial court's grant of summary judgment to the city of Sequim. PNSPA brought suit against the city and its police chief, Byron Nelson, alleging tortious interference with a contractual relationship or business expectancy between PNSPA and the city to use the city's convention center for a gun show. It also claimed that the city's actions violated RCW 9.41.290 and .300. PNSPA later argued that the city interfered **278 with its business expectancies with *346 vendors and the general public, but it failed to amend its complaint to add this claim. We hold that the question of interference with PNSPA's contractual relationships or business expectancies with vendors and the general public is not properly before us and do not decide the question. We also find that the city did not violate either RCW 9.41.290 or .300. Accordingly, we affirm the Court of Appeals.

I. FACTS

¶ 2 On April 3, 2002, PNSPA applied to the city for a temporary use permit to hold a gun show at the Guy Cole Convention Center from April 13 to April 14, 2002. The purpose stated on the application was for a gun show that was to include sales and "Display of Merchandise." Suppl. Clerk's Papers (SCP) at 8. On the application form, PNSPA was required to indicate what the property would be used for and the application stated that approval was subject to any attached conditions. The city distributed the application form, along with a separate memorandum, to Clallam County Fire District No. 3, the police department, public works, and the city manager soliciting their comments or conditions. The public works department and the city manager each returned a copy of the separate memorandum with handwritten comments and questions. The fire district and the police department provided separate memoranda with their conditions.

¶ 3 An undated document entitled "Special Conditions of Approval" was attached to the permit application. SCP at 13. It listed five conditions.[FN1] Only the first of these "special" conditions, the attached conditions from the police department, is at issue here.

FN1. The first condition referred to separate attached conditions from the police department. The second condition required that PNSPA comply with city sign regulations. The third condition referred to separate at-

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tached conditions from the fire district. The fourth condition required that the city be listed as the point of sale for all transactions. The fifth condition required PNSPA to contact the planning, public works, and police departments to verify that it was in compliance before the show.

***347** ¶ 4 Chief Nelson sent two memoranda to the city planning department, one dated April 9, 2002, and a second dated April 11, 2002, that superseded the April 9, 2002, memorandum. Only the second memorandum is at issue. April 11, 2002, is the date on which the city gave final approval to the permit application. The April 11, 2002, memorandum had 15 conditions, only three of which are being contested. The conditions required that (1) only dealers could "dispose of" handguns and then only to state residents, (2) only dealers could purchase or acquire firearms from unlicensed individuals, and (3) unlicensed dealers could not sell firearms at all. SCP at 18.

¶ 5 It is not clear from the record whether PNSPA received a copy of the April 9, 2002, memorandum, nor is it clear whether PNSPA received copies of the approved permit with all the referenced attachments on April 11, 2002, the date it was approved. Nevertheless, it seems clear that the conditions were imposed as part of a routine internal process for approval of applications to use the convention center, and PNSPA was aware in advance that the city might impose conditions on that use. Further, PNSPA does not allege that it failed to receive timely the documents containing the permit conditions. PNSPA merely alleges that Chief Nelson acted improperly by coming to the convention center on April 12, 2002, the day before the show, and "announcing" the conditions of use to the participants. Clerk's Papers (CP) at 80. As a result of Chief Nelson's "announcement," PNSPA claims that many vendors packed up and left the show and attendance by the public was significantly lower than expected. *Id.*

II. PROCEDURAL HISTORY

¶ 6 PNSPA filed suit against the city and Chief Nelson, as an employee and agent acting on behalf of the city, claiming that Chief Nelson tortiously interfered with the contractual relationship between PNSPA and the city. The complaint did not specifically allege interference with business expectancies between PNSPA and gun show participants, although***348** it did refer to the negative effect Chief Nelson's actions had on "sellers and potential gun-show participants." CP at 81. ****279** PNSPA further alleged that the city violated RCW 9.41.290 and .300 by imposing unauthorized restrictions on private party gun sales at the gun show. Witt, a member of PNSPA, filed suit soon after alleging tortious interference with an unexplained relationship between himself and the city. SCP at 63. PNSPA and Witt subsequently moved for consolidation of their cases which was granted.

¶ 7 The city moved for summary judgment, arguing that the claim of interference with a contractual relationship or business expectancy failed because the plaintiffs failed to establish the elements of the tort. It argued principally that the defendants were parties to the contract and could not be liable for interference with their own contract. The city further argued that plaintiffs' second claim, violation of RCW 9.41.290 and .300, failed because there is no private cause of action under RCW 9.41.300 and neither statute was violated. In its response PNSPA specifically alleged, for the first time, that the city had interfered with its expectancies with vendors and the general public. PNSPA attached only the declaration of Louis Huber, PNSPA's president, for this claim. PNSPA also conceded that its contract with the city had not been interfered with per se. In reply, the city contested PNSPA's new argument and responded that PNSPA did not present any evidence supporting expectancies with the vendors and general public.

¶ 8 PNSPA filed a motion for leave to amend its complaint to add a claim for breach of contract, but it never filed an amended complaint. PNSPA did not request leave to amend the tortious interference claim to include a reference to the expectancies between PNSPA, the vendors, and the general public.

¶ 9 Following oral argument, the trial court granted summary judgment to the city. Although the trial court order shows that it considered the motion for leave to amend, and the affidavit in support thereof, the record does ***349** not reflect that any action was taken on the motion to amend. The trial court dismissed both the claims of tortious interference with a contractual relationship or business expectancy and violation of RCW 9.41.290 and .300 in their entirety with prejudice. In a memorandum opinion, the trial

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court held that: (1) "[t]he City passed no ordinances contrary to RCW 9.41.290," (2) "[t]he conditions imposed by Police Chief Nelson were a part of the contract between the City and Plaintiff Shooting Park," and (3) "[p]laintiffs presented no evidence that those conditions were improper under the police powers of the City or that the Defendants in any way breached the contract in any manner." CP at 9.

¶ 10 PNSPA appealed to the Court of Appeals, Division Two, arguing that the city interfered with the business expectancies between PNSPA, the vendors, and the general public and that the city acted improperly by violating RCW 9.41.290 and .300. The city responded that PNSPA had pleaded only interference with the contractual relationship between the city and PNSPA-not business expectancies with vendors and the general public. The city also argued that, in any event, PNSPA failed to present admissible evidence supporting expectancies with the vendors and general public.

¶ 11 In an unpublished opinion, the Court of Appeals affirmed the trial court, holding that (1) PNSPA's argument that the city and Chief Nelson had interfered with a contract between the city and PNSPA failed because a party cannot tortiously interfere with its own contract; (2) PNSPA's argument that the city and Chief Nelson unlawfully interfered with a business expectancy between it and the gun show vendors failed because PNSPA did not explain why Chief Nelson's actions were unlawful and Chief Nelson had merely imposed and enforced valid permit conditions; (3) PNSPA's argument that RCW 9.41.290 preempted the city "from enacting laws or ordinances on the possession of firearms" failed because the city did not enact a law or ordinance and, even if it had, nothing in the statute creates ***350** a private cause of action; and (4) PNSPA's argument that the permit conditions imposed by the city through Chief Nelson violated RCW 9.41.290 and .300 failed because nothing in either statute affects permit conditions and, even if it did, neither statute creates a private****280** cause of action. *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, noted at 123 Wash.App. 1014, 2004 WL 1987254 at *2, 2004 Wash.App. LEXIS 2023, at *6.

¶ 12 PNSPA and Witt sought review of only two issues: (1) whether the city tortiously interfered with contractual relationships or business expectancies between PNSPA, Witt, the vendors, and the general public, and (2) whether the city violated RCW 9.41.290 and .300. We granted review. *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 154 Wash.2d 1019, 120 P.3d 953 (2005).

III. ISSUES

¶ 13 A. Did the city tortiously interfere with contractual relationships or business expectancies between PNSPA, Witt, the vendors, and the general public?

¶ 14 B. Did the city violate RCW 9.41.290 or .300?

IV. ANALYSIS

[1][2][3][4] ¶ 15 We engage in the same inquiry as the trial court when we review an order on summary judgment, treating all facts and reasonable inferences from the facts in the light most favorable to the nonmoving party. *Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998). The burden is on the party moving for summary judgment to demonstrate that there are no genuine issues of material fact. *Id.* A party may move for summary judgment by setting out its own version of the facts or by alleging that the nonmoving party failed to present sufficient evidence to support its case. *Guile v. Ballard Cmty. Hosp.*, 70 Wash.App. 18, 21, 851 P.2d 689 (1993). If the moving party uses the ***351** latter method, it must "identify those portions of the record, together with the affidavits, if any, which ... demonstrate the absence of a genuine issue of material fact." *Id.* at 22, 851 P.2d 689. Once the moving party has met its burden, the burden shifts to the nonmoving party to present admissible evidence demonstrating the existence of a genuine issue of material fact. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wash.2d 16, 27, 109 P.3d 805 (2005). If the nonmoving party cannot meet that burden, summary judgment is appropriate. *Id.*

A. Did the city tortiously interfere?

[5] ¶ 16 A party claiming tortious interference with a contractual relationship or business expectancy must prove five elements:

(1) the existence of a valid contractual relationship or business expectancy; (2) that defendants had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termi-

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nation of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage.

Leingang v. Pierce County Med. Bureau, Inc., 131 Wash.2d 133, 157, 930 P.2d 288 (1997).

¶ 17 Before we begin our substantive analysis, we must determine whether PNSPA's claim of tortious interference with contractual relationships and business expectancies with its vendors and the general public is properly before us. The difficulty is that PNSPA's original complaint alleged only that the city and Chief Nelson had interfered with the contractual relationship that PNSPA had with the city. It subsequently argued in its motion for summary judgment to the trial court, and in briefs to the Court of Appeals and to this court, that it *has always claimed* that the city interfered with business expectancies it had with vendors and the public.

¶ 18 The city, on the other hand, has steadfastly contended that PNSPA's only claim was for interference with a ***352** contractual relationship between *the city and PNSPA* and that a party cannot interfere with its own contract. However, in rebuttal to PNSPA's new arguments, the city argued that, in any event, PNSPA did not present sufficient facts to show interference with the expectancies with vendors and the general public.

¶ 19 Under CR 15, after an opposing party has filed an answer, a party may amend its pleading only by leave of the court, and the court is instructed to freely grant leave when justice so requires. *Bank of Am. v. Hubert*, 153 Wash.2d 102, 122, 101 P.3d 409 (2004). ****281** PNSPA did not introduce its claim of interference with its business expectancies with vendors and the general public until it responded to the city's motion for summary judgment. PNSPA requested leave to amend its complaint, however, it did so only to add a claim for breach of contract, not to amend the interference claim. But PNSPA now urges this court to consider its new interference argument as if that were what it had argued all along.

[6][7][8][9] ¶ 20 While inexpert pleadings may survive a summary judgment motion, insufficient pleadings cannot. *Lewis v. Bell*, 45 Wash.App. 192, 197, 724 P.2d 425 (1986). Washington is a notice pleading state and merely requires a simple concise statement of the claim and the relief sought. CR 8(a). Complaints that fail to give the opposing party fair notice of the claim asserted are insufficient. *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wash.App. 18, 26, 974 P.2d 847 (1999) (stating that a party who fails to plead a cause of action "cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along."); *Lundberg v. Coleman*, 115 Wash.App. 172, 180, 60 P.3d 595 (2002). In its complaint, PNSPA did not refer to a relationship it had with vendors or the general public. CP at 81-82. The complaint alluded to losses that PNSPA and other gun show participants had sustained, but it did not tie those losses to *specific relationships* between PNSPA and ***353** identifiable third parties. [FN2] *Id.* Thus, PNSPA failed to give the city fair notice of the basis for its claim.[FN3]

FN2. The dissent claims that the majority erroneously requires a party pleading a claim of tortious interference with a business expectancy to "name the specific parties with whom it expected to do business." Dissent at 2. In a tortious interference claim, a claimant is required to show a "relationship between parties contemplating a contract." *Scymanski v. Dufault*, 80 Wash.2d 77, 84-85, 491 P.2d 1050 (1971). To show a relationship between parties contemplating a contract, it follows that we must know the parties' identities. We are correct in concluding that PNSPA must show a specific relationship between it and identifiable third parties. In its complaint, PNSPA explicitly specified only that it had a contractual relationship with the city. PNSPA noted that it *invited* gun collectors, dealers, and buyers to buy, sell, and trade firearms, but PNSPA did not indicate it had a relationship with the gun collectors, dealers, and buyers. An invitation to some amorphous group of people does not magically become a relationship merely because some members of the group might attend the gun show.

FN3. The city also argues that Witt abandoned his claims because petitioners' briefs failed to refer to him on appeal. We agree. Because petitioners have largely ignored Witt's claims and no facts have been presented that specifically relate to Witt, we

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conclude his claims have been abandoned.

¶ 21 We hold that the question of interference with PNSPA's contractual relationships or business expectancies with vendors and the general public is not properly before us and do not decide it. Accordingly, we affirm the Court of Appeals.

B. Did the city violate RCW 9.41.290 or .300?

¶ 22 PNSPA contends that the city's permit conditions were "improper" because, under RCW 9.41.290, the State has fully occupied the field of firearms regulation and any municipal action that regulates sales of firearms necessarily violates the preemption clause. PNSPA further argues that the city's conditions constituted an unlawful restriction under RCW 9.41.300.

¶ 23 The city responds that the plain language of the preemption clause limits its reach to enactment of *laws and ordinances.* It argues that the text of the clause should be read in the context in which it was enacted, reasoning that the purpose was to eliminate inconsistencies in *criminal* firearms regulations. The city further contends that the reference to laws and ordinances is limited to laws of application to the general public. Regarding RCW 9.41.300, the city merely observes that it did not place any restrictions***354** on possession of firearms, but it does not indicate whether a restriction on sales would violate the statute.

[10][11][12] ¶ 24 In interpreting a statute, our primary goal is to determine and give effect to the legislature's intent and purpose in creating the statute. *Am. Cont'l Ins. Co. v. Steen,* 151 Wash.2d 512, 518, 91 P.3d 864 (2004) We generally begin our analysis with ****282** the text of the statute. *Id.* If the statute is clear and unambiguous on its face, we determine its meaning only from the language of the statute and do not resort to statutory construction principles. *Id.* A statute is ambiguous only if it can be reasonably interpreted in more than one way, not merely because other possible interpretations exist. *Id.*

¶ 25 RCW 9.41.290 states:

> The state of Washington hereby fully occupies and preempts the entire field of firearms regulation within the boundaries of the state, including the registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms, or any other element relating to firearms or parts thereof, including ammunition and reloader components. *Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to firearms that are specifically authorized by state law, as in RCW 9.41.300,* and are consistent with this chapter. Such local ordinances shall have the same penalty as provided for by state law. Local laws and ordinances that are inconsistent with, more restrictive than, or exceed the requirements of state law shall not be enacted and are preempted and repealed, regardless of the nature of the code, charter, or home rule status of such city, town, county, or municipality.

(Emphasis added.)

¶ 26 RCW 9.41.300(2)(b)(ii) states:

> (2) Cities, towns, counties, and other municipalities may enact laws and ordinances:
>
> ....
>
> (b) Restricting the *possession* of firearms in any stadium or convention center, operated by a city, town, county, or other municipality, except that such restrictions shall not apply to:
>
> ....
>
> ***355** (ii) Any showing, demonstration, or lecture involving the exhibition of firearms.

(Emphasis added.)

[13] ¶ 27 The text of RCW 9.41.290 states that the state of Washington has fully occupied and preempted the field of firearms regulation. That preemption covers regulations related to possession, purchase, sale, acquisition, and transfer of firearms, all of which are potentially at issue at a gun show. However, RCW 9.41.290 and .300 together explicitly allow cities, towns, counties, and municipalities to enact laws and ordinances restricting firearm *possession* in stadiums and convention centers they operate.

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Logic dictates that one must possess a firearm in order to "show" and "sell" a firearm. It follows that if the city had authority to regulate possession of firearms in its convention center under RCW 9.41.300, it also had authority to regulate sales of firearms under RCW 9.41.300. The authority to regulate sales of firearms flowed from its authority to regulate possession of firearms under RCW 9.41.300.[FN4]

FN4. Contrary to the dissent's claim, we do not hold that RCW 9.41.300 authorizes municipalities to "regulate gun shows." Dissent at 1, 4. We merely draw a logical inference based on RCW 9.41.300's explicit language authorizing municipalities to regulate *possession* of firearms on city property. The city's authority does not depend on the type of activity PNSPA intended to pursue on the city's property. If PNSPA planned to have a book sale, it likely would not have been affected by the city's authority to restrict possession of firearms on its property. It just so happens that PNSPA sought to hold an event whose sole purpose was firearm buying and selling, and the city had express authority to restrict firearm possession on its property.

[14] ¶ 28 Further, PNSPA's gun show does not qualify as an exception under RCW 9.41.300(2)(b)(ii). It was not a "showing, demonstration, or lecture involving the *exhibition* of firearms." RCW 9.41.300(2)(b)(ii) (emphasis added). PNSPA's complaint clearly states that gun collectors, dealers, and buyers were invited to "sell, trade and buy" *the firearms.*[FN5] CP at 80. An "exhibition"**283 is defined as "a display or show *356 where *the display itself* is the chief object and from which the exhibitor derives or expects to derive a profit." Webster's Third New International Dictionary 796 (2002) (emphasis added). Because the city had authority to regulate possession, and by logical inference sales, of firearms and the gun show did not qualify as an exhibition, the city did not violate RCW 9.41.300 by imposing permit conditions on the use of its convention center.

FN5. The dissent states that RCW 9.41.300 "explicitly and specifically prohibits municipalities from regulating gun shows on municipal property," but in order to reach this conclusion it must completely ignore the last three words of RCW 9.41.300(2)(b)(ii). Dissent at 4. RCW 9.41.300(2)(b)(ii) prohibits cities only from restricting showings, demonstrations, or lectures involving "*exhibition* of firearms." (Emphasis added.) The dissent fails to explain how a *sale* qualifies as an *exhibition.*

¶ 29 However, even if we were to conclude that the city could not regulate firearm *sales* under RCW 9.41.300 and the gun show qualified as an exhibition, we would still not conclude that RCW 9.41.290 preempted the city's permit conditions.

[15] ¶ 30 This court has already examined the text of the preemption clause in RCW 9.41.290 and considered its scope in a case involving restrictions imposed on firearm possession in the workplace by a municipal employer. *Cherry v. Mun. of Metro. Seattle,* 116 Wash.2d 794, 802, 808 P.2d 746 (1991). We determined that the purpose of the statute was unclear, at least with respect to the internal policies of municipal employers, and conducted an examination of legislative intent. *Id.* at 800, 808 P.2d 746. We concluded that the central purpose of RCW 9.41.290 was to eliminate *conflicting municipal criminal codes* and to "advance uniformity in *criminal* firearms regulation." *Id.* at 801, 808 P.2d 746 (emphasis added). We also found the penal nature of the Firearms Act, chapter 9.41 RCW, to be particularly significant, reasoning that the clause was not intended to interfere with a public employer's ability to establish workplace policies.[FN6] *Id.* at 800-01, 808 P.2d 746. We construed the clause to apply only to laws or regulations of general application. *Id.* We reasoned that it could not be construed to prohibit a municipality from *357 doing something that a private employer was not prohibited from doing because such a conclusion would result in an overly strained interpretation. *Id.* at 802, 808 P.2d 746. Therefore, *Cherry* supports the general proposition that when a municipality acts in a capacity that is comparable to that of a private party, the preemption clause does not apply.

FN6. We note that the legislature placed the preemption clause in Title 9 of the Washington criminal code rather than in Title 35, which governs activities of cities and towns, or Title 36, which governs activities of counties. Although this placement is not conclusive of the legislature's intent, it supports our analysis in *Cherry* regarding the

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penal focus of the preemption clause.

[16][17] ¶ 31 A municipality acts in a proprietary capacity when it "acts as the proprietor of a business enterprise for the private advantage of the [municipality]" and it may "exercise its business powers in much the same way as a private individual or corporation." *Hite v. Pub. Util. Dist. No. 2 of Grant County*, 112 Wash.2d 456, 459, 772 P.2d 481 (1989); *Branson v. Port of Seattle*, 152 Wash.2d 862, 870, 101 P.3d 67 (2004). When acting in a proprietary capacity, a city may enter into any contract " 'which is necessary to render the system efficient and beneficial to the public.' " *Hite*, 112 Wash.2d at 460, 772 P.2d 481 (quoting *Puget Sound Power & Light Co. v. Pub. Util. Dist. No. 1*, 17 Wash.App. 861, 864, 565 P.2d 1221 (1977)); *see also Stover v. Winston Bros. Co.*, 185 Wash. 416, 422, 55 P.2d 821 (1936). By issuing a temporary use permit, the city was leasing its property to PNSPA and acting in its private capacity as a property owner.

¶ 32 The preemption clause does not prohibit a private property owner from imposing conditions on the sale of firearms on his or her property. RCW 9.41.290. Applying our reasoning in *Cherry*, it follows that a municipal property owner like a private property owner may impose conditions related to firearms for the use of its property in order to protect its property interests. For the same reason that a municipal employer may enact policies regarding possession of firearms in the workplace because a private employer may do so, a municipal property owner should be allowed to impose conditions related to sales of firearms on its property if a private property owner may impose them. The critical point is that the conditions the city imposed related to a permit for private use of its property. They were not laws or regulations of application to the general public.

****284 *358** ¶ 33 We find that the city did not violate either RCW 9.41.290 or .300.

V. CONCLUSION

¶ 34 We hold that PNSPA failed to give the city fair notice of the basis for its claim of interference with its contractual relationships and business expectancies with vendors and the general public and the claim is not properly before us. We also hold that the city did not violate RCW 9.41.290 or .300. We affirm the Court of Appeals.

WE CONCUR: ALEXANDER, C.J., C. JOHNSON, MADSEN, BRIDGE and OWENS, JJ.
SANDERS, J. (dissenting).
¶ 35 The majority concludes Pacific Northwest Shooting Park Association (PNSPA) insufficiently pleaded a claim of tortious interference with a business expectancy because its complaints do not specifically state it expected to do business with vendors and the general public. The majority is wrong. A pleading is sufficient so long as it provides notice of the general nature of the claim asserted. *Dumas v. Gagner*, 137 Wash.2d 268, 282, 971 P.2d 17 (1999). The nature of PNSPA's claim is pellucid and its complaints entirely adequate. It alleges tortious interference with its expectation of hosting a gun show. No additional specificity is required.

¶ 36 Furthermore, the majority concludes RCW 9.41.300, which prohibits municipalities from regulating gun shows, permits municipalities to regulate gun shows. I am nonplussed. The statute means what it says. City of Sequim lacked authority to regulate PNSPA's gun show.

I. PNSPA Sufficiently Pleaded Tortious Interference with a Business Expectancy

¶ 37 A complaint must provide "(1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled." CR 8(a). Under these ***359** "liberal rules of procedure," a complaint is sufficient so long as it provides notice "of the general nature of the claim asserted." *Lightner v. Balow*, 59 Wash.2d 856, 858, 370 P.2d 982 (1962). *See also Berge v. Gorton*, 88 Wash.2d 756, 762, 567 P.2d 187 (1977) (holding complaint must "contain direct allegations sufficient to give notice to the court and the opponent of the nature of the plaintiff's claim"). By this standard, PNSPA's complaints are quite sufficient.

¶ 38 In order to state a claim of tortious interference with a business expectancy, a party must allege:

1. The existence of a valid contractual relationship or business expectancy;

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2. That defendants had knowledge of that relationship;

3. An intentional interference inducing or causing a breach or termination of the relationship or expectancy;

4. That defendants interfered for an improper purpose or used improper means; and

5. Resultant damages.

Sintra, Inc. v. City of Seattle, 119 Wash.2d 1, 28, 119 Wash.2d 1, 829 P.2d 765 (1992) (citing *Pleas v. City of Seattle*, 112 Wash.2d 794, 800, 804, 774 P.2d 1158 (1989)). PNSPA's complaints allege Byron Nelson and the city of Sequim knew it expected to host a gun show, intentionally and improperly interfered with its ability to host a gun show, and caused its gun show to fail. These allegations are quite sufficient to plead a claim of tortious interference with a business expectancy.

¶ 39 The majority incorrectly asserts a party pleading a claim of tortious interference with a business expectancy must name the specific parties with whom it expected to do business. It cites no authority for this proposition. And none exists.

¶ 40 The cause of action for tortious interference with a business expectancy vindicates " 'society's interest' " in " 'reasonable expectations of economic advantage' " and " 'affording to the individual a fair opportunity to conduct his legitimate business affairs without interruption from others except in so far as such interferences are sanctioned by the 'rules ***360** of the game' which society has adopted.' " ****285***Scymanski v. Dufault*, 80 Wash.2d 77, 84, 491 P.2d 1050 (1971) (quoting 1 Fowler V. Harper & Fleming James, Jr., The Law of Torts § 6.11, at 510 (1956)). "A valid business expectancy includes any prospective contractual or business relationship that would be of pecuniary value," including a party's prospective customers. *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.*, 114 Wash.App. 151, 158, 52 P.3d 30 (2002) (citing Restatement (Second) of Torts § 766B cmt. c (1979)). "All that is needed is a relationship between parties contemplating a contract, with at least a reasonable expectancy of fruition. And this relationship must be known, or reasonably apparent, to the interferor." *Scymanski*, 80 Wash.2d at 84-85, 491 P.2d 1050. PNSPA's complaints allege prospective contractual relations with "gun collectors, dealers and buyers from all over the northwest." PNSPA's Complaint for Damages for Tort of Interference with Business Relationship; and Violation of RCW 9.41.300, at 2. And PNSPA alleges Nelson was aware of those prospective contractual relations. *Id.* at 3. Accordingly, PNSPA sufficiently pleaded the existence of a business expectancy.

II. PNSPA Pleaded Facts Sufficient to State a Claim for Tortious Interference with a Business Expectancy

¶ 41 The record contains ample evidence supporting every element of tortious interference with a business expectancy. PNSPA's affidavits state Nelson was aware it expected to host a gun show attended by members of the public. And they state Nelson intentionally and improperly interfered with those expectations, causing the gun show to fail. Because these affidavits "set forth specific facts showing that there is a genuine issue for trial," CR 56(e), summary judgment is inappropriate.

III. Municipalities Lack Authority to Regulate Gun Shows

¶ 42 Curiously, the majority concludes RCW 9.41.300, which explicitly and specifically prohibits municipalities ***361** from regulating gun shows on municipal property, permits municipalities to regulate gun shows on municipal property. The statute is neither ambiguous nor unclear. Under RCW 9.41.300(2)(b)(ii), municipalities may not regulate the possession of firearms at a "showing, demonstration, or lecture involving the exhibition of firearms." The majority concludes a gun show is not an "exhibition of firearms." Majority at 282. I find this incredible. The legislature obviously intended this statute to exempt gun shows from municipal regulation. Only the majority's linguistic somersaults make it mean the opposite of what it says.

¶ 43 Perhaps the majority simply rejects such "primitive faith in the inherent potency and inherent meaning of words." *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal.2d 33, 37, 69

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Cal.Rptr. 561, 563-64, 442 P.2d 641, 643-44 (1968) (footnote omitted). But its humpty-dumptyism starkly illustrates the counter-majoritarian difficulty: "which is to be master," the legislature or the court? Lewis Carroll, Through the Looking-glass and What Alice Found There 124 (1871) (William Morrow & Co.1993). When a statute is unambiguous, and unambiguously within the power of the legislature to enact, the answer is clear. The court cannot substitute its preferences for those of the legislature.

¶ 44 I dissent.

J.M. JOHNSON, J. (concurrence in dissent).

¶ 45 I concur with the dissent; however, I write separately in order to briefly clarify Washington law regarding firearms and their sale, which was misstated or improperly applied by the police chief here.[FN1] This is particularly important as the Washington constitutional right "of the individual citizen to ***362** bear arms" could have also been implicated in this case.[FN2] Wash. Const. art. I, § 24. ****286** Whether this right includes a corollary constitutional right to sell or trade firearms need not be decided since Washington statutory law, correctly understood, allows the sales. I concur with the dissent.

FN1. Federal law is not addressed, although the city's police chief also claimed to have reviewed such law. *See infra* note 3.

FN2. Washington Constitution article I, section 24 protects this "right of the individual citizen to bear arms" in terms more absolute than the United States Constitution. *See State v. Rupe*, 101 Wash.2d 664, 706, 683 P.2d 571 (1984).

¶ 46 Police Chief Nelson made a significant legal error in his April 11, 2002 memo, which he personally distributed. Suppl. Clerk's Papers (SCP) at 17. The memo restricted gun sales at the show in a manner not allowed by Washington law. It is difficult to find that a law enforcement officer, who surely had access to the RCWs, could incorrectly state the law in good faith.[FN3]

FN3. The chief claimed he issued the April 11 memo after "reviewing application for a gun show ... as well as Federal Statutes." SCP at 17.

¶ 47 The memo stated that "Sales by persons who are not licensed dealers shall not be allowed." SCP at 18. Interestingly, the memo then contradicted itself and stated that "Dealers ONLY may purchase/acquire firearms from an unlicensed individual." *Id.* However, Washington law does not restrict the sale or purchase of guns to licensed dealers.

¶ 48 RCW 9.41.010(10) defines a "dealer" as

> a person engaged in the business of selling firearms at wholesale or retail who has, or is required to have, a federal firearms license under 18 U.S.C. Sec. 923(a). A person who does not have, and is not required to have, a federal firearms license under 18 U.S.C. Sec. 923(a), is not a dealer if that person makes only occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or sells all or part of his or her personal collection of firearms.

The statute itself expressly acknowledges that persons who are not dealers may make "occasional sales, exchanges, or purchases" of firearms under state law. The city of Sequim or its police chief may not be more restrictive than Washington law regarding the sale of firearms. *See* RCW 9.41.290. ***363** It was error for Police Chief Nelson to impose a more restrictive measure on the sale of firearms than Washington law requires. Under Washington law, persons who are not dealers may "occasionally" sell guns at gun shows without a license.

¶ 49 I concur with the dissent.

CHAMBERS, J., concurs.

Wash.,2006.

Pacific Northwest Shooting Park Ass'n v. City of Sequim

158 Wash.2d 342, 144 P.3d 276

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Supreme Court of Washington,
En Banc.
R.D. MERRILL COMPANY, Defendant,
v.
STATE of Washington, POLLUTION CONTROL HEARINGS BOARD, Respondent.
Okanogan Wilderness League ("OWL") and Aaron Burkhart, Appellants,
v.
State of Washington, Pollution Control Hearings Board, et al., Respondents.
No. 64607-4.

Argued Oct. 14, 1997.
Decided Jan. 7, 1999.

On judicial review, the Superior Court, Okanogan County, Jack Burchard, J., affirmed in part and reversed in part the decisions of Pollution Control Hearings Board concerning developer's applications for changes in water rights. Environmental group appealed. The Supreme Court, Madsen, J., held that: (1) seasonal water right may be changed to allow year-round use; (2) transfer of two unperfected groundwater permits was permissible; (3) in water rights context, public trust doctrine does not serve as an independent source of authority for Department of Ecology to use apart from water code; (4) irrigation right was never perfected and thus could not be changed or transferred; (5) exception to relinquishment of water right after five years of nonuse, applicable when nonuse is the "result of" legal proceedings, applies only when legal proceedings have prevented use; and (6) Board's grant of summary judgment on abandonment and relinquishment issues was improper.

Decision of Pollution Control Hearings Board affirmed in part, reversed and remanded in part.

West Headnotes

[1] Waters and Water Courses 405 ⚷151

405 Waters and Water Courses
405VI Appropriation and Prescription
405k151 k. Abandonment or Forfeiture of Rights. Most Cited Cases
Even if water right was historically perfected, it may have been lost in whole or in part as a result of abandonment or relinquishment; if so, the asserted right, whether in whole or in part, may not be changed or transferred under applicable statute. West's RCWA 90.03.380.

[2] Waters and Water Courses 405 ⚷145

405 Waters and Water Courses
405VI Appropriation and Prescription
405k145 k. Change in Place, Manner, or Purpose of Appropriation or Use. Most Cited Cases
For purposes of application to change or transfer a water right, amount of water actually beneficially used is not determined solely by amount actually applied to beneficial use immediately prior to change or transfer requests. West's RCWA 90.03.380.

[3] Waters and Water Courses 405 ⚷145

405 Waters and Water Courses
405VI Appropriation and Prescription
405k145 k. Change in Place, Manner, or Purpose of Appropriation or Use. Most Cited Cases
In order to decide whether to approve a transfer or change of water rights, Department of Ecology must tentatively determine the existence and extent of the beneficial use of a water right; it must address quantification of the right and whether the right has been relinquished or abandoned. West's RCWA 90.03.380.

[4] Waters and Water Courses 405 ⚷145

405 Waters and Water Courses
405VI Appropriation and Prescription
405k145 k. Change in Place, Manner, or Purpose of Appropriation or Use. Most Cited Cases
Water right which supplied water to a cabin continuously occupied except in winter could be changed to a year-round water right, with limitations on annual amounts so as to protect other water rights holders. West's RCWA 90.03.380.

[5] Waters and Water Courses 405 ⚷127

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405 Waters and Water Courses
405VI Appropriation and Prescription
405k127 k. Appropriation and Prescription in General. Most Cited Cases
Washington Supreme Court gives weight to well-established principles of western water law.

[6] Waters and Water Courses 405 ⚷143

405 Waters and Water Courses
405VI Appropriation and Prescription
405k141 Nature and Extent of Rights Acquired
405k143 k. Quantity of Water. Most Cited Cases

Waters and Water Courses 405 ⚷144

405 Waters and Water Courses
405VI Appropriation and Prescription
405k141 Nature and Extent of Rights Acquired
405k144 k. Use of Water. Most Cited Cases
Appropriated water right is limited by the time and volume of the original beneficial use.

[7] Waters and Water Courses 405 ⚷145

405 Waters and Water Courses
405VI Appropriation and Prescription
405k145 k. Change in Place, Manner, or Purpose of Appropriation or Use. Most Cited Cases
Statute governing applications for changes in water rights implicitly permits a change from seasonal use to year-round use; however, if such a change would cause injury to other water right holders, approval should be denied or conditioned so as to protect other water rights holders. West's RCWA 90.03.380.

[8] Waters and Water Courses 405 ⚷145

405 Waters and Water Courses
405VI Appropriation and Prescription
405k145 k. Change in Place, Manner, or Purpose of Appropriation or Use. Most Cited Cases
Transfer of two unperfected groundwater permits to developer seeking to consolidate water rights for irrigation, domestic, and stockwatering purposes was permissible under governing statute, although water had never been applied to beneficial use under permits. West's RCWA 90.44.100.

[9] Waters and Water Courses 405 ⚷139

405 Waters and Water Courses
405VI Appropriation and Prescription
405k139 k. Time of Vesting of Rights Under Appropriation. Most Cited Cases
Perfection of an appropriative water right is a term of art, requiring that appropriation is complete only when the water is actually applied to a beneficial use. West's RCWA 90.44.080.

[10] Waters and Water Courses 405 ⚷142

405 Waters and Water Courses
405VI Appropriation and Prescription
405k141 Nature and Extent of Rights Acquired
405k142 k. In General. Most Cited Cases
A holder's right under a permit to appropriate water is an "inchoate right," which is an incomplete appropriative right in good standing which remains in good standing so long as the requirements of law are being fulfilled.

[11] Waters and Water Courses 405 ⚷145

405 Waters and Water Courses
405VI Appropriation and Prescription
405k145 k. Change in Place, Manner, or Purpose of Appropriation or Use. Most Cited Cases
Beneficial use is not a prerequisite to an amendment of water use permit where unperfected rights under a groundwater permit are concerned. West's RCWA 90.44.100.

[12] Waters and Water Courses 405 ⚷145

405 Waters and Water Courses
405VI Appropriation and Prescription
405k145 k. Change in Place, Manner, or Purpose of Appropriation or Use. Most Cited Cases
Statute permitting amendments to unperfected groundwater rights cannot be used to speculate in water rights; other statutes require diligence in constructing water systems and application of water to beneficial use within a reasonable time. West's

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RCWA 90.03.250-90.03.340, 90.44.060, 90.44.100.

[13] Waters and Water Courses 405 ⚷145

405 Waters and Water Courses
405VI Appropriation and Prescription
405k145 k. Change in Place, Manner, or Purpose of Appropriation or Use. Most Cited Cases
Statute which permits amendments to unperfected groundwater rights authorizes a change in well location without affecting permit holder's priority date. West's RCWA 90.44.100.

[14] Waters and Water Courses 405 ⚷145

405 Waters and Water Courses
405VI Appropriation and Prescription
405k145 k. Change in Place, Manner, or Purpose of Appropriation or Use. Most Cited Cases
When holder of groundwater permit seeks amendment to permit, determination of the availability of water for appropriation should be based upon the time the holder applied for original permit, rather than the time at which holder seeks amendment. West's RCWA 90.44.100.

[15] Waters and Water Courses 405 ⚷145

405 Waters and Water Courses
405VI Appropriation and Prescription
405k145 k. Change in Place, Manner, or Purpose of Appropriation or Use. Most Cited Cases
Changes in unperfected groundwater rights are not limited to cases where some type of hydrologic or engineering difficulty is encountered. West's RCWA 90.44.100.

[16] Waters and Water Courses 405 ⚷145

405 Waters and Water Courses
405VI Appropriation and Prescription
405k145 k. Change in Place, Manner, or Purpose of Appropriation or Use. Most Cited Cases
In context of applications for change or transfer of water rights, public trust doctrine does not serve as an independent source of authority for Department of Ecology to use in its decision-making apart from the provisions in the water codes. West's RCWA 90.03.005, 90.03.380, 90.44.100

[17] Waters and Water Courses 405 ⚷145

405 Waters and Water Courses
405VI Appropriation and Prescription
405k145 k. Change in Place, Manner, or Purpose of Appropriation or Use. Most Cited Cases
Irrigation right based upon a 1915 notice of water right which described a point of diversion on creek was never perfected and therefore could not be changed or transferred, where evidence indicated that irrigation was accomplished by diverting water from another property owner's ditch and that holder of irrigation right constructed no separate diversion works under 1915 notice. West's RCWA 90.03.380.

[18] Statutes 361 ⚷228

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k228 k. Provisos, Exceptions, and Saving Clauses. Most Cited Cases
Generally, exceptions to statutory provisions are narrowly construed in order to give effect to legislative intent underlying the general provisions.

[19] Waters and Water Courses 405 ⚷152(6)

405 Waters and Water Courses
405VI Appropriation and Prescription
405k152 Actions to Determine, Establish, and Protect Rights
405k152(6) k. Presumptions and Burden of Proof. Most Cited Cases
While the party asserting abandonment of a water right or statutory relinquishment of the right has the burden of proving abandonment or nonuse, the party claiming sufficient cause for nonuse has the burden of showing how its nonuse falls under one of the narrow statutory exceptions. West's RCWA 90.14.140, 90.14.160-90.14.180.

[20] Waters and Water Courses 405 ⚷151

405 Waters and Water Courses
405VI Appropriation and Prescription
405k151 k. Abandonment or Forfeiture of Rights. Most Cited Cases
Exception to relinquishment of water right after five consecutive years of nonuse, applicable when such

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nonuse is "result of" legal proceedings, exists only when legal proceedings have prevented use. West's RCWA 90.14.140(1).

[21] Waters and Water Courses 405 ⚷151

405 Waters and Water Courses
405VI Appropriation and Prescription
405k151 k. Abandonment or Forfeiture of Rights. Most Cited Cases
For purposes of exception to relinquishment of water right after five years of nonuse, arising when rights are claimed for a determined future development, such development must be fixed conclusively or authoritatively prior to the end of the five-year period of nonuse. West's RCWA 90.14.140(2)(c).

[22] Waters and Water Courses 405 ⚷133

405 Waters and Water Courses
405VI Appropriation and Prescription
405k133 k. Proceedings to Effect and Character and Elements of Appropriation in General. Most Cited Cases
Genuine issue of material fact existed as to whether plans to develop property for use as ski resort were conclusively fixed prior to expiration of five-year period in which water right was not used; therefore, administrative board erred in determining summarily that developer fell within exception to rule that water right is relinquished after five consecutive years of nonuse. West's RCWA 90.14.140.

[23] Administrative Law and Procedure 15A ⚷796

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak796 k. Law Questions in General. Most Cited Cases
Under "error of law standard," a court may substitute its interpretation of the law for that of the agency. West's RCWA 34.05.570(3)(d).

[24] Waters and Water Courses 405 ⚷151

405 Waters and Water Courses
405VI Appropriation and Prescription
405k151 k. Abandonment or Forfeiture of Rights. Most Cited Cases
Under exception to relinquishment of water right after five years of nonuse, applicable when development plans are fixed prior to expiration of that period, some affirmative steps toward realization of the fixed plans must occur within 15-year period beginning with the later of July 1, 1967, or the latest beneficial use of water. West's RCWA 90.14.140.

[25] Waters and Water Courses 405 ⚷151

405 Waters and Water Courses
405VI Appropriation and Prescription
405k151 k. Abandonment or Forfeiture of Rights. Most Cited Cases
For purposes of satisfying exception to relinquishment of water right after five years of nonuse, objective evidence of affirmative steps to realize a fixed development plan includes applying for necessary permits, notifying Department of Ecology of plans to use the water right in connection with future development, actual physical development consistent with plans, and acquiring additional lands, rights, or materials needed to implement plans. West's RCWA 90.14.140.

[26] Waters and Water Courses 405 ⚷133

405 Waters and Water Courses
405VI Appropriation and Prescription
405k133 k. Proceedings to Effect and Character and Elements of Appropriation in General. Most Cited Cases
Granting of developer's motion for partial summary judgment in administrative proceeding concerning developer's claimed irrigation right, on basis that environmental group had failed to present evidence that right had been abandoned due to five-year period of nonuse, was erroneous where developer did not raise issue of nonuse in its motion. West's RCWA 90.14.140; CR 56(c).

[27] Judgment 228 ⚷183

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k183 k. In General. Most Cited Cases
It is incumbent upon party moving for summary

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judgment to determine what issues are susceptible to resolution by summary judgment and to clearly state in its opening papers those issues upon which summary judgment is sought. CR 56(c).

[28] Judgment 228 ⚷183

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k183 k. In General. Most Cited Cases
Rule governing summary judgment does not allow moving party to raise additional issues other than in the motion and memorandum in support of motion. CR 56(c).

[29] Judgment 228 ⚷184

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k184 k. Notice. Most Cited Cases
It is unfair to grant the extraordinary relief of summary judgment without allowing the nonmoving party the benefit of a clear opportunity to know on what grounds summary judgment is sought. CR 56(c).

****461 *122** Sierra Club Legal Defense, Todd True, Yukishisa Ishizuka, John B. Arum, Cutler & Nylander, Ps, Robert G. Nylander, Hillis, Clark, Martin & Peterson, Lynne M. Cohee, Stoel, Rives, Sarah Mack, Seattle, Law Offices of Charles Kimbrough, Charles A. Kimbrough, Bellevue, Foreman & Arch, Michael A. Arch, Wenatchee, for Appellants.

Christine Gregoire, Attorney General, Jean M. Wilkinson, Deborah L. Mull, Asst. Atty Gen., Olympia, for Respondents.

***123** MADSEN, J.

This case presents several issues arising out of R.D. Merrill's applications for changes in water rights as part of R.D. Merrill's efforts to provide water for the Wilson Ranch, a cross-country ski resort. R.D. Merrill sought changes in points of diversion, place of use, and purpose of use. Of the five applications now at issue, we affirm the Pollution Control Board's decision upholding the Department of Ecology's approval of three of the changes sought,[FN1] affirm the Board's determination that one of the rights was never perfected and therefore cannot be changed,[FN2] and reverse and remand for further proceedings with respect to the remaining application.[FN3]

FN1. We affirm the approvals of change applications for the Vane Certificate 3362 and Domestic Groundwater Permits G4 24313P and G4 24314P.

FN2. We affirm denial of the change application for the Wilson Irrigation Claim No. 131559.

FN3. We reverse and remand with respect to the change application for the Willis Irrigation Claim No. 115861.

We adhere to our recent decision in ****462***Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wash.2d 769, 947 P.2d 732 (1997) concerning beneficial use of a water right before a change application may be approved under RCW 90.03.380. We also adhere to our analysis in *Rettkowski v. Department of Ecology*, 122 Wash.2d 219, 858 P.2d 232 (1993) of the public trust doctrine and its relationship to the state's water codes. We conclude that under certain circumstances a change from seasonal to year-round use is permitted under RCW 90.03.380. We hold that approval of two unperfected groundwater rights was permissible under RCW 90.44.100, which, unlike RCW 90.03.380, does not require beneficial use of the appropriative right obtained ***124** under a permit before a change in well location may be approved. We conclude that an asserted water right for irrigation under a 1915 notice of intent to appropriate was never perfected and therefore is not subject to change. Finally, we hold that material issues of fact remain as to abandonment or relinquishment of all or a part of the other irrigation right at issue, and remand for further proceedings.

Facts

R.D. Merrill wants to build a resort consisting of a main lodge with dining facilities, 7 dwelling units, 10 lots for cabins, 10 single family lots, and a man-made lake and wetland. The land on which the development is to occur has been the subject of attempts, dating back to the 1970's, by several of R.D. Merrill's predecessors in interest to develop recreational facili-

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ties. One earlier proposed development involved a lengthy delay due to litigation involving an environmental review conducted by the United States Forest Service in conjunction with a special permit to develop ski facilities. R.D. Merrill obtained title and development rights in 1992.

In order to build its cross-country ski resort, R.D. Merrill sought to consolidate water rights for irrigation, domestic and stockwatering purposes. The water rights involved in the change applications at issue at this stage of the proceedings are as follows. The Willis irrigation right involves a claim for diverted surface water with a 1910 priority date for stockwatering and irrigation. A 1974 claims registration form indicates 23 acres were irrigated under this right. The Department approved the change application in this amount. However, the Board found that between 1920 and 1930 no more than 14 to 20 acres were irrigated, and accordingly held that the change application could be approved only to the extent of this historical use, i.e., an amount to irrigate up to 20 acres. The Board did not address the extent to which the right was used after that period of time. The Superior Court affirmed.

The Wilson well right is represented by a certificate of *125 water right issued in 1949, the Vane Certificate, for domestic use and stockwatering. Water was supplied under this right to a cabin continuously occupied, except during the winter, from about 1953 to the present. The Department approved a change application in the amount of one acre foot per year. The Board reduced this quantity to .67 acre feet per year to reflect the fact the right had not been used in the winter, and the Superior Court affirmed.

Two of the change applications concern unperfected groundwater permits issued in 1979 for domestic, stockwater and irrigation uses. No beneficial use of water for domestic and stockwatering uses has occurred. The Department approved transfer of these unperfected rights, the Board affirmed, and the Superior Court affirmed.

The final right at issue is the Wilson irrigation right. This asserted right is based upon a 1915 notice of water right describing a diversion of water from the Early Winters Creek. There is no evidence that diversionary works were ever constructed in accord with the notice, and there is conflicting evidence as to whether any water was ever beneficially used under this claimed right. The Department approved the change application. The Board reversed, holding the right had never been perfected and therefore was not subject to change under RCW 90.03.380. The Superior Court reversed.

Discussion

Change applications under RCW 90.03.380

Okanogan Wilderness League (OWL) makes the same argument in this case that it presented in **463*Okanogan Wilderness League, Inc. v. Twisp*, 133 Wash.2d 769, 947 P.2d 732, as to what is required before transfer of a water right may be permitted. Under RCW 90.03.380, the right to use water which has been applied to beneficial use in this state is appurtenant to the land where it is used; however, the right can, without loss of priority, be transferred to another (or others) and become appurtenant to other land or place of use, or a change in point of diversion or the purpose of use *126 can occur, provided in each case that there is no detriment or injury to existing rights. RCW 90.03.380.[FN4] OWL maintains that the Pollution Control Hearings Board (Board) erred in approving changes in defendant R.D. Merrill's water rights because the Board considered only whether water rights had been historically perfected without regard to the extent to which the water rights had been actually beneficially used at the time of the applications for change.

FN4. A 1997 amendment to the statute has added that changes in place of use, point of diversion, and/or purpose of use to make possible irrigation of additional acreage or addition of new uses may be allowed if the change results in no increase in the annual consumptive quantity of water used. Laws of 1997, ch. 442, § 801.

[1] Historic perfected use is not the measure of a water right subject to change under the statute. *Okanogan Wilderness League, Inc.*, 133 Wash.2d at 777-81, 947 P.2d 732. Moreover, a change application under RCW 90.03.380 is precluded where a perfected right has been abandoned or otherwise extinguished. *Id.* at 781, 947 P.2d 732. Thus, even if a use was historically perfected, it may have been lost in whole or in part as a result of abandonment or relin-

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quishment. If so, the asserted right (whether in whole or in part) may not be changed or transferred under RCW 90.03.380. Accordingly, issues of abandonment and relinquishment are relevant to the question of beneficial use under RCW 90.03.380.

[2] The amount of water actually beneficially used is also not determined solely with regard to the amount actually applied to beneficial use *immediately* prior to transfer (or change) requests, and immediate prior use is not the measure of the right which may be transferred or changed. Quantifying a water right for purposes of RCW 90.03.380 based upon beneficial use immediately prior to the time of a transfer or change application could result in an incorrect measure. For example, the amount of water applied to irrigation uses may be considerably higher or lower in a given season or year depending upon, among other things, rainfall, temperature, and recent years' history of drought or rainfall affecting surface and groundwater resources. "Neither the statute nor any authority cited by OWL supports the conclusion that the sole inquiry is whether water ***127** has been beneficially used continuously up to the time the change in diversion point is sought." *Okanogan Wilderness League, Inc.*, 133 Wash.2d at 780-81, 947 P.2d 732.

[3] *Okanogan Wilderness League, Inc.* also resolves an additional claim made by plaintiff Burkhart that the Department improperly conducted a de facto adjudication of the rights to use waters of Early Winters Creek and the Methow River. In order to decide whether to approve a change under RCW 90.03.380, the Department must tentatively determine the existence and extent of the beneficial use of a water right. *Okanogan Wilderness League, Inc.*, 133 Wash.2d at 778-79, 947 P.2d 732. Quantification of the right and whether the right has been relinquished or abandoned in whole or in part are matters the Department must address in deciding whether to approve a transfer or change application. *Id.*

Seasonal use under RCW 90.03.380

[4] The Vane water right supplied water to a cabin continuously used except in the winter. OWL maintains that under RCW 90.03.380 a transferred right must be limited to the season in which the right has been beneficially used.

[5] Long-settled western water law establishes that a water right is measured not only by quantity, but by time of use. This court gives weight to well-established principles of western water law. *Okanogan Wilderness League, Inc.*, 133 Wash.2d at 783, 947 P.2d 732; ****464***Department of Ecology v. Grimes*, 121 Wash.2d 459, 475, 852 P.2d 1044 (1993); *Department of Ecology v. United States Bureau of Reclamation*, 118 Wash.2d 761, 767-69, 827 P.2d 275 (1992).

[6] "An appropriated water right is limited *by the time* and volume of the original beneficial use. '[U]niversally recognized as a part of the law of waters in the western states [is the rule] that a water right may be measured by time as well as by volume.' " *Neubert v. Yakima-Tieton Irrigation Dist.*, 117 Wash.2d 232, 238, 814 P.2d 199 (1991) (emphasis added) (quoting ***128***United States v. Ahtanum Irrigation Dist.*, 330 F.2d 897, 908 (9th Cir.1964)). Cases cited in *Ahtanum*, 330 F.2d at 915 n. 15, include: *Clough v. Wing*, 2 Ariz. 371, 378, 17 P. 453 (1888); *Santa Paula Waterworks v. Peralta*, 113 Cal. 38, 44, 45 P. 168 (1896); *Cache La Poudre Reservoir Co. v. Water Supply & Storage Co.*, 25 Colo. 161, 53 P. 331 (1898); *Uhrig v. Coffin*, 72 Idaho 271, 275, 240 P.2d 480 (1952); *Galiger v. McNulty*, 80 Mont. 339, 354, 260 P. 401 (1927); *see also City of Westminster v. Church*, 167 Colo. 1, 445 P.2d 52 (1968); *Rencken v. Young*, 300 Or. 352, 711 P.2d 954 (1985).

Seasonal use is relevant to a change application. As one commentator states: "[T]iming changes which alter the length of the period or the season of the year during which water is diverted and used" can cause impermissible third party effects. George A. Gould, *Transfer of Water Rights*, 29 Nat. Res. J. 457, 463 (1989). This is because water which has not been diverted and used during certain periods of time has been available during such periods for appropriation and use by others.

[7] While RCW 90.03.380 does not expressly mention a change in water rights from seasonal use to year-round use, such a proposed change is implicitly covered by the statute. Aside from the requirement that water rights must have been put to actual beneficial use before transfer or change, RCW 90.03.380 allows other changes in water rights so long as there is no detriment or injury to other water rights. The statute expressly allows, for example, a change in purpose of use. Purpose of use is often tied to time of

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use. For example, if the purpose of use is irrigation, the right will almost always be used seasonally. Domestic water use often is year-round use. Thus, a change in purpose of use may require that time of use be changed as well in order to put the water right to the proposed new use.

However, as with other changes under RCW 90.03.380, a change in time of use may not be made which is detrimental to other appropriators' rights. If a change from seasonal to year-round use would cause injury, approval of a change in *129 time of use should be denied or conditioned to protect other water rights holders by, for example, limiting the use for new purposes to the same season as the historical use.

We conclude that the change in the Vane transfer was properly approved.

RCW 90.44.100

[8] The Board approved a change in two unperfected groundwater permits although water was never applied to beneficial use under the permits. Reliance on RCW 90.03.380 to approve a change in these rights would be improper because water must have been applied to beneficial use before a transfer or change of a water right may be approved under RCW 90.03.380.

However, defendants argue that this transfer was proper under RCW 90.44.100. RCW 90.44.100 is found in the groundwater code, and pertains to amendments of permits and groundwater right certificates. In contrast to RCW 90.03.380, which requires beneficial use of water before a change may be approved, RCW 90.44.100 clearly allows for amendment of a groundwater permit where water has not actually been applied to beneficial use. RCW 90.44.100 addresses amendments to both certificates of groundwater rights *and* to *permits*. The statute provides that an amendment to a certificate of groundwater right or a *permit* may be applied for, and, if approved, allow the holder to construct wells or other means of withdrawal at another location or to change the manner or place of use of the water without loss of priority of right.

**465 [9] A certificate of groundwater right is issued when a water right is perfected. *See* RCW 90.44.080. Perfection of an appropriative right is a term of art, requiring that appropriation is complete only when the water is actually applied to a beneficial use. *See, e.g., Ellis v. Pomeroy Improvement Co.,* 1 Wash. 572, 21 P. 27 (1889); Arval A. Morris, *Washington Water Rights-A Sketch,* 31 Wash. L.Rev. 243, 252, 258 (1956); 2 *Waters and Water Rights* § 14.03(d) (Robert E. Becker ed., 1991).

[10] *130 However, a permit to appropriate groundwater is not the same thing as a final groundwater certificate. A water right under a permit to appropriate water is not a perfected water right. A permit to withdraw public groundwaters authorizes the holder to appropriate public waters. RCW 90.44.050. Applications for permits and permits issued pursuant to such applications are governed by provisions in the surface water code. RCW 90.44.060. A holder's right under a permit to appropriate water is an inchoate right, which is " 'an incomplete appropriative right in good standing' " which " 'remains in good standing so long as the requirements of law are being fulfilled.' " *Department of Ecology v. Theodoratus,* 135 Wash.2d 582, 596, 957 P.2d 1241 (1998) (quoting 1 Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States* 226 (1971)). Appropriations of groundwater must comply with surface water code provisions expressly incorporated into the groundwater code. RCW 90.44.060. Inchoate rights are expressly recognized in the surface water code, which provides that nothing in the chapter "shall operate to effect an impairment of any inchoate right to divert and use water while the application of the water in question to a beneficial use is being prosecuted with reasonable diligence." RCW 90.03.460.

[11] By expressly allowing amendment of a *permit,* RCW 90.44.100 plainly contemplates that an unperfected water right may be involved. It follows that water may not actually have been beneficially used. Thus, unlike RCW 90.03.380, which requires beneficial use of water before a change may be approved, RCW 90.44.100 expressly allows for amendment where water has not actually been applied to beneficial use. Beneficial use is not a prerequisite to an amendment under RCW 90.44.100 where unperfected rights under a groundwater permit are concerned.

[12] As the Department correctly points out, however, RCW 90.44.100 does not authorize amend-

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ments for changes in *purpose* of use. Further, other statutes govern appropriation, RCW 90.03.250 to .340 (incorporated into groundwater code under RCW 90.44.060), and require diligence in ***131** constructing water systems and application of water to beneficial use within a reasonable time. Given these statutory limitations, RCW 90.44.100 cannot be used to speculate in water rights even though amendment is allowed where unperfected rights are involved.

[13] RCW 90.44.100 facilitates appropriation of groundwater under a permit. A holder of an appropriative right to withdraw groundwater may sink a well in the location stated in the permit application, but discover it provides no water. Another location on the property is found which is likely to provide ample water to satisfy the appropriative right. RCW 90.44.100 authorizes a change in well location in these circumstances without affecting the permit holder's priority date.

Changes in well location(s), or the manner or place of use of the water, i.e., changes permitted under RCW 90.44.100, do not alter the original project or the quantity of water needed. As the Department points out, RCW 90.44.100 allows flexibility in the physical location and means of withdrawal so that permit holders can beneficially use the groundwater they are entitled to appropriate under their permits. However, the flexibility is not unlimited. The statute places a number of conditions on additional or replacement wells including, among other things, that the same body of public groundwater must be tapped, that the original right may not be enlarged, and that the change permitted by amendment must not impair the existing rights of other water users. RCW 90.44.100.[FN5]

FN5. Before amendment in 1997, RCW 90.44.100 provided that an application for amendment had to be made in the case of additional or replacement wells at the same location or a new location. As amended, the statute provides that if the location is not changed, an application for an amendment is not required, provided that certain conditions are satisfied. Laws of 1997, ch. 316, § 2.

****466** In addition, under the version of the statute in effect when R.D. Merrill's application was made, as well as under the current statute insofar as changes in well location (as here) are concerned, amendment shall be issued only after notice and findings as in the case of the original application.***132** Former RCW 90.44.100; Laws of 1997, ch. 316, § 2. This means that findings must be made that water is available for a beneficial use, that the appropriation will not impair existing rights, and that appropriation will not be detrimental to the public welfare. RCW 90.03.290 (incorporated by reference in RCW 90.44 under RCW 90.44.060).

[14] The next question is whether the statutory conditions were met in this case. The chief dispute is whether, at the time amendment is sought, the Department must find that water is then available for appropriation, or whether its determination of availability should be based upon the time the holder applied for the original permit.

The statute states that "upon the issuance by the department of an amendment to the appropriate permit or certificate of groundwater right, the holder of a valid right to withdraw public groundwaters may, *without losing the holder's priority of right,* construct wells...." RCW 90.44.100 (emphasis added). An applicant's priority date for a water right which has been perfected in accord with law relates back to the date of application for the permit. RCW 90.03.340 (incorporated into groundwater code by RCW 90.44.060); *Hillis v. Department of Ecology,* 131 Wash.2d 373, 384-85, 932 P.2d 139 (1997). Whether water is available for other appropriation after that date will not affect the holder's right. By providing that priority is maintained after amendment, RCW 90.44.100 evidences legislative intent that the time for determining the availability of water subject to appropriation is the time a permit is applied for.[FN6] RCW 90.44.100 has been satisfied in this case.

FN6. Plaintiffs also maintain that the Department failed to consider whether any threat of detriment to the public welfare would occur as a result of amendment to the groundwater permits under RCW 90.44.100. *See* RCW 90.03.290 (relating to findings required in the case of an original permit). The Department concluded, however, that the proposed changes sought by R.D. Merrill would not be contrary to the public interest. Ex. R-13, at 8.

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[15] Finally, on this issue, the Department maintains that RCW 90.44.100 is a narrow exception to the transfer and change provisions of RCW 90.03.380, and urges that it allows*133 for a change in an unperfected right only where some type of hydrologic or engineering difficulty is encountered. However, nothing in the statute indicates such a narrow reach.

Moreover, the narrow reading of the statute urged by the Department is not necessary to avoid conflict with RCW 90.03.380. The perceived conflict arises because RCW 90.03.380 requires that water be applied to beneficial use before a transfer or change can be approved while RCW 90.44.100 does not mention beneficial use. As explained, beneficial use is not a prerequisite to amendment where a permit is concerned, because an unperfected water right is by definition involved. There is no conflict, because RCW 90.03.380's beneficial use requirement means that unperfected rights are not encompassed within RCW 90.03.380. Insofar as RCW 90.44.100 allows amendment to a final certificate of groundwater right, as noted, a certificate only issues once the right has been perfected, i.e., water has been applied to beneficial use.[FN7]

FN7. If, as the Department suggests, hydrologic or engineering difficulties are encountered which prevent beneficial use of water after a final certificate of groundwater right has been issued, for example, where a well "runs dry," the resulting failure to actually apply water to beneficial use before amendment is sought may be excused. The statutory relinquishment statutes evidence legislative intent that that loss of a water right, *and its priority,* not occur where unavailability of water prevents beneficial use. For example, RCW 90.14.160-.180 define five years of nonuse as the *voluntary* failure to beneficially use the water right. Further, RCW 90.14.140(1)(a) establishes that sufficient cause precluding relinquishment for nonuse exists where there is drought or unavailability of water.

**467 We uphold the Board's affirmance of the Department's approval of changes in the unperfected groundwater permits.

Public trust doctrine

Plaintiff OWL argues that the Department's decisions in this case violate the public trust doctrine. The court in *Rettkowski* noted two problems with applying the public trust doctrine to water law issues. First, we have never held that the doctrine applies to nonnavigable *134 or groundwater. 122 Wash.2d at 232, 858 P.2d 232. Second, the duty devolves upon the State, not any particular agency. The Department's enabling statute does not grant it authority to assume the public trust duties of the state. *Id.* The court then observed that the issue before it involved the Department's regulatory authority and the public trust doctrine could provide no guidance as to the Department's authority because "[t]hat guidance ... is found only in the Water Code." *Id.* at 233, 858 P.2d 232.

[16] We adhere to this analysis. Without question, the state water codes contain numerous provisions intended to protect public interests. However, the public trust doctrine does not serve as an independent source of authority for the Department to use in its decision-making apart from the provisions in the water codes.

Plaintiffs urge, however, that the public trust doctrine should be used as a canon of construction in interpreting the state water code provisions. The state statutes contain numerous provisions representing legislative policy on water use and water users' rights. For example, RCW 90.03.005 states that

> [i]t is the policy of this state to promote the use of public waters in a fashion which provides for obtaining maximum net benefits arising from both diversionary uses of the state's public waters and the retention of waters within streams and lakes in sufficient quantity and quality to protect instream and natural values and rights.

Here, resort to the public trust doctrine as an additional canon of construction is not necessary in light of the specific provisions at issue and the water law policies expressed in the state water codes.

Whether Wilson irrigation right perfected

[17] Plaintiffs contend that the Wilson irrigation right was never perfected and therefore is not subject to

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transfer or change under RCW 90.03.380. The Board held that the right had not been perfected. The superior court reversed. *135 We uphold the Board's determination because substantial evidence supports its factual determinations which support its conclusion that the right was never perfected. The superior court improperly substituted its own factual determinations in reaching its opposite conclusion.

On appeal from a decision of the Board, the superior court must uphold agency findings unless "[t]he order is not supported by evidence that is substantial when viewed in light of the whole record before the court...." RCW 34.05.570(3)(e). Agency findings on factual matters are entitled to great deference. *Penick v. Employment Sec. Dep't,* 82 Wash.App. 30, 37, 917 P.2d 136 (1996).

The Board found: The Wilson irrigation right is based upon a 1915 notice of water right which described a point of diversion on Early Winters Creek, just below the diversion for the Early Winters Ditch Company ditch which begins at the creek and runs along and past the western boundary of the homestead property allegedly irrigated under the Wilson irrigation right. A homestead survey of this property in 1917 does not indicate a separate diversion ditch from the ditch company's ditch, and later assessor records similarly do not indicate any such ditch. Jack Wilson used diverted water from the ditch company's ditch to irrigate 10 acres of pasture. However, no evidence indicates any water was diverted under the 1915 notice and put to beneficial use. Although conflicting evidence was presented, Wilson possibly used water under the ditch company's claim, rather than under the 1915 notice. Testimony concerning the chain of title to the homestead property and the ditch company partnership agreement indicated no shares were held in the ditch company. However, the notice of water right for the ditch company **468 recorded in 1907 and the company's 1974 registration form indicated that the homestead property was part of the land where the ditch company's right was to be used. Further, evidence was presented that Wilson early during his ownership paid for use of the ditch company's ditch and later acquired ditch company shares to irrigate another piece of property. *136 Finding of fact VI, Vol. 5, at 9 (Apr. 26, 1995) (*Knight v. Ecology,* Pollution Control Hearings Board (PCHB) No. 94-61). All of these findings are supported by substantial evidence in the record.

The superior court said, however, that the owners of the homestead property claimed a right independent of the ditch company right, conveyed the water through the ditch company's ditch, and beneficially applied the water to the land. The court also said that the owners of the property did not claim any other right for that purpose, and no owner of the property ever owned shares in the ditch company for purposes of irrigating the homestead property.

The problem with the superior court's "findings" is that the court made its own findings despite substantial evidence supporting the Board's findings. Further, the superior court drew the conclusion that the owners of the property must have been using their own claimed right because, the court reasoned, they had no right to use the ditch company's water. As the Board found, though, there was conflicting evidence. Regardless of whether the owners of the property owned shares in the ditch company, the ditch company's claims included irrigation water for the homestead property, and no separate diversion works were constructed under the 1915 notice, even though that notice expressly said that a separate diversion would be made. The superior court failed to defer to the agency's factual determinations as it should have.

The Board's legal conclusion that the Wilson irrigation right was not perfected is supported by its findings. At the time this water right was claimed, perfected surface water rights for irrigation use could be established under 1891 legislation by posting a notice of claim at the proposed point of diversion, filing a copy with the county auditor, commencing the work associated with the notice within prescribed times, and diligently completing the work. Charles B. Roe, Jr. & Peter B. Anderson, *Water Law, in* 1C Kelly Kunsch *Washington Practice: Methods of Practice* § 91.6 (4th ed.1997) (discussing Laws of 1891, ch. 142). *137 "[S]trict compliance" with the requirements was necessary, and "a failure to comply [with the requirements] deprive[d] the appropriator of the right to the use of the water as against a subsequent appropriator...." Laws of 1891, ch. 142, § 4 at 328.

Perfection of a water right could also occur in accordance with community custom, requiring "(1) an intent to appropriate, (2) implementation of that intent by an actual diversion of public waters, and (3) an application of the diverted water to a beneficial use

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within a reasonable time based upon the concept of due (or reasonable) diligence." Roe & Anderson, *Supra,* § 91.8, at 330 (discussing appropriation predating the 1917 water code).

The evidence does not establish that there was an actual diversion of water under the claimed right nor that water diverted under the claimed right was used to irrigate the homestead property. While it may be possible for owners of water rights to make a joint diversion, *see* Jurupa Ditch Co. v. San Bernardino County, 256 Cal.App.2d 35, 63 Cal.Rptr. 764 (1967), here there is no evidence that a joint diversion was intended; to the contrary, the 1915 notice provided that a separate diversion would be made. There is no evidence that any separate diversion was ever constructed. The evidence thus indicates that intent to appropriate water under the 1915 notice was not carried out. The claimed right was never perfected in accord with either the 1891 statutes or community custom.

The superior court held, though, that the Board erred in applying the law, reasoning that application of water to beneficial use is the important consideration and that the means of diversion are incidental. First, the court's statement of the law does not answer the problem that the evidence does not adequately support the proposition that water under the 1915 notice was ever diverted and **469 applied to beneficial use, regardless of the means of diversion. Second, insofar as water rights claimed prior to the 1917 water code are concerned, diversion was, as noted above, a key *138 requirement of a perfected water right.[FN8] Third, the case relied on by the superior court for the principle that diversion is only an incidental matter does not support the proposition. In that case the court said that "[a]ppropriation of water consists in the intention, accompanied by reasonable diligence, to use the water for the purposes originally contemplated *at the time of its diversion.* " Offield v. Ish, 21 Wash. 277, 280-81, 57 P. 809 (1899) (emphasis added). The court then explained that the fact that the point of diversion may have been changed does not affect the right. *Id.* It was in that context that the court said "[t]he right to use the water is the essence of appropriation; the means by which it is done are incidental." *Id. Offield* actually involved an already perfected right and later changes in the point of diversion. In fact, the case was later cited for the proposition that "the point of diversion may be changed and not affect the right to the entire appropriation." *In re Water Rights in Ahtanum Creek,* 139 Wash. 84, 100, 245 P. 758 (1926). That rule, the court further noted in *Ahtanum Creek,* is now embodied in RCW 90.03.380, which concerns transfers and changes of water rights, *not* perfection of such rights. *Id.* (citing Laws of 1917, ch. 117, § 39 (now RCW 90.03.380)). The holding in *Offield* does not involve the question of perfection of a pre-1917 code right and the superior court erroneously relied upon it to overturn the Board.

> FN8. Where permitting statutes prescribe the way in which water is to be appropriated, actual diversion may not be required depending upon the statutory provisions. *See, e.g.,* State v. Morros, 104 Nev. 709, 713, 766 P.2d 263 (1988). In Washington, even under the 1917 water code, diversion still retains importance. The application for a permit to appropriate water must provide "the location and description of the proposed ditch, canal, or other work, the time within which the completion of the construction and the time for the complete application of the water to the proposed use." RCW 90.03.260.

We uphold the Board's determination that the Wilson irrigation right was not perfected and that no change of right is permitted under RCW 90.03.380 because no valid right existed to change.

*139 Summary judgment

In light of our holdings as to the four change applications discussed above, our discussion of the questions of abandonment or relinquishment, and quantification of the amount of a water right subject to transfer or change under RCW 90.03.380 primarily concerns the application to change the Willis irrigation right. The Board ruled on R.D. Merrill's motion for partial summary judgment that plaintiffs had the burden of establishing abandonment or relinquishment and had failed to present sufficient evidence. That ruling was erroneous. The issue was not before the Board on the summary judgment motion and plaintiffs have not had a fair opportunity to present evidence on the issue. The record shows that material issues of fact remain on the issues of abandonment and relinquishment as to the Willis irrigation right, and therefore

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summary judgment was improperly granted in favor of defendant R.D. Merrill.

Statutory exceptions to relinquishment

Under RCW 90.14, a water right is subject to relinquishment in whole or in part if, without sufficient cause, the holder voluntarily fails to beneficially use the right or a portion of the right for a period of five years. RCW 90.14.130; RCW 90.14.160-.180. RCW 90.14.140 defines sufficient cause for nonuse. R.D. Merrill relies upon two statutory exceptions to relinquishment, arguing that "[t]he operation of legal proceedings" is sufficient cause for nonuse, RCW 90.14.140(1)(d), and that no relinquishment occurred, notwithstanding RCW 90.14.130 through .180, because its rights were claimed "for a determined future development to take place either within fifteen years of July 1, 1967 [the effective date of the relinquishment statutes], or the most recent beneficial use of the water right, whichever date is later[,]" RCW 90.14.140(2)(c).

Material issues of fact remain regarding applicability of the exceptions in RCW 90.14.140.

****470** [18] ***140** In addressing the exceptions to relinquishment, it is important to bear in mind that generally exceptions to statutory provisions are narrowly construed in order to give effect to legislative intent underlying the general provisions. *State v. Williams*, 94 Wash.2d 531, 548, 617 P.2d 1012, 24 A.L.R.4th 1191 (1980); *Olson v. University of Washington*, 89 Wash.2d 558, 562, 573 P.2d 1308 (1978); *Hall v. Corporation of Catholic Archbishop*, 80 Wash.2d 797, 801, 498 P.2d 844 (1972). The purpose of the relinquishment statutes is "to cause a return to the state of any water rights which are no longer exercised by putting said waters to beneficial use." RCW 90.14.010. RCW 90.14.020(3) provides that "[a] strong beneficial use requirement as a condition precedent to the continued ownership of a right to withdraw or divert water is essential to the orderly development of the state...." RCW 90.14.160 through .180 state that where water rights have not been beneficially used for five continuous years, or have been abandoned, "said right or portion thereof shall revert to the state, and the waters affected by said right shall become available for appropriation...." Given these purpose and policy statements, and the express provisions of RCW 90.14.160 through .180, the Legislature intended that water be beneficially used, and, if not, that water rights be returned to the state so that the water will be available for appropriation by others who will put the water to beneficial use.

[19] It is also important to keep in mind that while the party asserting abandonment of a water right or statutory relinquishment of the right has the burden of proving abandonment or nonuse, R.D. Merrill, as the party claiming sufficient cause for nonuse, has the "burden of showing how its nonuse falls under one of the narrow categories in RCW 90.14.140." *Department of Ecology v. Acquavella*, 131 Wash.2d 746, 758, 935 P.2d 595 (1997); *see Hall*, 80 Wash.2d at 801-02, 498 P.2d 844 (burden of proof of facts essential to invocation of a statutory exception is on the proponent); ***141** *In re Petition of North Laramie Land Co.*, 605 P.2d 367 (Wyo.1980) (burden of proof of applicability of exception excusing nonuse for purposes of statutory forfeiture of water right on party claiming exception); *In re Water Appropriation No. 442A*, 210 Neb. 161, 313 N.W.2d 271 (1981) (same). Thus, regardless of plaintiff's burden of proof on abandonment or relinquishment, R.D. Merrill has the burden of proving that nonuse of the water rights is excused by a statutory exception.

[20] The first exception claimed by R.D. Merrill is that the operation of legal proceedings excused any nonuse of the water rights. RCW 90.14.140(1)(d) provides that sufficient cause exists for nonuse of all or part of the water by the owner of a water right for five consecutive years "as a result of ... [t]he operation of legal proceedings." R.D. Merrill argues that litigation involving the ability to develop a ski area on federal land adjacent to its land tied up its development plans and constitutes sufficient cause for nonuse. R.D. Merrill points out that the Board has construed "legal proceedings" to mean "all proceedings authorized or sanctioned by law and brought or instituted in a court or legal tribunal for the acquiring of a right or the enforcement of a remedy." Pollution Control Hr'gs Board Second Partial Summ. J. Order, Vol. 4, at 4 (Feb. 3, 1995) (*Knight v. Ecology*, PCHB No. 94-61, at 4) (citing *Attwood v. Department of Ecology*, PCHB No. 82-58, 1983 WL 197279 (Mar. 24, 1983)). While this may be a correct definition of what constitutes a legal proceeding, the fact that a legal proceeding exists involving a water right holder's land or development plans does not in itself compel application of the exception.

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RCW 90.14.140(1)(d) requires that nonuse of the water be "the result of" the legal proceedings. As plaintiffs and the Department argue, the "operation of legal proceedings" exception thus requires more than involvement in legal proceedings. Read narrowly to preserve the general statutory provisions, the exception requires that the nonuse of water be attributable to the legal proceedings, i.e., ***142** that the legal proceedings prevent the use of the water. This approach is in keeping with the general provisions favoring beneficial use of water unless there is some legitimate reason why the water cannot be used. Here, while development plans may have been delayed****471** as a result of the litigation, it is not clear whether beneficial use of the water for other purposes was prevented while the litigation was pending. Because the Board applied the wrong legal standard in determining whether the operation of legal proceedings excused any nonuse of the water, remand for further factual determinations is necessary on this question.

[21][22] The second claimed exception is that nonuse does not require relinquishment because the rights were "claimed for a determined future development to take place either within fifteen years of July 1, 1967, or the most recent beneficial use of the water right, whichever date is later...." RCW 90.14.140(2)(c). The statute does not define "determined future development." The Board has interpreted "determined" in accord with the dictionary definition, i.e., " 'to fix conclusively or authoritatively.' " *E.g., Cocking Farms v. Department of Ecology*, PCHB No. 93-251, 1994 WL 905549, at *2 (Conclusion of Law 3) (Feb. 14, 1994) (citing *Webster's Third New International Dictionary* 616 (1971)).[FN9] In accord with the Board's interpretation, the Department reasons that the water right holder must have a firm definitive plan in order to fall within the exception. The Board has also interpreted the exception to mean that in order to be fixed conclusively or authoritatively, the future development must, at the least, be fixed prior to the end of the five year period of nonuse. *Georgia Manor Water Ass'n v. Department of Ecology*, PCHB No. 93-68, 1994 WL 905585 (Nov. 9, 1994).

FN9. The Pollution Control Hearings Board's (PCHB) decisions are cited here to show the agency interpretation of RCW 90.14.140(2)(c). As the Department acknowledges, the PCHB decisions do not provide precedent for the court to follow.

[23] Under the error of law standard of RCW 34.05.570(3)(d), ***143** a court may substitute its interpretation of the law for that of the agency. *Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wash.2d 450, 458, 938 P.2d 827 (1997). However, the agency's interpretation accords with the ordinary dictionary definition of the term and, therefore, correctly states the law. *See State v. Chester*, 133 Wash.2d 15, 22, 940 P.2d 1374 (1997) ("[i]n the absence of a specific statutory definition, words in a statute are given their common law or ordinary meaning"; "[a] nontechnical word may be given its dictionary definition.")

The Board's prior interpretation of the statute as requiring that the future development be determined before the expiration of five years of nonuse also comports with the relinquishment statutes. RCW 90.14.140(2)(c) refers to a "determined future development to take place ... within fifteen years[,]" thus contemplating (1) a fixed determination-a firm definitive plan (2) of a future development which will take place within 15 years-encompassing the possibility of future development which may occur after the 5 years nonuse period. While the actual development need not occur within the five years nonuse period, there must be fixed development plans within that period. First, the statute refers to a plan which is already determined ("determin*ed* "). Second, any other reading of the provision would defeat the general relinquishment provisions, because a water right holder whose rights are subject to relinquishment for five years nonuse could otherwise decide *after* five continuous years of nonuse to plan a future development in order to avoid relinquishment. Such a result is at odds with the obvious purpose of the statutory provision to avoid relinquishment only where fixed development plans will take longer than five years to come to fruition.

Here, there is a genuine issue of material fact as to whether there was any conclusively or authoritatively fixed development plans within five years of July 1, 1967. R.D. Merrill points to evidence of feasibility studies in 1970. However, investigation of whether development is feasible ***144** is not a fixed, definitive plan. Instead it is preliminary to a fixed development

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plan. Other evidence to the effect that property purchases were made in 1972 is also insufficient to hold that a determined future development was planned as of July 1, 1972, because the evidence does not disclose *when* in 1972 any purchases were made. If purchases were later than June 30, 1972, then five years had already passed. If, as plaintiffs contend, those were years of **472 continuous nonuse (in whole or in part), relinquishment had already occurred.

Further, while the Department claims the evidence shows that the water rights were beneficially used later than July 1, 1972, thus making last beneficial use the relevant time period from which the 5 and 15 year periods ran, plaintiff Burkhart quite correctly points out that the Department relies on evidence produced during the hearing before the Board after the issues of abandonment and statutory relinquishment had already been foreclosed by the Board's summary judgment. At the time of the hearing, plaintiffs were not put to the burden of proving abandonment or statutory relinquishment, and in fact were not allowed to pursue the issues, and nonuse for purposes of the relinquishment statute was not at issue. Disputed material issues of fact are raised by materials submitted on the issue of nonuse when plaintiffs sought reconsideration of the second partial summary judgment (after the Board ruled on the issue despite the fact it was not raised by the partial summary judgment motion). (The Board denied plaintiffs' motion for reconsideration of the second order granting partial summary judgment.) Thus, whether the time of last beneficial use is the relevant time depends upon resolution of material disputed facts.

We hold that there remain disputed issues of material fact as to whether five years of nonuse occurred before any conclusively or authoritatively fixed development plans were made. Therefore, partial summary judgment on the "determined future development" exception was improper.

[24][25] As the Department and plaintiff Burkhart contend, *145 the "determined future development" exception additionally requires that the development plan be effected within 15 years (either of July 1, 1967, or the latest beneficial use of water). The provision states the right must be claimed for a determined future development "to take place" within 15 years. RCW 90.14.140(2)(c). A legal issue is raised as to what is required within the 15 year period. Completion of development within 15 years should not be required because some large-scale projects will require a lengthy development period, particularly where extensive environmental review and construction are involved, and RCW 90.14.140(2)(c) is clearly not intended to provide an exception only for small projects. However, there must be some development within the 15 year period in order for the right to remain valid.

Burkhart maintains the development must be actual physical development. R.D. Merrill points, in contrast, to *Sheep Mountain Cattle Co. v. Department of Ecology*, 45 Wash.App. 427, 726 P.2d 55 (1986), where the court listed certain facts as supporting application of the future development exception. The facts listed, with the exception of the fact that some irrigation pipe had been laid on a portion of the land, relate to planning and investigation, rather than actual physical development. For two reasons, *Sheep Mountain* provides little guidance. First, the issue there was whether the water right holder had been provided due process before the Department issued an order declaring the right had reverted to the state under the relinquishment statutes. The court held that the holder had been deprived of notice and the opportunity to be heard. The discussion of whether the determined future development exception might apply was dicta. Second, the facts the court recited in *Sheep Mountain* clearly supported finding that a conclusively or authoritatively fixed development plan was in place, which was all that was necessary at the time because 15 years from July 1, 1967, had not yet passed-the relinquishment order was dated May 21, 1981-and the holder would still have had time to commence physical development if that were required.

*146 We conclude that some affirmative steps toward realization of the fixed development plans must occur within the 15-year period. Among factors which may serve as objective evidence indicating actual implementation are: applying for necessary county and other permits, notifying the Department of plans to use the water right in connection with a future development, actual physical development consistent with the fixed development plans such as clearing land or commencing construction, and acquiring additional lands, rights, or materials needed to implement the **473 determined development plan. We do not intend an exhaustive list, nor to suggest that any of these factors are dispositive in a

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given case. However, whatever steps are taken to implement the development plans, the water right holder must proceed in the exercise of reasonable due diligence within the 15-year period.

Abandonment and relinquishment

[26] In ruling on R.D. Merrill's motion for partial summary judgment, the Board also reasoned that plaintiffs had the burden of establishing abandonment or statutory relinquishment and had failed to present evidence supporting their claim that the water rights had not been used. This ruling was erroneous because the issue of nonuse was not raised in R.D. Merrill's partial summary judgment motion and therefore the Board erred in deciding the issues of abandonment and statutory relinquishment on summary judgment.

[27] R.D. Merrill's motion for partial summary judgment noted plaintiffs' assertion that water rights approved for changes had been abandoned or relinquished by Merrill. R. D. Merrill's Mot. for Partial Summ. J., at 12 (Jan. 3, 1995). (However, *plaintiffs* did *not* move for summary judgment on this issue.) R.D. Merrill's motion then states: "In fact, *as to any periods of non-use* after 1967, these rights have neither been abandoned nor relinquished by Merrill." *Id.* (emphasis added). The motion then sought summary judgment on the basis of the two exceptions to relinquishment*147 claimed by R.D. Merrill. *Id.* at 13-15. Thus, defendant's motion maintained that *regardless* of whether there was any nonuse, the two exceptions applied and excused any nonuse. The motion did not discuss whether nonuse occurred, and did not raise nonuse as an issue.[FN10]

FN10. R.D. Merrill argues that the issue of nonuse was "inherent" in its motion. The issue was not inherent in R.D. Merrill's partial summary judgment motion. The Board could rule on whether the exceptions excused any nonuse without having to rule on whether there were disputed material facts as to whether five years' nonuse occurred. Moreover, a party responding to a summary judgment motion should not have to guess what additional issues may be "inherent" in the motion. "[I]t is incumbent upon the moving party to determine what issues are susceptible to resolution by summary judgment, and to clearly state in its opening papers those issues upon which summary judgment is sought." *White v. Kent Med. Ctr., Inc.*, 61 Wash.App. 163, 169, 810 P.2d 4 (1991).

[28] Even if the issue of nonuse had been raised in R.D. Merrill's reply brief, the issue would still not be a proper basis for summary judgment. First, allowing the moving party to raise new issues in rebuttal materials generally gives the moving party no opportunity to respond. *White v. Kent Med. Ctr., Inc.*, 61 Wash.App. 163, 168, 810 P.2d 4 (1991). Second, nothing in CR 56(c) allows the raising of additional issues other than in the motion and memorandum in support of the motion. *Id.*

In any event, it is difficult to agree that R.D. Merrill attempted to raise the issue of nonuse in its reply memorandum. The reply brief stated that R.D. Merrill "moved for partial summary judgment as to Issue No. 3 [regarding plaintiffs' claims of abandonment and relinquishment] ... requesting a determination by this Board that *any periods* of non-use after 1967 could not constitute relinquishment or abandonment of the water rights at issue...." Merrill's Reply Mem. in Supp. of Summ. J., at 4 (Jan. 23, 1995) (emphasis added). The reply memorandum then argued (1) that plaintiffs bore the burden of proof on the issues of abandonment and relinquishment and that in response to defendant's partial summary judgment motion plaintiffs had failed to put forward sufficient evidence of nonuse; and (2) that plaintiffs had failed to sufficiently controvert evidence which defendant presented in favor of application of *148 the two exceptions to relinquishment which it claimed. *Id.* at 5-7. Therefore, even if an issue on which summary judgment is sought could be raised in a reply memorandum, R.D. Merrill did not raise the issue of nonuse. Rather, R.D. Merrill tied its discussion of plaintiffs' "failure" to provide sufficient evidence on nonuse *directly to* the issues it raised *in the partial summary judgment motion,* and said that plaintiffs' response was inadequate to overcome the motion.**474 R.D. Merrill was not purporting to raise in the reply memorandum a new issue on which summary judgment should be granted, but instead referred to the grounds for summary judgment raised in the motion itself.

The fact that plaintiffs bear the burden of proof on the issues of abandonment and statutory relinquishment does not make any difference here. First, since

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the issue of nonuse was not raised in the summary judgment motion, plaintiffs had no reason at all to provide evidence of nonuse in response. Second, as explained above, on the issues which R.D. Merrill actually raised in its partial summary judgment motion, applicability of the two claimed exceptions to relinquishment, R.D. Merrill bore the burden of proof.

[29] Finally, R.D. Merrill argues that if error occurred when the Board considered the issue of nonuse, the error was harmless. We disagree. Initially, we have serious doubts that a harmless error analysis should apply here at all. It is unfair to grant the extraordinary relief of summary judgment without allowing the nonmoving party the benefit of a clear opportunity to know on what grounds summary judgment is sought. In addition, plaintiffs submitted materials to the Board following R.D. Merrill's reply and again upon their own motion for reconsideration of the Board's second partial summary judgment ruling which raise material issues of fact as to nonuse. (The Board denied that motion for reconsideration.)

The Board erred in granting summary judgment on the issues of abandonment and relinquishment.

We reverse the Board's partial summary judgment rulings*149 on the issues of abandonment and statutory relinquishment, including applicability of the exceptions to statutory relinquishment, and remand for further proceedings. The abandonment and relinquishment issues are relevant to the change sought in the Willis irrigation right (not to be confused with the Wilson irrigation right).

Conclusion

For the reasons stated in this opinion, we affirm the Board's decision upholding the changes in the Vane water right and in the two unperfected groundwater rights. We also affirm the Board's determination that the Wilson irrigation right was never perfected and accordingly cannot be changed under RCW 90.03.380. We reverse the Board's grant of partial summary judgment on the issues of abandonment and statutory relinquishment.

DURHAM, C.J., and DOLLIVER, SMITH, GUY, JOHNSON, ALEXANDER, TALMADGE and SANDERS, JJ., concur.

Wash.,1999.
R.D. Merrill Co. v. State, Pollution Control Hearings Bd.
137 Wash.2d 118, 969 P.2d 458

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Supreme Court of Washington,
En Banc.
The STATE of Washington, Petitioner,
v.
Edward Dean BASH and Lawrence Edward Delzer,
Respondents.
No. 63828-4.

Argued June 26, 1996.
Decided Nov. 7, 1996.

Criminal charges were brought against dog owners under statute providing that owners of dog which aggressively attacks and causes severe injury or death of human being is guilty of felony. In denying dog owners' motion to dismiss charges, the Superior Court, Yakima County, Robert N. Hackett, J., ruled that statute set forth strict-liability offense, but that dog owners could assert as affirmative defense that they neither knew nor should have known that dog was potentially dangerous or dangerous dog. State sought discretionary review. The Supreme Court, Madsen, J., held that: (1) criminal liability arose under such statute only if dog was previously classified as either potentially dangerous or dangerous dog, and (2) statute did not create strict-liability offense.

Reversed.

Durham, C.J., concurred with opinion.

Dolliver, J., dissented with opinion.

West Headnotes

[1] Animals 28 ⚷76

28 Animals
28k66 Injuries to Persons
28k76 k. Criminal Prosecutions. Most Cited Cases
Statute providing that owners of dog which aggressively attacks and causes severe injury or death of human being is guilty of class C felony imposes criminal liability only if dog was previously classified as either potentially dangerous or dangerous dog. West's RCWA 16.08.100(3).

[2] Statutes 361 ⚷190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases
Ambiguous statute is subject to construction.

[3] Statutes 361 ⚷190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases

Statutes 361 ⚷217.4

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k217.4 k. Legislative History in General. Most Cited Cases
Where statute is amenable to more than one interpretation, legislative history and other aids to construction may provide guidance in construing statute to give effect to intent of legislature.

[4] Statutes 361 ⚷223.1

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.1 k. In General. Most Cited Cases
Supreme Court assumes that legislature did not intend to create inconsistency in statutes, and seeks to construe statutes so as to avoid inconsistency.

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[5] Animals 28 ⚷76

28 Animals
28k66 Injuries to Persons
28k76 k. Criminal Prosecutions. Most Cited Cases
Statute providing that owners of dog which aggressively attacks and causes severe injury or death of human being is guilty of class C felony does not set forth strict-liability offense, but instead requires state to prove beyond reasonable doubt that defendant either knew or should have known that his or her dog was potentially dangerous or dangerous dog. West's RCWA 16.08.100(3).

[6] Statutes 361 ⚷241(1)

361 Statutes
361VI Construction and Operation
361VI(B) Particular Classes of Statutes
361k241 Penal Statutes
361k241(1) k. In General. Most Cited Cases
Where criminal statute does not specify mental element, legislative intent may be determined by resort to another body of law generally guiding such inquiry.

[7] Constitutional Law 92 ⚷2507(1)

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2499 Particular Issues and Applications
92k2507 Criminal Law
92k2507(1) k. In General. Most Cited Cases
(Formerly 92k70.1(10))
Whether mental element is essential element of crime is matter to be determined by legislature.

[8] Criminal Law 110 ⚷21

110 Criminal Law
110I Nature and Elements of Crime
110k19 Criminal Intent and Malice
110k21 k. Acts Prohibited by Statute. Most Cited Cases
(Formerly 110k26)
Legislature may create strict-liability crimes.

[9] Statutes 361 ⚷241(1)

361 Statutes
361VI Construction and Operation
361VI(B) Particular Classes of Statutes
361k241 Penal Statutes
361k241(1) k. In General. Most Cited Cases
Deciding whether statute sets forth strict-liability crime is statutory construction question aimed at ascertaining legislative intent.

[10] Criminal Law 110 ⚷20

110 Criminal Law
110I Nature and Elements of Crime
110k19 Criminal Intent and Malice
110k20 k. In General. Most Cited Cases
(Formerly 110k26)
Criminal offenses with no requirement of mental element have generally disfavored status.

[11] Criminal Law 110 ⚷26

110 Criminal Law
110I Nature and Elements of Crime
110k26 k. Criminal Act or Omission. Most Cited Cases
Other things being equal, greater the possible punishment for particular crime, the more likely some fault is required under statute defining such crime; and, conversely, lighter the possible punishment, the more likely legislature meant to impose criminal liability without fault.

[12] Criminal Law 110 ⚷26

110 Criminal Law
110I Nature and Elements of Crime
110k26 k. Criminal Act or Omission. Most Cited Cases
Other things being equal, the more serious a particular crime's consequences are to public, the more likely legislature meant to impose liability without regard to fault, and vice versa.
**979*597 Jeffrey C. Sullivan, Yakima County

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Prosecutor, Bruce Hanify, Deputy, Yakima, for petitioner.

Kirschenmann, Devin, Fortier & Raber, Kenneth W. Raber, Moore, Thompson & Scott, John S. Moore, Jr., Yakima, for respondents.

MADSEN, Justice.

Respondents Lawrence E. Delzer and Edward D. Bash were charged by information with violating RCW 16.08.100(3), which provides that the owner of a dog which aggressively attacks and causes severe injury or death of a human being is guilty of a class C felony. The trial court concluded that the statute sets forth a strict liability offense but that a defendant may assert as an affirmative defense that he or she neither knew nor should have known that the dog was a potentially dangerous or dangerous dog. We granted discretionary review and reverse, holding that the statute does not define a strict liability crime, but instead requires that the dog's owner either knew or should have known that the dog was a potentially dangerous or dangerous dog.

STATEMENT OF CASE

The State says that it will produce evidence at trial that two pit bulls owned by respondents attacked and killed *598 Mr. Walt Freser, a seventy-five-year-old man, who was sitting in a wheel chair in his back yard, and that the dogs also seriously injured a neighbor, Mr. Herman Miller, when he tried to rescue Mr. Freser.

Respondents' cases were consolidated for trial. Respondents moved for dismissal of the charges because the State failed to allege any mental element of the crime and it appeared the prosecution would proceed on the basis that RCW 16.08.100(3) defines a strict liability crime. Respondents maintained that RCW 16.08.100(3) does not set forth a strict liability offense, and, if it does, it is unconstitutional. The trial court denied the motion to dismiss. The court ruled that the statute sets forth a strict liability offense. The court was troubled by what it perceived to be due process problems attendant with the strict liability nature of the offense, however, and therefore further ruled that the statute would be unconstitutional unless a judicially imposed defense was available to a defendant charged under the statute. Accordingly, the court, drawing by analogy from the "unwitting possession" defense against the strict liability crime of possession of a controlled substance, concluded that respondents would be entitled to assert the defense that they did not know or reasonably should not have known of the potential dangerousness or dangerousness of either or both of the dogs. Clerk's Papers at 4-6. The court reasoned the burden of proving the defense by a preponderance of the evidence would be on the defendant. The court fashioned a jury instruction to this effect.

The State sought discretionary review by this court of that part of the trial court's order creating a defense. The State's motion was granted. Trial court proceedings are stayed pending this court's decision in the case.

ANALYSIS

In 1987, the Legislature enacted a number of statutes concerning the ownership of dogs. **980 Laws of 1987, ch. 94. *599 RCW 16.08.100 is one of those statutes. To place the statute in context, an overview of the 1987 legislation is helpful. In general, the 1987 statutes define potentially dangerous and dangerous dogs, set forth requirements regarding ownership of dangerous dogs, and establish criminal liability under several circumstances.

RCW 16.08.070(1) defines

> "Potentially dangerous dog" [as] any dog that when unprovoked: (a) Inflicts bites on a human or a domestic animal either on public or private property, or (b) chases or approaches a person upon the streets, sidewalks, or any public grounds in a menacing fashion or apparent attitude of attack, or any dog with a known propensity, tendency, or disposition to attack unprovoked, to cause injury, or otherwise to threaten the safety of humans or domestic animals.

RCW 16.08.070(2) defines

> "Dangerous dog" [as] any dog that according to the records of the appropriate authority, (a) has inflicted severe injury on a human being without provocation on public or private property, (b) has killed a domestic animal without provocation while

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> off the owner's property, or (c) has been previously found to be potentially dangerous, the owner having received notice of such and the dog again aggressively bites, attacks, or endangers the safety of humans or domestic animals.

" 'Severe injury' means any physical injury that results in broken bones or disfiguring lacerations requiring multiple sutures or cosmetic surgery." RCW 16.08.070(3).

Under RCW 16.08.080, it is unlawful to have an unregistered dangerous dog (with an exception for police dogs). A certificate of registration will be issued upon sufficient evidence of a proper enclosure for the dog and $50,000 in liability insurance covering injuries caused by the dog. RCW 16.08.080. A dangerous dog must be properly restrained and muzzled in accordance with RCW 16.08.090(1) when outside its enclosure. Potentially dangerous dogs are not regulated under RCW 16.08, but instead are to be regulated by local, municipal, and county ordinances. ***600**RCW 16.08.090(2). Dogs are not to be declared dangerous if the threat, injury, or damage was sustained by a person who either committed a willful trespass or other tort or crime on the owner's premises, or had tormented, abused, or assaulted the dog. RCW 16.08.090(3).

Finally, in addition to providing for criminal liability under RCW 16.08.100(3), RCW 16.08.100 provides for confiscation of a dangerous dog if it is not registered, the owner has failed to secure liability insurance, the dog is not maintained in a proper enclosure, or the dog is not properly restrained while outside the owner's dwelling or the dog's proper enclosure. In these instances, the owner is guilty of a gross misdemeanor. RCW 16.06.100(1). If a dangerous dog of an owner who has a prior conviction under RCW 16.08 attacks or bites a person or domestic animal, the owner is guilty of a class C felony and the dog must be confiscated and humanely destroyed. RCW 16.08.100(2).

The statutory provision at issue in this case is RCW 16.08.100(3), which provides:

> The owner of any dog that aggressively attacks and causes severe injury or death of any human, whether the dog has previously been declared potentially dangerous or dangerous, shall be guilty of a class C felony punishable in accordance with RCW 9A.20.021. In addition, the dog shall be immediately confiscated by an animal control authority, placed in quarantine for the proper length of time, and thereafter destroyed in an expeditious and humane manner.

Under RCW 9A.20.021(c), a class C felony is punishable by confinement for five years in a state correctional facility, by a fine of $10,000, or both.

The State maintains, and the trial court agreed, that RCW 16.08.100(3) sets forth a strict liability crime, one having no required mental element. Respondents maintain that the statute does have a mental element, or, at the least, it is ambiguous and should be construed as having a mental element requirement.

[1] ***601** Respondents correctly argue that the statute is ambiguous, primarily as a result****981** of the clause "whether the dog has previously been declared potentially dangerous or dangerous." RCW 16.08.100(3). This clause can be read two ways. It can be read to mean "whether or not" the dog has previously been declared potentially dangerous or dangerous, an owner is criminally liable. This is the way in which the trial court construed the statute. The clause can also be read to mean "whether the dog has previously been declared potentially dangerous or whether the dog has been previously declared dangerous," *i.e.*, one or the other. Under this reading, criminal liability would only arise if the dog had previously been classified as either a "potentially dangerous dog" or a "dangerous dog," in accord with the definitions in RCW 16.08.070.

[2][3] An ambiguous statute is subject to construction. *Whatcom County v. City of Bellingham*, 128 Wash.2d 537, 546, 909 P.2d 1303 (1996). Where a statute is amenable to more than one interpretation, legislative history and other aids to construction may provide guidance in construing the statute to give effect to the intent of the Legislature. *Kadoranian v. Bellingham Police Dep't*, 119 Wash.2d 178, 185, 829 P.2d 1061 (1992). The court has frequently looked to final bill reports as part of an inquiry into legislative history. *E.g.*, *State v. Silva-Baltazar*, 125 Wash.2d 472, 479, 886 P.2d 138 (1994).

The final bill report on SSB 5301, the bill enacted as RCW 16.08, provides some background but no clari-

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fication to the legislation. The report indicates that while current law then held dog owners liable for injury a person sustained as a result of a dog bite, the dog owners were not required to establish the ability to pay until after an incident occurred. Some owners refused or were unable to pay damages for injuries suffered. Senate Comm. on Judiciary, House Comm. on Judiciary, Final Bill Report, SSB 5301, 49th Legislature (1987). With regard to RCW 16.08.100(3), the report states "The owner of any dog that causes severe injury or death to any human, irrespective ***602** of the dog's previous classification, is guilty of a class C felony and the dog must be quarantined and destroyed." *Id.*; Clerk's Papers at 137.

Unfortunately, the final bill report does not resolve the ambiguity in the statute. It can be read to say that regardless of any, or no, previous classification, criminal liability arises-a reading consistent with the State's position that RCW 16.08.100(3) sets forth a strict liability crime. Alternatively, because the explanation in the final bill report refers to "the dog's previous classification," it can be read to mean that the dog had a previous classification which, under the statutory scheme and the language in RCW 16.08.100(3), would have been as a potentially dangerous dog or a dangerous dog.

Principles of statutory construction may also be applied to resolve an ambiguity. Applicable here is the rule that statutes should be construed so that all of the language used is given effect, and no part is rendered meaningless or superfluous. *Whatcom County*, 128 Wash.2d at 546, 909 P.2d 1303. If, as the trial court concluded, the "whether" clause means "whether or not" the dog has been declared either potentially dangerous or dangerous, the clause adds nothing to the meaning and is superfluous-if it were eliminated, the statute would mean the same thing. Giving meaning to the clause requires that it be construed as providing that regardless of whether the dog was previously classified as either a potentially dangerous dog or as a dangerous dog (but it was classified as one or the other), criminal liability may arise.

[4] Respondents also urge that in the context of RCW 16.08 as a whole, the 1987 statutes are inconsistent if RCW 16.08.100(3) is read as a "first bite" statute, one which imposes criminal liability without regard to any previous classification of the dog. This court assumes that the Legislature did not intend to create an inconsistency in statutes, and seeks to construe statutes so as to avoid inconsistency. *Timberline Air Service, Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wash.2d 305, 314, 884 P.2d 920 (1994). ***603** Under RCW 16.08.070(2)(a) a dog which inflicts severe injury on a human being is a dangerous dog which must be registered for lawful ownership. Under RCW 16.08.070(2)(c), a dog previously found to be potentially dangerous, which again aggressively attacks a human is a dangerous dog which must be registered. ****982** In neither case do the statutes mandate destruction of the dog. However, under RCW 16.08.100(3), the dog must be destroyed. If RCW 16.08.100(3) is read to apply to any dog which aggressively attacks and inflicts severe injury on a human, regardless of any previous classification, it is inconsistent with RCW 16.08.070(2). The statutes would then provide that a dog attacking a human and inflicting severe injury could be registered as a dangerous dog under RCW 16.08.070(2) and . 080, but would have to be destroyed under RCW 16.08.100(3).

Perhaps more importantly, under RCW 16.08.070(2)(a), an owner can register as a dangerous dog a dog which has inflicted severe injury on a human being apparently without being subjected to a felony prosecution, while under RCW 16.08.100(3), a dog which aggressively attacks and causes severe injury to a human being is subject to a felony prosecution for a first attack under the State's position and the trial court's construction of the statute. We decline to construe RCW 16.08.100(3) in a manner which would render it inconsistent with other provisions in the statute.

[5] Resolving the ambiguity in the statute as requiring the State to prove the dog was either a potentially dangerous dog or a dangerous dog, however, does not answer the question of whether a mental element is part of the crime established by RCW 16.08.100 because the statutes do not in general contain provisions attributing knowledge about the animal's aggressive or dangerous propensities to the owner, especially with regard to potentially dangerous dogs. Under the statutory scheme, a dog could be either an unregistered dangerous dog or a potentially dangerous dog without the owner's knowledge-the statute does not ***604** expressly tie the classification to notice to the owner except in one instance. That one instance is that a dangerous dog includes one previously found

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to be potentially dangerous, "*the owner having received notice of such* and the dog again aggressively bites, attacks, or endangers the safety of humans or domestic animals." RCW 16.08.070(2)(c) (emphasis added). By this provision, it is apparent that the Legislature contemplated that an owner might have a potentially dangerous dog with no notice of that classification. Also, while the definition of "dangerous dog" includes the fact that the records of the appropriate agency reflect the dog's conduct, thus suggesting the owner may have some reason to know of it, the definition of "potentially dangerous dog" does not contain such language. Adding to the uncertainty is the fact that the statutes are not clear about how a dog is "declared" or "classified" as either a "potentially dangerous dog" or a "dangerous dog."

[6][7][8] Where a statute does not specify a mental element, legislative intent may be determined by resort to another body of law generally guiding such an inquiry. Although there is no fixed test, courts have considered several factors in deciding whether a criminal statute provides for a strict liability crime where it does not specify a mental element. Whether a mental element is an essential element of a crime is a matter to be determined by the Legislature. *State v. Cleppe*, 96 Wash.2d 373, 378, 635 P.2d 435 (1981), *cert. denied*, 456 U.S. 1006, 102 S.Ct. 2296, 73 L.Ed.2d 1300 (1982) (citing *State v. Henker*, 50 Wash.2d 809, 812, 314 P.2d 645 (1957)); *see also Staples v. United States*, 511 U.S. 600, ---- - ----, 114 S.Ct. 1793, 1796-97, 128 L.Ed.2d 608 (1994). The Legislature may create strict liability crimes. *State v. Rivas*, 126 Wash.2d 443, 452, 896 P.2d 57 (1995) (citing *Cleppe*, 96 Wash.2d at 380, 635 P.2d 435; *State v. Stroh*, 91 Wash.2d 580, 583-84, 588 P.2d 1182, 8 A.L.R.4th 760 (1979), and *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952)).

[9] Thus, deciding whether a statute sets forth a strict liability crime is a statutory construction question aimed at **605 ascertaining legislative intent. The inquiry begins with the statute's language and legislative history. The "whether" clause in RCW 16.08.100(3) indicates legislative intent that a strict liability crime was not intended, on the ground that the dog must have exhibited some aggressive or dangerous conduct giving the owner indication that the animal needed to be controlled or it might cause harm. Further, use of the word "declared" in that clause suggests the Legislature envisioned some notice of the dog's status.

**983 In the context of the statutes as a whole, the Legislature was seeking to identify dogs likely to pose a significant danger to people and to require owners to take precautions reducing that danger. It is therefore reasonable to conclude that the Legislature did not intend to impose criminal liability if the owner were unaware of the dog's aggressiveness or dangerous propensities.

Moreover, RCW 16.08.040, enacted in 1941, provides for strict civil liability of an owner for damages resulting from a dog bite "regardless of the former viciousness of such dog or the owner's knowledge of such viciousness." The Legislature clearly knew how to eliminate any knowledge requirement as it expressly did in RCW 16.08.040, and could similarly have done so in RCW 16.08.100(3) if that had been the Legislature's intent.

[10] In *Staples*, the United States Supreme Court identified several considerations which bear upon legislative intent to impose strict liability: (1) a statute's silence on a mental element is not dispositive of legislative intent; the statute must be construed in light of the background rules of the common law, and its conventional mens rea element; (2) whether the crime can be characterized as a "public welfare offense" created by the Legislature; (3) the extent to which a strict liability reading of the statute would encompass seemingly entirely innocent conduct; (4) and the harshness of the penalty. Other considerations include: (5) the seriousness of the harm to the public; (6) the ease or difficulty of the defendant ascertaining the true facts; **606 7) relieving the prosecution of difficult and time-consuming proof of fault where the Legislature thinks it important to stamp out harmful conduct at all costs, "even at the cost of convicting innocent-minded and blameless people"; and (8) the number of prosecutions to be expected. 1 Wayne R. LaFave & Austin W. Scott, *Substantive Criminal Law* § 3.8, at 341-44 (1986). Finally, criminal offenses with no requirement of a mental element have a "generally disfavored status." *E.g.*, *Liparota v. United States*, 471 U.S. 419, 426, 105 S.Ct. 2084, 2088, 85 L.Ed.2d 434 (1985) (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 438, 98 S.Ct. 2864, 2874, 57 L.Ed.2d 854 (1978)); *United States v. Nguyen*, 73 F.3d 887, 890-91 (9th Cir.1995).

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For several centuries, common law crimes were defined to require both an actus reus, or guilty conduct, and a mens rea, the culpable state of mind, whether intent, knowledge, recklessness, or, more rarely, negligence. 1 LaFave & Scott § 3.8, at 340; *see* *Morissette,* 342 U.S. at 251, 72 S.Ct. at 244 (common law crimes "generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand"); *State v. Smith,* 17 Wash.App. 231, 234, 562 P.2d 659 (1977), *review denied,* 89 Wash.2d 1022 (1978) (at common law, general rule was that intent or scienter was an element of every crime). "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette,* 342 U.S. at 250, 72 S.Ct. at 243.

More modernly, statutes were enacted defining criminal acts, and courts concluded that common law crimes when codified continued to require intent or guilty knowledge, even if the statutes were silent on the matter. *Id.* at 252, 72 S.Ct. at 244. An associated principle is that crimes which involve moral turpitude are malum in se and have been held to require a mental element, some level of "guilty knowledge," even ***607** if the statute does not specify that element. *State v. Turner,* 78 Wash.2d 276, 280, 474 P.2d 91, 41 A.L.R.3d 493 (1970). In contrast, statutory crimes which are mala prohibita, if properly enacted within the police power, are often upheld without proof of an evil intent, and even without any mental element at all. *Id.* at 280, 474 P.2d 91. Such crimes often fall within a category of crimes called "public welfare" or "regulatory" offenses, such as those involving "pure food and drugs, labeling, weights and measures, building, plumbing and electrical codes, fire protection, air and water pollution, sanitation, highway safety and numerous other areas[.]" *Id.* at 280, 474 P.2d 91; *see Staples,* at ---- - ----, 114 ****984** S.Ct., at 1797-98. Many of the public welfare offenses "are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize." *Morissette,* 342 U.S. at 255-56, 72 S.Ct. at 246.

Respondents argue that the goal of RCW 16.08.100(3) is to prevent aggressive dog attacks causing injury or death in humans, and that such occurrences are bad in and of themselves. Respondents urge that the crime is thus a malum in se crime requiring scienter, and is unlike regulatory crimes such as erecting a building without a permit. The State maintains, to the contrary, that RCW 16.08.100(3) establishes a malum prohibitum offense which is a strict liability crime.

In identifying the typical "public welfare offense," the nature of the thing regulated is often a crucial inquiry. Items within such regulation have included "potentially harmful or injurious items[,]" and "dangerous or deleterious devices or products or obnoxious waste materials[.]" *Staples,* at ----, 114 S.Ct. at 1798 (quoting *United States v. International Minerals & Chem. Corp.,* 402 U.S. 558, 564-65, 91 S.Ct. 1697, 1701-02, 29 L.Ed.2d 178 (1971)). The Court has reasoned, though, that even statutes regulating dangerous ***608** items will not be treated as defining a public welfare offense where strict liability would criminalize a broad range of apparently innocent behavior. *Id.* at ---- - ----, 114 S.Ct. at 1798-1800. The Court said in *Staples,* involving a statute criminalizing possession of unregistered machine-guns, that items or devices, even if dangerous, must be of a nature to "alert individuals to the likelihood of strict regulation." *Id.* at ----, 114 S.Ct. at 1800. The Court reasoned that "despite their potential for harm, guns generally can be owned in perfect innocence." *Id.* at ----, 114 S.Ct. at 1800. The Court observed that virtually any semi-automatic weapon may be converted, by internal modification, or in some cases by wear and tear, into a machine-gun within the meaning of the statute at issue, and give no visible external indication it is fully automatic. *Id.* at ----, 114 S.Ct. at 1802. The Court held that under the statute criminalizing possession of an unregistered machine-gun, the Government had to prove beyond a reasonable doubt that the defendant knew that the gun possessed had characteristics bringing it within the statutory definition of a machine-gun, and rejected the Government's argument that the statute established a strict liability public welfare offense.

This notion that a dangerous or destructive item

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which is regulated must be such as to put the owner on notice of the likelihood of regulation in order to find a strict liability crime favors respondents in this case. The analogy would be that as a general proposition, ownership of dogs is "so commonplace" (*see Staples,* at ----, 114 S.Ct., at 1800), and often occurs with such "perfect innocence" (*see Staples,* at ----, 114 S.Ct., at 1800), that dog owners would not be put sufficiently on notice of the likelihood of regulation to an extent to justify interpreting RCW 16.08.100(3) as not requiring a mental element (*compare Staples,* at ----, 114 S.Ct., at 1800).

[11] The Court in *Staples* also reasoned that the harshness of the penalty is a relevant consideration in deciding whether Congress intended a strict liability crime. *Staples,* at ----, 114 S.Ct. at 1802-04; *see* 1 LaFave & Scott § 3.8, at 340-41, 343. "Other things being equal, the greater the possible***609** punishment, the more likely some fault is required; and, conversely, the lighter the possible punishment, the more likely the legislature meant to impose liability without fault." 1 LaFave & Scott § 3.8, at 343 (citing, among other cases, *State v. Strong,* 294 N.W.2d 319 (Minn.1980)) (statute defining crime of taking contraband into state prison without specifying mental element not a strict liability crime; court stresses crime punishable by 3 to 5 years imprisonment); *see also United States v. X-Citement Video, Inc.,* --- U.S. ----, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994) (mental element requirement presumed where violations of statute criminalizing transporting or receiving visual ****985** depictions of minors engaging in sexually explicit conduct punishable by up to 10 years' imprisonment). The Court in *Staples* stopped short of saying that punishing a crime as a felony was incompatible with the theory of the public welfare offense, but strongly hinted in that direction and then concluded that "absent a clear statement from Congress that mens rea is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with mens rea." *Staples,* at ----, 114 S.Ct. at 1804.

The crime defined in RCW 16.08.100(3) is a class C felony, punishable by 5 years' imprisonment, or a $10,000 fine, or both, and the harshness of this penalty may indicate the Legislature did not intend a strict liability crime in RCW 16.08.100(3). However, it should also be noted that this court has found a statute to state a strict liability offense where the conduct was punishable as a felony. *State v. Lindberg,* 125 Wash. 51, 215 P. 41 (1923) (state banking act punishing bank director for borrowing from bank; one to five-year indeterminate sentence imposed). LaFave and Scott observe, though, that generally in cases where a strict liability statute has been found even with a harsh penalty, other factors in the cases pointed toward strict liability. 1 LaFave & Scott § 3.8, at 345.

[12] The seriousness of the possible harm to the public arguablyweighs ***610** in favor of a strict liability offense. "Other things being equal, the more serious the consequences to the public, the more likely the legislature meant to impose liability without regard to fault, and vice versa." LaFave & Scott § 3.8, at 343. Animals which attack humans are a serious problem and the history recounted in the final bill report discussed above demonstrates legislative concern for accountability. That history expressly concerns financial responsibility, a matter addressed in the legislation making $50,000 in liability insurance mandatory as a condition of owning a dangerous dog. But criminal liability was undoubtedly thought of by the Legislature as having a deterrent effect which would protect the public from unrestrained and uncontrolled dogs. Whether a strict liability standard would accomplish the goal of deterrence is doubtful, however, because unless the owner knows or reasonably should know of the dog's dangerous propensities, it is unlikely that the owner would think it necessary to use extraordinary care in controlling the dog.

The record does not offer any information regarding the difficulty for the prosecution in proving fault nor whether the burden would be so time-consuming that imposing strict liability would be justified. Likewise, the record is silent as to the number of prosecutions which can be expected under the RCW 16.08.100(3).

On balance, the statutory scheme as a whole favors reading the statute as not setting forth a strict liability crime. At the least, as respondents argue, the inclusion of the "whether" clause in the statute does not clearly eliminate scienter, and given the nature of the crime as a felony and the harshness of the potential punishment, legislative intent to dispense with a mental element should be clear before the court concludes the statute defines a strict liability crime. Actual knowledge of a dog's dangerous propensities, or a "should have known" standard, like a negligence

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standard, is consistent with the Legislature's apparent purpose in enacting the 1987 statutes in RCW 16.08 regarding regulation and control of aggressive and dangerous dogs.

***611** Cases cited by the State are not to the contrary. In its motion for discretionary review, the State relied upon *State v. Coria*, 120 Wash.2d 156, 839 P.2d 890 (1992) and *State v. Rivas*, 126 Wash.2d 443, 896 P.2d 57 (1995) as examples of areas of the criminal law where strict liability has been upheld. *Coria* involved statutes imposing enhanced penalties for drug dealing within 1,000 feet of a school bus stop. The court held that the statute constitutionally imposed the enhanced penalties regardless of the drug dealers' knowledge whether he was in a drug-free zone. *Coria* is unlike the present case in an important regard, however. While dog ownership is widespread and generally innocent behavior, selling drugs is not.

Rivas is also unlike the present case. *Rivas* involved the question whether under the ****986** vehicular homicide by intoxication statute there was a required causal connection between intoxication and the victim's death. *Rivas*, 126 Wash.2d at 452-53, 896 P.2d 57. The crime there involved consumption of alcohol to a state of intoxication, and the driving of a motor vehicle. Courts have recognized that alcohol is an inherently dangerous substance producing harmful secondary effects such as drunk driving, and accordingly alcohol-related offenses may be strict liability offenses. *State v. Larson*, 94-1237 La. 4/10/95, 653 So.2d 1158 (1995). Moreover, the conduct in vehicular homicide by intoxication requires the choice to consume alcohol and drive, an unquestionably dangerous combination. In general, owning a dog is not fraught with the same danger potential.

We reverse the order of the trial court and hold that criminal liability arises under RCW 16.08.100(3) only if the dog which severely injures or kills a human being previously fell within the definition of either a potentially dangerous or dangerous dog and that the State must prove beyond a reasonable doubt that the defendant either knew or should have known that his or her dog was a potentially dangerous or dangerous dog as an element of the crime.

GUY, ALEXANDER and SANDERS, JJ., concur.DURHAM, Chief Justice, concurring.
Under RCW 16.08.100(3), ***612** the owner of a dog that attacks and severely injures or kills a human being may be guilty of a felony if that dog has "previously been declared potentially dangerous or dangerous." Although the statute is not well drafted, its meaning is clear. The majority properly refuses the State's invitation to construe the statute in a manner that renders the quoted passage superfluous.

Unfortunately, the majority then proceeds to ignore the plain meaning of the same passage. This leads the majority to an analysis of a notice or knowledge issue that is not presented by the facts of this case. The majority's concern for owners who may be unaware of their dogs' dangerous propensities is misplaced. Contrary to the majority's paraphrasing, RCW 16.08.100(3) does not apply to the owners of dogs that "previously fell within the definition of either a potentially dangerous or dangerous dog." Majority at 18. The statute applies only to the owners of dogs that have "*previously been declared*" to meet either of those definitions.[FN1] Strict criminal liability for harm caused by such animals is entirely appropriate.

FN1. RCW 16.08.070(1), (2) defines "potentially dangerous" and "dangerous" dogs.

As the majority points out, RCW 16.08.100(3) does not explain how, as a practical matter, particular dogs are to be "declared" to be "potentially dangerous" or "dangerous." [FN2] But the statute does not exist in a vacuum. Chapter 16.08 clearly contemplates local administrative regulation and enforcement. The definition of a "dangerous dog" is based on the records of local animal control authorities. RCW 16.08.070(2). "Dangerous" dogs must be registered with local authorities. RCW 16.08.080. Liability insurance, proper enclosures, and warning signs are all prerequisites to legal ownership of such dogs. RCW 16.08.080(2). Failure to comply with these requirements for "dangerous" dogs is a gross misdemeanor. RCW 16.08.100(1). Local governments***613** may further regulate "potentially dangerous" dogs. RCW 16.08.090(2). These provisions are not self executing. They must be implemented and enforced by local animal control authorities.

FN2. "[T]he statutes are not clear about how a dog is 'declared' or 'classified' as either a 'potentially dangerous dog' or a 'dangerous dog.' " Majority at 9. We are concerned with the meaning of the term "declared" as it is

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used in RCW 16.08.100(3). The term "classified" does not appear anywhere in RCW Ch. 16.08.

The Yakima County Code creates a dog control department with the administrative authority to declare dogs to be "potentially dangerous" or "dangerous" for purposes of RCW Ch. 16.08. Yakima County Code 8.36.040(b)(1). Unless Yakima County animal control authorities have previously declared Respondents' dogs to be "potentially dangerous" or "dangerous," Respondents cannot be charged with a felony under **987RCW 16.08.100(3). Because Informations filed against each Respondent (Clerk's Papers at 33-34 (Bash); 166-67 (Delzer)) do not even allege that such declarations have been made, the charges against Respondents must be dismissed. This determination should have been dispositive of this appeal.

The majority's failure to acknowledge the plain meaning of RCW 16.08.100(3) leads the majority to the questionable assumption that dog owners may become liable under the statute without prior knowledge of their dogs' dangerous propensities. This assumption leads to the majority's unnecessary conclusion that RCW 16.08.100(3) does not define a strict liability offense. Contrary to the majority's analysis, this statute does not criminalize a broad range of apparently innocent behavior. The statute applies only to the owners of dogs that, based on prior aggressive behavior, have been administratively declared "potentially dangerous" or "dangerous." Only those persons who choose to continue to own and take legal responsibility for such an animal may become liable under the statute. The seriousness of the potential harm fully justifies holding the owners of such dogs criminally liable for any failure to prevent such dogs from harming a human being.

The additional element of actual or constructive knowledge is probably unnecessary. An administrative declaration that a particular dog is "potentially dangerous" or "dangerous" would presumably include notice of that fact ***614** to the dog's owner. If local animal control authorities declared a dog to be "potentially dangerous" or "dangerous" without notice to the owner, any subsequent prosecution under RCW 16.08.100(3) could be challenged on procedural due process grounds.[FN3] A subsequent owner who was not aware that a dog had previously been declared "potentially dangerous" or "dangerous" might make the same argument advanced by Respondents here. I find it unnecessary to reach this issue because the Informations do not allege that these dogs were ever declared to be "potentially dangerous" or "dangerous" for purposes of RCW 16.08.100(3).

FN3. *See State v. Whitney*, 78 Wash.App. 506, 897 P.2d 374 (prosecution for driving with suspended driver's license requires a showing that driver was provided with notice of suspension and an opportunity to be heard), *review denied*, 128 Wash.2d 1003, 907 P.2d 297 (1995).

JOHNSON and TALMADGE, JJ., concur.
DOLLIVER, Justice, dissenting.
I dissent. Regardless of the elaborate and sometimes tendentious argument of the majority, I believe the statute is definitely a strict liability statute. The majority attempts to convert this into a "second bite" statute, but Mr. Walt Freser was *killed* by the attack of the dogs. Surely the majority did not wish to make this a "second death" statute.

We may have serious objections to the method which the Legislature chose to resolve this problem, but we are not platonic guardians. If we were to take on every instance of disagreement with a legislature that drafts its statutes in a manner unpleasing to us, we would have a full-time job. It is not the prerogative of this court to pass upon the desirability of a statute. The Legislature has perceived a problem, written a statute, and now it must live with the consequences. It is not our duty to do otherwise.

***615** SMITH, J., concurs.
Wash.,1996.
State v. Bash
130 Wash.2d 594, 925 P.2d 978

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Supreme Court of Washington,
En Banc.
STATE of Washington, Respondent,
v.
Lawrence John KELLER, Petitioner.
No. 68993-8.

Argued Oct. 26, 2000.
Decided March 22, 2001.

Defendant was convicted in the Superior Court, King County, Joan Dubuque, J., of vehicular assault and felony hit and run, and was sentenced to life imprisonment without possibility of parole under terms of Persistent Offender Accountability Act (POAA). Defendant appealed. The Court of Appeals affirmed, 98 Wash.App. 381, 990 P.2d 423. Following grant of review, the en banc Supreme Court, Smith, J., held that two prior felony convictions which counted as one offense in calculation of offender score because sentences were served concurrently could nevertheless be counted as two prior convictions in determining "strikes" under POAA.

Affirmed.

Alexander, C.J., issued dissenting opinion in which Johnson, Madsen, and Sanders, JJ., joined.

West Headnotes

[1] Criminal Law 110 ⚷1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 k. In General. Most Cited Cases

Statutes 361 ⚷176

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k176 k. Judicial Authority and Duty. Most Cited Cases
Statutory interpretation is a question of law, which the Supreme Court reviews de novo.

[2] Statutes 361 ⚷212.7

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k212 Presumptions to Aid Construction
361k212.7 k. Other Matters. Most Cited Cases
In interpreting statutes, courts should assume the Legislature means exactly what it says.

[3] Statutes 361 ⚷188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases
Plain words in a statute do not require construction.

[4] Statutes 361 ⚷190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases
The courts do not engage in interpretation of a statute that is not ambiguous.

[5] Statutes 361 ⚷190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases
If a statute is plain and unambiguous, its meaning must be derived from the wording of the statute itself.

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[6] Statutes 361 ⚷190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases
A statute is ambiguous if it can reasonably be interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable.

[7] Statutes 361 ⚷190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases
When interpreting statutes, courts are not obliged to discern any ambiguity by imagining a variety of alternative interpretations.

[8] Sentencing and Punishment 350H ⚷1297

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(E) Time of Prior Offense or Conviction
350Hk1297 k. Particular Intervals. Most Cited Cases

Sentencing and Punishment 350H ⚷1307

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(G) Number of Prior Adjudications
350Hk1307 k. Convictions Counted as Separate. Most Cited Cases
Former definition of "persistent offender" under Persistent Offender Accountability Act (POAA), which required that defendant have previously been convicted on two separate occasions of felonies that would be "included in the offender score" under Sentencing Reform Act (SRA), referred specifically to "washout" provision of SRA, under which prior felony was not "included" in offender score if defendant had spent five consecutive years in community after his release without being convicted of felony, and did not incorporate separate provision under which multiple convictions for offenses committed prior to July 1, 1986, "counted" only as one offense in computing offender score. West's RCWA 9.94A.030(25), 9.94A.360(2, 6) (1995).

[9] Statutes 361 ⚷190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases
When the language of a statute is clear and unambiguous the meaning is derived from the words of the statute itself.

[10] Statutes 361 ⚷205

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k205 k. In General. Most Cited Cases
When construing a statute the court reads the statute in its entirety.

[11] Statutes 361 ⚷205

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k205 k. In General. Most Cited Cases
When construing a statute, each provision must be viewed in relation to other provisions and harmonized, if at all possible.

[12] Statutes 361 ⚷206

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction

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361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k206 k. Giving Effect to Entire Statute. Most Cited Cases
Statutes must be construed so that all language is given effect with no portion rendered meaningless or superfluous.

[13] Statutes 361 ⚷181(2)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(2) k. Effect and Consequences. Most Cited Cases
The court must avoid statutory constructions that yield unlikely, strange or absurd consequences.

[14] Sentencing and Punishment 350H ⚷1307

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(G) Number of Prior Adjudications
350Hk1307 k. Convictions Counted as Separate. Most Cited Cases
"Included," as used in former Persistent Offender Accountability Act (POAA) section requiring that defendant have previously been convicted on two separate occasions of felonies that would be "included in the offender score," did not have same meaning as "count," as used in "washout" provision of Sentencing Reform Act (SRA), which provided that in case of multiple prior convictions for offenses committed before July 1, 1986, court shall count all adult convictions served concurrently as one offense; thus, two prior convictions for which defendant served concurrent sentences could be "included" as separate offenses under POAA. West's RCWA 9.94A.030(25), 9.94A.360(6)(c) (1995).

[15] Statutes 361 ⚷209

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k209 k. Same or Different Language. Most Cited Cases
If the Legislature uses specific language in one instance and dissimilar language in another, a difference in legislative intent may be inferred.

[16] Statutes 361 ⚷209

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k209 k. Same or Different Language. Most Cited Cases
When the Legislature uses different words in the same statute, it usually means it intended the words to have different meanings.

[17] Sentencing and Punishment 350H ⚷1307

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(G) Number of Prior Adjudications
350Hk1307 k. Convictions Counted as Separate. Most Cited Cases
Under former version of Persistent Offender Accountability Act (POAA), defendant's prior convictions for aggravated assault and second degree assault, for which defendant served concurrent sentences, and which had not "washed out" under Sentencing Reform Act (SRA), were offenses includable in his offender score, and thus counted as separate offenses which could be relied upon to bring defendant within definition of "persistent offender," even though offenses were committed prior to July 1, 1986, and thus counted as only single offense in determining offender score under SRA. West's RCWA 9.94A.030(25), 9.94A.360(2, 6) (1995).

[18] Sentencing and Punishment 350H ⚷1279

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(C) Offenses Usable for Enhancement
350HVI(C)2 Offenses in Other Jurisdictions
350Hk1274 Grade or Degree of Offense
350Hk1279 k. Equivalence or Substantial Similarity to Felony in Forum. Most Cited

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Cases
Defendant's prior Arizona conviction for assault, "using a dangerous weapon or dangerous instrument ... a shotgun, ... intentionally [placing victim] in reasonable apprehension of imminent physical injury," was comparable to assault in second degree under Washington law, and thus, counted as "strike" under Persistent Offender Act. West's RCWA 9.94A.030(29), 9A.36.021(1)(c).
****1032 *270** Suzanne Lee Elliott, Seattle, amicus curiae on behalf of Washington Ass'n of Criminal Defense Lawyers.

Lawrence J. Keller, Walla Walla, Carney, Badley, Smith & Spellman, Kenneth Scott Kagan, Seattle, for Petitioner.

Norm Maleng, King County Prosecutor, Stephen Gerard Teply, Deputy, Amy Jean Freedheim, Deputy, James Morrissey Whisman, Deputy, Seattle, for Respondent.

SMITH, J.

Petitioner Lawrence John Keller seeks review of a decision of the Court of Appeals, Division One, which affirmed his conviction in the King County Superior Court for vehicular assault under former RCW 46 .61.522(1)(b) and felony hit and run under RCW 46.52.020.[FN1] Petitioner was determined to be a persistent offender with three "strikes," thus subjecting him to the penalty of life imprisonment under the Persistent Offender Accountability Act (Persistent Offender Act).[FN2] The Court of Appeals concluded the phrase "included in the offender score under [former] RCW 9.94A.360" in former RCW 9.94A.030(25)(b) refers specifically to the "washout" provision in former RCW 9.94A.360(2), and thus Petitioner's two prior felony convictions would be included as "strikes" under the Persistent Offender Act. This court granted review limited to the persistent offender issue. We affirm.

FN1. *State v. Keller*, 98 Wash.App. 381, 990 P.2d 423 (1999).

FN2. *Id.* at 390; former RCW 9.94A.030(25).

QUESTION PRESENTED

The question presented in this case is whether two prior felony convictions which count as one offense in the calculation of an offender score because the sentences were served concurrently may nevertheless be counted as two prior convictions in determining "strikes" under the Persistent Offender Act.

****271 STATEMENT OF FACTS***

Petitioner Lawrence John Keller on December 21, 1994 was charged by information in the King County Superior Court with one count of vehicular assault under former RCW 46.61.522(1)(b) and on May 16, 1996 by amended information with one count of vehicular assault under former RCW 46.61.522(1)(b), a class C felony; one count of hit and run-felony under RCW 46.52.020(4), a class C felony; and one count of assault in the second degree under former RCW 9A.36.020(1)(f), repealed by Laws of 1986, ch. 257, § 9, a class B felony. The charges arose out of an automobile collision in Seattle, Washington on October 16, 1994.[FN3]

FN3. The State of Washington originally charged Petitioner on December 21, 1994 with one count of vehicular assault under former RCW 46.61.522(1)(b) and with one count of assault in the fourth degree under former RCW 9A.36.041. Clerk's Papers at 1-2. The State amended the information on May 16, 1996 to charge Petitioner with hit and run-felony under former RCW 46.52.020 and assault in the second degree under former 9A.36.020(1)(f) instead of assault in the fourth degree. Clerk's Papers at 220-21.

On August 5, 1995 Petitioner was found "guilty" of hit and run-felony and assault in the second degree.[FN4] On August 6, 1995 a mistrial was declared because of prosecutorial misconduct and a new trial was ordered. [FN5] In the retrial, the jury on January 8, 1996 ****1033** found Petitioner Keller "guilty" of vehicular assault under former RCW 46.61.522(1)(b) and felony hit and run under RCW 46 .52.020.[FN6]

FN4. Clerks Papers at 254-55.

FN5. Clerks Papers at 258.

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FN6. Clerk's Papers at 405.

At the sentencing hearing on February 18, 1997, the trial court, the Honorable Joan E. DuBuque, concluded it was established by the State that Petitioner "had two prior convictions, and that they ... qualify under the Persistent Offender Act...." [FN7] The court then indicated its intention to impose sentence as follows:

FN7. Report of Proceedings at 2821.

> *272 In Count I, in accordance with the law, the Court is going to impose the sentence of life imprisonment, without the possibility of parole, or early release .... [and Petitioner] is to be given credit for time served of three hundred seventy days.[FN8]

FN8. Report of Proceedings at 2826.

Petitioner was previously convicted of second degree assault in Washington in 1979 and convicted of aggravated assault in Arizona in 1983. He served his sentences in those cases concurrently.[FN9] The trial court counted Petitioner's two prior convictions as "two strikes" [FN10] and this vehicular assault conviction as a "third strike" under the Persistent Offender Act. The court on February 18, 1997 signed a judgment and sentence finding that petitioner was a persistent offender and sentencing him to life in prison without early release.[FN11] Petitioner appealed the decision to the Court of Appeals, Division One, on February 21, 1997.[FN12]

FN9. Clerk's Papers at 707.

FN10. *Id.*

FN11. *Id.* at 433.

FN12. Clerk's Papers at 436.

Under the Persistent Offender Act, former RCW 9.94A.030(25) stated that an offense would be considered a "strike" only if it "would be included in the offender score under RCW 9.94A.360." [FN13] Petitioner claims this phrase refers to the entire statute, including former RCW 9.94A.360(6)(c), which contained language that "[i]n the case of multiple prior convictions committed before July 1, 1986, for the purpose of computing the offender score, [the sentencing court must] count all adult convictions served concurrently as one offense...." [FN14] Petitioner claims that since *273 the sentences for his two prior felony convictions were served concurrently, they should only count as "one strike" under the Persistent Offender Act.[FN15] Respondent State of Washington asserts the phrase in the Act refers only to subsection (2), the "washout" provision of RCW 9.94A.360.[FN16] Respondent argues that Petitioner's two prior felony convictions should count as "two strikes," even though the sentences were served concurrently, because neither of them "washed out" under RCW 9.94A.360(2) which provides, in part, "Class A and sex prior felony convictions shall always be included in the offender score." [FN17]

FN13. Former RCW 9.94A.030(25)(b) defined "Persistent offender" as one who: "Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A .360...." The statute, in almost identical wording, is now codified as RCW 9.94A.030(29)(b)(ii).

FN14. "Petition for Discretionary Review" at 7, 12. Former RCW 9.94A.360(6)(c) provided "In the case of multiple prior convictions for offenses committed before July 1, 1986, for the purpose of computing the offender score, count all adult convictions served concurrently as one offense, and count all juvenile convictions entered on the same date as one offense. Use the conviction for the offense that yields the highest offender score." The statute, in identical wording, is now codified as RCW 9.94A.360(5)(a)(ii).

FN15. *Id.* at 10.

FN16. Supplemental Br. of Resp't at 5.

FN17. *Id.*

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On December 13, 1999, the Court of Appeals, the Honorable Ronald E. Cox writing, affirmed the trial court's decision and held "the phrase 'included in the offender score under [former] RCW 9.94A.360' as used in former RCW 9.94A.030(25) refers specifically to the washout provisions set forth in former **1034 RCW 9.94A.360(2)" [FN18] and that "[t]he phrase is not interchangeable with the provisions of former RCW 9.94A.360(6)(c)." The Court of Appeals agreed with the trial court and concluded Petitioner Keller's prior felony convictions counted as two strikes and that he was a persistent offender under the Persistent Offender Act.[FN19]

FN18. *Keller*, 98 Wash.App. at 390, 990 P.2d 423.

FN19. *Id.*

On December 30, 1999 Petitioner filed a motion for discretionary review in this court. On June 30, 2000, this *274 court granted review limited to the persistent offender issue.[FN20]

FN20. Review was granted only on the persistent offender issue discussed in the published portion of the Court of Appeals opinion.

DISCUSSION

Former RCW 9.94A.030(25) provided:

(25) "Persistent offender" is an offender who:

(a) Has been convicted in this state of any felony considered a most serious offense; and

(b) Has, before the commission of the offense under (a) of this subsection, been *convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A .360;* provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted.[FN21]

FN21. (Emphasis added.) Former RCW 9.94A.030(25) is now codified as RCW 9.94A.030(29)(6)(ii).

Under RCW 9.94A.120(4) "[a] persistent offender shall be sentenced to a term of total confinement for life without the possibility of parole" unless sentenced to death under RCW 10.95.030.

Petitioner claims the phrase "would be included in the offender score under RCW 9.94A.360" applies to the entire Sentencing Reform Act of 1981, including former RCW 9.94A.360(6)(c), which read: [FN22]

FN22. Pet. for Discretionary Review at 7, 12 (emphasis added). Former RCW 9.94A.360(6)(c) is now codified as RCW 9.94A.360(5)(a)(ii).

In the case of multiple prior convictions for offenses committed before July 1, 1986, *for the purpose of computing the offender score, count all adult convictions served concurrently as one offense,* and count all juvenile convictions entered on the same date as one offense. Use the conviction for the offense that yields the highest offender score.

*275 Petitioner claims that since the sentences under his two prior felony convictions were served concurrently and counted as only one conviction for the purpose of computing his offender score, under former RCW 9.94A.360(6)(c) those convictions should count only as one "strike" under the Persistent Offender Act.[FN23] Respondent argues the words "one offense" in subsection (c) refer to the "washout" provision of former RCW 9.94A.360(2). [FN24] Respondent reasons that Petitioner's two prior felony convictions, the sentences for which were served concurrently, should count as two "strikes" under the Persistent Offender Act unless they were "washed out" under subsection (2).[FN25]

FN23. *Id.* at 7.

FN24. The language in the current version of the statute is substantially identical to the language in the former version.

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FN25. Supplemental Br. of Resp't at 5.

The "wash out" portion of the offender score statute in former RCW 9.94A.360(2) and the out-of-state conviction section in (3) read:

> (2) Except as provided in subsection (4) of this section, class A and sex prior felony convictions shall always be included in the offender score. Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender**1035 had spent ten consecutive years in the community without being convicted of any felonies. Class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without being convicted of any felonies. Serious traffic convictions shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender spent five years in the community *276 without being convicted of any serious traffic or felony traffic offenses. This subsection applies to both adult and juvenile prior convictions.
>
> (3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law.

The Court of Appeals affirmed the decision of the trial court, which concluded the "one offense" language in former RCW 9.94A.360(6)(c) refers only to the "wash out" provision of former RCW 9.94A.360 and sentenced Petitioner Keller to life in prison without the possibility of parole or early release. [FN26] The principal question to be determined by this court is whether the phrase "would be included in the offender score under 9.94A.360" refers to all other sections of the Sentencing Reform Act of 1981, chapter 9.94A RCW.

FN26. *Keller*, 98 Wash.App. at 390, 990 P.2d 423.

[1][2][3][4][5][6][7] Statutory interpretation is a question of law, which this court reviews *de novo*.[FN27] Courts should assume the Legislature means exactly what it says.[FN28] Plain words do not require construction.[FN29] The courts do not engage in statutory interpretation of a statute that is not ambiguous.[FN30] If a statute is plain and unambiguous, its meaning must be derived from the wording of the statute itself.[FN31] A statute is ambiguous if it can reasonably be interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable.[FN32] The courts are *277 not "obliged to discern any ambiguity by imagining a variety of alternative interpretations." [FN33]

FN27. *W. Telepage, Inc. v. Tacoma Dep't of Financing*, 140 Wash.2d 599, 607, 998 P.2d 884 (2000) (citing *Enterp. Leasing, Inc. v. City of Tacoma* 139 Wash.2d 546, 988 P.2d 961 (1999)).

FN28. *W. Telepage*, 140 Wash.2d at 609, 998 P.2d 884 (*citing State v. McCraw*, 127 Wash.2d 281, 288, 898 P.2d 838 (1995) (quoting *Sidis v. Brodie/Dohrmann, Inc.* 117 Wash.2d 325, 329, 815 P.2d 781 (1991))); *State v. Smith*, 117 Wash.2d 263, 271, 814 P.2d 652 (1991).

FN29. *Id.*

FN30. *Davis v. Dep't of Licensing*, 137 Wash.2d 957, 963, 977 P.2d 554 (1999) (citing *Whatcom County v. City of Bellingham*, 128 Wash.2d 537, 546, 909 P.2d 1303 (1996)).

FN31. *State v. Tili*, 139 Wash.2d 107, 115, 985 P.2d 365 (1999).

FN32. *Id.*

FN33. *W. Telepage*, 140 Wash.2d at 608, 998 P.2d 884.

[8] In this case the phrase "would be included in the offender score under RCW 9.94A.360" cannot rea-

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sonably be interpreted to mean anything but what it says. The phrase refers to the entire offender score statute, RCW 9.94A.360, and does not limit its application to one section or subsection. [FN34] In this case we must assume the Legislature meant exactly what it said.[FN35] We conclude the statute is not ambiguous.

FN34. *Id.*

FN35. *Id.*

[9][10][11][12][13] When the language of a statute is clear and unambiguous the meaning is derived from the words of the statute itself. [FN36] When construing a statute we read the statute in its entirety. [FN37] "Each provision must **1036 be viewed in relation to other provisions and harmonized, if at all possible...." [FN38] Statutes must be construed so that all language is given effect with no portion rendered meaningless or superfluous.[FN39] The court must also avoid constructions "that yield unlikely, strange or absurd consequences." [FN40]

FN36. *Tili,* 139 Wash.2d at 115, 985 P.2d 365.

FN37. *In re Post Sentencing Review of Charles,* 135 Wash.2d 239, 249, 955 P.2d 798 (1998); *see State v. Thorne,* 129 Wash.2d 736, 762-63, 921 P.2d 514 (1996).

FN38. *Thorne,* 129 Wash.2d at 761, 921 P.2d 514; *see State v. Young,* 125 Wash.2d 688, 888 P.2d 142 (1995).

FN39. *Davis,* 137 Wash.2d at 963, 977 P.2d 554 (citing *Whatcom County,* 128 Wash.2d at 546, 909 P.2d 1303 (citing *Stone v. Chelan County Sheriff's Dep't,* 110 Wash.2d 806, 810, 756 P.2d 736 (1988))).

FN40. *State v. Contreras,* 124 Wash.2d 741, 747, 880 P.2d 1000 (1994) *see Upjohn v. Russell,* 33 Wash.App. 777, 780, 658 P.2d 27 (1983).

Respondent argues that Petitioner's proposed construction would lead to absurd results, rewarding offenders simply because they committed their second offense while on parole and served their sentences concurrently.[FN41] Respondent suggests Petitioner's interpretation would render RCW 9.94A.360(2) superfluous because class A and prior *278 sex felony convictions would not under that circumstance be separately counted in the offender score if the sentences were served concurrently.[FN42]

FN41. Supplemental Br. of Resp't at 14. Petitioner was on parole in Washington when he was convicted in Arizona in 1983.

FN42. *Id.* at 17.

Under Petitioner's interpretation, even sentences for two or more class A, including prior sex felonies, which were served concurrently would not be separately counted in the offender score. That interpretation is inconsistent with subsection (2) of RCW 9.94A.360 which states that "[c]lass A and sex prior felonies *shall always* be included in the offender score." [FN43] Petitioner's interpretation would render RCW 9.94A.360(2) meaningless or superfluous. The phrase "would be included in the offender score under RCW 9.94A.360" refers to the entire statute, RCW 9.94A.360. It does not apply only to subsection 6(c). We must construe the language to give meaning to the entire statute.[FN44]

FN43. RCW 9.94A.360(2) (emphasis added).

FN44. *Davis,* 137 Wash.2d at 963, 977 P.2d 554 (citing *Whatcom County,* 128 Wash.2d at 546, 909 P.2d 1303).

[14][15][16] Petitioner claims the Legislature intended the words "include" and "count" to have the same meaning because they have historically been used interchangeably and have similar definitions.[FN45] Respondent answers that the Legislature intentionally used different words in the statute and that it intended "include" and "count" to have different meanings. [FN46] The Court of Appeals reasoned it could be inferred that the words "include" and "count" were intended to have different meanings because they are two different words used in the same statute.[FN47] If the Legislature uses "specific language in one instance and dissimilar language in another, a difference in legislative intent may be inferred." [FN48] When the Legislature uses different words in the same statute, it usually means it intended the words to have

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different meanings. However, the courts must look at *279 the entire statute and interpret the provisions to give meaning to all parts of it.[FN49] In reading the entire Sentencing Reform Act of 1981, chapter 0.94A RCW, we conclude the word "included" in RCW 9.94A.030(25)(b) and the word "count" in RCW 9.94A.360(6)(c) have different meanings.

FN45. Pet. for Discretionary Review at 10-11.

FN46. Supplemental Br. of Resp't at 11-12.

FN47. *Keller*, 98 Wash.App. at 387, 990 P.2d 423.

FN48. *In Personal Restraint of Sietz*, 124 Wash.2d 645, 651, 880 P.2d 34 (1994).

FN49. *Id.*

Petitioner argues the Court of Appeals was in error in concluding his two prior felony convictions should be separately counted under the Persistent Offender Act because those convictions are counted as only one offense when calculating his offender score.[FN50] He cites *State v. Cruz* to support his assertion that the Persistent Offender Act was **1037 referring to the entire statute, including subsection (6)(c).[FN51]

FN50. Pet. for Discretionary Review at 10; *State v. Cruz*, 139 Wash.2d 186, 985 P.2d 384 (1999).

FN51. Supplemental Br. of Pet'r at 19-20.

In *Cruz* the court determined whether a rape conviction which was previously washed out could figure into the defendant's offender score when a statutory amendment was later adopted stating sex felonies could never wash out. [FN52] The court held the new statute applied prospectively only and did not revive the defendant's previously washed out conviction.[FN53] The court concluded defendant Cruz' criminal history did not include his prior conviction which had washed out,[FN54] stating that "a conviction for purposes of implementing the [Persistent Offender Act] must also be a conviction that forms part of the defendant's offender score." [FN55]

FN52. *Cruz*, 139 Wash.2d at 189, 985 P.2d 384.

FN53. *Id.* at 193, 985 P.2d 384.

FN54. *Id.*

FN55. *Id.* at 190, 985 P.2d 384.

Petitioner's reliance on *Cruz* is misplaced. The court concluded Mr. Cruz' prior conviction washed out, was no longer part of his criminal history, and could not be included*280 in his offender score.[FN56] It was thus not counted as a "strike" under the Persistent Offender Act.[FN57] The case did not involve concurrent sentences.

FN56. *Id.* at 193, 985 P.2d 384.

FN57. *Id.*

Petitioner cites *State v. Morley* in which the defendant was sentenced to life imprisonment under the Persistent Offender Act after pleading "guilty" to three counts of second degree child molestation counting as his third "strike." [FN58] He challenged his second offense, a military general court-martial in which he was found "guilty" of robbery and assault.[FN59] The court concluded the court-martial conviction should be included in the offender score and then decided it would count as a "strike" under the Persistent Offender Act.[FN60] The court declared four elements necessary for determining that a person is a persistent offender, the fourth element requiring that prior convictions "be included in the offender score under RCW 9.94A.360." [FN61] The court indicated that, to satisfy the fourth element, the conviction must be "comparable to a Washington offense and the conviction does not wash out." [FN62] The case did not involve concurrent sentences.

FN58. *State v. Morley*, 134 Wash.2d 588, 592, 952 P.2d 167 (1998).

FN59. *Id.*

FN60. *Id.* at 602, 952 P.2d 167.

FN61. *Id.* at 604, 952 P.2d 167.

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FN62. *Id.*

Petitioner also cites *State v. Berry* in which this court interpreted former RCW 9.94A.030(27)(a)(ii) (formerly subsection 25), under the Persistent Offender Act to determine whether the defendant's prior assault convictions would be considered "most serious offenses." [FN63] The court merely mentioned in a footnote that none of the defendant's ***281** prior convictions had washed out.[FN64] The case did not involve concurrent sentences.

FN63. *State v. Berry*, 141 Wash.2d 121, 130, 5 P.3d 658 (2000).

FN64. *Id.*

Both Petitioner Keller and Respondent State filed supplemental briefs on September 6, 2000. The Washington Association of Criminal Defense Lawyers filed a brief amicus curiae on September 26, 2000. Respondent on September 29, 2000 filed a motion to strike pages 7 through 11 of Petititoner's supplemental brief. The motion was passed to the merits for consideration by the court at the time of oral argument.

Although full oral argument was allowed on all matters referred to in Petitioner's supplemental brief, we nevertheless grant Respondent's motion to strike pages 7 through 11 of Petitioner's supplemental brief relating to classification of Petitioner's 1983 conviction and sentence for aggravated assault under Arizona Revised Statute § 13-1204 ****1038** as comparable to a "most serious offense," and consequently a "strike," under Washington's Persistent Offender Accountability Act.[FN65]

FN65. Clerk's Papers at 703-59.

We are satisfied the trial court had before it sufficient certified documents (including the indictment, statement on plea of "guilty," judgment and sentence, and pre-sentence report) from the State of Arizona to establish that Petitioner entered pleas of "guilty" on March 9, 1983 to two counts of an indictment which charged in Count I that:

LAWRENCE JOHN KELLER, on or about the 1st day of MARCH, 1982, using a dangerous weapon or dangerous instrument, to-wit: a shotgun, intentionally placed ROBERT NEIL SNIDER in reasonable apprehension of imminent physical injury, in violation of A.R.S. §§ 13-1204(A)(2)(B), 13-1203(A)(2), 13-701, 13-702 and 13-801.[FN66]

FN66. Clerk's Papers at 719-21, 753.

[17] The trial court during the sentencing hearing on February 18, 1997 concluded that Petitioner "had two prior convictions, and that they otherwise qualify under the ***282** Persistent Offender Act ...." and specifically that the plea to aggravated assault "under Arizona law [was] equivalent ... to a Class C Felony, ... [which] makes it count" as a most serious offense under the Persistent Offender Act.[FN67]

FN67. Report of Proceedings at 2821, 2825.

Under RCW 9.94A.030(29), "most serious offense" means any of the specified felonies, including "[a]ssault in the second degree" under subsection (b) and "[v]ehicular assault" under subsection (q). Under RCW 9A.36.021(1)(c) "[a] person is guilty of assault in the second degree if [the person], under circumstances not amounting to assault in the first degree: .... [a]ssaults another with a deadly weapon;...."

[18] We conclude the trial court properly determined Petitioner's 1983 Arizona conviction for assault, "using a dangerous weapon or dangerous instrument ... a shotgun, ... intentionally [placing] Robert Neil Snider in reasonable apprehension of imminent physical injury," was comparable to assault in the second degree under Washington law and counts as a "strike" under our Persistent Offender Act.

We agree with the Court of Appeals and affirm its conclusion upholding the decision of the King County Superior Court.

SUMMARY AND CONCLUSIONS

The interpretation of a statute is a matter of law. Courts do not engage in statutory construction of a statute that is not ambiguous. Where a statute is unambiguous, the meaning must be derived from the wording of the statute itself. A statute is ambiguous when it can reasonably be interpreted in two or more

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The Court of Appeals correctly concluded former RCW 9.94A.030(25) was not ambiguous. The phrase "included in the offender score under RCW 9.94A.360" stated in the Persistent Offender Act refers to the entire statute and ***283** cannot reasonably be interpreted to mean two different things. The statute is not ambiguous, and thus is not subject to the rule of strict construction.

We affirm the decision of the Court of Appeals, Division One, which affirmed the judgment of the King County Superior Court holding that Petitioner Lawrence John Keller's two prior felony convictions counted as two "strikes" under the Persistent Offender Accountability Act, although they counted only as one conviction in calculating his offender score, and sentenced him to life imprisonment without the possibility of parole.

IRELAND, BRIDGE, JJ., and GUY, J.P.T., and TALMADGE, J.P.T., concur.
ALEXANDER, C.J. (dissenting).
The Persistent Offender Accountability Act, commonly referred to as the "three strikes" law was passed by initiative and is subsumed within the Sentencing Reform Act of 1981(SRA). It requires every "persistent offender" to be sentenced to life imprisonment without the possibility of parole. RCW 9.94A.120(4). As the majority observes, a ****1039** persistent offender is one who is convicted in this state of "any felony considered a most serious offense" and has, before the commission of the latest offense:

> been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and *would be included in the offender score under RCW 9.94A.360;* provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted.

RCW 9.94A.030(29)(a)(i), (ii) (emphasis added).

There is no dispute about the fact that Lawrence Keller's current conviction for vehicular assault, as well as his prior conviction in this state for second degree assault, are most serious offenses. I also agree with the majority that Keller's ***284** prior Arizona conviction qualifies as a most serious offense. I disagree, though, with the majority's conclusion that Keller falls within the definition of "persistent offender" on the basis that his prior convictions, both of which occurred before July 1, 1986, "would be included in the offender score under RCW 9.94A.360." RCW 9.94A.030(29)(a)(ii).

As the above definition of "persistent offender" indicates, RCW 9.94A.360 sets forth the rules for calculating the offender score for sentencing purposes. The Court of Appeals and the majority looked for language in that statute that echoed the "included in the offender score" language of RCW 9.94A.030(29)(a)(ii), finding it in subsection (2). In relevant part that subsection provides:

> Class A and sex prior felony convictions shall always be included in the offender score. Class B prior felony convictions other than sex offenses *shall not be included in the offender score,* if since the last date of release from confinement ... pursuant to a felony conviction ... the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction. Class C prior felony convictions other than sex offenses *shall not be included in the offender score* if, since the last date of release from confinement ... pursuant to a felony conviction ... the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.360(2) (emphasis added).

Under case law, offenses which "shall not be included in the offender score" pursuant to the above provision are said to have "washed out." *See State v. Cruz,* 139 Wash.2d 186, 189, 985 P.2d 384 (1999). In the view of the Court of Appeals and the majority, this is the only provision to which the definition of "persistent offender" refers when it says that the defendant must have been convicted of two prison offenses that "would be included in the offender score." RCW 9.94A.030(29)(a)(ii). Since Keller did not remain crime-free long enough for his prior convictions to "washout" under RCW 9.94A.360(2), the Court of Appeals and the ***285** majority determined that his

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conviction would be "included" in his offender score and, therefore, count as two "strikes" against him under the "three strikes" law.

Keller argued at the Court of Appeals and here that his prior convictions are subject to another part of RCW 9.94A.360; specifically, subsection (5)(a)(ii). That provision states that "[i]n the case of multiple prior convictions for offenses committed before July 1, 1986, for purposes of computing the offender score, *count* all adult convictions served concurrently as one offense," using "the conviction for the offense that yields the highest offender score." (Emphasis added.) Keller reasons that because he committed his prior crimes before July 1, 1986, and served his sentences concurrently, those crimes "count" only as one for purposes of computing his offender score. He asserts, therefore, that only one crime is "included" in his offender score and he, therefore, has only one "strike."

The majority, like the Court of Appeals, has rejected Keller's argument. As noted above, it relies on the fact that only the washout provisions mirror the definition of **1040 "persistent offender" by using the phrase "included in the offender score," whereas RCW 9.94A.360(5)(a)(ii) says that concurrently served prior convictions shall "count" as one offense in computing the offender score. The majority reasons that "[w]hen the Legislature uses different words in the same statute, it usually means it intended the words to have different meanings." Majority at 1036. It concludes, therefore, that RCW 9.94A.030(29) unambiguously means that a prior conviction for a most serious offense is included in the offender score unless it is subject to the washout provisions in RCW 9.94A.360.

In concluding that the term "persistent offender" unambiguously refers only to the washout provisions, the majority is not swayed by the fact that the terms "count" and "include" have been used interchangeably by this court when discussing offender scores. *See State v. Morley,* 134 Wash.2d 588, 596, 952 P.2d 167 (1998). Furthermore, because it holds that the definition of "persistent offender" is unambiguous,*286 it declines to give Keller the benefit of the rule of lenity.

The majority's decision is problematic and, as I indicated above, I disagree with it. On the last point mentioned above, it seems odd for the majority to devote significant space to analyzing legislative intent only to conclude that the statute is unambiguous. Also, the majority appears to have examined the intent behind the statute from the wrong perspective. The interpretation of the persistent offender statute is not a matter of gleaning the *Legislature's* intent. The so-called "three strikes" law was enacted by the people as an initiative. Thus, while the basic rules of construction are the same as those applicable to statutes passed by the Legislature, interpretation must focus on the collective intent of the voters. *State v. Thorne,* 129 Wash.2d 736, 763, 921 P.2d 514 (1996). Here the majority incorrectly analyzed the issue as a matter of what the Legislature likely had in mind when it enacted the statute.

Addressing myself to the merits, the interaction between the persistent offender statute and the offender score provisions of the SRA seems at least ambiguous. Unquestionably, any offense not "included in the offender score" under the washout provisions would not count as a "strike" under the persistent offender statute, since the definition of "persistent offender" uses precisely the same language. It is not entirely clear, however, that the voters intended that only the washout provisions would govern whether a prior offense is "included in the offender score." Although RCW 9.94A.360(5)(a)(ii) contains the word "count" instead of "included," it cannot be said that the context in which that term is used is so different as to give it an entirely different meaning. As noted above, RCW 9.94A.360(5)(a)(ii) provides that all adult convictions before July 1, 1986, that were served concurrently are to be treated as one offense "for the purpose of computing the offender score," with the offense that yields the highest score being the one the sentencing court must "use." If the sentencing court may "use" only one of the prior offenses computing the offender score, then it is *287 reasonable to assume that offense is "included" in the offender score. The fact that the word "count" was used rather than "included" in RCW 9.94A.360(5)(a)(ii) may simply indicate that the drafters believed it to be the more appropriate term under the circumstances. It is difficult to divine from that difference in terms any particular intent on the voters' part with respect to the "three-strikes" law.

While one could argue that considering prior concurrently served crimes as one offense is not entirely

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consistent with the intent expressed in RCW 9.94A.392 to more severely punish repeat serious offenders, neither is the application of the washout provisions. Even under those provisions, a defendant with multiple prior Class B felonies will not have strikes if that defendant has been crime-free for 10 years.

The majority makes the point that Keller's position is inconsistent with the portion of RCW 9.92A.360(2) that provides that "Class A and sex prior felony convictions shall always be included in the offender score." It observes, in that regard, that under Keller's interpretation multiple Class A or sex offenses that were committed before July 1, 1986, and served concurrently, would be considered****1041** as only one offense. While this may be one reason for concluding that subsection (5)(a)(ii) was not meant to be used in defining what prior offenses count as strikes, it also underscores the ambiguity of the statute on this point.

In sum, it is my view that it is not at all clear that the definition of "persistent offender" refers to only the washout provisions of RCW 9.94A.360(2). It is well established that a statute is ambiguous if it can be reasonably interpreted in two or more ways. *State v. Tili*, 139 Wash.2d 107, 115, 985 P.2d 365 (1999). In my view, Keller has presented a reasonable argument that his two prior convictions are subject to the provisions of RCW 9.94A .360(5)(a)(ii) and, therefore, "count" as only one in computing his offender score. Particularly in light of the fact that a life sentence without the possibility of parole is at stake here, we should be free of doubt about the meaning of the statutes in question before ***288** we reject that argument. Because I am left with substantial doubt, I would resolve the ambiguity in favor of Keller per the rule of lenity.

SANDERS, JOHNSON, and MADSEN, JJ., concur.
Wash.,2001.
State v. Keller
143 Wash.2d 267, 19 P.3d 1030

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C

Court of Appeals of Washington,
Division 2.
STATE of Washington, Respondent,
v.
Craig T. THIESSEN, Petitioner.
No. 20899-7-II.

Nov. 21, 1997.

Following acquittal of defendant on criminal assault charges, the Superior Court, Grays Harbor County, Gordon Godfrey, J., awarded defendant reimbursement for defense costs and expenses and awarded statutory interest. State appealed award of interest. The Court of Appeals, Seinfeld, J., held that doctrine of sovereign immunity precluded award of interest on reimbursement for defense costs and expenses.

Reversed.

West Headnotes

[1] States 360 171

360 States
360V Claims Against State
360k171 k. Interest. Most Cited Cases
Doctrine of sovereign immunity requires state's consent before court can hold it liable for interest on its debts.

[2] States 360 171

360 States
360V Claims Against State
360k171 k. Interest. Most Cited Cases
Statutory waiver of sovereign immunity as to interest will apply only in those circumstances specifically delineated by statute.

[3] Constitutional Law 92 2475

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2472 Making, Interpretation, and Application of Statutes
92k2475 k. Judicial "Reading Into" Statutory Language. Most Cited Cases
(Formerly 92k70.1(2))

Statutes 361 176

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k176 k. Judicial Authority and Duty. Most Cited Cases
Court does not read into statute provisions that are not there, nor does court modify statute by construction.

[4] States 360 171

360 States
360V Claims Against State
360k171 k. Interest. Most Cited Cases
Doctrine of sovereign immunity precluded award of interest on reimbursement of defense costs and expenses after defendant successfully defended himself against criminal assault charges by arguing self-defense. West's RCWA 4.56.110, 4.56.115, 9A.16.110.

****1208 *828** Loren Oakley, Grays Harbor County Deputy Prosecuting Attorney, Montesano, for State.

Gregory Prosser Canova, Assistant Attorney General, Seattle, for Office of the Attorney General.

Chris L. Matson, Seattle, Natalie Rosenbaum De Maar, Redmond, for Thiessen.

SEINFELD, Judge.

Arguing self-defense, Craig Thiessen successfully defended himself against criminal assault charges. Following RCW 9A.16.110(2), the trial court then awarded Thiessen $3,250 reimbursement for defense costs and expenses. In addition, it awarded him statutory interest. The State appeals the interest award and Thiessen concedes error. We agree that neither RCW

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9A.16.110, RCW 4.56.110, nor RCW 4.56.115requires the State to pay interest under these circumstances. Thus, we reverse.

[1][2][3] ***829** The doctrine of sovereign immunity requires the State's consent before a court can hold it liable for interest on its debts. *Our Lady of Lourdes Hosp. v. Franklin Cy.*, 120 Wash.2d 439, 455-56, 842 P.2d 956 (1993) (county not entitled to interest on award reimbursing it for inmate's medical expenses because no statute or contract indicates state's consent to liability for interest). A statutory waiver of sovereign immunity as to interest will apply only in those circumstances specifically delineated by statute. *Shum v. Department of Labor & Indus.*, 63 Wash.App. 405, 411, 819 P.2d 399 (1991). We do not read into a statute provisions that are not there; nor do we modify a statute by construction. *Shum*, 63 Wash.App. at 409, 819 P.2d 399 (absent express statutory provision, the state has not consented to liability for prejudgment interest on claim for industrial insurance benefits).

[4] Neither RCW 4.56.110, which provides for interest on judgments generally, nor RCW 9A.16.110(2), which provides for self-defense reimbursement, authorize interest on reimbursement awards.[FN1] Further, RCW 4.56.115, which contains a limited waiver of immunity for interest, applies only to "judgments founded on the tortious conduct of the [S]tate." [FN2] A self-defense reimbursement award is not a "judgment" against the State, but rather is a "sundry claim" subject to the Legislature's discretion under RCW 4.92.040(5). *See* ***830***City of Seattle v. Fontanilla*, 128 Wash.2d 492, 505-06 n. 6, 909 P.2d 1294 (1996). Nor was the self-defense interest****1209** awarded here "founded on the [State's] tortious conduct" or based upon an "independent cause of action." *See* RCW 9A.16.110. Thus, the waiver of sovereign immunity in RCW 4.56.115 is not applicable here.

FN1. RCW 9A.16.110(2) provides:

> When a person charged with a crime listed in subsection (1) of this section is found not guilty by reason of self-defense, the state of Washington shall reimburse the defendant for all reasonable costs, including loss of time, legal fees incurred, and other expenses involved in his or her defense. *This reimbursement is not an independent cause of action.* To award these reasonable costs the trier of fact must find that the defendant's claim of self-defense was sustained by a preponderance of the evidence. If the trier of fact makes a determination of self-defense, the judge shall determine the amount of the award.
>
> (Emphasis added).

FN2. RCW 4.56.115 provides: "Judgments founded on the tortious conduct of the state of Washington or of the political subdivisions, ... shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020...."

Because the Legislature has not waived the State's sovereign immunity for interest on self-defense reimbursement awards, we reverse the trial court's award of interest.

MORGAN, and HUNT, J., concur.
Wash.App. Div. 2,1997.
State v. Thiessen
88 Wash.App. 827, 946 P.2d 1207

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Supreme Court of Washington.
WESTERN TELEPAGE, INC. d/b/a AT & T Wireless Services, Appellant,
v.
CITY OF TACOMA DEPARTMENT OF FINANCING, Respondent.
No. 68028-1.

Argued March 1, 2000.
Decided May 11, 2000.

Telecommunications firm which provided one-way paging services sought refund of public utility tax of six percent of gross income which had been imposed against it by city as tax on telephone services. City denied refund request, and the Office of the Hearing Examiner upheld denial of refund. Firm appealed, and the Superior Court, Pierce County, Bryan Chushcoff, J., granted summary judgment to city. Provider appealed, and the Court of Appeals affirmed, 95 Wash.App. 140, 974 P.2d 1270. After granting petition for review, the Supreme Court, Talmadge, J., held that: (1) paging system constituted "network telephone service," so that firm was engaged in "telephone business," and could properly be made subject to local public utility tax, and (2) city's enactment of ordinance which subjected paging services to same local public utility tax rate as telephone businesses did not result in impermissible increase in tax rate on such services, in violation of statute governing imposition of license fees or taxes on certain business activities.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ⚷893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Appellate court reviews an order of summary judgment de novo. CR 56(c).

[2] Appeal and Error 30 ⚷934(1)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k934 Judgment
30k934(1) k. In General. Most Cited Cases
On appeal from grant of summary judgment, reviewing court construes the facts and the inferences from the facts in a light most favorable to the nonmoving party. CR 56(c).

[3] Appeal and Error 30 ⚷893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Statutory interpretation is a question of law, which is reviewed de novo.

[4] Statutes 361 ⚷190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases
A statute is ambiguous if it can be reasonably interpreted in more than one way.

[5] Statutes 361 ⚷190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language

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361k190 k. Existence of Ambiguity. Most Cited Cases
While a statute is ambiguous if it is susceptible to two or more reasonable interpretations, a court is not obliged to discern an ambiguity by imagining a variety of alternative interpretations.

[6] Statutes 361 ⚷190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases
A court does not construe unambiguous statutes.

[7] Statutes 361 ⚷188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases

Statutes 361 ⚷212.7

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k212 Presumptions to Aid Construction
361k212.7 k. Other Matters. Most Cited Cases
In judicial interpretation of statutes, the first rule is that the court should assume that the legislature means exactly what it says, and plain words do not require construction.

[8] Statutes 361 ⚷181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most Cited Cases

Statutes 361 ⚷190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases
When construing an unambiguous statute, court looks to the wording of the statute, not to outside sources such as legislative intent.

[9] Statutes 361 ⚷245

361 Statutes
361VI Construction and Operation
361VI(B) Particular Classes of Statutes
361k245 k. Revenue Laws. Most Cited Cases
Ambiguous tax statutes are to be construed against the taxing entity.

[10] Telecommunications 372 ⚷1043

372 Telecommunications
372IV Wireless and Mobile Communications
372k1043 k. License or Authorization Fees or Taxes. Most Cited Cases
(Formerly 372k461.10)
Paging system in which telecommunications firm transmitted numeric and alpha-numeric messages to its customers' paging devices involved the providing of data by microwave, and thus constituted "network telephone service," so that firm was engaged in "telephone business," and could properly be made subject to local public utility tax imposed pursuant to ordinance. West's RCWA 82.04.065.

[11] Statutes 361 ⚷188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases
Where terms used are not defined in the statute, court turns to their ordinary dictionary meaning.

[12] Telecommunications 372 ⚷1043

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372 Telecommunications
372IV Wireless and Mobile Communications
372k1043 k. License or Authorization Fees or Taxes. Most Cited Cases
(Formerly 372k461.10)
Definition of "pager service" in local ordinance making pager services subject to local public utility tax, which defined such service as service provided by means of an electronic device which has the ability to send or receive voice or digital messages transmitted through the local telephone network, via satellite or any other form of voice or data transmission, was not inconsistent with definition of "telephone services" contained in statute authorizing imposition of public utility tax on such services. West's RCWA 82.04.065.

[13] Statutes 361 ⚷214

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k214 k. In General. Most Cited Cases
In light of reluctance of courts to discern legislative intent from the testimony of a single legislator, the view of a lobbyist is of even less utility in discerning the Legislature's intent in enacting a bill.

[14] Statutes 361 ⚷219(3)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(3) k. Long Continuance of Construction, and Approval or Acquiescence. Most Cited Cases
While a court may defer to a long-standing administrative agency interpretation of a statute, it will do so only when the statutory language is ambiguous, and the agency interpretation is clear and definitive.

[15] Taxation 371 ⚷2529

371 Taxation
371III Property Taxes
371III(H) Levy and Assessment
371III(H)5 Valuation of Property
371k2529 k. Personal Property in General. Most Cited Cases
(Formerly 371k350, 238k29)
Statute governing imposition of license fees or taxes on certain business activities was not designed to freeze local tax codes at their 1982 status, but was designed to severely restrict the tax rates local governments could assess. West's RCWA 35.21.710.

[16] Taxation 371 ⚷2529

371 Taxation
371III Property Taxes
371III(H) Levy and Assessment
371III(H)5 Valuation of Property
371k2529 k. Personal Property in General. Most Cited Cases
(Formerly 371k350, 238k5.5)
Local governments can change the tax treatment of certain activities to make that taxation consistent with state definitions, so long as the effort is not a mere subterfuge meant to circumvent the express restrictions on local taxing authority set forth in statute governing imposition of license fees or taxes on certain business activities. West's RCWA 35.21.710.

[17] Telecommunications 372 ⚷1043

372 Telecommunications
372IV Wireless and Mobile Communications
372k1043 k. License or Authorization Fees or Taxes. Most Cited Cases
(Formerly 372k461.10)
City's enactment of ordinance which subjected paging services to same local public utility tax rate as telephone businesses generally was expressly authorized by state law, and did not result in impermissible increase in tax rate on such services, in violation of statute governing imposition of license fees or taxes on certain business activities. West's RCWA 35.21.710.
****886 *601** Lane, Powell, Spears & Lubersky, George Carl Mastrodonato, Olympia amicus curiae on behalf of Association of Washington Businesses.

Davis, Wright & Tremaine, D. Bruce Lamka, Dirk Jay Giseburt, Seattle, for Petitioner.

Harding Thomas Roe, Assistant Tacoma City Attorney, Tacoma, for Respondent.

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TALMADGE, J.

We must decide in this case if the City of Tacoma's (Tacoma) local public utility tax on paging services is consistent with the state law definition of a taxable telephone business under RCW 82.04.065(4), and whether Tacoma's tax constitutes an excessive increase in a tax rate pursuant to RCW 35.21.710. Insofar as paging services involve the transmission of data by microwave systems, we conclude Tacoma's local public utility tax on paging services is consistent with RCW 82.04.065. We also hold Tacoma's taxation of paging services under its public utilities tax does not violate RCW 35.21.710, even though Tacoma formerly taxed such activities under the services classifications of its local business and occupation (B & O) tax. We affirm the judgment of the trial court.

ISSUES

1. Does the definition of "telephone business" under RCW 82.04.065 include paging services?

***602** 2. Does a municipality violate the restriction of RCW 35.21.710 if it properly classifies and taxes an activity under its local tax ordinances thereby changing the rate of taxation on the activity?

FACTS

Western Telepage, Inc., d/b/a AT & T Wireless Services (Telepage), has provided paging services in Tacoma and elsewhere in Washington since 1984. It also leases paging devices to some of its customers. Telepage's paging service transmits numeric and alpha-numeric messages to customers. A numeric message is usually transmitted in response to a telephone call made to a customer's pager access number; a telephone company then transmits the call to Telepage's paging terminal. Alternatively, an alpha-numeric message may be prompted by a message sent to the paging terminal by one of several ways, including direct access by modem, dictation to a live operator, and Internet e-mail. For either the numeric or alpha-numeric message, Telepage's paging terminal sends a microwave (radio) transmission to the pager device advising the caller to return a call to ****887** the specified telephone number or transmitting the brief alpha-numeric message.[FN1] Generally, the pager itself does not permit the customer to respond to callers or to initiate messages, nor does it have any of the capacities sometimes associated with more recent innovations in two-way paging-message acknowledgment, embedded responses, or message initiation.

FN1. Telepage has argued throughout this case that its paging services involve "one-way" communication-its terminal transmits only by microwave to the pager. However, to be fair, it could be argued two-way communications are actually involved. Someone must also telephone, e-mail, or otherwise communicate a message to Telepage's terminal before the paging service has any practical utility.

Until 1981, the Legislature imposed a public utility tax on traditional telephone services. Former RCW 82.16.010 (1965), *amended by* Laws of 1981, ch. 144, § 2. Recognizing the impending revolution in telecommunications services and wishing to "level the playing field" between regulated ***603** telephone businesses and emerging, nonregulated telecommunications companies,[FN2] the Legislature broadened the definition of companies susceptible to the state public utilities tax by amending former RCW 82.16.010. Former RCW 82.16.010(6), the 1981 predecessor to RCW 82.04.065, stated: [FN3]

FN2. The legislature recognizes that there have been significant changes in the nature of the telephone business in recent years. Once solely the domain of regulated monopolies, the telephone business has now been opened up to competition with respect to most of its services and equipment. As a result of this competition, the state and local excise tax structure in the state of Washington has become discriminatory when applied to regulated telephone company transactions that are similar in nature to those consumated [sic] by nonregulated competitors. Telephone companies are forced to operate at a significant state and local tax disadvantage when compared to these nonregulated competitors.

To remedy this situation, it is the intent of

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the legislature to place telephone companies and nonregulated competitors of telephone companies on an equal excise tax basis with regard to the providing of similar goods and services.

Laws of 1981, ch. 144, § 1.

FN3. In 1983, the Legislature amended former RCW 82.16.010(6), deleting the subsection and placing the definition of "telephone business" in RCW 82.04.065. Laws of 1983, 2d Ex.Sess., ch. 3, §§ 24, 32.

"Telephone business" means the business of providing access to a local telephone network, local telephone network switching service, toll service, or coin telephone services, or providing telephonic, video, data, or similar communication or transmission for hire, via a local telephone network, toll line or channel, or similar communication or transmission system. It includes cooperative or farmer line telephone companies or associations operating an exchange. "Telephone business" does not include the providing of competitive telephone service, or the providing of cable television service.
Laws of 1981, ch. 144, § 2(6).

As predicted, the telecommunications industry underwent unprecedented change in the 1980's. The breakup of the AT & T telephone system monopoly involving the local Bell operating companies, *United States v. American Tel. & Tel. Co.*, 552 F.Supp. 131 (D.D.C.1982), *aff'd*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983), the onset of ***604** new, competitive long distance telephone services, and the development of new telecommunications services such as cable television, cellular telephones, and Internet-based services were major mileposts in that industry-wide change. Several of these new service industries sought and obtained exemptions from the public utilities tax, which are reflected in the present language of RCW 82.04.065, which states:

(1) "Competitive telephone service" means the providing by any person of telecommunications equipment or apparatus, or service related to that equipment or apparatus such as repair or maintenance service, if the equipment or apparatus is of a type which can be provided by persons that are not subject to regulation as telephone companies under Title 80 RCW and for which a separate charge is made.

(2) "Network telephone service" means the providing by any person of access to a local telephone network, local telephone network switching service, toll service, or coin telephone services, or the providing of ****888** telephonic, video, data, or similar communication or transmission for hire, via a local telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Network telephone service" includes interstate service, including toll service, originating from or received on telecommunications equipment or apparatus in this state if the charge for the service is billed to a person in this state. "Network telephone service" includes the provision of transmission to and from the site of an internet provider via a local telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Network telephone service" does not include the providing of competitive telephone service, the providing of cable television service, the providing of broadcast services by radio or television stations, nor the provision of internet service as defined in RCW 82.04.297, including the reception of dial-in connection, provided at the site of the internet service provider.

(3) "Telephone service" means competitive telephone service or network telephone service, or both, as defined in subsections (1) and (2) of this section.

(4) "Telephone business" means the business of providing ***605** network telephone service, as defined in subsection (2) of this section. It includes cooperative or farmer line telephone companies or associations operating an exchange.

In the early 1990's, representatives of the cellular telephone industry prevailed upon the Legislature to direct the Department of Revenue (DOR) to review state and local taxes on cellular telephone companies. DOR created an advisory committee on cellular telephone services; in turn, that committee recommended a model local ordinance on the taxation of such services. Prompted by the dissemination of this model ordinance, Tacoma initiated a review of its tax treatment of cellular telephone and paging services.

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Until 1995, Telepage had reported and paid its B & O taxes locally under the "Services and Other" classification of Tacoma Municipal Code (TMC) 6.68.220. [FN4] Under that classification, Telepage paid a B & O tax of forty-eight one-hundredths of one percent (.0048%) of its gross income, the rate applicable to those "engaged in the business of rendering any type of service[.]" TMC 6.68.220(I). Prior to 1995, Tacoma did not apply its local public utility tax to paging services.

FN4. Telepage voluntarily reported and paid the B & O tax at this miscellaneous rate; Tacoma never instructed it to do so. According to Duston Jensen, Manager of the Tax & License Division of Tacoma's Department of Finance, "[t]he manner in which a company has reported does not make it correct or change the law as to the proper reporting classification." Clerk's Papers at 168.

In March 1995, Tacoma adopted Ordinance 25680, which amended Title 6 of the Tacoma Municipal Code, and defined pager service for purposes of Tacoma's local public utilities tax as follows:

> "Pager service" means service provided by means of an electronic device which has the ability to send or receive voice or digital messages transmitted through the local telephone network, via satellite or any other form of voice or data transmission.

TMC 6.67.020. TMC 6.67.030 subjects both cellular telephone services and paging services to the local public utility*606 tax of six percent of the taxpayer's total gross income. This is the same rate applicable to "telephone businesses" generally. TMC 6.66.030. The tax became effective on July 1, 1995.

After the adoption of the ordinance, Tacoma sent a letter to Telepage stating:

> Effective July 1, 1995, a city tax of 6% will be imposed on paging services, which is defined as a communication service. Prior to July 1, 1995, all gross sales received from customers inside the city limits should be reported under the Service and Other classification.

Ex. 4. When Tacoma discovered pager companies had not been reporting under the proper tax classification, it decided to prospectively collect the proper rate under the proper classification. This decision allowed the companies to continue reporting as they had been doing, but provided a date certain as to when they would be required to begin **889 reporting under the proper classification and paying at the proper rate. Tacoma also believed this decision would limit the financial hardship for the companies' previous underreporting, as it did not seek retroactive adjustment.

Under protest, Telepage paid the tax as required and requested a refund at the end of the year. Tacoma denied the request, and Telepage administratively appealed to the Tacoma Office of the Hearing Examiner. A hearing examiner considered only the issue of whether Telepage's services fit the definition of "pager service" set forth in TMC 6.67.020. The hearing examiner denied Telepage's refund request and affirmed the application of TMC 6.67 to Telepage.

Telepage appealed the hearing examiner's ruling to the Pierce County Superior Court. In its appeal, Telepage alleged it was due a tax refund because its business of providing one-way paging services was not covered by the tax ordinance as properly construed and, if the ordinance applied, the tax exceeded Tacoma's authority under RCW 35.21.710. Telepage moved for partial summary judgment *607 on the issue of whether the Tacoma ordinance unlawfully increased Telepage's tax rate in excess of two percent and conflicted with the statutory definition of telephone business. The trial court, the Honorable Bryan Chushcoff, denied Telepage's motion and subsequently granted Tacoma's motion for summary judgment, finding the statutory definition was plain on its face and included paging services; thus, Tacoma's ordinance was not in violation of state law.

Telepage appealed to the Court of Appeals, Division Two, which affirmed in a published decision, holding paging services as defined in the Tacoma ordinance are not inconsistent with the state definition of telephone business. *Western Telepage, Inc. v. City of Tacoma*, 95 Wash.App. 140, 974 P.2d 1270 (1999). We granted Telepage's petition for review.

ANALYSIS

[1][2] We review an order of summary judgment de

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novo. *Enterprise Leasing, Inc. v. City of Tacoma*, 139 Wash.2d 546, 988 P.2d 961, 964 (1999); *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c). We construe the facts and the inferences from the facts in a light most favorable to the nonmoving party. *Reid v. Pierce County*, 136 Wash.2d 195, 201, 961 P.2d 333 (1998); *Wilson*, 98 Wash.2d at 437, 656 P.2d 1030.

[3] Additionally, statutory interpretation is a question of law, which we review de novo. *Enterprise Leasing*, 139 Wash.2d at 551, 988 P.2d 961; *Monroe v. Soliz*, 132 Wash.2d 414, 418, 939 P.2d 205 (1997); *Rettkowski v. Department of Ecology*, 128 Wash.2d 508, 515, 910 P.2d 462 (1996).

A. Telephone Business

The basic question in this case is whether the definition of "pager services" in TMC 6.67.020 is consistent with the ***608** statutory definition of telephone services in RCW 82.04.065. Telepage asserts the lower courts incorrectly concluded the statute is unambiguous and includes paging services. Rather, Telepage contends the Legislature did not intend to include paging services in the statute because the statutory definition, when properly construed, is limited to "two-way" communications and paging services do not meet that definition. Tacoma, in turn, argues the statutory definition of telephone services subject to the public utility tax plainly encompasses paging services. Tacoma suggests there is no ambiguity in the language of the statute because paging services involve the transmission of data or information.

Under state law, " '[t]elephone business' means the business of providing network telephone service, as defined in subsection (2) of this section." RCW 82.04.065(4). Network telephone service means:

> the providing by any person of access to a local telephone network, local telephone network switching service, toll service, or coin telephone services, *or the providing of telephonic, video, data, or similar communication**890 or transmission for hire, via a local telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. ...*

RCW 82.04.065(2) (emphasis added).

[4][5] A statute is ambiguous if it can be *reasonably* interpreted in more than one way. *Vashon Island Comm. for Self-Gov't v. Washington State Boundary Review Bd.*, 127 Wash.2d 759, 771, 903 P.2d 953 (1995) (emphasis added). While a statute is ambiguous if it is susceptible to two or more reasonable interpretations, we are not obliged to discern an ambiguity by imagining a variety of alternative interpretations. *State v. Tili*, 139 Wash.2d 107, 115, 985 P.2d 365 (1999).

[6][7][8][9] Moreover, we do not construe unambiguous statutes. *Whatcom County v. City of Bellingham*, 128 Wash.2d 537, 546, 909 P.2d 1303 (1996). "In judicial interpretation of ***609** statutes, the first rule is 'the court should assume that the legislature means exactly what it says. Plain words do not require construction'." *State v. McCraw*, 127 Wash.2d 281, 288, 898 P.2d 838 (1995) (quoting *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wash.2d 325, 329, 815 P.2d 781 (1991)); *State v. Smith*, 117 Wash.2d 263, 271, 814 P.2d 652 (1991) ("Words are given the meaning provided by the statute or, in the absence of specific definition, their ordinary meaning.") (quoting *State v. Standifer*, 110 Wash.2d 90, 92, 750 P.2d 258 (1988)). Thus, when construing an unambiguous statute we look to the wording of the statute, not to outside sources such as legislative intent. *Multicare Med. Ctr. v. Department of Soc. & Health Servs.*, 114 Wash.2d 572, 582, 790 P.2d 124 (1990). [FN5]

> FN5. One canon of construction indicates ambiguous statutes are to be construed against the taxing entity; it is not applicable here because the statute is clear on its face. *See Dravo Corp. v. City of Tacoma*, 80 Wash.2d 590, 595, 496 P.2d 504 (1972).

[10][11][12] Here, Telepage's interpretation cannot be harmonized with the plain language of the statute. On its face, the statute is not ambiguous. It defines precisely the range of activity that falls within its purview-the transmission of telephonic, video, data, or similar communication by telephone line or microwave. Although Telepage concedes its paging services involve a transmission of signals by microwave, Br. of Appellant at 28, it denies its services

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involve "the providing of telephonic, video, data, or similar communication or transmission[.]" RCW 82.04.065(2). Thus, the real issue before us narrowly focuses on whether Telepage transmits telephone, video, data, or similar communication by microwave. Because those terms are not defined in the statute, we turn to their ordinary dictionary meaning. *C.J.C. v. Corporation of Catholic Bishop*, 138 Wash.2d 699, 709, 985 P.2d 262 (1999) (citing *American Legion Post No. 32 v. City of Walla Walla*, 116 Wash.2d 1, 8, 802 P.2d 784 (1991)).

Webster's dictionary defines "telephonic" as "conveying sound to a distance ... of or relating to the telephone ... ***610** carried or conveyed by telephone." *Webster's Third New International Dictionary* 2350 (1971). It defines "video" as "relating to or used in the transmission or reception of the television image." *Id.* at 2551. These definitions do not accurately describe Telepage's paging services. Thus, the only category left under which paging services would constitute a telephone business is if such services involved data communication or transmission. *Webster's* defines "data" (the plural of "datum") as "material serving as a basis for discussion, inference, or determination of policy ... *detailed information of any kind.*" *Webster's Third New International Dictionary* 577 (1971) (emphasis added). Likewise, *Webster's New Riverside University Dictionary* 348 (1984) defines "data" as "[i]nformation, esp. information organized for analysis or used as the basis for decision-making ... [n]umerical information suitable for computer processing ... *data* can now function as a singular form in English."

As previously stated, paging services involve the transmission or communication of data because the service transmits numeric and alpha-numeric information to customers by microwave. Simply put, paging services involve the transmission of *information.* As such, paging services plainly fall within the purview of RCW 82.04.065. Nowhere does ****891** the statute say only two-way communications are subject to RCW 82.04.065. Furthermore, of the three enumerated types of communication included in the statute, only one, "telephonic," is traditionally a two-way communication. *Western Telepage*, 95 Wash.App. at 146 n. 8, 974 P.2d 1270.

Even were we to discern an ambiguity in the statute requiring our construction of RCW 82.04.065, we do not believe Telepage's arguments support its own interpretation of the statute. First, by its terms, RCW 82.04.065 applies to the transmission of data by microwave. Second, the Legislature *expressly* excluded from RCW 82.04.065(4) various types of "network telephone service," such as competitive telephone services, cable television, radio, broadcast television, and the Internet. It did not expressly exclude ***611** paging services. As we have noted, the mention of one thing implies the exclusion of others, under the maxim "expressio unius est exclusio alterius." *State ex rel. Port of Seattle v. Department of Public Serv.*, 1 Wash.2d 102, 95 P.2d 1007 (1939). Thus, where the Legislature did not expressly exclude paging services from the broad definition of network telephone services in RCW 82.04.065(4), it must be assumed the Legislature did so intentionally.

[13] Telepage argues we should be persuaded only "two-way" transmissions are covered by RCW 82.04.065, but it undercuts its own position by acknowledging that "large-scale," one-way data dissemination is subject to the statute. Moreover, Telepage's view on two-way communication as the essence of the definition in RCW 82.04.065 is based on the declaration of a former telephone company lobbyist. Given our reluctance to discern legislative intent from the testimony of a single legislator, *City of Yakima v. International Ass'n of Fire Fighters, AFL-CIO, Local 469*, 117 Wash.2d 655, 677, 818 P.2d 1076 (1991), we find the view of a lobbyist to be of even less utility in discerning *the Legislature's* intent in enacting a bill.[FN6] Moreover, the declaration submitted was written 17 years after the events of 1981. A noncontemporaneous understanding of legislative intent is not reflective of the Legislature's rationale for enacting a 1981 statute.

> FN6. While lobbyists refer to themselves as the "Third House," this appellation has no grounding in our Constitution. *See* WASH. CONST.., art. II, § 1.

[14] Telepage's best argument is the fact DOR apparently does not treat paging as a "telephone business" for tax purposes. Telepage repeatedly refers to an article in a DOR newsletter, *Tax Topics,* which states: "A pager does not provide an ability to establish two-way contact or communication. Consequently, paging services are not classified as telephone services." Clerk's Papers at 261. While we may defer to a long-

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standing agency interpretation of a statute, *Davis v. Employment Security Dep't*, 108 Wash.2d 272, 279, 737 P.2d 1262 (1987), we do so only when the statutory language is ambiguous. ***612***Waste Management, Inc. v. Utilities & Transp. Comm'n*, 123 Wash.2d 621, 627-28, 869 P.2d 1034 (1994); *see also Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 813-14, 828 P.2d 549 (1992). Additionally, the agency interpretation must be clear and definitive. DOR did not adopt a rule on the issue in this case,[FN7] nor did it adopt an interpretive guideline or a policy statement.[FN8] We decline to give deference to a short article in an agency bulletin that lacks an official, definitive analysis of the ****892** issue in question. In the absence of a DOR rule, interpretive guideline, or policy statement on the issue of paging services being subject to RCW 82.04.065, we believe the language of RCW 82.04.065 compels the conclusion paging services meet the definition of network telephone services in RCW 82.04.065.

FN7. Arguably, an agency policy of the nature Telepage contends existed here had to be adopted as a rule. RCW 34.05.010(16); *Hillis v. Department of Ecology*, 131 Wash.2d 373, 399, 932 P.2d 139 (1997).

FN8. RCW 34.05.230 encourages agency adoption of interpretive or policy statements. RCW 34.05.010(8) defines an "interpretive statement" as

> a written expression of the opinion of an agency, entitled an interpretive statement by the agency head or its designee, as to the meaning of a statute or other provision of law, of a court decision, or of an agency order.

RCW 34.05.010(15) defines a "policy statement" as

> a written description of the current approach of an agency, entitled a policy statement by the agency head or its designee, to implementation of a statute or other provision of law, of a court decision, or of an agency order, including where appropriate the agency's current practice, procedure, or method of action based upon that approach.

In summary, we believe RCW 82.04.065 plainly contemplates taxation of paging services because such services involve data transmitted by microwave. Consequently, the definition of "pager service" in TMC 6.67.020 is not inconsistent with the definition of telephone services contained in RCW 82.04.065.

B. Limitation on the Tax Rate

Telepage also contends TMC 6.67 violates the terms of RCW 35.21.710, which limits the rate of increase in local taxes. We disagree.

***613** RCW 35.21.710 states:

> Any city which imposes a license fee or tax upon business activities consisting of the making of retail sales of tangible personal property which are measured by gross receipts or gross income from such sales, shall impose such tax at a single uniform rate upon all such business activities. The taxing authority granted to cities for taxes upon business activities measured by gross receipts or gross income from sales shall not exceed a rate of .0020; except that any city with an adopted ordinance at a higher rate, as of January 1, 1982 shall be limited to a maximum increase of ten percent of the January 1982 rate, not to exceed an annual incremental increase of two percent of current rate: *Provided*, That any adopted ordinance which classifies according to different types of business or services shall be subject to both the ten percent and the two percent annual incremental increase limitation on each tax rate: *Provided further*, That all surtaxes on business and occupation classifications in effect as of January 1, 1982, shall expire no later than December 31, 1982, or by expiration date established by local ordinance. Cities which impose a license fee or tax upon business activities consisting of the making of retail sales of tangible personal property which are measured by gross receipts or gross income from such sales shall be required to submit an annual report to the state auditor identifying the rate established and the revenues received from each fee or tax. This section shall not apply to any business activities subject to the tax imposed by chapter 82.16 RCW. For purposes of this section, the providing to consumers of competitive telephone service, as defined in RCW 82.04.065, shall be deemed to be the retail sale of tangible personal

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property.

[15][16][17] Prior to 1995, Tacoma treated paging services as services for purposes of its local B & O tax, but changed the basis for the tax on such services to the local option public utilities tax authorized by state law. We do not believe RCW 35.21.710 was designed to freeze local tax codes at their 1982 status; the statute was, however, designed to severely restrict the tax rates local governments could assess. Local governments can change the tax treatment of certain activities to make that taxation consistent with state definitions, ***614** so long as the effort is not a mere subterfuge, meant to circumvent the express restrictions on local taxing authority set forth in RCW 35.21.710. Telepage fails to show Tacoma's action here was pretextual or prompted by a bad faith effort to circumvent the provisions of RCW 35.21.710. Rather, it was the result of an analysis by DOR's advisory committee of the tax treatment of cellular telecommunications and paging services, as well as the promulgation of a model ordinance. Tacoma made its taxation of paging services consistent with a public utilities tax expressly authorized by state law. RCW 35.21.714. As such, Tacoma did not raise the B & O tax *rate* on such services, and RCW 35.21.710 does not apply. *See, Enterprise Leasing,* 139 Wash.2d at 554, 988 P.2d 961.

CONCLUSION

RCW 82.04.065 is clear on its face. The definition of "telephone business" includes paging services because those services involve the transmission or communication of data by microwave. Tacoma's ordinance is consistent with the statute. Moreover, the Tacoma ordinance does not violate ****893**RCW 35.21.710 as it represents Tacoma's good faith effort to properly classify and tax paging services, and does not represent an increase in the local B & O tax rate.

We affirm the judgment in favor of Tacoma.

GUY, C.J., SMITH, JOHNSON, MADSEN, ALEXANDER, SANDERS, IRELAND, and BRIDGE, JJ., concur.
Wash.,2000.
Western Telepage, Inc. v. City of Tacoma Dept. of Financing
140 Wash.2d 599, 998 P.2d 884

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H

Court of Appeals of Washington,
Division 2.

WASHINGTON HOSPITAL LIABILITY INSURANCE FUND, a Washington Non-Profit Corporation, Respondent,
v.
PUBLIC HOSPITAL DISTRICT NO. 1 OF CLALLAM COUNTY, Karolyn Burdick, David Duclos and Bill Brager, Individually, and in Their Official Capacity as Commissioners of Public Hospital District No. 1 of Clallam County; Robert J. Clark, Individually, and Glenda Clark, His Wife; and Robert J. Clark, in His Official Capacity as Treasurer of Public Hospital District No. 1 of Clallam County, Appellants.
No. 11493-3-II.

Aug. 21, 1990.

Insurer sued insured hospital and its treasurer, seeking declaratory judgment determination as to its duty under policy. The Superior Court, Clallam County, Waldo F. Stone, J. pro tem., held that policy did not cover claim. Insureds appealed. The Court of Appeals, Petrich, J., held that hospital district was permitted by law to indemnify its treasurer for loss incurred as a result of a direct claim by hospital district itself, and that the indemnification commitment of the hospital was covered by the insurance.

Reversed.

Worswick, J., dissented and filed opinion.

West Headnotes

[1] Health 198H ⚷233

198H Health
198HI Regulation in General
198HI(C) Institutions and Facilities
198Hk233 k. Power of Local Government. Most Cited Cases
(Formerly 204k3 Hospitals)
A hospital district, as a municipal corporation, is limited to those powers expressly granted and to powers necessarily or fairly implied in or incident to powers expressly granted, and also those essential to declared objects and purposes.

[2] Health 198H ⚷263

198H Health
198HI Regulation in General
198HI(C) Institutions and Facilities
198Hk259 Officers and Employees
198Hk263 k. Compensation and Benefits. Most Cited Cases
(Formerly 204k4 Hospitals)
Public hospital districts have common-law authority to indemnify their officers for loss incurred in good faith discharge of their duties.

[3] Insurance 217 ⚷2379

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2377 Directors' and Officers' Liabilities
217k2379 k. Scope of Coverage. Most Cited Cases
(Formerly 217k435.38)
Insurance policy under which insurer was required to pay all losses for which insured was required or permitted by law to indemnify its officers and directors applied to claim brought directly by insured public hospital corporation against its treasurer, even though indemnification obligations of insureds ordinarily contemplated claims by third persons.
****718*897** Craig L. Miller,Knebes Miller & Richardson, Port Angeles, for appellants Public Hosp., Burdick, Duclos & Brager.

Martha J. Dawson, Preston Thorgrimson, Seattle, for appellant Clark.

Richard C. Siefert, Lane Powell Moss & Miller, Seattle, for defendants Clark.

William R. Hickman, Reed McClure Moceri, Seattle,

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for respondent Washington Hosp.

PETRICH, Judge.

Public Hospital District No. 1 of Clallam County (Hospital District) sued its treasurer, Robert Clark, to recover losses from an unsuccessful investment of approximately $1 million of Hospital District funds. The Hospital District and Clark then sought coverage of the claim under the Hospital District's insurance policy issued by Washington Hospital Liability Insurance Fund (Liability Insurance Fund). Liability Insurance Fund brought a declaratory action to determine its duty under the policy. On cross motions for summary judgment, the Superior Court found that the policy did not cover the claim in question. We reverse.

The Hospital District is a municipal corporation formed under the laws of RCW 70.44. Liability Insurance Fund is a mutual corporation consisting of several hospitals that have organized for the purpose of self-insuring against liability claims. Liability Insurance Fund issued directors' and officers' insurance to the Hospital District. Special Endorsement No. 2, the relevant portion of the policy, provides as follows:

I. *INSURING CLAUSE:*

(a) As to the Directors and Officers of the Hospital that if during the policy period any claim or claims are made against the Directors and Officers individually or collectively, for a Wrongful Act, the Fund will pay, in accordance with the terms of this endorsement, on behalf of the Directors and Officers or any of them, their Executors, Administrators or Assigns all loss which the said Directors and Officers, or any of them shall become legally obligated to pay.

***898** (b) As to the Hospital that if during the policy period any claim or claims are made against the Directors and Officers, individually or collectively, for a Wrongful Act, the Fund will pay, in accordance with the terms of this policy, on behalf of the Hospital all loss for which the Hospital is required or permitted by law to indemnify such Directors and Officers.

. . . . .

II. *DEFINITIONS:*

. . . . .

****719** (c) The term "Loss" shall mean any amount which the Directors or Officers are legally obligated to pay for which the Hospital is required or permitted by law to pay as indemnity to the Directors or Officers for a claim or claims made against the Directors or Officers for Wrongful Acts and shall include but not be limited to damages, judgments, settlements and costs, costs of investigation and defense of legal actions (excluding from such costs of investigation and defense, salaries of Officers or Employees of the Hospital) claims or proceedings and appeals therefrom, cost of attachment or similar bonds provided always, however, such subject of loss shall not include fines or penalties imposed by law or matters which are uninsurable under the law pursuant to which this policy shall be construed.

Under the policy, Liability Insurance Fund must pay "all loss" an officer or director becomes legally obligated to pay, so long as the loss is one for which the Hospital District is required or permitted by law to indemnify its officer or director. The critical question is whether the Hospital District is permitted by law to indemnify its treasurer for a loss incurred as a result of a direct claim by the Hospital District itself.

[1][2] The Hospital District, as a municipal corporation, is limited to those powers expressly granted and to powers "necessarily or fairly implied in or incident to the powers expressly granted, and also those essential to the declared objects and purposes of the corporation." *Washington Pub. Utils. Sys. v. Public Util. Dist. No. 1,* 112 Wash.2d 1, 6, 771 P.2d 701 (1989), quoting *Port of Seattle v. State Utils. & Transp. Comm'n,* 92 Wash.2d 789, 794-95, 597 P.2d 383 (1979). Hospital districts are statutorily authorized to sue and be sued in any court of competent jurisdiction, RCW 70.44.060(8); individually or jointly to self-insure, ***899**RCW 48.62.010; and to purchase insurance to protect and hold harmless their officers from claims arising out of the performance of their duties and to hold harmless these individuals from any expenses connected with such claims against them, RCW 36.16.138. Hospital Districts do not have

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statutory authority to indemnify their officers. However, the parties agree, as we think they must, that public hospital districts have the common law authority to indemnify their officers for loss incurred in the good faith discharge of their duties. *See* 3 McQuillan, *Municipal Corporations,* § 12.137 (3d Ed.1982).

[3] Liability Insurance Fund contends that if the Hospital District reimbursed its officer for the very loss it sued him to recover, such action would not be in the nature of an indemnity. It argues, rather, that indemnity requires the loss to the indemnitee to have resulted from a third party action. However, the Washington Supreme Court's decision in *Washington Pub. Utils. Sys., supra,* leads us to the conclusion that indemnity can occur in a direct (two party) action.

Washington Pub. Utils. Sys. arose from facts similar to those involved here. Public Utility District No. 1 of Clallam County sued its treasurer to recover losses from the treasurer's investment of its funds and requested its insurer to cover the claims. The insurer sought a declaratory judgment concerning its duty to provide coverage. The first issue, as framed by the court, was as follows:

> whether a public utility district (PUD) has the constitutional and statutory authority to enter into a self-insurance agreement with other state PUD's to provide coverage for *indemnification* against judgment and defense costs of the PUD's own treasurer upon a direct claim by the PUD against that treasurer.

(Emphasis added.) *Washington Pub. Utils. Sys.,* 112 Wash.2d at 3, 771 P.2d 701.

In resolving the issue, the court observed that PUDs have statutory authority to indemnify their officers against "any action, claim or proceeding" under RCW 54.16.097. The court also observed that the statute does not indicate ***900** whether the Legislature intended to allow insurance and indemnification of only third party claims. *Washington Pub. Utils. Sys.,* 112 Wash.2d at 9, 771 P.2d 701. The court held ultimately that the purpose of the statute, ****720** to protect against loss associated with public officials' good faith efforts, was best advanced by permitting a PUD to self-insure for indemnification of its officers against direct claims by the district itself. *Washington Pub. Utils. Sys.,* 112 Wash.2d at 10, 771 P.2d 701.

In reaching its decision, the court did not refer to any principles of indemnification that limit indemnification to loss caused by a third party claim. Although we recognize that indemnity traditionally involves a third party claim against the indemnitee, *Washington Pub. Utils. Sys.,* indicated that indemnification is not necessarily so limited.

> While claims against directors and officers traditionally took the form of third party lawsuits or shareholders' derivative actions, courts are recognizing that coverage for direct actions is not antithetical to the objects and purposes of these policies. If insurers do not want to provide coverage for such claims an exclusion can be easily written into the contract.

Washington Pub. Utils. Sys., 112 Wash.2d at 13, 771 P.2d 701.

Reading *Washington Pub. Utils. Sys.* as we do to permit indemnification in a direct action, and given the Hospital District's common law authority to indemnify its officers, we conclude that the Hospital District is permitted by law to indemnify its treasurer for a loss caused by its own claim. The insurance policy in question does not exclude coverage of a claim of this sort. Therefore, we reverse the decision of the Superior Court and hold that the insurance policy in question provides coverage of the Hospital District's claim against its treasurer.[FN1]

> FN1. *Washington Pub. Utils. Sys.* also disposes of Liability Insurance Fund's argument that indemnification of the treasurer against the Hospital District's claim would be an unconstitutional gift of public funds. "An expenditure of public funds is unconstitutional if it is without consideration and with donative intent." *Washington Pub. Utils. Sys.,* 112 Wash.2d at 9, 771 P.2d 701; *Bellevue v. State,* 92 Wash.2d 717, 720, 600 P.2d 1268 (1979). The insurance policy here, as in *Washington Pub. Utils. Sys.,* limits payment to the good faith rendering of services. A rendering of services constitutes consideration and thereby removes the case from the realm of "gifts" prohibited by Const. art. 8, § 7. *Washington Pub. Utils. Sys.,* 112 Wash.2d at 9, 771 P.2d 701.

Reversed.

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ALEXANDER, C.J., concurs.

***901** WORSWICK, Judge (dissenting).

I cannot believe that any appellate court would decide this case as the majority has if insurance did not lurk in the background. Notwithstanding its statement of the issue, the majority treats this as an insurance case. It is not, for the policy here extends coverage only to those whom the hospital district has the legal authority to indemnify. The lure of an insurance company treasury should not becloud the real issue: whether a public entity, accountable for its stewardship of public money, has authority to forgive its own claim against a negligent employee and thereby suffer a loss. I would hold that the hospital district has no such authority.

The majority relies heavily on *Washington Pub. Utilities Sys. v. Public Util. Dist. No. 1,* 112 Wash.2d 1, 771 P.2d 701 (1989). That case was decided under a different statute, however, and is distinguishable. Public utility districts have statutory authority to indemnify their officers and directors (RCW 54.16.097); hospital districts do not. *See* RCW 70.44.060. Had the legislature intended the districts to have this power, it would have said so. It is not the place of this court to fill in legislative gaps by reading into statutes what is not there. *Jenkins v. Bellingham Municipal Court,* 95 Wash.2d 574, 579, 627 P.2d 1316 (1981); *Christie v. Maxwell,* 40 Wash.App. 40, 48, 696 P.2d 1256, *review denied,* 104 Wash.2d 1002 (1985).

Even if hospital districts have a common law right to indemnify officers and directors, it does not follow that the insurance policy in this case, purchased pursuant to RCW 36.16.138, benefits the hospital district's treasurer in a suit against him by the district. This insurance is similar to ****721** directors' and officers' liability insurance purchased by ***902** business corporations as authorized by RCW 23B.08.580.[FN2] Such insurance was created to fill gaps left by statutes that prohibited corporations from indemnifying directors and officers for judgments against them. *See generally,* Johnston, *Corporate Indemnification and Liability Insurance for Directors and Officers,* 33 Bus.Law. 1993 (1978). The purpose of such insurance is "to protect aggressive managers who are willing to take good-faith risks in the search of profits" for the corporations they represent. Johnston, *supra,* at 1993-94. By extending coverage to include a hospital district's own claims against its officers, and not just third party claims, the majority is protecting not just aggressive managers, but negligent or even reckless ones as well.

FN2. RCW 23B.08.580 states:

> A corporation may purchase and maintain insurance on behalf of an individual who is or was a director, officer, employee, or agent of the corporation, or who, while a director, officer, employee, or agent of the corporation is or was serving at the request of the corporation as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise, against liability asserted against or incurred by the individual in that capacity or arising from the individual's status as a director, officer, employee, or agent, whether or not the corporation would have power to indemnify the individual against the same liability under RCW 23B.08.510 or 23B.08.520.

Further, even when statutory authority permits an entity to indemnify officers or directors, necessarily such indemnity does not extend to direct claims between the two. *City of Norwich v. Silverberg,* 200 Conn. 367, 511 A.2d 336 (1986). In *Silverberg,* the city of Norwich sued their city attorneys for malpractice, and those attorneys counterclaimed under the indemnification statute for reimbursement of any amount the court might order them to pay. Construing the statute and upholding the dismissal of these counterclaims, the court stated that, in enacting the statute, the legislature had "created a statutory analogue for the common law ***903** doctrine of respondeat superior." *Silverberg,* 511 A.2d at 340. The court continued:

> It is true that the legislature might have determined that the need to attract citizens to public service required it to go beyond respondeat superior and to provide for municipal officers and employees total immunity from liability for actions in negligence brought by their municipal employers. In our view, however, if that had been the legislature's intention, it would have been manifested by a straight-

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> forward immunity statute rather than by the round-about system of indemnification that defendants ask us to read into [the statute].

Silverberg, 511 A.2d at 340. Similarly here, had it intended to cover claims of this kind, the legislature could have permitted this sort of indemnification. Also, had the parties to the insurance contract intended this coverage, the insurance policy would have been drafted to include it. In effect, the majority here creates an equivalent of uninsured motorist coverage for hospital districts. That sort of innovation is the province of the legislature, not this court.

Also, by so expanding the traditional authority of an entity to indemnify its officers, this court effectively confers immunity upon both the hospital district and its treasurer. By doing so, it allows the risk of the treasurer's defalcations to be shifted to an insurance company that had no idea, when it issued the policy, that it was writing a fidelity bond instead of an insurance contract. This is bad policy; if an entity that elects an officer can be made immune from the risk of any negligence on his part, it has little incentive to select good officers. If the officer himself is immune from the consequences of his negligence, he has little incentive to be careful.

Most important of all, the majority is announcing a principle that will apply even when the entity has no recourse, to insurance or any other source, to cover such losses. In ***904** such circumstances, the entity would be empowered without limitation to jeopardize the public purse. This is intolerable to contemplate. I dissent.

Wash.App.,1990.
Washington Hosp. Liability Ins. Fund v. Public Hosp. Dist. No. 1 of Clallam County
58 Wash.App. 896, 795 P.2d 717

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STATUTES

Effective: July 15, 2008

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 7. Social Security (Refs & Annos)
Subchapter XVIII. Health Insurance for Aged and Disabled (Refs & Annos)
Part E. Miscellaneous Provisions (Refs & Annos)
→ **§ 1395mm. Payments to health maintenance organizations and competitive medical plans**

(a) Rates and adjustments

(1)(A) The Secretary shall annually determine, and shall announce (in a manner intended to provide notice to interested parties) not later than September 7 before the calendar year concerned--

(i) a per capita rate of payment for each class of individuals who are enrolled under this section with an eligible organization which has entered into a risk-sharing contract and who are entitled to benefits under part A of this subchapter and enrolled under part B of this subchapter, and

(ii) a per capita rate of payment for each class of individuals who are so enrolled with such an organization and who are enrolled under part B of this subchapter only.

For purposes of this section, the term "risk-sharing contract" means a contract entered into under subsection (g) of this section and the term "reasonable cost reimbursement contract" means a contract entered into under subsection (h) of this section.

(B) The Secretary shall define appropriate classes of members, based on age, disability status, and such other factors as the Secretary determines to be appropriate, so as to ensure actuarial equivalence. The Secretary may add to, modify, or substitute for such classes, if such changes will improve the determination of actuarial equivalence.

(C) The annual per capita rate of payment for each such class shall be equal to 95 percent of the adjusted average per capita cost (as defined in paragraph (4)) for that class.

(D) In the case of an eligible organization with a risk-sharing contract, the Secretary shall make monthly payments in advance and in accordance with the rate determined under subparagraph (C) and except as provided in subsection (g)(2) of this section, to the organization for each individual enrolled with the organization under this section.

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(E)(i) The amount of payment under this paragraph may be retroactively adjusted to take into account any difference between the actual number of individuals enrolled in the plan under this section and the number of such individuals estimated to be so enrolled in determining the amount of the advance payment.

(ii)(I) Subject to subclause (II), the Secretary may make retroactive adjustments under clause (i) to take into account individuals enrolled during the period beginning on the date on which the individual enrolls with an eligible organization (which has a risk-sharing contract under this section) under a health benefit plan operated, sponsored, or contributed to by the individual's employer or former employer (or the employer or former employer of the individual's spouse) and ending on the date on which the individual is enrolled in the plan under this section, except that for purposes of making such retroactive adjustments under this clause, such period may not exceed 90 days.

(II) No adjustment may be made under subclause (I) with respect to any individual who does not certify that the organization provided the individual with the explanation described in subsection (c)(3)(E) of this section at the time the individual enrolled with the organization.

(F)(i) At least 45 days before making the announcement under subparagraph (A) for a year (beginning with the announcement for 1991), the Secretary shall provide for notice to eligible organizations of proposed changes to be made in the methodology or benefit coverage assumptions from the methodology and assumptions used in the previous announcement and shall provide such organizations an opportunity to comment on such proposed changes.

(ii) In each announcement made under subparagraph (A) for a year (beginning with the announcement for 1991), the Secretary shall include an explanation of the assumptions (including any benefit coverage assumptions) and changes in methodology used in the announcement in sufficient detail so that eligible organizations can compute per capita rates of payment for classes of individuals located in each county (or equivalent area) which is in whole or in part within the service area of such an organization.

(2) With respect to any eligible organization which has entered into a reasonable cost reimbursement contract, payments shall be made to such plan in accordance with subsection (h)(2) of this section rather than paragraph (1).

(3) Subject to subsections (c)(2)(B)(ii) and (c)(7) of this section, payments under a contract to an eligible organization under paragraph (1) or (2) shall be instead of the amounts which (in the absence of the contract) would be otherwise payable, pursuant to sections 1395f(b) and 1395*l* (a) of this title, for services furnished by or through the organization to individuals enrolled with the organization under this section.

(4) For purposes of this section, the term "adjusted average per capita cost" means the average per capita amount that the Secretary estimates in advance (on the basis of actual experience, or retrospective actuarial equivalent based upon an adequate sample and other information and data, in a geographic area served by an eligible organization or in a similar area, with appropriate adjustments to assure actuarial equivalence) would be payable in

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any contract year for services covered under parts A and B of this subchapter, or part B only, and types of expenses otherwise reimbursable under parts A and B of this subchapter, or part B only (including administrative costs incurred by organizations described in sections 1395h and 1395u of this title), if the services were to be furnished by other than an eligible organization or, in the case of services covered only under section 1395x(s)(2)(H) of this title, if the services were to be furnished by a physician or as an incident to a physician's service.

(5) The payment to an eligible organization under this section for individuals enrolled under this section with the organization and entitled to benefits under part A of this subchapter and enrolled under part B of this subchapter shall be made from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund. The portion of that payment to the organization for a month to be paid by each trust fund shall be determined as follows:

(A) In regard to expenditures by eligible organizations having risk-sharing contracts, the allocation shall be determined each year by the Secretary based on the relative weight that benefits from each fund contribute to the adjusted average per capita cost.

(B) In regard to expenditures by eligible organizations operating under a reasonable cost reimbursement contract, the initial allocation shall be based on the plan's most recent budget, such allocation to be adjusted, as needed, after cost settlement to reflect the distribution of actual expenditures.

The remainder of that payment shall be paid by the former trust fund.

(6) Subject to subsections (c)(2)(B)(ii) and (c)(7) of this section, if an individual is enrolled under this section with an eligible organization having a risk-sharing contract, only the eligible organization shall be entitled to receive payments from the Secretary under this subchapter for services furnished to the individual.

(b) Definitions; requirements

For purposes of this section, the term "eligible organization" means a public or private entity (which may be a health maintenance organization or a competitive medical plan), organized under the laws of any State, which--

(1) is a qualified health maintenance organization (as defined in section 300e-9(d) of this title), or

(2) meets the following requirements:

(A) The entity provides to enrolled members at least the following health care services:

(i) Physicians' services performed by physicians (as defined in section 1395x(r)(1) of this title).

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(ii) Inpatient hospital services.

(iii) Laboratory, X-ray, emergency, and preventive services.

(iv) Out-of-area coverage.

(B) The entity is compensated (except for deductibles, coinsurance, and copayments) for the provision of health care services to enrolled members by a payment which is paid on a periodic basis without regard to the date the health care services are provided and which is fixed without regard to the frequency, extent, or kind of health care service actually provided to a member.

(C) The entity provides physicians' services primarily (i) directly through physicians who are either employees or partners of such organization, or (ii) through contracts with individual physicians or one or more groups of physicians (organized on a group practice or individual practice basis).

(D) The entity assumes full financial risk on a prospective basis for the provision of the health care services listed in subparagraph (A), except that such entity may--

(i) obtain insurance or make other arrangements for the cost of providing to any enrolled member health care services listed in subparagraph (A) the aggregate value of which exceeds $5,000 in any year,

(ii) obtain insurance or make other arrangements for the cost of health care service listed in subparagraph (A) provided to its enrolled members other than through the entity because medical necessity required their provision before they could be secured through the entity,

(iii) obtain insurance or make other arrangements for not more than 90 percent of the amount by which its costs for any of its fiscal years exceed 115 percent of its income for such fiscal year, and

(iv) make arrangements with physicians or other health professionals, health care institutions, or any combination of such individuals or institutions to assume all or part of the financial risk on a prospective basis for the provision of basic health services by the physicians or other health professionals or through the institutions.

(E) The entity has made adequate provision against the risk of insolvency, which provision is satisfactory to the Secretary.

Paragraph (2)(A)(ii) shall not apply to an entity which had contracted with a single State agency administering a State plan approved under subchapter XIX of this chapter for the provision of services (other than inpatient hospital services) to individuals eligible for such services under such State plan on a prepaid risk

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basis prior to 1970.

(c) Enrollment in plan; duties of organization to enrollees

(1) The Secretary may not enter into a contract under this section with an eligible organization unless it meets the requirements of this subsection and subsection (e) of this section with respect to members enrolled under this section.

(2)(A) The organization must provide to members enrolled under this section, through providers and other persons that meet the applicable requirements of this subchapter and part A of subchapter XI of this chapter--

(i) only those services covered under parts A and B of this subchapter, for those members entitled to benefits under part A of this subchapter and enrolled under part B of this subchapter, or

(ii) only those services covered under part B of this subchapter, for those members enrolled only under such part,

which are available to individuals residing in the geographic area served by the organization, except that (I) the organization may provide such members with such additional health care services as the members may elect, at their option, to have covered, and (II) in the case of an organization with a risk-sharing contract, the organization may provide such members with such additional health care services as the Secretary may approve. The Secretary shall approve any such additional health care services which the organization proposes to offer to such members, unless the Secretary determines that including such additional services will substantially discourage enrollment by covered individuals with the organization.

(B) If there is a national coverage determination made in the period beginning on the date of an announcement under subsection (a)(1)(A) of this section and ending on the date of the next announcement under such subsection that the Secretary projects will result in a significant change in the costs to the organization of providing the benefits that are the subject of such national coverage determination and that was not incorporated in the determination of the per capita rate of payment included in the announcement made at the beginning of such period--

(i) such determination shall not apply to risk-sharing contracts under this section until the first contract year that begins after the end of such period; and

(ii) if such coverage determination provides for coverage of additional benefits or under additional circumstances, subsection (a)(3) of this section shall not apply to payment for such additional benefits or benefits provided under such additional circumstances until the first contract year that begins after the end of such period,

unless otherwise required by law.

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(3)(A)(i) Each eligible organization must have an open enrollment period, for the enrollment of individuals under this section, of at least 30 days duration every year and including the period or periods specified under clause (ii), and must provide that at any time during which enrollments are accepted, the organization will accept up to the limits of its capacity (as determined by the Secretary) and without restrictions, except as may be authorized in regulations, individuals who are eligible to enroll under subsection (d) of this section in the order in which they apply for enrollment, unless to do so would result in failure to meet the requirements of subsection (f) of this section or would result in the enrollment of enrollees substantially nonrepresentative, as determined in accordance with regulations of the Secretary, of the population in the geographic area served by the organization.

(ii)(I) If a risk-sharing contract under this section is not renewed or is otherwise terminated, eligible organizations with risk-sharing contracts under this section and serving a part of the same service area as under the terminated contract are required to have an open enrollment period for individuals who were enrolled under the terminated contract as of the date of notice of such termination. If a risk-sharing contract under this section is renewed in a manner that discontinues coverage for individuals residing in part of the service area, eligible organizations with risk-sharing contracts under this section and enrolling individuals residing in that part of the service area are required to have an open enrollment period for individuals residing in the part of the service area who were enrolled under the contract as of the date of notice of such discontinued coverage.

(II) The open enrollment periods required under subclause (I) shall be for 30 days and shall begin 30 days after the date that the Secretary provides notice of such requirement.

(III) Enrollment under this clause shall be effective 30 days after the end of the open enrollment period, or, if the Secretary determines that such date is not feasible, such other date as the Secretary specifies.

(B) An individual may enroll under this section with an eligible organization in such manner as may be prescribed in regulations and may terminate his enrollment with the eligible organization as of the beginning of the first calendar month following the date on which the request is made for such termination (or, in the case of financial insolvency of the organization, as may be prescribed by regulations) or, in the case of such an organization with a reasonable cost reimbursement contract, as may be prescribed by regulations. In the case of an individual's termination of enrollment, the organization shall provide the individual with a copy of the written request for termination of enrollment and a written explanation of the period (ending on the effective date of the termination) during which the individual continues to be enrolled with the organization and may not receive benefits under this subchapter other than through the organization.

(C) The Secretary may prescribe the procedures and conditions under which an eligible organization that has entered into a contract with the Secretary under this subsection may inform individuals eligible to enroll under this section with the organization about the organization, or may enroll such individuals with the organization. No brochures, application forms, or other promotional or informational material may be distributed by an organization to (or for the use of) individuals eligible to enroll with the organization under this section unless (i) at least 45 days before its distribution, the organization has submitted the material to the Secretary for review and (ii) the Secretary has not disapproved the distribution of the material. The Secretary shall review all such materi-

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al submitted and shall disapprove such material if the Secretary determines, in the Secretary's discretion, that the material is materially inaccurate or misleading or otherwise makes a material misrepresentation.

(D) The organization must provide assurances to the Secretary that it will not expel or refuse to re-enroll any such individual because of the individual's health status or requirements for health care services, and that it will notify each such individual of such fact at the time of the individual's enrollment.

(E) Each eligible organization shall provide each enrollee, at the time of enrollment and not less frequently than annually thereafter, an explanation of the enrollee's rights under this section, including an explanation of--

(i) the enrollee's rights to benefits from the organization,

(ii) the restrictions on payments under this subchapter for services furnished other than by or through the organization,

(iii) out-of-area coverage provided by the organization,

(iv) the organization's coverage of emergency services and urgently needed care, and

(v) appeal rights of enrollees.

(F) Each eligible organization that provides items and services pursuant to a contract under this section shall provide assurances to the Secretary that in the event the organization ceases to provide such items and services, the organization shall provide or arrange for supplemental coverage of benefits under this subchapter related to a pre-existing condition with respect to any exclusion period, to all individuals enrolled with the entity who receive benefits under this subchapter, for the lesser of six months or the duration of such period.

(G)(i) Each eligible organization having a risk-sharing contract under this section shall notify individuals eligible to enroll with the organization under this section and individuals enrolled with the organization under this section that--

(I) the organization is authorized by law to terminate or refuse to renew the contract, and

(II) termination or nonrenewal of the contract may result in termination of the enrollments of individuals enrolled with the organization under this section.

(ii) The notice required by clause (i) shall be included in--

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(I) any marketing materials described in subparagraph (C) that are distributed by an eligible organization to individuals eligible to enroll under this section with the organization, and

(II) any explanation provided to enrollees by the organization pursuant to subparagraph (E).

(4) The organization must--

(A) make the services described in paragraph (2) (and such other health care services as such individuals have contracted for) (i) available and accessible to each such individual, within the area served by the organization, with reasonable promptness and in a manner which assures continuity, and (ii) when medically necessary, available and accessible twenty-four hours a day and seven days a week, and

(B) provide for reimbursement with respect to services which are described in subparagraph (A) and which are provided to such an individual other than through the organization, if (i) the services were medically necessary and immediately required because of an unforeseen illness, injury, or condition and (ii) it was not reasonable given the circumstances to obtain the services through the organization.

(5)(A) The organization must provide meaningful procedures for hearing and resolving grievances between the organization (including any entity or individual through which the organization provides health care services) and members enrolled with the organization under this section.

(B) A member enrolled with an eligible organization under this section who is dissatisfied by reason of his failure to receive any health service to which he believes he is entitled and at no greater charge than he believes he is required to pay is entitled, if the amount in controversy is $100 or more, to a hearing before the Secretary to the same extent as is provided in section 405(b) of this title, and in any such hearing the Secretary shall make the eligible organization a party. If the amount in controversy is $1,000 or more, the individual or eligible organization shall, upon notifying the other party, be entitled to judicial review of the Secretary's final decision as provided in section 405(g) of this title, and both the individual and the eligible organization shall be entitled to be parties to that judicial review. In applying sections 405(b) and 405(g) of this title as provided in this subparagraph, and in applying section 405(l) of this title thereto, any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a reference to the Secretary or the Department of Health and Human Services, respectively.

(6) The organization must have arrangements, established in accordance with regulations of the Secretary, for an ongoing quality assurance program for health care services it provides to such individuals, which program (A) stresses health outcomes and (B) provides review by physicians and other health care professionals of the process followed in the provision of such health care services.

(7) A risk-sharing contract under this section shall provide that in the case of an individual who is receiving inpatient hospital services from a subsection (d) hospital (as defined in section 1395ww(d)(1)(B) of this title) as of the effective date of the individual's--

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(A) enrollment with an eligible organization under this section--

(i) payment for such services until the date of the individual's discharge shall be made under this subchapter as if the individual were not enrolled with the organization,

(ii) the organization shall not be financially responsible for payment for such services until the date after the date of the individual's discharge, and

(iii) the organization shall nonetheless be paid the full amount otherwise payable to the organization under this section; or

(B) termination of enrollment with an eligible organization under this section--

(i) the organization shall be financially responsible for payment for such services after such date and until the date of the individual's discharge,

(ii) payment for such services during the stay shall not be made under section 1395ww(d) of this title, and

(iii) the organization shall not receive any payment with respect to the individual under this section during the period the individual is not enrolled.

(8) A contract under this section shall provide that the eligible organization shall meet the requirement of section 1395cc(f) of this title (relating to maintaining written policies and procedures respecting advance directives).

(d) Right to enroll with contracting organization in geographic area

Subject to the provisions of subsection (c)(3) of this section, every individual entitled to benefits under part A of this subchapter and enrolled under part B of this subchapter or enrolled under part B of this subchapter only (other than an individual medically determined to have end-stage renal disease) shall be eligible to enroll under this section with any eligible organization with which the Secretary has entered into a contract under this section and which serves the geographic area in which the individual resides.

(e) Limitation on charges; election of coverage; "adjusted community rate" defined; workmen's compensation and insurance benefits

(1) In no case may--

(A) the portion of an eligible organization's premium rate and the actuarial value of its deductibles, coinsurance, and copayments charged (with respect to services covered under parts A and B of this subchapter) to individuals who are enrolled under this section with the organization and who are entitled to benefits under part

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A of this subchapter and enrolled under part B of this subchapter, or

(B) the portion of its premium rate and the actuarial value of its deductibles, coinsurance, and copayments charged (with respect to services covered under part B of this subchapter) to individuals who are enrolled under this section with the organization and enrolled under part B of this subchapter only

exceed the actuarial value of the coinsurance and deductibles that would be applicable on the average to individuals enrolled under this section with the organization (or, if the Secretary finds that adequate data are not available to determine that actuarial value, the actuarial value of the coinsurance and deductibles applicable on the average to individuals in the area, in the State, or in the United States, eligible to enroll under this section with the organization, or other appropriate data) and entitled to benefits under part A of this subchapter and enrolled under part B of this subchapter, or enrolled under part B only, respectively, if they were not members of an eligible organization.

(2) If the eligible organization provides to its members enrolled under this section services in addition to services covered under parts A and B of this subchapter, election of coverage for such additional services (unless such services have been approved by the Secretary under subsection (c)(2) of this section) shall be optional for such members and such organization shall furnish such members with information on the portion of its premium rate or other charges applicable to such additional services. In no case may the sum of--

(A) the portion of such organization's premium rate charged, with respect to such additional services, to members enrolled under this section, and

(B) the actuarial value of its deductibles, coinsurance, and copayments charged, with respect to such services to such members

exceed the adjusted community rate for such services.

(3) For purposes of this section, the term "adjusted community rate" for a service or services means, at the election of an eligible organization, either--

(A) the rate of payment for that service or services which the Secretary annually determines would apply to a member enrolled under this section with an eligible organization if the rate of payment were determined under a "community rating system" (as defined in section 300e-1(8) of this title, other than subparagraph (C)), or

(B) such portion of the weighted aggregate premium, which the Secretary annually estimates would apply to a member enrolled under this section with the eligible organization, as the Secretary annually estimates is attributable to that service or services,

but adjusted for differences between the utilization characteristics of the members enrolled with the eligible or-

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ganization under this section and the utilization characteristics of the other members of the organization (or, if the Secretary finds that adequate data are not available to adjust for those differences, the differences between the utilization characteristics of members in other eligible organizations, or individuals in the area, in the State, or in the United States, eligible to enroll under this section with an eligible organization and the utilization characteristics of the rest of the population in the area, in the State, or in the United States, respectively).

(4) Notwithstanding any other provision of law, the eligible organization may (in the case of the provision of services to a member enrolled under this section for an illness or injury for which the member is entitled to benefits under a workmen's compensation law or plan of the United States or a State, under an automobile or liability insurance policy or plan, including a self-insured plan, or under no fault insurance) charge or authorize the provider of such services to charge, in accordance with the charges allowed under such law or policy--

(A) the insurance carrier, employer, or other entity which under such law, plan, or policy is to pay for the provision of such services, or

(B) such member to the extent that the member has been paid under such law, plan, or policy for such services.

(f) Membership requirements

(1) For contract periods beginning before January 1, 1999, each eligible organization with which the Secretary enters into a contract under this section shall have, for the duration of such contract, an enrolled membership at least one-half of which consists of individuals who are not entitled to benefits under this subchapter.

(2) Subject to paragraph (4), the Secretary may modify or waive the requirement imposed by paragraph (1) only--

(A) to the extent that more than 50 percent of the population of the area served by the organization consists of individuals who are entitled to benefits under this subchapter or under a State plan approved under subchapter XIX of this chapter, or

(B) in the case of an eligible organization that is owned and operated by a governmental entity, only with respect to a period of three years beginning on the date the organization first enters into a contract under this section, and only if the organization has taken and is making reasonable efforts to enroll individuals who are not entitled to benefits under this subchapter or under a State plan approved under subchapter XIX of this chapter.

(3) If the Secretary determines that an eligible organization has failed to comply with the requirements of this subsection, the Secretary may provide for the suspension of enrollment of individuals under this section or of payment to the organization under this section for individuals newly enrolled with the organization, after the date the Secretary notifies the organization of such noncompliance.

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(4) Effective for contract periods beginning after December 31, 1996, the Secretary may waive or modify the requirement imposed by paragraph (1) to the extent the Secretary finds that it is in the public interest.

(g) Risk-sharing contract

(1) The Secretary may enter a risk-sharing contract with any eligible organization, as defined in subsection (b) of this section, which has at least 5,000 members, except that the Secretary may enter into such a contract with an eligible organization that has fewer members if the organization primarily serves members residing outside of urbanized areas.

(2) Each risk-sharing contract shall provide that--

(A) if the adjusted community rate, as defined in subsection (e)(3) of this section, for services under parts A and B of this subchapter (as reduced for the actuarial value of the coinsurance and deductibles under those parts) for members enrolled under this section with the organization and entitled to benefits under part A of this subchapter and enrolled in part B of this subchapter, or

(B) if the adjusted community rate for services under part B of this subchapter (as reduced for the actuarial value of the coinsurance and deductibles under that part) for members enrolled under this section with the organization and entitled to benefits under part B of this subchapter only

is less than the average of the per capita rates of payment to be made under subsection (a)(1) of this section at the beginning of an annual contract period for members enrolled under this section with the organization and entitled to benefits under part A of this subchapter and enrolled in part B of this subchapter, or enrolled in part B of this subchapter only, respectively, the eligible organization shall provide to members enrolled under a risk-sharing contract under this section with the organization and entitled to benefits under part A of this subchapter and enrolled in part B of this subchapter, or enrolled in part B of this subchapter only, respectively, the additional benefits described in paragraph (3) which are selected by the eligible organization and which the Secretary finds are at least equal in value to the difference between that average per capita payment and the adjusted community rate (as so reduced); except that this paragraph shall not apply with respect to any organization which elects to receive a lesser payment to the extent that there is no longer a difference between the average per capita payment and adjusted community rate (as so reduced) and except that an organization (with the approval of the Secretary) may provide that a part of the value of such additional benefits be withheld and reserved by the Secretary as provided in paragraph (5). If the Secretary finds that there is insufficient enrollment experience to determine an average of the per capita rates of payment to be made under subsection (a)(1) of this section at the beginning of a contract period, the Secretary may determine such an average based on the enrollment experience of other contracts entered into under this section.

(3) The additional benefits referred to in paragraph (2) are--

(A) the reduction of the premium rate or other charges made with respect to services furnished by the organization to members enrolled under this section, or

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(B) the provision of additional health benefits,

or both.

(4) Repealed. Pub.L. 100-203, Title IV, § 4012(b), Dec. 22, 1987, 101 Stat. 1330-61

(5) An organization having a risk-sharing contract under this section may (with the approval of the Secretary) provide that a part of the value of additional benefits otherwise required to be provided by reason of paragraph (2) be withheld and reserved in the Federal Hospital Insurance Trust Fund and in the Federal Supplementary Medical Insurance Trust Fund (in such proportions as the Secretary determines to be appropriate) by the Secretary for subsequent annual contract periods, to the extent required to stabilize and prevent undue fluctuations in the additional benefits offered in those subsequent periods by the organization in accordance with paragraph (3). Any of such value of additional benefits which is not provided to members of the organization in accordance with paragraph (3) prior to the end of such period, shall revert for the use of such trust funds.

(6)(A) A risk-sharing contract under this section shall require the eligible organization to provide prompt payment (consistent with the provisions of sections 1395h(c)(2) and 1395u(c)(2) of this title) of claims submitted for services and supplies furnished to individuals pursuant to such contract, if the services or supplies are not furnished under a contract between the organization and the provider or supplier.

(B) In the case of an eligible organization which the Secretary determines, after notice and opportunity for a hearing, has failed to make payments of amounts in compliance with subparagraph (A), the Secretary may provide for direct payment of the amounts owed to providers and suppliers for such covered services furnished to individuals enrolled under this section under the contract. If the Secretary provides for such direct payments, the Secretary shall provide for an appropriate reduction in the amount of payments otherwise made to the organization under this section to reflect the amount of the Secretary's payments (and costs incurred by the Secretary in making such payments).

(h) Reasonable cost reimbursement contract; requirements

(1) If--

(A) the Secretary is not satisfied that an eligible organization has the capacity to bear the risk of potential losses under a risk-sharing contract under this section, or

(B) the eligible organization so elects or has an insufficient number of members to be eligible to enter into a risk-sharing contract under subsection (g)(1) of this section,

the Secretary may, if he is otherwise satisfied that the eligible organization is able to perform its contractual obligations effectively and efficiently, enter into a contract with such organization pursuant to which such organization is reimbursed on the basis of its reasonable cost (as defined in section 1395x(v) of this title) in the manner

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prescribed in paragraph (3).

(2) A reasonable cost reimbursement contract under this subsection may, at the option of such organization, provide that the Secretary--

(A) will reimburse hospitals and skilled nursing facilities either for the reasonable cost (as determined under section 1395x(v) of this title) or for payment amounts determined in accordance with section 1395ww of this title, as applicable, of services furnished to individuals enrolled with such organization pursuant to subsection (d) of this section, and

(B) will deduct the amount of such reimbursement from payment which would otherwise be made to such organization.

If such an eligible organization pays a hospital or skilled nursing facility directly, the amount paid shall not exceed the reasonable cost of the services (as determined under section 1395x(v) of this title) or the amount determined under section 1395ww of this title, as applicable, unless such organization demonstrates to the satisfaction of the Secretary that such excess payments are justified on the basis of advantages gained by the organization.

(3) Payments made to an organization with a reasonable cost reimbursement contract shall be subject to appropriate retroactive corrective adjustment at the end of each contract year so as to assure that such organization is paid for the reasonable cost actually incurred (excluding any part of incurred cost found to be unnecessary in the efficient delivery of health services) or the amounts otherwise determined under section 1395ww of this title for the types of expenses otherwise reimbursable under this subchapter for providing services covered under this subchapter to individuals described in subsection (a)(1) of this section.

(4) Any reasonable cost reimbursement contract with an eligible organization under this subsection shall provide that the Secretary shall require, at such time following the expiration of each accounting period of the eligible organization (and in such form and in such detail) as he may prescribe--

(A) that the organization report to him in an independently certified financial statement its per capita incurred cost based on the types of components of expenses otherwise reimbursable under this subchapter for providing services described in subsection (a)(1) of this section, including therein, in accordance with accounting procedures prescribed by the Secretary, its methods of allocating costs between individuals enrolled under this section and other individuals enrolled with such organization;

(B) that failure to report such information as may be required may be deemed to constitute evidence of likely overpayment on the basis of which appropriate collection action may be taken;

(C) that in any case in which an eligible organization is related to another organization by common ownership

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or control, a consolidated financial statement shall be filed and that the allowable costs for such organization may not include costs for the types of expense otherwise reimbursable under this subchapter, in excess of those which would be determined to be reasonable in accordance with regulations (providing for limiting reimbursement to costs rather than charges to the eligible organization by related organizations and owners) issued by the Secretary; and

(D) that in any case in which compensation is paid by an eligible organization substantially in excess of what is normally paid for similar services by similar practitioners (regardless of method of compensation), such compensation may as appropriate be considered to constitute a distribution of profits.

(5)(A) After August 5, 1997, the Secretary may not enter into a reasonable cost reimbursement contract under this subsection (if the contract is not in effect as of August 5, 1997), except for a contract with an eligible organization which, immediately previous to entering into such contract, had an agreement in effect under section 1395*l*(a)(1)(A) of this title.

(B) Subject to subparagraph (C), the Secretary shall approve an application for a modification to a reasonable cost contract under this section in order to expand the service area of such contract if--

(i) such application is submitted to the Secretary on or before September 1, 2003; and

(ii) the Secretary determines that the organization with the contract continues to meet the requirements applicable to such organizations and contracts under this section.

(C)(i) Subject to clause (ii), a reasonable cost reimbursement contract under this subsection may be extended or renewed indefinitely.

(ii) For any period beginning on or after January 1, 2010, a reasonable cost reimbursement contract under this subsection may not be extended or renewed for a service area insofar as such area during the entire previous year was within the service area of--

(I) 2 or more MA regional plans described in clause (iii), provided that all such plans are not offered by the same Medicare Advantage organization; or

(II) 2 or more MA local plans described in clause (iii), provided that all such plans are not offered by the same Medicare Advantage organization.

(iii) A plan described in this clause for a year for a service area is a plan described in section 1395w-21(a)(2)(A)(i) of this title if the service area for the year meets the following minimum enrollment requirements:

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(I) With respect to any portion of the area involved that is within a Metropolitan Statistical Area with a population of more than 250, 000 and counties contiguous to such Metropolitan Statistical Area that are not in another Metropolitan Statistical Area with a population of more than 250,000, 5,000 individuals. If the service area includes a portion in more than 1 Metropolitan Statistical Area with a population of more than 250,000, the minimum enrollment determination under the preceding sentence shall be made with respect to each such Metropolitan Statistical Area (and such applicable contiguous counties to such Metropolitan Statistical Area).

(II) With respect to any other portion of such area, 1,500 individuals.

(i) Duration, termination, effective date, and terms of contract; powers and duties of Secretary

(1) Each contract under this section shall be for a term of at least one year, as determined by the Secretary, and may be made automatically renewable from term to term in the absence of notice by either party of intention to terminate at the end of the current term; except that in accordance with procedures established under paragraph (9), the Secretary may at any time terminate any such contract or may impose the intermediate sanctions described in paragraph (6)(B) or (6)(C) (whichever is applicable) on the eligible organization if the Secretary determines that the organization--

(A) has failed substantially to carry out the contract;

(B) is carrying out the contract in a manner substantially inconsistent with the efficient and effective administration of this section; or

(C) no longer substantially meets the applicable conditions of subsections (b), (c), (e), and (f) of this section.

(2) The effective date of any contract executed pursuant to this section shall be specified in the contract.

(3) Each contract under this section--

(A) shall provide that the Secretary, or any person or organization designated by him--

(i) shall have the right to inspect or otherwise evaluate (I) the quality, appropriateness, and timeliness of services performed under the contract and (II) the facilities of the organization when there is reasonable evidence of some need for such inspection, and

(ii) shall have the right to audit and inspect any books and records of the eligible organization that pertain (I) to the ability of the organization to bear the risk of potential financial losses, or (II) to services performed or determinations of amounts payable under the contract;

(B) shall require the organization with a risk-sharing contract to provide (and pay for) written notice in ad-

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vance of the contract's termination, as well as a description of alternatives for obtaining benefits under this subchapter, to each individual enrolled under this section with the organization; and

(C)(i) shall require the organization to comply with subsections (a) and (c) of section 300e-17 of this title (relating to disclosure of certain financial information) and with the requirement of section 300e(c)(8) of this title (relating to liability arrangements to protect members);

(ii) shall require the organization to provide and supply information (described in section 1395cc(b)(2)(C)(ii) of this title) in the manner such information is required to be provided or supplied under that section;

(iii) shall require the organization to notify the Secretary of loans and other special financial arrangements which are made between the organization and subcontractors, affiliates, and related parties; and

(D) shall contain such other terms and conditions not inconsistent with this section (including requiring the organization to provide the Secretary with such information) as the Secretary may find necessary and appropriate.

(4) The Secretary may not enter into a risk-sharing contract with an eligible organization if a previous risk-sharing contract with that organization under this section was terminated at the request of the organization within the preceding five-year period, except in circumstances which warrant special consideration, as determined by the Secretary.

(5) The authority vested in the Secretary by this section may be performed without regard to such provisions of law or regulations relating to the making, performance, amendment, or modification of contracts of the United States as the Secretary may determine to be inconsistent with the furtherance of the purpose of this subchapter.

(6)(A) If the Secretary determines that an eligible organization with a contract under this section--

(i) fails substantially to provide medically necessary items and services that are required (under law or under the contract) to be provided to an individual covered under the contract, if the failure has adversely affected (or has substantial likelihood of adversely affecting) the individual;

(ii) imposes premiums on individuals enrolled under this section in excess of the premiums permitted;

(iii) acts to expel or to refuse to re-enroll an individual in violation of the provisions of this section;

(iv) engages in any practice that would reasonably be expected to have the effect of denying or discouraging enrollment (except as permitted by this section) by eligible individuals with the organization whose medical condition or history indicates a need for substantial future medical services;

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(v) misrepresents or falsifies information that is furnished--

(I) to the Secretary under this section, or

(II) to an individual or to any other entity under this section;

(vi) fails to comply with the requirements of subsection (g)(6)(A) or paragraph (8) of this section; or

(vii) in the case of a risk-sharing contract, employs or contracts with any individual or entity that is excluded from participation under this subchapter under section 1320a-7 or 1320a-7a of this title for the provision of health care, utilization review, medical social work, or administrative services or employs or contracts with any entity for the provision (directly or indirectly) through such an excluded individual or entity of such services;

the Secretary may provide, in addition to any other remedies authorized by law, for any of the remedies described in subparagraph (B).

(B) The remedies described in this subparagraph are--

(i) civil money penalties of not more than $25,000 for each determination under subparagraph (A) or, with respect to a determination under clause (iv) or (v)(I) of such subparagraph, of not more than $100,000 for each such determination, plus, with respect to a determination under subparagraph (A)(ii), double the excess amount charged in violation of such subparagraph (and the excess amount charged shall be deducted from the penalty and returned to the individual concerned), and plus, with respect to a determination under subparagraph (A)(iv), $15,000 for each individual not enrolled as a result of the practice involved,

(ii) suspension of enrollment of individuals under this section after the date the Secretary notifies the organization of a determination under subparagraph (A) and until the Secretary is satisfied that the basis for such determination has been corrected and is not likely to recur, or

(iii) suspension of payment to the organization under this section for individuals enrolled after the date the Secretary notifies the organization of a determination under subparagraph (A) and until the Secretary is satisfied that the basis for such determination has been corrected and is not likely to recur.

(C) In the case of an eligible organization for which the Secretary makes a determination under paragraph (1), the basis of which is not described in subparagraph (A), the Secretary may apply the following intermediate sanctions:

(i) Civil money penalties of not more than $25,000 for each determination under paragraph (1) if the defi-

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ciency that is the basis of the determination has directly adversely affected (or has the substantial likelihood of adversely affecting) an individual covered under the organization's contract.

(ii) Civil money penalties of not more than $10,000 for each week beginning after the initiation of procedures by the Secretary under paragraph (9) during which the deficiency that is the basis of a determination under paragraph (1) exists.

(iii) Suspension of enrollment of individuals under this section after the date the Secretary notifies the organization of a determination under paragraph (1) and until the Secretary is satisfied that the deficiency that is the basis for the determination has been corrected and is not likely to recur.

(D) The provisions of section 1320a-7a of this title (other than subsections (a) and (b)) shall apply to a civil money penalty under subparagraph (B)(i) or (C)(i) in the same manner as such provisions apply to a civil money penalty or proceeding under section 1320a-7a(a) of this title.

(7)(A) Each risk-sharing contract with an eligible organization under this section shall provide that the organization will maintain a written agreement with a utilization and quality control peer review organization (which has a contract with the Secretary under part B of subchapter XI of this chapter for the area in which the eligible organization is located) or with an entity selected by the Secretary under section 1320c-3(a)(4)(C) of this title under which the review organization will perform functions under section 1320c-3(a)(4)(B) of this title and section 1320c-3(a)(14) of this title (other than those performed under contracts described in section 1395cc(a)(1)(F) of this title) with respect to services, furnished by the eligible organization, for which payment may be made under this subchapter.

(B) For purposes of payment under this subchapter, the cost of such agreement to the eligible organization shall be considered a cost incurred by a provider of services in providing covered services under this subchapter and shall be paid directly by the Secretary to the review organization on behalf of such eligible organization in accordance with a schedule established by the Secretary.

(C) Such payments--

(i) shall be transferred in appropriate proportions from the Federal Hospital Insurance Trust Fund and from the Supplementary Medical Insurance Trust Fund, without regard to amounts appropriated in advance in appropriation Acts, in the same manner as transfers are made for payment for services provided directly to beneficiaries, and

(ii) shall not be less in the aggregate for such organizations for a fiscal year than the amounts the Secretary determines to be sufficient to cover the costs of such organizations' conducting activities described in subparagraph (A) with respect to such eligible organizations under part B of subchapter XI of this chapter.

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(8)(A) Each contract with an eligible organization under this section shall provide that the organization may not operate any physician incentive plan (as defined in subparagraph (B)) unless the following requirements are met:

(i) No specific payment is made directly or indirectly under the plan to a physician or physician group as an inducement to reduce or limit medically necessary services provided with respect to a specific individual enrolled with the organization.

(ii) If the plan places a physician or physician group at substantial financial risk (as determined by the Secretary) for services not provided by the physician or physician group, the organization--

(I) provides stop-loss protection for the physician or group that is adequate and appropriate, based on standards developed by the Secretary that take into account the number of physicians placed at such substantial financial risk in the group or under the plan and the number of individuals enrolled with the organization who receive services from the physician or the physician group, and

(II) conducts periodic surveys of both individuals enrolled and individuals previously enrolled with the organization to determine the degree of access of such individuals to services provided by the organization and satisfaction with the quality of such services.

(iii) The organization provides the Secretary with descriptive information regarding the plan, sufficient to permit the Secretary to determine whether the plan is in compliance with the requirements of this subparagraph.

(B) In this paragraph, the term "physician incentive plan" means any compensation arrangement between an eligible organization and a physician or physician group that may directly or indirectly have the effect of reducing or limiting services provided with respect to individuals enrolled with the organization.

(9) The Secretary may terminate a contract with an eligible organization under this section or may impose the intermediate sanctions described in paragraph (6) on the organization in accordance with formal investigation and compliance procedures established by the Secretary under which--

(A) the Secretary first provides the organization with the reasonable opportunity to develop and implement a corrective action plan to correct the deficiencies that were the basis of the Secretary's determination under paragraph (1) and the organization fails to develop or implement such a plan;

(B) in deciding whether to impose sanctions, the Secretary considers aggravating factors such as whether an organization has a history of deficiencies or has not taken action to correct deficiencies the Secretary has brought to the organization's attention;

(C) there are no unreasonable or unnecessary delays between the finding of a deficiency and the imposition of sanctions; and

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(D) the Secretary provides the organization with reasonable notice and opportunity for hearing (including the right to appeal an initial decision) before imposing any sanction or terminating the contract.

(j) Payment in full and limitation on actual charges; physicians, providers of services, or renal dialysis facilities not under contract with organization

(1)(A) In the case of physicians' services or renal dialysis services described in paragraph (2) which are furnished by a participating physician or provider of services or renal dialysis facility to an individual enrolled with an eligible organization under this section and enrolled under part B of this subchapter, the applicable participation agreement is deemed to provide that the physician or provider of services or renal dialysis facility will accept as payment in full from the eligible organization the amount that would be payable to the physician or provider of services or renal dialysis facility under part B of this subchapter and from the individual under such part, if the individual were not enrolled with an eligible organization under this section.

(B) In the case of physicians' services described in paragraph (2) which are furnished by a nonparticipating physician, the limitations on actual charges for such services otherwise applicable under part B of this subchapter (to services furnished by individuals not enrolled with an eligible organization under this section) shall apply in the same manner as such limitations apply to services furnished to individuals not enrolled with such an organization.

(2) The physicians' services or renal dialysis services described in this paragraph are physicians' services or renal dialysis services which are furnished to an enrollee of an eligible organization under this section by a physician, provider of services, or renal dialysis facility who is not under a contract with the organization.

(k) Risk-sharing contracts

(1) Except as provided in paragraph (2)--

(A) on or after the date standards for Medicare+Choice organizations and plans are first established under section 1395w-26(b)(1) of this title, the Secretary shall not enter into any risk-sharing contract under this section with an eligible organization; and

(B) for any contract year beginning on or after January 1, 1999, the Secretary shall not renew any such contract.

(2) An individual who is enrolled in part B of this subchapter only and is enrolled in an eligible organization with a risk-sharing contract under this section on December 31, 1998, may continue enrollment in such organization in accordance with regulations described in section 1395w-26(b)(1) of this title.

(3) Notwithstanding subsection (a) of this section, the Secretary shall provide that payment amounts under risk-sharing contracts under this section for months in a year (beginning with January 1998) shall be computed--

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(A) with respect to individuals entitled to benefits under both parts A and B of this subchapter, by substituting payment rates under section 1395w-23(a) of this title for the payment rates otherwise established under subsection (a) of this section, and

(B) with respect to individuals only entitled to benefits under part B of this subchapter, by substituting an appropriate proportion of such rates (reflecting the relative proportion of payments under this subchapter attributable to such part) for the payment rates otherwise established under subsection (a) of this section.

(4) The following requirements shall apply to eligible organizations with risk-sharing contracts under this section in the same manner as they apply to Medicare+Choice organizations under part C of this subchapter:

(A) Data collection requirements under section 1395w-23(a)(3)(B) of this title.

(B) Restrictions on imposition of premium taxes under section 1395w-24(g) of this title in relating to payments to such organizations under this section.

(C) The requirement to accept enrollment of new enrollees during November 1998 under section 1395w-21(e)(6) of this title.

(D) Payments under section 1395w-27(e)(2) of this title.

CREDIT(S)

(Aug. 14, 1935, c. 531, Title XVIII, § 1876, as added and amended Oct. 30, 1972, Pub.L. 92-603, Title II, §§ 226(a), 278(b)(3), 86 Stat. 1396, 1453; Dec. 31, 1973, Pub.L. 93-233, § 18(m), (n), 87 Stat. 970, 971; Oct. 8, 1976, Pub.L. 94-460, Title II, § 201(a) to (d), 90 Stat. 1956, 1957; June 13, 1978, Pub.L. 95-292, § 5, 92 Stat. 315; Sept. 3, 1982, Pub.L. 97-248, Title I, § 114(a), 96 Stat. 341; Jan. 12, 1983, Pub.L. 97-448, Title III, § 309(b)(12), 96 Stat. 2409; Apr. 20, 1983, Pub.L. 98-21, Title VI, §§ 602(g), 606(a)(3)(H), 97 Stat. 164, 171; July 18, 1984, Pub.L. 98-369, Div. B, Title III, §§ 2350(a)(1), (b)(1), (2), (c), 2354(b)(37), (38), 98 Stat. 1097, 1098, 1102; Apr. 7, 1986, Pub.L. 99-272, Title IX, § 9211(a) to (d), 100 Stat. 178, 179; Oct. 21, 1986, Pub.L. 99-509, Title IX, §§ 9312(b)(1), (c)(1), (2), (d)(1), (e)(1), (f), 9353(e)(2), 100 Stat. 1999 to 2001, 2048; Oct. 22, 1986, Pub.L. 99-514, Title XVIII, § 1895(b)(11)(A), 100 Stat. 2934; Dec. 22, 1987, Pub.L. 100-203, Title IV, §§ 4011(a)(1), (b)(1), 4012(b), 4013(a), 4014, 4018(a), 4039(h)(8), 101 Stat. 1330-60, 1330-61, 1330-65; July 1, 1988, Pub.L. 100-360, Title II, §§ 202(f), 211(c)(3), 224, Title IV, § 411(c)(1) to (6), (3)(3), 102 Stat. 717, 738, 748, 772, 773, 776; Oct. 13, 1988, Pub.L. 100-485, Title VI, § 608(d)(19)(B), (C), 102 Stat. 2419; Nov. 10, 1988, Pub.L. 100-647, Title VIII, § 8412(a)(1), 102 Stat. 3801; Dec.13, 1989, Pub.L. 101-234, Title II, §§ 201(a)(1), 202(a), 103 Stat. 1981; Dec. 19, 1989, Pub.L. 101-239, Title VI, §§ 6206(a)(1), (b)(1), 6212(b)(1), (c)(2), 6411(d)(3)(A), 103 Stat. 2244, 2250, 2271; Nov. 5, 1990, Pub.L. 101-508, Title IV, §§ 4204(a)(1), (2), (c)(1), (2), (d)(1), (e)(1), 4206(b)(1), 104 Stat. 1388-108 to 1388-111, 1388-116; Aug. 15, 1994, Pub.L. 103-296, Title I, § 108(c)(6), 108 Stat. 1486; Oct. 31, 1994, Pub.L. 103-432, Title I, § 157(b)(1), (4), 108 Stat. 4442; Aug. 21, 1996, Pub.L. 104-191, Title II, §§ 215(a), (b), 231(g), 110 Stat. 2005 to 2007, 2014; Aug. 5, 1997, Pub.L. 105-33, Title IV, § 4002(a), (b)(1), (b)(2)(A), 111 Stat. 328, 329; Nov. 29, 1999, Pub.L. 106-113,

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Div. B, § 1000(a)(6) [Title IV, § 503], 113 Stat. 1536, 1501A-380; Dec. 21, 2000, Pub.L. 106-554, § 1(a)(6) [Title VI, § 634], 114 Stat. 2763, 2763A-568; Dec. 8, 2003, Pub.L. 108-173, Title II, § 234, Title VII, § 736(d)(2), Title IX, § 940(b)(2)(B), 117 Stat. 2209, 2357, 2417; Dec. 29, 2007, Pub.L. 110-173, Title I, § 109, 121 Stat. 2497; July 15, 2008, Pub.L. 110-275, Title I, § 167(a) to (c), 122 Stat. 2575.)

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United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 7. Social Security (Refs & Annos)
Subchapter XVIII. Health Insurance for Aged and Disabled (Refs & Annos)
Part E. Miscellaneous Provisions (Refs & Annos)
§ 1395ss. Certification of medicare supplemental health insurance policies

(a) Submission of policy by insurer

(1) The Secretary shall establish a procedure whereby medicare supplemental policies (as defined in subsection (g)(1) of this section) may be certified by the Secretary as meeting minimum standards and requirements set forth in subsection (c) of this section. Such procedure shall provide an opportunity for any insurer to submit any such policy, and such additional data as the Secretary finds necessary, to the Secretary for his examination and for his certification thereof as meeting the standards and requirements set forth in subsection (c) of this section. Subject to subsections (k)(3), (m), and (n) of this section, such certification shall remain in effect if the insurer files a notarized statement with the Secretary no later than June 30 of each year stating that the policy continues to meet such standards and requirements and if the insurer submits such additional data as the Secretary finds necessary to independently verify the accuracy of such notarized statement. Where the Secretary determines such a policy meets (or continues to meet) such standards and requirements, he shall authorize the insurer to have printed on such policy (but only in accordance with such requirements and conditions as the Secretary may prescribe) an emblem which the Secretary shall cause to be designed for use as an indication that a policy has received the Secretary's certification. The Secretary shall provide each State commissioner or superintendent of insurance with a list of all the policies which have received his certification.

(2) No medicare supplemental policy may be issued in a State on or after the date specified in subsection (p)(1)(C) of this section, unless--

(A) the State's regulatory program under subsection (b)(1) of this section provides for the application and enforcement of the standards and requirements set forth in such subsection (including the 1991 NAIC Model Regulation or 1991 Federal Regulation (as the case may be)) by the date specified in subsection (p)(1)(C) of this section; or

(B) if the State's program does not provide for the application and enforcement of such standards and requirements, the policy has been certified by the Secretary under paragraph (1) as meeting the standards and requirements set forth in subsection (c) of this section (including such applicable standards) by such date.

Any person who issues a medicare supplemental policy, on and after the effective date specified in subsection

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(p)(1)(C) of this section, in violation of this paragraph is subject to a civil money penalty of not to exceed $25,000 for each such violation. The provisions of section 1320a-7a of this title (other than the first sentence of subsection (a) and other than subsection (b)) shall apply to a civil money penalty under the previous sentence in the same manner as such provisions apply to a penalty or proceeding under section 1320a-7a(a) of this title.

(b) Standards and requirements; periodic review by Secretary

(1) Any medicare supplemental policy issued in any State which the Secretary determines has established under State law a regulatory program that--

(A) provides for the application and enforcement of standards with respect to such policies equal to or more stringent than the NAIC Model Standards (as defined in subsection (g)(2)(A) of this section), except as otherwise provided by subparagraph H;

(B) includes requirements equal to or more stringent than the requirements described in paragraphs (2) through (5) of subsection (c) of this section;

(C) provides that--

(i) information with respect to the actual ratio of benefits provided to premiums collected under such policies will be reported to the State on forms conforming to those developed by the National Association of Insurance Commissioners for such purpose, or

(ii) such ratios will be monitored under the program in an alternative manner approved by the Secretary, and that a copy of each such policy, the most recent premium for each such policy, and a listing of the ratio of benefits provided to premiums collected for the most recent 3-year period for each such policy issued or sold in the State is maintained and made available to interested persons;

(D) provides for application and enforcement of the standards and requirements described in subparagraphs (A), (B), and (C) to all medicare supplemental policies (as defined in subsection (g)(1) of this section) issued in such State,

(E) provides the Secretary periodically (but at least annually) with a list containing the name and address of the issuer of each such policy and the name and number of each such policy (including an indication of policies that have been previously approved, newly approved, or withdrawn from approval since the previous list was provided),

(F) reports to the Secretary on the implementation and enforcement of standards and requirements of this paragraph at intervals established by the Secretary,

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(G) provides for a process for approving or disapproving proposed premium increases with respect to such policies, and establishes a policy for the holding of public hearings prior to approval of a premium increase, and

(H) in the case of a policy that meets the standards under subparagraph (A) except that benefits under the policy are limited to items and services furnished by certain entities (or reduced benefits are provided when items or services are furnished by other entities), provides for the application of requirements equal to or more stringent than the requirements under subsection (t) of this section,

shall be deemed (subject to subsections (k)(3), (m), and (n) of this section, for so long as the Secretary finds that such State regulatory program continues to meet the standards and requirements of this paragraph) to meet the standards and requirements set forth in subsection (c) of this section. Each report required under subparagraph (F) shall include information on loss ratios of policies sold in the State, frequency and types of instances in which policies approved by the State fail to meet the standards and requirements of this paragraph, actions taken by the State to bring such policies into compliance, information regarding State programs implementing consumer protection provisions, and such further information as the Secretary in consultation with the National Association of Insurance Commissioners may specify.

(2) The Secretary periodically shall review State regulatory programs to determine if they continue to meet the standards and requirements specified in paragraph (1). If the Secretary finds that a State regulatory program no longer meets the standards and requirements, before making a final determination, the Secretary shall provide the State an opportunity to adopt such a plan of correction as would permit the State regulatory program to continue to meet such standards and requirements. If the Secretary makes a final determination that the State regulatory program, after such an opportunity, fails to meet such standards and requirements, the program shall no longer be considered to have in operation a program meeting such standards and requirements.

(3) Notwithstanding paragraph (1), a medicare supplemental policy offered in a State shall not be deemed to meet the standards and requirements set forth in subsection (c) of this section, with respect to an advertisement (whether through written, radio, or television medium) used (or, at a State's option, to be used) for the policy in the State, unless the entity issuing the policy provides a copy of each advertisement to the Commissioner of Insurance (or comparable officer identified by the Secretary) of that State for review or approval to the extent it may be required under State law.

(c) Requisite findings

The Secretary shall certify under this section any medicare supplemental policy, or continue certification of such a policy, only if he finds that such policy (or, with respect to paragraph (3) or the requirement described in subsection (s) of this section, the issuer of the policy)--

(1) meets or exceeds (either in a single policy or, in the case of nonprofit hospital and medical service associations, in one or more policies issued in conjunction with one another) the NAIC Model Standards (except as otherwise provided by subsection (t) of this section);

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(2) meets the requirements of subsection (r) of this section;

(3)(A) accepts a notice under section 1395u(h)(3)(B) of this title as a claim form for benefits under such policy in lieu of any claim form otherwise required and agrees to make a payment determination on the basis of the information contained in such notice;

(B) where such a notice is received--

(i) provides notice to such physician or supplier and the beneficiary of the payment determination under the policy, and

(ii) provides any payment covered by such policy directly to the participating physician or supplier involved;

(C) provides each enrollee at the time of enrollment a card listing the policy name and number and a single mailing address to which notices under section 1395u(h)(3)(B) of this title respecting the policy are to be sent;

(D) agrees to pay any user fees established under section 1395u(h)(3)(B) of this title with respect to information transmitted to the issuer of the policy; and

(E) provides to the Secretary at least annually, for transmittal to carriers, a single mailing address to which notices under section 1395u(h)(3)(B) of this title respecting the policy are to be sent;

(4) may, during a period of not less than 30 days after the policy is issued, be returned for a full refund of any premiums paid (without regard to the manner in which the purchase of the policy was solicited); and

(5) meets the applicable requirements of subsections (o) through (t) of this section.

(d) Criminal penalties; civil penalties for certain violations

(1) Whoever knowingly and willfully makes or causes to be made or induces or seeks to induce the making of any false statement or representation of a material fact with respect to the compliance of any policy with the standards and requirements set forth in subsection (c) of this section or in regulations promulgated pursuant to such subsection, or with respect to the use of the emblem designed by the Secretary under subsection (a) of this section, shall be fined under Title 18 or imprisoned not more than 5 years, or both, and, in addition to or in lieu of such a criminal penalty, is subject to a civil money penalty of not to exceed $5,000 for each such prohibited act.

(2) Whoever falsely assumes or pretends to be acting, or misrepresents in any way that he is acting, under the authority of or in association with, the program of health insurance established by this subchapter, or any Feder-

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al agency, for the purpose of selling or attempting to sell insurance, or in such pretended character demands, or obtains money, paper, documents, or anything of value, shall be fined under Title 18 or imprisoned not more than 5 years, or both, and, in addition to or in lieu of such a criminal penalty, is subject to a civil money penalty of not to exceed $5,000 for each such prohibited act.

(3)(A)(i) It is unlawful for a person to sell or issue to an individual entitled to benefits under part A or enrolled under part B of this subchapter (including an individual electing a Medicare+Choice plan under section 1395w-21 of this title)--

(I) a health insurance policy with knowledge that the policy duplicates health benefits to which the individual is otherwise entitled under this subchapter or subchapter XIX of this chapter,

(II) in the case of an individual not electing a Medicare+Choice plan a medicare supplemental policy with knowledge that the individual is entitled to benefits under another medicare supplemental policy or in the case of an individual electing a Medicare+Choice plan, a medicare supplemental policy with knowledge that the policy duplicates health benefits to which the individual is otherwise entitled under the Medicare+Choice plan or under another medicare supplemental policy, or

(III) a health insurance policy (other than a medicare supplemental policy) with knowledge that the policy duplicates health benefits to which the individual is otherwise entitled, other than benefits to which the individual is entitled under a requirement of State or Federal law.

(ii) Whoever violates clause (i) shall be fined under Title 18 or imprisoned not more than 5 years, or both, and, in addition to or in lieu of such a criminal penalty, is subject to a civil money penalty of not to exceed $25,000 (or $15,000 in the case of a person other than the issuer of the policy) for each such prohibited act.

(iii) A seller (who is not the issuer of a health insurance policy) shall not be considered to violate clause (i)(II) with respect to the sale of a medicare supplemental policy if the policy is sold in compliance with subparagraph (B).

(iv) For purposes of this subparagraph, a health insurance policy (other than a Medicare supplemental policy) providing for benefits which are payable to or on behalf of an individual without regard to other health benefit coverage of such individual is not considered to "duplicate" any health benefits under this subchapter; under subchapter XIX of this chapter, or under a health insurance policy, and subclauses (I) and (III) of clause (i) do not apply to such a policy.

(v) For purposes of this subparagraph, a health insurance policy (or a rider to an insurance contract which is not a health insurance policy) is not considered to "duplicate" health benefits under this subchapter or under another health insurance policy if it--

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(I) provides health care benefits only for long-term care, nursing home care, home health care, or community-based care, or any combination thereof,

(II) coordinates against or excludes items and services available or paid for under this subchapter or under another health insurance policy, and

(III) for policies sold or issued on or after the end of the 90-day period beginning on August 21, 1996 discloses such coordination or exclusion in the policy's outline of coverage.

For purposes of this clause, the terms "coordinates" and "coordination" mean, with respect to a policy in relation to health benefits under this subchapter or under another health insurance policy, that the policy under its terms is secondary to, or excludes from payment, items and services to the extent available or paid for under this subchapter or under another health insurance policy.

(vi)(I) An individual entitled to benefits under part A or enrolled under part B of this subchapter who is applying for a health insurance policy (other than a policy described in subclause (III)) shall be furnished a disclosure statement described in clause (vii) for the type of policy being applied for. Such statement shall be furnished as a part of (or together with) the application for such policy.

(II) Whoever issues or sells a health insurance policy (other than a policy described in subclause (III)) to an individual described in subclause (I) and fails to furnish the appropriate disclosure statement as required under such subclause shall be fined under Title 18, or imprisoned not more than 5 years, or both, and, in addition to or in lieu of such a criminal penalty, is subject to a civil money penalty of not to exceed $25,000 (or $15,000 in the case of a person other than the issuer of the policy) for each such violation.

(III) A policy described in this subclause (to which subclauses (I) and (II) do not apply) is a Medicare supplemental policy, a policy described in clause (v), or a health insurance policy identified under 60 Federal Register 30880 (June 12, 1995) as a policy not required to have a disclosure statement.

(IV) Any reference in this section to the revised NAIC model regulation (referred to in subsection (m)(1)(A) of this section) is deemed a reference to such regulation as revised by section 171(m)(2) of the Social Security Act Amendments of 1994 (Public Law 103-432) and as modified by substituting, for the disclosure required under section 16D(2), disclosure under subclause (I) of an appropriate disclosure statement under clause (vii).

(vii) The disclosure statement described in this clause for a type of policy is the statement specified under subparagraph (D) of this paragraph (as in effect before August 21, 1996) for that type of policy, as revised as follows:

(I) In each statement, amend the second line to read as follows:

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"THIS IS NOT MEDICARE SUPPLEMENT INSURANCE".

(II) In each statement, strike the third line and insert the following: **"Some health care services paid for by Medicare may also trigger the payment of benefits under this policy."**.

(III) In each statement not described in subclause (V), strike the boldface matter that begins **"This insurance"** and all that follows up to the next paragraph that begins **"Medicare"**.

(IV) In each statement not described in subclause (V), insert before the boxed matter (that states **"Before You Buy This Insurance"**) the following: **"This policy must pay benefits without regard to other health benefit coverage to which you may be entitled under Medicare or other insurance."**.

(V) In a statement relating to policies providing both nursing home and non-institutional coverage, to policies providing nursing home benefits only, or policies providing home care benefits only, amend the sentence that begins **"Federal law"** to read as follows: **"Federal law requires us to inform you that in certain situations this insurance may pay for some care also covered by Medicare."**.

(viii)(I) Subject to subclause (II), nothing in this subparagraph shall restrict or preclude a State's ability to regulate health insurance policies, including any health insurance policy that is described in clause (iv), (v), or (vi)(III).

(II) A State may not declare or specify, in statute, regulation, or otherwise, that a health insurance policy (other than a Medicare supplemental policy) or rider to an insurance contract which is not a health insurance policy, that is described in clause (iv), (v), or (vi)(III) and that is sold, issued, or renewed to an individual entitled to benefits under part A or enrolled under part B "duplicates" health benefits under this subchapter or under a Medicare supplemental policy.

(B)(i) It is unlawful for a person to issue or sell a medicare supplemental policy to an individual entitled to benefits under part A of this subchapter or enrolled under part B of this subchapter, whether directly, through the mail, or otherwise, unless--

(I) the person obtains from the individual, as part of the application for the issuance or purchase and on a form described in clause (ii), a written statement signed by the individual stating, to the best of the individual's knowledge, what health insurance policies (including any Medicare+Choice plan) the individual has, from what source, and whether the individual is entitled to any medical assistance under subchapter XIX of this chapter, whether as a qualified medicare beneficiary or otherwise, and

(II) the written statement is accompanied by a written acknowledgment, signed by the seller of the policy, of the request for and receipt of such statement.

(ii) The statement required by clause (i) shall be made on a form that--

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(I) states in substance that a medicare-eligible individual does not need more than one medicare supplemental policy,

(II) states in substance that individuals may be eligible for benefits under the State medicaid program under subchapter XIX of this chapter and that such individuals who are entitled to benefits under that program usually do not need a medicare supplemental policy and that benefits and premiums under any such policy shall be suspended upon request of the policyholder during the period (of not longer than 24 months) of entitlement to benefits under such subchapter and may be reinstituted upon loss of such entitlement, and

(III) states that counseling services may be available in the State to provide advice concerning the purchase of medicare supplemental policies and enrollment under the medicaid program and may provide the telephone number for such services.

(iii)(I) Except as provided in subclauses (II) and (III), if the statement required by clause (i) is not obtained or indicates that the individual has a medicare supplemental policy or indicates that the individual is entitled to any medical assistance under subchapter XIX of this chapter, the sale of a medicare supplemental policy shall be considered to be a violation of subparagraph (A).

(II) Subclause (I) shall not apply in the case of an individual who has a medicare supplemental policy, if the individual indicates in writing, as part of the application for purchase, that the policy being purchased replaces such other policy and indicates an intent to terminate the policy being replaced when the new policy becomes effective and the issuer or seller certifies in writing that such policy will not, to the best of the issuer's or seller's knowledge, duplicate coverage (taking into account any such replacement).

(III) If the statement required by clause (i) is obtained and indicates that the individual is entitled to any medical assistance under subchapter XIX of this chapter, the sale of the policy is not in violation of clause (i) (insofar as such clause relates to such medical assistance), if (aa) a State medicaid plan under such subchapter pays the premiums for the policy, (bb) in the case of a qualified medicare beneficiary described in section 1396d(p)(1) of this title, the policy provides for coverage of outpatient prescription drugs, or (cc) the only medical assistance to which the individual is entitled under the State plan is medicare cost sharing described in section 1396d(p)(3)(A)(ii) of this title.

(iv) Whoever issues or sells a medicare supplemental policy in violation of this subparagraph shall be fined under Title 18, or imprisoned not more than 5 years, or both, and, in addition to or in lieu of such a criminal penalty, is subject to a civil money penalty of not to exceed $25,000 (or $15,000 in the case of a seller who is not the issuer of a policy) for each such violation.

(C) Subparagraph (A) shall not apply with respect to the sale or issuance of a group policy or plan of one or more employers or labor organizations, or of the trustees of a fund established by one or more employers or labor organizations (or combination thereof), for employees or former employees (or combination thereof) or for members or former members (or combination thereof) of the labor organizations.

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(4)(A) Whoever knowingly, directly or through his agent, mails or causes to be mailed any matter for a prohibited purpose (as determined under subparagraph (B)) shall be fined under Title 18 or imprisoned not more than 5 years, or both, and, in addition to or in lieu of such a criminal penalty, is subject to a civil money penalty of not to exceed $5,000 for each such prohibited act.

(B) For purposes of subparagraph (A), a prohibited purpose means the advertising, solicitation, or offer for sale of a medicare supplemental policy, or the delivery of such a policy, in or into any State in which such policy has not been approved by the State commissioner or superintendent of insurance.

(C) Subparagraph (A) shall not apply in the case of a person who mails or causes to be mailed a medicare supplemental policy into a State if such person has ascertained that the party insured under such policy to whom (or on whose behalf) such policy is mailed is located in such State on a temporary basis.

(D) Subparagraph (A) shall not apply in the case of a person who mails or causes to be mailed a duplicate copy of a medicare supplemental policy previously issued to the party to whom (or on whose behalf) such duplicate copy is mailed.

(E) Subparagraph (A) shall not apply in the case of an issuer who mails or causes to be mailed a policy, certificate, or other matter solely to comply with the requirements of subsection (q) of this section.

(5) The provisions of section 1320a-7a of this title (other than subsections (a) and (b)) shall apply to civil money penalties under paragraphs (1), (2), (3)(A), and (4)(A) in the same manner as such provisions apply to penalties and proceedings under section 1320a-7a(a) of this title.

(e) Dissemination of information

(1) The Secretary shall provide to all individuals entitled to benefits under this subchapter (and, to the extent feasible, to individuals about to become so entitled) such information as will permit such individuals to evaluate the value of medicare supplemental policies to them and the relationship of any such policies to benefits provided under this subchapter.

(2) The Secretary shall--

(A) inform all individuals entitled to benefits under this subchapter (and, to the extent feasible, individuals about to become so entitled) of--

(i) the actions and practices that are subject to sanctions under subsection (d) of this section, and

(ii) the manner in which they may report any such action or practice to an appropriate official of the Department of Health and Human Services (or to an appropriate State official), and

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(B) publish the toll-free telephone number for individuals to report suspected violations of the provisions of such subsection.

(3) The Secretary shall provide individuals entitled to benefits under this subchapter (and, to the extent feasible, individuals about to become so entitled) with a listing of the addresses and telephone numbers of State and Federal agencies and offices that provide information and assistance to individuals with respect to the selection of medicare supplemental policies.

(f) Study and evaluation of comparative effectiveness of various State approaches to regulating medicare supplemental policies; report to Congress no later than January 1, 1982; periodic evaluations

(1)(A) The Secretary shall, in consultation with Federal and State regulatory agencies, the National Association of Insurance Commissioners, private insurers, and organizations representing consumers and the aged, conduct a comprehensive study and evaluation of the comparative effectiveness of various State approaches to the regulation of medicare supplemental policies in (i) limiting marketing and agent abuse, (ii) assuring the dissemination of such information to individuals entitled to benefits under this subchapter (and to other consumers) as is necessary to permit informed choice, (iii) promoting policies which provide reasonable economic benefits for such individuals, (iv) reducing the purchase of unnecessary duplicative coverage, (v) improving price competition, and (vi) establishing effective approved State regulatory programs described in subsection (b) of this section.

(B) Such study shall also address the need for standards or certification of health insurance policies, other than medicare supplemental policies, sold to individuals eligible for benefits under this subchapter.

(C) The Secretary shall, no later than January 1, 1982, submit a report to the Congress on the results of such study and evaluation, accompanied by such recommendations as the Secretary finds warranted by such results with respect to the need for legislative or administrative changes to accomplish the objectives set forth in subparagraphs (A) and (B), including the need for a mandatory Federal regulatory program to assure the marketing of appropriate types of medicare supplemental policies, and such other means as he finds may be appropriate to enhance effective State regulation of such policies.

(2) The Secretary shall submit to the Congress no later than July 1, 1982, and periodically as may be appropriate thereafter (but not less often than once every 2 years), a report evaluating the effectiveness of the certification procedure and the criminal penalties established under this section, and shall include in such reports an analysis of--

(A) the impact of such procedure and penalties on the types, market share, value, and cost to individuals entitled to benefits under this subchapter of medicare supplemental policies which have been certified by the Secretary;

(B) the need for any change in the certification procedure to improve its administration or effectiveness; and

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(C) whether the certification program and criminal penalties should be continued.

(3) The Secretary shall provide information via a toll-free telephone number on medicare supplemental policies (including the relationship of State programs under subchapter XIX of this chapter to such policies).

(g) Definitions

(1) For purposes of this section, a medicare supplemental policy is a health insurance policy or other health benefit plan offered by a private entity to individuals who are entitled to have payment made under this subchapter, which provides reimbursement for expenses incurred for services and items for which payment may be made under this subchapter but which are not reimbursable by reason of the applicability of deductibles, coinsurance amounts, or other limitations imposed pursuant to this subchapter; but does not include a prescription drug plan under part D or a Medicare+Choice plan or any such policy or plan of one or more employers or labor organizations, or of the trustees of a fund established by one or more employers or labor organizations (or combination thereof), for employees or former employees (or combination thereof) or for members or former members (or combination thereof) of the labor organizations and does not include a Medicare+Choice plan or a policy or plan of an eligible organization (as defined in section 1395mm(b) of this title) if the policy or plan provides benefits pursuant to a contract under section 1395mm of this title or an approved demonstration project described in section 603(c) of the Social Security Amendments of 1983, section 2355 of the Deficit Reduction Act of 1984, or section 9412(b) of the Omnibus Budget Reconciliation Act of 1986, or, a policy or plan of an organization if the policy or plan provides benefits pursuant to an agreement under section 1395*l*(a)(1)(A) of this title. For purposes of this section, the term "policy" includes a certificate issued under such policy.

(2) For purposes of this section:

(A) The term "NAIC Model Standards" means the "NAIC Model Regulation to Implement the Individual Accident and Sickness Insurance Minimum Standards Act", adopted by the National Association of Insurance Commissioners on June 6, 1979, as it applies to medicare supplemental policies.

(B) The term "State with an approved regulatory program" means a State for which the Secretary has made a determination under subsection (b)(1) of this section.

(C) The State in which a policy is issued means--

(i) in the case of an individual policy, the State in which the policyholder resides; and

(ii) in the case of a group policy, the State in which the holder of the master policy resides.

(h) Rules and regulations

The Secretary shall prescribe such regulations as may be necessary for the effective, efficient, and equitable ad-

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ministration of the certification procedure established under this section. The Secretary shall first issue final regulations to implement the certification procedure established under subsection (a) of this section not later than March 1, 1981.

(i) Commencement of certification program

(1) No medicare supplemental policy shall be certified and no such policy may be issued bearing the emblem authorized by the Secretary under subsection (a) of this section until July 1, 1982. On and after such date policies certified by the Secretary may bear such emblem, including policies which were issued prior to such date and were subsequently certified, and insurers may notify holders of such certified policies issued prior to such date using such emblem in the notification.

(2)(A) The Secretary shall not implement the certification program established under subsection (a) of this section with respect to policies issued in a State unless the Panel makes a finding that such State cannot be expected to have established, by July 1, 1982, an approved State regulatory program meeting the standards and requirements of subsection (b)(1) of this section. If the Panel makes such a finding, the Secretary shall implement such program under subsection (a) of this section with respect to medicare supplemental policies issued in such State, until such time as the Panel determines that such State has a program that meets the standards and requirements of subsection (b)(1) of this section.

(B) Any finding by the Panel under subparagraph (A) shall be transmitted in writing, not later than January 1, 1982, to the Committee on Finance of the Senate and to the Committee on Energy and Commerce and the Committee on Ways and Means of the House of Representatives and shall not become effective until 60 days after the date of its transmittal to the Committees of the Congress under this subparagraph. In counting such days, days on which either House is not in session because of an adjournment sine die or an adjournment of more than three days to a day certain are excluded in the computation.

(j) State regulation of policies issued in other States

Nothing in this section shall be construed so as to affect the right of any State to regulate medicare supplemental policies which, under the provisions of this section, are considered to be issued in another State.

(k) Amended NAIC Model Regulation or Federal model standards applicable; effective date; medicare supplemental policy and State regulatory program meeting applicable standards

(1)(A) If, within the 90-day period beginning on July 1, 1988, the National Association of Insurance Commissioners (in this subsection referred to as the "Association") amends the NAIC Model Regulation adopted on June 6, 1979 (as it relates to medicare supplemental policies), with respect to matters such as minimum benefit standards, loss ratios, disclosure requirements, and replacement requirements and provisions otherwise necessary to reflect the changes in law made by the Medicare Catastrophic Coverage Act of 1988, except as provided in subsection (m) of this section, subsection (g)(2)(A) of this section shall be applied in a State, effective on and after the date specified in subparagraph (B), as if the reference to the Model Regulation adopted on June 6, 1979, were a reference to the Model Regulation as amended by the Association in accordance with this para-

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graph (in this subsection and subsection (l) of this section referred to as the "amended NAIC Model Regulation").

(B) The date specified in this subparagraph for a State is the earlier of the date the State adopts standards equal to or more stringent than the amended NAIC Model Regulation or 1 year after the date the Association first adopts such amended Regulation.

(2)(A) If the Association does not amend the NAIC Model Regulation within the 90-day period specified in paragraph (1)(A), the Secretary shall promulgate, not later than 60 days after the end of such period, Federal model standards (in this subsection and subsection (l) referred to as "Federal model standards") for medicare supplemental policies to reflect the changes in law made by the Medicare Catastrophic Coverage Act of 1988, and subsection (g)(2)(A) of this section shall be applied in a State, effective on and after the date specified in subparagraph (B), as if the reference to the Model Regulation adopted on June 6, 1979, were a reference to Federal model standards.

(B) The date specified in this subparagraph for a State is the earlier of the date the State adopts standards equal to or more stringent than the Federal model standards or 1 year after the date the Secretary first promulgates such standards.

(3) Notwithstanding any other provision of this section (except as provided in subsections (l), (m), and (n) of this section)--

(A) no medicare supplemental policy may be certified by the Secretary pursuant to subsection (a) of this section,

(B) no certification made pursuant to subsection (a) of this section shall remain in effect, and

(C) no State regulatory program shall be found to meet (or to continue to meet) the requirements of subsection (b)(1)(A) of this section,

unless such policy meets (or such program provides for the application of standards equal to or more stringent than) the standards set forth in the amended NAIC Model Regulation or the Federal model standards (as the case may be) by the date specified in paragraph (1)(B) or (2)(B) (as the case may be).

(l) Transitional compliance with NAIC Model Transition Regulation; "qualifying medicare supplemental policy" and "NAIC Model Transition Regulation" defined; report to Congress respecting State action in adopting equal or more stringent standards

(1) Until the date specified in paragraph (3), in the case of a qualifying medicare supplemental policy described in paragraph (2) issued--

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(A) before January 1, 1989, the policy is deemed to remain in compliance with this section if the insurer issuing the policy complies with the NAIC Model Transition Regulation (including giving notices to subscribers and filing for premium adjustments with the State as described in section 5.B. of such Regulation) by January 1, 1989; or

(B) on or after January 1, 1989, the policy is deemed to be in compliance with this section if the insurer issuing the policy complies with the NAIC Model Transition Regulation before the date of the sale of the policy.

(2) In paragraph (1), the term "qualifying medicare supplemental policy" means a medicare supplemental policy--

(A) issued in a State which--

(i) has not adopted standards equal to or more stringent than the NAIC Model Transition Regulation by January 1, 1989, and

(ii) has not adopted standards equal to or more stringent than the amended NAIC Model Regulation (or Federal model-standards) by January 1, 1989; and

(B) which has been issued in compliance with this section (as in effect on June 1, 1988).

(3)(A) The date specified in this paragraph is the earlier of--

(i) the first date a State adopts, after January 1, 1989, standards equal to or more stringent than the NAIC Model Transition Regulation or equal to or more stringent than the amended NAIC Model Regulation (or Federal model standards), as the case may be, or

(ii) the later of (I) the date specified in subsection (k)(1)(B) or (k)(2)(B) of this section (as the case may be), or (II) the date specified in subparagraph (B).

(B) In the case of a State which the Secretary identifies as--

(i) requiring State legislation (other than legislation appropriating funds) in order for medicare supplemental policies to meet standards described in subparagraph (A)(i), but

(ii) having a legislature which is not scheduled to meet in 1989 in a legislative session in which such legislation may be considered,

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the date specified in this subparagraph is the first day of the first calendar quarter beginning after the close of the first legislative session of the State legislature that begins on or after January 1, 1989, and in which legislation described in clause (i) may be considered. For purposes of the previous sentence, in the case of a State that has a 2-year legislative session, each year of such session shall be deemed to be a separate regular session of the State legislature.

(4) In the case of a medicare supplemental policy in effect on January 1, 1989, and offered in a State which, as of such date--

(A) has adopted standards equal to or more stringent than the amended NAIC Model Regulation (or Federal model standards), but

(B) does not have in effect standards equal to or more stringent than the NAIC Model Transition Regulation (or otherwise requiring notice substantially the same as the notice required in section 5.B. of such Regulation),

the policy shall not be deemed to meet the standards in subsection (c) of this section unless each individual who is entitled to benefits under this subchapter and is a policyholder under such policy on January 1, 1989, is sent such a notice in any appropriate form by not later than January 31, 1989, that explains--

(A) the improved benefits under this subchapter contained in the Medicare Catastrophic Coverage Act of 1988, and

(B) how these improvements affect the benefits contained in the policies and the premium for the policy.

(5) In this subsection, the term "NAIC Model Transition Regulation" refers to the standards contained in the "Model Regulation to Implement Transitional Requirements for the Conversion of Medicare Supplement Insurance Benefits and Premiums to Conform to Medicare Program Revisions" (as adopted by the National Association of Insurance Commissioners in September 1987).

(m) Revision of amended NAIC Model Regulation and amended Federal model standards; effective dates; medicare supplemental policy and State regulatory program meeting applicable standards

(1)(A) If, within the 90-day period beginning on December 13, 1989, the National Association of Insurance Commissioners (in this subsection and subsection (n) of this section referred to as the "Association") revises the amended NAIC Model Regulation (referred to in subsection (k)(1)(A) of this section and adopted on September 20, 1988) to improve such regulation and otherwise to reflect the changes in law made by the Medicare Catastrophic Coverage Repeal Act of 1989, subsection (g)(2)(A) of this section shall be applied in a State, effective on and after the date specified in subparagraph (B), as if the reference to the Model Regulation adopted on June 6, 1979, were a reference to the amended NAIC Model Regulation (referred to in subsection (k)(1)(A) of this section) as revised by the Association in accordance with this paragraph (in this subsection and subsection (n) of this section referred to as the "revised NAIC Model Regulation").

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(B) The date specified in this subparagraph for a State is the earlier of the date the State adopts standards equal to or more stringent than the revised NAIC Model Regulation or 1 year after the date the Association first adopts such revised Regulation.

(2)(A) If the Association does not revise the amended NAIC Model Regulation, within the 90-day period specified in paragraph (1)(A), the Secretary shall promulgate, not later than 60 days after the end of such period, revised Federal model standards (in this subsection and subsection (n) of this section referred to as "revised Federal model standards") for medicare supplemental policies to improve such standards and otherwise to reflect the changes in law made by the Medicare Catastrophic Coverage Repeal Act of 1989, subsection (g)(2)(A) of this section shall be applied in a State, effective on and after the date specified in subparagraph (B), as if the reference to the Model Regulation adopted on June 6, 1979, were a reference to the revised Federal model standards.

(B) The date specified in this subparagraph for a State is the earlier of the date the State adopts standards equal to or more stringent than the revised Federal model standards or 1 year after the date the Secretary first promulgates such standards.

(3) Notwithstanding any other provision of this section (except as provided in subsection (n) of this section)--

(A) no medicare supplemental policy may be certified by the Secretary pursuant to subsection (a) of this section,

(B) no certification made pursuant to subsection (a) of this section shall remain in effect, and

(C) no State regulatory program shall be found to meet (or to continue to meet) the requirements of subsection (b)(1)(A) of this section,

unless such policy meets (or such program provides for the application of standards equal to or more stringent than) the standards set forth in the revised NAIC Model Regulation or the revised Federal model standards (as the case may be) by the date specified in paragraph (1)(B) or (2)(B) (as the case may be).

(n) Transition compliance with revision of NAIC Model Regulation and Federal model standards

(1) Until the date specified in paragraph (4), in the case of a qualifying medicare supplemental policy described in paragraph (3) issued in a State--

(A) before the transition deadline, the policy is deemed to remain in compliance with the standards described in subsection (b)(1)(A) of this section only if the insurer issuing the policy complies with the transition provision described in paragraph (2), or

(B) on or after the transition deadline, the policy is deemed to be in compliance with the standards described

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in subsection (b)(1)(A) of this section only if the insurer issuing the policy complies with the revised NAIC Model Regulation or the revised Federal model standards (as the case may be) before the date of the sale of the policy.

In this paragraph, the term "transition deadline" means 1 year after the date the Association adopts the revised NAIC Model Regulation or 1 year after the date the Secretary promulgates revised Federal model standards (as the case may be).

(2) The transition provision described in this paragraph is--

(A) such transition provision as the Association provides, by not later than December 15, 1989, so as to provide for an appropriate transition (i) to restore benefit provisions which are no longer duplicative as a result of the changes in benefits under this subchapter made by the Medicare Catastrophic Coverage Repeal Act of 1989 and (ii) to eliminate the requirement of payment for the first 8 days of coinsurance for extended care services, or

(B) if the Association does not provide for a transition provision by the date described in subparagraph (A), such transition provision as the Secretary shall provide, by January 1, 1990, so as to provide for an appropriate transition described in subparagraph (A).

(3) In paragraph (1), the term "qualifying medicare supplemental policy" means a medicare supplemental policy which has been issued in compliance with this section as in effect on the date before December 13, 1989.

(4)(A) The date specified in this paragraph for a policy issued in a State is--

(i) the first date a State adopts, after December 13, 1989, standards equal to or more stringent than the revised NAIC Model Regulation (or revised Federal model standards), as the case may be, or

(ii) the date specified in subparagraph (B),

whichever is earlier.

(B) In the case of a State which the Secretary identifies, in consultation with the Association, as--

(i) requiring State legislation (other than legislation appropriating funds) in order for medicare supplemental policies to meet standards described in subparagraph (A)(i), but

(ii) having a legislature which is not scheduled to meet in 1990 in a legislative session in which such legislation may be considered,

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the date specified in this subparagraph is the first day of the first calendar quarter beginning after the close of the first legislative session of the State legislature that begins on or after January 1, 1990. For purposes of the previous sentence, in the case of a State that has a 2-year legislative session, each year of such session shall be deemed to be a separate regular session of the State legislature.

(5) In the case of a medicare supplemental policy in effect on January 1, 1990, the policy shall not be deemed to meet the standards in subsection (c) of this section unless each individual who is entitled to benefits under this subchapter and is a policyholder or certificate holder under such policy on such date is sent a notice in an appropriate form by not later than January 31, 1990, that explains--

(A) the changes in benefits under this subchapter effected by the Medicare Catastrophic Coverage Repeal Act of 1989, and

(B) how these changes may affect the benefits contained in such policy and the premium for the policy.

(6)(A) Except as provided in subparagraph (B), in the case of an individual who had in effect, as of December 31, 1988, a medicare supplemental policy with an insurer (as a policyholder or, in the case of a group policy, as a certificate holder) and the individual terminated coverage under such policy before December 13, 1989, no medicare supplemental policy of the insurer shall be deemed to meet the standards in subsection (c) of this section unless the insurer--

(i) provides written notice, no earlier than December 15, 1989, and no later than January 30, 1990, to the policyholder or certificate holder (at the most recent available address) of the offer described in clause (ii), and

(ii) offers the individual, during a period of at least 60 days beginning not later than February 1, 1990, reinstitution of coverage (with coverage effective as of January 1, 1990), under the terms which (I) do not provide for any waiting period with respect to treatment of pre-existing [FN1] conditions, (II) provides for coverage which is substantially equivalent to coverage in effect before the date of such termination, and (III) provides for classification of premiums on which terms are at least as favorable to the policyholder or certificate holder as the premium classification terms that would have applied to the policyholder or certificate holder had the coverage never terminated.

(B) An insurer is not required to make the offer under subparagraph (A)(ii) in the case of an individual who is a policyholder or certificate holder in another medicare supplemental policy as of December 13, 1989, if (as of January 1, 1990) the individual is not subject to a waiting period with respect to treatment of a pre-existing [FN1] condition under such other policy.

(o) Requirements of group benefits; core group benefits; uniform outline of coverage

The requirements of this subsection are as follows:

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(1) Each medicare supplemental policy shall provide for coverage of a group of benefits consistent with subsections (p), (v), and (w) of this section.

(2) If the medicare supplemental policy provides for coverage of a group of benefits other than the core group of basic benefits described in subsection (p)(2)(B) of this section, the issuer of the policy must make available to the individual a medicare supplemental policy with only such core group of basic benefits.

(3) The issuer of the policy has provided, before the sale of the policy, an outline of coverage that uses uniform language and format (including layout and print size) that facilitates comparison among medicare supplemental policies and comparison with medicare benefits.

(4) The issuer of the medicare supplemental policy complies with subsection (s)(2)(E) and subsection (x).

(5) In addition to the requirement under paragraph (2), the issuer of the policy must make available to the individual at least Medicare supplemental policies with benefit packages classified as "C" or "F".

(p) Standards for group benefits

(1)(A) If, within 9 months after November 5, 1990, the National Association of Insurance Commissioners (in this subsection referred to as the "Association") changes the revised NAIC Model Regulation (described in subsection (m) of this section) to incorporate--

(i) limitations on the groups or packages of benefits that may be offered under a medicare supplemental policy consistent with paragraphs (2) and (3) of this subsection,

(ii) uniform language and definitions to be used with respect to such benefits,

(iii) uniform format to be used in the policy with respect to such benefits, and

(iv) other standards to meet the additional requirements imposed by the amendments made by the Omnibus Budget Reconciliation Act of 1990,

subsection (g)(2)(A) of this section shall be applied in each State, effective for policies issued to policyholders on and after the date specified in subparagraph (C), as if the reference to the Model Regulation adopted on June 6, 1979, were a reference to the revised NAIC Model Regulation as changed under this subparagraph (such changed regulation referred to in this section as the "1991 NAIC Model Regulation").

(B) If the Association does not make the changes in the revised NAIC Model Regulation within the 9-month period specified in subparagraph (A), the Secretary shall promulgate, not later than 9 months after the end of such period, a regulation and subsection (g)(2)(A) of this section shall be applied in each State, effective for

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policies issued to policyholders on and after the date specified in subparagraph (C), as if the reference to the Model Regulation adopted on June 6, 1979, were a reference to the revised NAIC Model Regulation as changed by the Secretary under this subparagraph (such changed regulation referred to in this section as the "1991 Federal Regulation").

(C)(i) Subject to clause (ii), the date specified in this subparagraph for a State is the date the State adopts the 1991 NAIC Model Regulation or 1991 Federal Regulation or 1 year after the date the Association or the Secretary first adopts such standards, whichever is earlier.

(ii) In the case of a State which the Secretary identifies, in consultation with the Association, as--

(I) requiring State legislation (other than legislation appropriating funds) in order for medicare supplemental policies to meet the 1991 NAIC Model Regulation or 1991 Federal Regulation, but

(II) having a legislature which is not scheduled to meet in 1992 in a legislative session in which such legislation may be considered,

the date specified in this subparagraph is the first day of the first calendar quarter beginning after the close of the first legislative session of the State legislature that begins on or after January 1, 1992. For purposes of the previous sentence, in the case of a State that has a 2-year legislative session, each year of such session shall be deemed to be a separate regular session of the State legislature.

(D) In promulgating standards under this paragraph, the Association or Secretary shall consult with a working group composed of representatives of issuers of medicare supplemental policies, consumer groups, medicare beneficiaries, and other qualified individuals. Such representatives shall be selected in a manner so as to assure balanced representation among the interested groups.

(E) If benefits (including deductibles and coinsurance) under this subchapter are changed and the Secretary determines, in consultation with the Association, that changes in the 1991 NAIC Model Regulation or 1991 Federal Regulation are needed to reflect such changes, the preceding provisions of this paragraph shall apply to the modification of standards previously established in the same manner as they applied to the original establishment of such standards.

(2) The benefits under the 1991 NAIC Model Regulation or 1991 Federal Regulation shall provide--

(A) for such groups or packages of benefits as may be appropriate taking into account the considerations specified in paragraph (3) and the requirements of the succeeding subparagraphs;

(B) for identification of a core group of basic benefits common to all policies; and

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(C) that, subject to paragraph (4)(B), the total number of different benefit packages (counting the core group of basic benefits described in subparagraph (B) and each other combination of benefits that may be offered as a separate benefit package) that may be established in all the States and by all issuers shall not exceed 10 plus the 2 plans described in paragraph (11)(A).

(3) The benefits under paragraph (2) shall, to the extent possible--

(A) provide for benefits that offer consumers the ability to purchase the benefits that are available in the market as of November 5, 1990; and

(B) balance the objectives of (i) simplifying the market to facilitate comparisons among policies, (ii) avoiding adverse selection, (iii) providing consumer choice, (iv) providing market stability, and (v) promoting competition.

(4)(A)(i) Except as provided in subparagraph (B) or paragraph (6), no State with a regulatory program approved under subsection (b)(1) of this section may provide for or permit the grouping of benefits (or language or format with respect to such benefits) under a medicare supplemental policy unless such grouping meets the applicable 1991 NAIC Model Regulation or 1991 Federal Regulation.

(ii) Except as provided in subparagraph (B), the Secretary may not provide for or permit the grouping of benefits (or language or format with respect to such benefits) under a medicare supplemental policy seeking approval by the Secretary unless such grouping meets the applicable 1991 NAIC Model Regulation or 1991 Federal Regulation.

(B) With the approval of the State (in the case of a policy issued in a State with an approved regulatory program) or the Secretary (in the case of any other policy), the issuer of a medicare supplemental policy may offer new or innovative benefits in addition to the benefits provided in a policy that otherwise complies with the applicable 1991 NAIC Model Regulation or 1991 Federal Regulation. Any such new or innovative benefits may include benefits that are not otherwise available and are cost-effective and shall be offered in a manner which is consistent with the goal of simplification of medicare supplemental policies.

(5)(A) Except as provided in subparagraph (B), this subsection shall not be construed as preventing a State from restricting the groups of benefits that may be offered in medicare supplemental policies in the State.

(B) A State with a regulatory program approved under subsection (b)(1) of this section may not restrict under subparagraph (A) the offering of a medicare supplemental policy consisting only of the core group of benefits described in paragraph (2)(B).

(6) The Secretary may waive the application of standards described in clauses (i) through (iii) of paragraph (1)(A) in those States that on November 5, 1990, had in place an alternative simplification program.

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(7) This subsection shall not be construed as preventing an issuer of a medicare supplemental policy who otherwise meets the requirements of this section from providing, through an arrangement with a vendor, for discounts from that vendor to policyholders or certificateholders for the purchase of items or services not covered under its medicare supplemental policies.

(8) Any person who sells or issues a medicare supplemental policy, on and after the effective date specified in paragraph (1)(C) (but subject to paragraph (10)), in violation of the applicable 1991 NAIC Model Regulation or 1991 Federal Regulation insofar as such regulation relates to the requirements of subsection (o) or (q) of this section or clause (i), (ii), or (iii) of paragraph (1)(A) is subject to a civil money penalty of not to exceed $25,000 (or $15,000 in the case of a seller who is not an issuer of a policy) for each such violation. The provisions of section 1320a-7a of this title (other than the first sentence of subsection (a) and other than subsection (b)) shall apply to a civil money penalty under the previous sentence in the same manner as such provisions apply to a penalty or proceeding under section 1320a-7a(a) of this title.

(9)(A) Anyone who sells a medicare supplemental policy to an individual shall make available for sale to the individual a medicare supplemental policy with only the core group of basic benefits (described in paragraph (2)(B)).

(B) Anyone who sells a medicare supplemental policy to an individual shall provide the individual, before the sale of the policy, an outline of coverage which describes the benefits under the policy. Such outline shall be on a standard form approved by the State regulatory program or the Secretary (as the case may be) consistent with the 1991 NAIC Model Regulation or 1991 Federal Regulation under this subsection.

(C) Whoever sells a medicare supplemental policy in violation of this paragraph is subject to a civil money penalty of not to exceed $25,000 (or $15,000 in the case of a seller who is not the issuer of the policy) for each such violation. The provisions of section 1320a-7a of this title (other than the first sentence of subsection (a) and other than subsection (b)) shall apply to a civil money penalty under the previous sentence in the same manner as such provisions apply to a penalty or proceeding under section 1320a-7a(a) of this title.

(D) Subject to paragraph (10), this paragraph shall apply to sales of policies occurring on or after the effective date specified in paragraph (1)(C).

(10) No penalty may be imposed under paragraph (8) or (9) in the care [FN2] of a seller who is not the issuer of a policy until the Secretary has published a list of the groups of benefit packages that may be sold or issued consistent with paragraph (1)(A)(i).

(11)(A) For purposes of paragraph (2), the benefit packages described in this subparagraph are as follows:

(i) The benefit package classified as "F" under the standards established by such paragraph, except that it has a high deductible feature.

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(ii) The benefit package classified as "J" under the standards established by such paragraph, except that it has a high deductible feature.

(B) For purposes of subparagraph (A), a high deductible feature is one which--

(i) requires the beneficiary of the policy to pay annual out-of-pocket expenses (other than premiums) in the amount specified in subparagraph (C) before the policy begins payment of benefits, and

(ii) covers 100 percent of covered out-of-pocket expenses once such deductible has been satisfied in a year.

(C) The amount specified in this subparagraph--

(i) for 1998 and 1999 is $1,500, and

(ii) for a subsequent year, is the amount specified in this subparagraph for the previous year increased by the percentage increase in the Consumer Price Index for all urban consumers (all items; U.S. city average) for the 12-month period ending with August of the preceding year.

If any amount determined under clause (ii) is not a multiple of $10, it shall be rounded to the nearest multiple of $10.

(q) Guaranteed renewal of policies; termination; suspension

The requirements of this subsection are as follows:

(1) Each medicare supplemental policy shall be guaranteed renewable and--

(A) the issuer may not cancel or nonrenew the policy solely on the ground of health status of the individual; and

(B) the issuer shall not cancel or nonrenew the policy for any reason other than nonpayment of premium or material misrepresentation.

(2) If the medicare supplemental policy is terminated by the group policyholder and is not replaced as provided under paragraph (4), the issuer shall offer certificateholders an individual medicare supplemental policy which (at the option of the certificateholder)--

(A) provides for continuation of the benefits contained in the group policy, or

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(B) provides for such benefits as otherwise meets [FN3] the requirements of this section.

(3) If an individual is a certificateholder in a group medicare supplemental policy and the individual terminates membership in the group, the issuer shall--

(A) offer the certificateholder the conversion opportunity described in paragraph (2), or

(B) at the option of the group policyholder, offer the certificateholder continuation of coverage under the group policy.

(4) If a group medicare supplemental policy is replaced by another group medicare supplemental policy purchased by the same policyholder, issuer [FN4] of the replacement policy shall offer coverage to all persons covered under the old group policy on its date of termination. Coverage under the new group policy shall not result in any exclusion for preexisting conditions that would have been covered under the group policy being replaced.

(5)(A) Each medicare supplemental policy shall provide that benefits and premiums under the policy shall be suspended at the request of the policyholder for the period (not to exceed 24 months) in which the policyholder has applied for and is determined to be entitled to medical assistance under subchapter XIX of this chapter, but only if the policyholder notifies the issuer of such policy within 90 days after the date the individual becomes entitled to such assistance. If such suspension occurs and if the policyholder or certificate holder loses entitlement to such medical assistance, such policy shall be automatically reinstituted (effective as of the date of termination of such entitlement) under terms described in subsection (n)(6)(A)(ii) of this section as of the termination of such entitlement if the policyholder provides notice of loss of such entitlement within 90 days after the date of such loss.

(B) Nothing in this section shall be construed as affecting the authority of a State, under subchapter XIX of this chapter, to purchase a medicare supplemental policy for an individual otherwise entitled to assistance under such subchapter.

(C) Any person who issues a medicare supplemental policy and fails to comply with the requirements of this paragraph or paragraph (6) is subject to a civil money penalty of not to exceed $25,000 for each such violation. The provisions of section 1320a-7a of this title (other than the first sentence of subsection (a) and other than subsection (b)) shall apply to a civil money penalty under the previous sentence in the same manner as such provisions apply to a penalty or proceeding under section 1320a-7a(a) of this title.

(6) Each medicare supplemental policy shall provide that benefits and premiums under the policy shall be suspended at the request of the policyholder if the policyholder is entitled to benefits under section 426(b) of this title and is covered under a group health plan (as defined in section 1395y(b)(1)(A)(v)) of this title. If such suspension occurs and if the policyholder or certificate holder loses coverage under the group health plan, such policy shall be automatically reinstituted (effective as of the date of such loss of coverage) under terms

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described in subsection (n)(6)(A)(ii) as of the loss of such coverage if the policyholder provides notice of loss of such coverage within 90 days after the date of such loss.

(r) Required ratio of aggregate benefits to aggregate premiums

(1) A medicare supplemental policy may not be issued or renewed (or otherwise provide coverage after the date described in subsection (p)(1)(C) of this section) in any State unless--

(A) the policy can be expected for periods after the effective date of these provisions (as estimated for the entire period for which rates are computed to provide coverage, on the basis of incurred claims experience and earned premiums for such periods and in accordance with a uniform methodology, including uniform reporting standards, developed by the National Association of Insurance Commissioners) to return to policyholders in the form of aggregate benefits provided under the policy, at least 75 percent of the aggregate amount of premiums collected in the case of group policies and at least 65 percent in the case of individual policies; and

(B) the issuer of the policy provides for the issuance of a proportional refund, or a credit against future premiums of a proportional amount, based on the premium paid and in accordance with paragraph (2), of the amount of premiums received necessary to assure that the ratio of aggregate benefits provided to the aggregate premiums collected (net of such refunds or credits) complies with the expectation required under subparagraph (A), treating policies of the same type as a single policy for each standard package.

For purposes of applying subparagraph (A) only, policies issued as a result of solicitations of individuals through the mails or by mass media advertising (including both print and broadcast advertising) shall be deemed to be individual policies. For the purpose of calculating the refund or credit required under paragraph (1)(B) for a policy issued before the date specified in subsection (p)(1)(C) of this section, the refund or credit calculation shall be based on the aggregate benefits provided and premiums collected under all such policies issued by an insurer in a State (separated as to individual and group policies) and shall be based only on aggregate benefits provided and premiums collected under such policies after the date specified in section 171(m)(4) of the Social Security Act Amendments of 1994.

(2)(A) Paragraph (1)(B) shall be applied with respect to each type of policy by standard package. Paragraph (1)(B) shall not apply to a policy until 12 months following issue. The Comptroller General, in consultation with the National Association of Insurance Commissioners, shall submit to Congress a report containing recommendations on adjustments in the percentages under paragraph (1)(A) that may be appropriate. In the case of a policy issued before the date specified in subsection (p)(1)(C) of this section, paragraph (1)(B) shall not apply until 1 year after the date specified in section 171(m)(4) of the Social Security Act Amendments of 1994.

(B) A refund or credit required under paragraph (1)(B) shall be made to each policyholder insured under the applicable policy as of the last day of the year involved.

(C) Such a refund or credit shall include interest from the end of the calendar year involved until the date of the refund or credit at a rate as specified by the Secretary for this purpose from time to time which is not less than

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the average rate of interest for 13-week Treasury notes.

(D) For purposes of this paragraph and paragraph (1)(B), refunds or credits against premiums due shall be made, with respect to a calendar year, not later than the third quarter of the succeeding calendar year.

(3) The provisions of this subsection do not preempt a State from requiring a higher percentage than that specified in paragraph (1)(A).

(4) The Secretary shall submit in October of each year (beginning with 1993) a report to the Committees on Energy and Commerce and Ways and Means of the House of Representatives and the Committee on Finance of the Senate on loss ratios under medicare supplemental policies and the use of sanctions, such as a required rebate or credit or the disallowance of premium increases, for policies that fail to meet the requirements of this subsection (relating to loss ratios). Such report shall include a list of the policies that failed to comply with such loss ratio requirements or other requirements of this section.

(5) The Secretary may perform audits with respect to the compliance of medicare supplemental policies with the loss ratio requirements of this subsection and shall report the results of such audits to the State involved.

(6)(A) A person who fails to provide refunds or credits as required in paragraph (1)(B) is subject to a civil money penalty of not to exceed $25,000 for each policy issued for which such failure occurred. The provisions of section 1320a-7a of this title (other than the first sentence of subsection (a) and other than subsection (b)) shall apply to a civil money penalty under the previous sentence in the same manner as such provisions apply to a penalty or proceeding under section 1320a-7a(a) of this title.

(B) Each issuer of a policy subject to the requirements of paragraph (1)(B) shall be liable to the policyholder or, in the case of a group policy, to the certificate holder for credits required under such paragraph.

(s) Coverage of pre-existing [FN1] conditions

(1) If a medicare supplemental policy replaces another medicare supplemental policy, the issuer of the replacing policy shall waive any time periods applicable to preexisting conditions, waiting period, elimination periods and probationary periods in the new medicare supplemental policy for similar benefits to the extent such time was spent under the original policy.

(2)(A) The issuer of a medicare supplemental policy may not deny or condition the issuance or effectiveness of a medicare supplemental policy, or discriminate in the pricing of the policy, because of health status, claims experience, receipt of health care, or medical condition in the case of an individual for whom an application is submitted prior to or during the 6 month period beginning with the first month as of the first day on which the individual is 65 years of age or older and is enrolled for benefits under part B of this subchapter.

(B) Subject to subparagraphs (C) and (D), subparagraph (A) shall not be construed as preventing the exclusion

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of benefits under a policy, during its first 6 months, based on a pre-existing [FN1] condition for which the policyholder received treatment or was otherwise diagnosed during the 6 months before the policy became effective.

(C) If a medicare supplemental policy or certificate replaces another such policy or certificate which has been in effect for 6 months or longer, the replacing policy may not provide any time period applicable to pre-existing [FN1] conditions, waiting periods, elimination periods, and probationary periods in the new policy or certificate for similar benefits.

(D) In the case of a policy issued during the 6-month period described in subparagraph (A) to an individual who is 65 years of age or older as of the date of issuance and who as of the date of the application for enrollment has a continuous period of creditable coverage (as defined in section 300gg(c) of this title) of--

(i) at least 6 months, the policy may not exclude benefits based on a pre-existing [FN1] condition; or

(ii) less than 6 months, if the policy excludes benefits based on a preexisting condition, the policy shall reduce the period of any preexisting condition exclusion by the aggregate of the periods of creditable coverage (if any, as so defined) applicable to the individual as of the enrollment date.

The Secretary shall specify the manner of the reduction under clause (ii), based upon the rules used by the Secretary in carrying out section 300gg(a)(3) of this title.

(E) An issuer of a medicare supplemental policy shall not deny or condition the issuance or effectiveness of the policy (including the imposition of any exclusion of benefits under the policy based on a pre-existing condition) and shall not discriminate in the pricing of the policy (including the adjustment of premium rates) of an individual on the basis of the genetic information with respect to such individual.

(F) Rule of construction

Nothing in subparagraph (E) or in subparagraphs (A) or (B) of subsection (x)(2) shall be construed to limit the ability of an issuer of a medicare supplemental policy from, to the extent otherwise permitted under this subchapter--

(i) denying or conditioning the issuance or effectiveness of the policy or increasing the premium for an employer based on the manifestation of a disease or disorder of an individual who is covered under the policy; or

(ii) increasing the premium for any policy issued to an individual based on the manifestation of a disease or disorder of an individual who is covered under the policy (in such case, the manifestation of a disease or disorder in one individual cannot also be used as genetic information about other group members and to further increase the premium for the employer).

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(3)(A) The issuer of a medicare supplemental policy--

(i) may not deny or condition the issuance or effectiveness of a medicare supplemental policy described in subparagraph (C) that is offered and is available for issuance to new enrollees by such issuer;

(ii) may not discriminate in the pricing of such policy, because of health status, claims experience, receipt of health care, or medical condition; and

(iii) may not impose an exclusion of benefits based on a preexisting condition under such policy,

in the case of an individual described in subparagraph (B) who seeks to enroll under the policy during the period specified in subparagraph (E) and who submits evidence of the date of termination or disenrollment along with the application for such medicare supplemental policy.

(B) An individual described in this subparagraph is an individual described in any of the following clauses:

(i) The individual is enrolled under an employee welfare benefit plan that provides health benefits that supplement the benefits under this subchapter and the plan terminates or ceases to provide all such supplemental health benefits to the individual.

(ii) The individual is enrolled with a Medicare+Choice organization under a Medicare+Choice plan under part C of this subchapter, and there are circumstances permitting discontinuance of the individual's election of the plan under the first sentence of section 1395w-21(e)(4) of this title or the individual is 65 years of age or older and is enrolled with a PACE provider under section 1395eee of this title, and there are circumstances that would permit the discontinuance of the individual's enrollment with such provider under circumstances that are similar to the circumstances that would permit discontinuance of the individual's election under the first sentence of such section if such individual were enrolled in a Medicare+Choice plan.

(iii) The individual is enrolled with an eligible organization under a contract under section 1395mm of this title, a similar organization operating under demonstration project authority, effective for periods before April 1, 1999, with an organization under an agreement under section 1395*l*(a)(1)(A) of this title, or with an organization under a policy described in subsection (t) of this section, and such enrollment ceases under the same circumstances that would permit discontinuance of an individual's election of coverage under the first sentence of section 1395w-21(e)(4) of this title and, in the case of a policy described in subsection (t) of this section, there is no provision under applicable State law for the continuation or conversion of coverage under such policy.

(iv) The individual is enrolled under a medicare supplemental policy under this section and such enrollment ceases because--

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(I) of the bankruptcy or insolvency of the issuer or because of other involuntary termination of coverage or enrollment under such policy and there is no provision under applicable State law for the continuation or conversion of such coverage;

(II) the issuer of the policy substantially violated a material provision of the policy; or

(III) the issuer (or an agent or other entity acting on the issuer's behalf) materially misrepresented the policy's provisions in marketing the policy to the individual.

(v) The individual--

(I) was enrolled under a medicare supplemental policy under this section,

(II) subsequently terminates such enrollment and enrolls, for the first time, with any Medicare+Choice organization under a Medicare+Choice plan under part C of this subchapter, any eligible organization under a contract under section 1395mm of this title, any similar organization operating under demonstration project authority, any PACE provider under section 1395eee of this title, or any policy described in subsection (t) of this section, and

(III) the subsequent enrollment under subclause (II) is terminated by the enrollee during any period within the first 12 months of such enrollment (during which the enrollee is permitted to terminate such subsequent enrollment under section 1395w-21(e) of this title).

(vi) The individual, upon first becoming eligible for benefits under part A of this subchapter at age 65, enrolls in a Medicare+Choice plan under part C of this subchapter or in a PACE program under section 1395eee of this title, and disenrolls from such plan or such program by not later than 12 months after the effective date of such enrollment.

(C)(i) Subject to clauses (ii) and (iii), a medicare supplemental policy described in this subparagraph is a medicare supplemental policy which has a benefit package classified as 'A', 'B', 'C', or 'F' under the standards established under subsection (p)(2) of this section.

(ii)(I) Subject to subclause (II), only for purposes of an individual described in subparagraph (B)(v), a medicare supplemental policy described in this subparagraph is the same medicare supplemental policy referred to in such subparagraph in which the individual was most recently previously enrolled, if available from the same issuer, or, if not so available, a policy described in clause (i).

(II) If the medicare supplemental policy referred to in subparagraph (B)(v) was a medigap Rx policy (as defined in subsection (v)(6)(A) of this section), a medicare supplemental policy described in this subparagraph is such policy in which the individual was most recently enrolled as modified under subsection (v)(2)(C)(i) of this sec-

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tion or, at the election of the individual, a policy referred to in subsection (v)(3)(A)(i) of this section.

(iii) Only for purposes of an individual described in subparagraph (B)(vi) and subject to subsection (v)(1) of this section, a medicare supplemental policy described in this subparagraph shall include any medicare supplemental policy.

(iv) For purposes of applying this paragraph in the case of a State that provides for offering of benefit packages other than under the classification referred to in clause (i), the references to benefit packages in such clause are deemed references to comparable benefit packages offered in such State.

(D) At the time of an event described in subparagraph (B) because of which an individual ceases enrollment or loses coverage or benefits under a contract or agreement, policy, or plan, the organization that offers the contract or agreement, the insurer offering the policy, or the administrator of the plan, respectively, shall notify the individual of the rights of the individual under this paragraph, and obligations of issuers of medicare supplemental policies, under subparagraph (A).

(E) For purposes of subparagraph (A), the time period specified in this subparagraph is--

(i) in the case of an individual described in subparagraph (B)(i), the period beginning on the date the individual receives a notice of termination or cessation of all supplemental health benefits (or, if no such notice is received, notice that a claim has been denied because of such a termination or cessation) and ending on the date that is 63 days after the applicable notice;

(ii) in the case of an individual described in clause (ii), (iii), (v), or (vi) of subparagraph (B) whose enrollment is terminated involuntarily, the period beginning on the date that the individual receives a notice of termination and ending on the date that is 63 days after the date the applicable coverage is terminated;

(iii) in the case of an individual described in subparagraph (B)(iv)(I), the period beginning on the earlier of (I) the date that the individual receives a notice of termination, a notice of the issuer's bankruptcy or insolvency, or other such similar notice, if any, and (II) the date that the applicable coverage is terminated, and ending on the date that is 63 days after the date the coverage is terminated;

(iv) in the case of an individual described in clause (ii), (iii), (iv)(II), (iv)(III), (v), or (vi) of subparagraph (B) who disenrolls voluntarily, the period beginning on the date that is 60 days before the effective date of the disenrollment and ending on the date that is 63 days after such effective date; and

(v) in the case of an individual described in subparagraph (B) but not described in the preceding provisions of this subparagraph, the period beginning on the effective date of the disenrollment and ending on the date that is 63 days after such effective date.

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(F)(i) Subject to clause (ii), for purposes of this paragraph--

(I) in the case of an individual described in subparagraph (B)(v) (or deemed to be so described, pursuant to this subparagraph) whose enrollment with an organization or provider described in subclause (II) of such subparagraph is involuntarily terminated within the first 12 months of such enrollment, and who, without an intervening enrollment, enrolls with another such organization or provider, such subsequent enrollment shall be deemed to be an initial enrollment described in such subparagraph; and

(II) in the case of an individual described in clause (vi) of subparagraph (B) (or deemed to be so described, pursuant to this subparagraph) whose enrollment with a plan or in a program described in such clause is involuntarily terminated within the first 12 months of such enrollment, and who, without an intervening enrollment, enrolls in another such plan or program, such subsequent enrollment shall be deemed to be an initial enrollment described in such clause.

(ii) For purposes of clauses (v) and (vi) of subparagraph (B), no enrollment of an individual with an organization or provider described in clause (v)(II), or with a plan or in a program described in clause (vi), may be deemed to be an initial enrollment under this clause after the 2-year period beginning on the date on which the individual first enrolled with such an organization, provider, plan, or program.

(4) Any issuer of a medicare supplemental policy that fails to meet the requirements of this subsection is subject to a civil money penalty of not to exceed $5,000 for each such failure. The provisions of section 1320a-7a of this title (other than the first sentence of subsection (a) and other than subsection (b)) shall apply to a civil money penalty under the previous sentence in the same manner as such provisions apply to a penalty or proceeding under section 1320a-7a(a) of this title.

(t) Medicare select policies

(1) If a medicare supplemental policy meets the 1991 NAIC Model Regulation or 1991 Federal Regulation and otherwise complies with the requirements of this section except that benefits under the policy are restricted to items and services furnished by certain entities (or reduced benefits are provided when items or services are furnished by other entities), the policy shall nevertheless be treated as meeting those standards if--

(A) full benefits are provided for items and services furnished through a network of entities which have entered into contracts or agreements with the issuer of the policy;

(B) full benefits are provided for items and services furnished by other entities if the services are medically necessary and immediately required because of an unforeseen illness, injury, or condition and it is not reasonable given the circumstances to obtain the services through the network;

(C) the network offers sufficient access;

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(D) the issuer of the policy has arrangements for an ongoing quality assurance program for items and services furnished through the network;

(E)(i) the issuer of the policy provides to each enrollee at the time of enrollment an explanation of (I) the restrictions on payment under the policy for services furnished other than by or through the network, (II) out of area coverage under the policy, (III) the policy's coverage of emergency services and urgently needed care, and (IV) the availability of a policy through the entity that meets the standards in the 1991 NAIC Model Regulation or 1991 Federal Regulation without reference to this subsection and the premium charged for such policy, and

(ii) each enrollee prior to enrollment acknowledges receipt of the explanation provided under clause (i); and

(F) the issuer of the policy makes available to individuals, in addition to the policy described in this subsection, any policy (otherwise offered by the issuer to individuals in the State) that meets the standards in the 1991 NAIC Model Regulation or 1991 Federal Regulation and other requirements of this section without reference to this subsection.

(2) If the Secretary determines that an issuer of a policy approved under paragraph (1)--

(A) fails substantially to provide medically necessary items and services to enrollees seeking such items and services through the issuer's network, if the failure has adversely affected (or has substantial likelihood of adversely affecting) the individual,

(B) imposes premiums on enrollees in excess of the premiums approved by the State,

(C) acts to expel an enrollee for reasons other than nonpayment of premiums, or

(D) does not provide the explanation required under paragraph (1)(E)(i) or does not obtain the acknowledgment required under paragraph (1)(E)(ii),

the issuer is subject to a civil money penalty in an amount not to exceed $25,000 for each such violation. The provisions of section 1320a-7a of this title (other than the first sentence of subsection (a) and other than subsection (b)) shall apply to a civil money penalty under the previous sentence in the same manner as such provisions apply to a penalty or proceeding under section 1320a-7a(a) of this title.

(3) The Secretary may enter into a contract with an entity whose policy has been certified under paragraph (1) or has been approved by a State under subsection (b)(1)(H) to determine whether items and services (furnished to individuals entitled to benefits under this subchapter and under that policy) are not allowable under section 1395y(a)(1) of this title. Payments to the entity shall be in such amounts as the Secretary may determine, taking into account estimated savings under contracts with carriers and fiscal intermediaries and other factors that the

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Secretary finds appropriate. Paragraph (1), the first sentence of paragraph (2)(A), paragraph (2)(B), paragraph (3)(C), paragraph (3)(D), and paragraph (3)(E) of section 1395u(b) of this title shall apply to the entity.

(u) Additional rules relating to individuals enrolled in MSA plans and in private fee-for-service plans

(1) It is unlawful for a person to sell or issue a policy described in paragraph (2) to an individual with knowledge that the individual has in effect under section 1395w-21 of this title an election of an MSA plan or a Medicare+Choice private fee-for-service plan.

(2)(A) A policy described in this subparagraph is a health insurance policy (other than a policy described in subparagraph (B)) that provides for coverage of expenses that are otherwise required to be counted toward meeting the annual deductible amount provided under the MSA plan.

(B) A policy described in this subparagraph is any of the following:

(i) A policy that provides coverage (whether through insurance or otherwise) for accidents, disability, dental care, vision care, or long-term care.

(ii) A policy of insurance to which substantially all of the coverage relates to--

(I) liabilities incurred under workers' compensation laws,

(II) tort liabilities,

(III) liabilities relating to ownership or use of property, or

(IV) such other similar liabilities as the Secretary may specify by regulations.

(iii) A policy of insurance that provides coverage for a specified disease or illness.

(iv) A policy of insurance that pays a fixed amount per day (or other period) of hospitalization.

(v) Rules relating to medigap policies that provide prescription drug coverage

(1) Prohibition on sale, issuance, and renewal of new policies that provide prescription drug coverage

(A) In general

Notwithstanding any other provision of law, on or after January 1, 2006, a medigap Rx policy (as defined in paragraph (6)(A)) may not be sold, issued, or renewed under this section--

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(i) to an individual who is a part D enrollee (as defined in paragraph (6)(B)); or

(ii) except as provided in subparagraph (B), to an individual who is not a part D enrollee.

(B) Continuation permitted for non-part D enrollees

Subparagraph (A)(ii) shall not apply to the renewal of a medigap Rx policy that was issued before January 1, 2006.

(C) Construction

Nothing in this subsection shall be construed as preventing the offering on and after January 1, 2006, of "H", "I", and "J" policies described in paragraph (2)(D)(i) if the benefit packages are modified in accordance with paragraph (2)(C).

(2) Elimination of duplicative coverage upon part D enrollment

(A) In general

In the case of an individual who is covered under a medigap Rx policy and enrolls under a part D plan--

(i) before the end of the initial part D enrollment period, the individual may--

(I) enroll in a medicare supplemental policy without prescription drug coverage under paragraph (3); or

(II) continue the policy in effect subject to the modification described in subparagraph (C)(i); or

(ii) after the end of such period, the individual may continue the policy in effect subject to such modification.

(B) Notice required to be provided to current policyholders with medigap Rx policy

No medicare supplemental policy of an issuer shall be deemed to meet the standards in subsection (c) of this section unless the issuer provides written notice (in accordance with standards of the Secretary established in consultation with the National Association of Insurance Commissioners) during the 60-day period immediately preceding the initial part D enrollment period, to each individual who is a policyholder or certificate holder of a medigap Rx policy (at the most recent available address of that individual) of the following:

(i) If the individual enrolls in a plan under part D during the initial enrollment period under section 1395w-101(b)(2)(A) of this title, the individual has the option of--

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(I) continuing enrollment in the individual's current plan, but the plan's coverage of prescription drugs will be modified under subparagraph (C)(i); or

(II) enrolling in another medicare supplemental policy pursuant to paragraph (3).

(ii) If the individual does not enroll in a plan under part D during such period, the individual may continue enrollment in the individual's current plan without change, but--

(I) the individual will not be guaranteed the option of enrollment in another medicare supplemental policy pursuant to paragraph (3); and

(II) if the current plan does not provide creditable prescription drug coverage (as defined in section 1395w-113(b)(4) of this title, notice of such fact and that there are limitations on the periods in a year in which the individual may enroll under a part D plan and any such enrollment is subject to a late enrollment penalty.

(iii) Such other information as the Secretary may specify (in consultation with the National Association of Insurance Commissioners), including the potential impact of such election on premiums for medicare supplemental policies.

(C) Modification

(i) In general

The policy modification described in this subparagraph is the elimination of prescription coverage for expenses of prescription drugs incurred after the effective date of the individual's coverage under a part D plan and the appropriate adjustment of premiums to reflect such elimination of coverage.

(ii) Continuation of renewability and application of modification

No medicare supplemental policy of an issuer shall be deemed to meet the standards in subsection (c) of this section unless the issuer--

(I) continues renewability of medigap Rx policies that it has issued, subject to subclause (II); and

(II) applies the policy modification described in clause (i) in the cases described in clauses (i)(II) and (ii) of subparagraph (A).

(D) References to Rx policies

(i) H, I, and J policies

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Any reference to a benefit package classified as "H", "I", or "J" (including the benefit package classified as "J" with a high deductible feature, as described in subsection (p)(11) of this section) under the standards established under subsection (p)(2) of this section shall be construed as including a reference to such a package as modified under subparagraph (C) and such packages as modified shall not be counted as a separate benefit package under such subsection.

(ii) Application in waivered States

Except for the modification provided under subparagraph (C), the waivers previously in effect under subsection (p)(2) of this section shall continue in effect.

(3) Availability of substitute policies with guaranteed issue

(A) In general

The issuer of a medicare supplemental policy--

(i) may not deny or condition the issuance or effectiveness of a medicare supplemental policy that has a benefit package classified as "A", "B", "C", or "F" (including the benefit package classified as "F" with a high deductible feature, as described in subsection (p)(11) of this section), under the standards established under subsection (p)(2) of this section, or a benefit package described in subparagraph (A) or (B) of subsection (w)(2) of this section and that is offered and is available for issuance to new enrollees by such issuer;

(ii) may not discriminate in the pricing of such policy, because of health status, claims experience, receipt of health care, or medical condition; and

(iii) may not impose an exclusion of benefits based on a pre-existing condition under such policy,

in the case of an individual described in subparagraph (B) who seeks to enroll under the policy not later than 63 days after the effective date of the individual's coverage under a part D plan.

(B) Individual covered

An individual described in this subparagraph with respect to the issuer of a medicare supplemental policy is an individual who--

(i) enrolls in a part D plan during the initial part D enrollment period;

(ii) at the time of such enrollment was enrolled in a medigap Rx policy issued by such issuer; and

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(iii) terminates enrollment in such policy and submits evidence of such termination along with the application for the policy under subparagraph (A).

(C) Special rule for waivered States

For purposes of applying this paragraph in the case of a State that provides for offering of benefit packages other than under the classification referred to in subparagraph (A)(i), the references to benefit packages in such subparagraph are deemed references to comparable benefit packages offered in such State.

(4) Enforcement

(A) Penalties for duplication

The penalties described in subsection (d)(3)(A)(ii) of this section shall apply with respect to a violation of paragraph (1)(A).

(B) Guaranteed issue

The provisions of paragraph (4) of subsection (s) of this section shall apply with respect to the requirements of paragraph (3) in the same manner as they apply to the requirements of such subsection.

(5) Construction

Any provision in this section or in a medicare supplemental policy relating to guaranteed renewability of coverage shall be deemed to have been met with respect to a part D enrollee through the continuation of the policy subject to modification under paragraph (2)(C) or the offering of a substitute policy under paragraph (3). The previous sentence shall not be construed to affect the guaranteed renewability of such a modified or substitute policy.

(6) Definitions

For purposes of this subsection:

(A) Medigap Rx policy

The term "medigap Rx policy" means a medicare supplemental policy--

(i) which has a benefit package classified as "H", "I", or "J" (including the benefit package classified as "J" with a high deductible feature, as described in subsection (p)(11) of this section) under the standards established under subsection (p)(2) of this section, without regard to this subsection; and

(ii) to which such standards do not apply (or to which such standards have been waived under subsection (p)(6) of this section) but which provides benefits for prescription drugs.

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Such term does not include a policy with a benefit package as classified under clause (i) which has been modified under paragraph (2)(C)(i).

(B) Part D enrollee

The term "part D enrollee" means an individual who is enrolled in a part D plan.

(C) Part D plan

The term "part D plan" means a prescription drug plan or an MA-PD plan (as defined for purposes of part D).

(D) Initial part D enrollment period

The term "initial part D enrollment period" means the initial enrollment period described in section 1395w-101(b)(2)(A).

(w) Development of new standards for medicare supplemental policies

(1) In general

The Secretary shall request the National Association of Insurance Commissioners to review and revise the standards for benefit packages under subsection (p)(1) of this section, taking into account the changes in benefits resulting from enactment of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 and to otherwise update standards to reflect other changes in law included in such Act. Such revision shall incorporate the inclusion of the 2 benefit packages described in paragraph (2). Such revisions shall be made consistent with the rules applicable under subsection (p)(1)(E) of this section with the reference to the "1991 NAIC Model Regulation" deemed a reference to the NAIC Model Regulation as published in the Federal Register on December 4, 1998, and as subsequently updated by the National Association of Insurance Commissioners to reflect previous changes in law (and subsection (v) of this section) and the reference to "date of enactment of this subsection" deemed a reference to Dec. 8, 2003. To the extent practicable, such revision shall provide for the implementation of revised standards for benefit packages as of January 1, 2006.

(2) New benefit packages

The benefit packages described in this paragraph are the following (notwithstanding any other provision of this section relating to a core benefit package):

(A) First new benefit package

A benefit package consisting of the following:

(i) Subject to clause (ii), coverage of 50 percent of the cost-sharing otherwise applicable under parts A

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and B of this subchapter, except there shall be no coverage of the part B deductible and coverage of 100 percent of any cost-sharing otherwise applicable for preventive benefits.

(ii) Coverage for all hospital inpatient coinsurance and 365 extra lifetime days of coverage of inpatient hospital services (as in the current core benefit package).

(iii) A limitation on annual out-of-pocket expenditures under parts A and B of this subchapter to $4,000 in 2006 (or, in a subsequent year, to such limitation for the previous year increased by an appropriate inflation adjustment specified by the Secretary).

(B) Second new benefit package

A benefit package consisting of the benefit package described in subparagraph (A), except as follows:

(i) Substitute "75 percent" for "50 percent" in clause (i) of such subparagraph.

(ii) Substitute "$2,000" for "$4,000" in clause (iii) of such subparagraph.

(x) Limitations on genetic testing and information

(1) Genetic testing

(A) Limitation on requesting or requiring genetic testing

An issuer of a medicare supplemental policy shall not request or require an individual or a family member of such individual to undergo a genetic test.

(B) Rule of construction

Subparagraph (A) shall not be construed to limit the authority of a health care professional who is providing health care services to an individual to request that such individual undergo a genetic test.

(C) Rule of construction regarding payment

(i) In general

Nothing in subparagraph (A) shall be construed to preclude an issuer of a medicare supplemental policy from obtaining and using the results of a genetic test in making a determination regarding payment (as such term is defined for the purposes of applying the regulations promulgated by the Secretary under part C of title XI and section 264 of the Health Insurance Portability and Accountability Act of 1996, as may be revised from time to time) consistent with subsection (s)(2)(E).

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(ii) Limitation

For purposes of clause (i), an issuer of a medicare supplemental policy may request only the minimum amount of information necessary to accomplish the intended purpose.

(D) Research exception

Notwithstanding subparagraph (A), an issuer of a medicare supplemental policy may request, but not require, that an individual or a family member of such individual undergo a genetic test if each of the following conditions is met:

(i) The request is made pursuant to research that complies with part 46 of title 45, Code of Federal Regulations, or equivalent Federal regulations, and any applicable State or local law or regulations for the protection of human subjects in research.

(ii) The issuer clearly indicates to each individual, or in the case of a minor child, to the legal guardian of such child, to whom the request is made that--

(I) compliance with the request is voluntary; and

(II) non-compliance will have no effect on enrollment status or premium or contribution amounts.

(iii) No genetic information collected or acquired under this subparagraph shall be used for underwriting, determination of eligibility to enroll or maintain enrollment status, premium rating, or the creation, renewal, or replacement of a plan, contract, or coverage for health insurance or health benefits.

(iv) The issuer notifies the Secretary in writing that the issuer is conducting activities pursuant to the exception provided for under this subparagraph, including a description of the activities conducted.

(v) The issuer complies with such other conditions as the Secretary may by regulation require for activities conducted under this subparagraph.

(2) Prohibition on collection of genetic information

(A) In general

An issuer of a medicare supplemental policy shall not request, require, or purchase genetic information for underwriting purposes (as defined in paragraph (3)).

(B) Prohibition on collection of genetic information prior to enrollment

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An issuer of a medicare supplemental policy shall not request, require, or purchase genetic information with respect to any individual prior to such individual's enrollment under the policy in connection with such enrollment.

(C) Incidental collection

If an issuer of a medicare supplemental policy obtains genetic information incidental to the requesting, requiring, or purchasing of other information concerning any individual, such request, requirement, or purchase shall not be considered a violation of subparagraph (B) if such request, requirement, or purchase is not in violation of subparagraph (A).

(3) Definitions

In this subsection:

(A) Family member

The term "family member" means with respect to an individual, any other individual who is a first-degree, second-degree, third-degree, or fourth-degree relative of such individual.

(B) Genetic information

(i) In general

The term "genetic information" means, with respect to any individual, information about--

(I) such individual's genetic tests,

(II) the genetic tests of family members of such individual, and

(III) subject to clause (iv), the manifestation of a disease or disorder in family members of such individual.

(ii) Inclusion of genetic services and participation in genetic research

Such term includes, with respect to any individual, any request for, or receipt of, genetic services, or participation in clinical research which includes genetic services, by such individual or any family member of such individual.

(iii) Exclusions

The term "genetic information" shall not include information about the sex or age of any individual.

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(C) Genetic test

(i) In general

The term "genetic test" means an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes.

(ii) Exceptions

The term "genetic test" does not mean--

(I) an analysis of proteins or metabolites that does not detect genotypes, mutations, or chromosomal changes; or

(II) an analysis of proteins or metabolites that is directly related to a manifested disease, disorder, or pathological condition that could reasonably be detected by a health care professional with appropriate training and expertise in the field of medicine involved.

(D) Genetic services

The term "genetic services" means--

(i) a genetic test;

(ii) genetic counseling (including obtaining, interpreting, or assessing genetic information); or

(iii) genetic education.

(E) Underwriting purposes

The term "underwriting purposes" means, with respect to a medicare supplemental policy--

(i) rules for, or determination of, eligibility (including enrollment and continued eligibility) for benefits under the policy;

(ii) the computation of premium or contribution amounts under the policy;

(iii) the application of any pre-existing condition exclusion under the policy; and

(iv) other activities related to the creation, renewal, or replacement of a contract of health insurance or

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health benefits.

(F) Issuer of a medicare supplemental policy

The term "issuer of a medicare supplemental policy" includes a third-party administrator or other person acting for or on behalf of such issuer.

(4) Genetic information of a fetus or embryo

Any reference in this section to genetic information concerning an individual or family member of an individual shall--

(A) with respect to such an individual or family member of an individual who is a pregnant woman, include genetic information of any fetus carried by such pregnant woman; and

(B) with respect to an individual or family member utilizing an assisted reproductive technology, include genetic information of any embryo legally held by the individual or family member.

CREDIT(S)

(Aug. 14, 1935, c. 531, Title XVIII, § 1882, as added June 9, 1980, Pub.L. 96-265, Title V, § 507(a), 94 Stat. 476, and amended H.Res. 549, Mar. 25, 1980; Aug. 18, 1987, Pub.L. 100-93, § 13, 101 Stat. 697; Dec. 22, 1987, Pub.L. 100-203, Title IV, § 4081(b), 101 Stat. 1330-127; July 1, 1988, Pub.L. 100-360, Title II, § 221(a) to (f), Title IV, §§ 411(i)(1)(B), (C), 428(b), 102 Stat. 742 to 746, 788, 817; Dec. 13, 1989, Pub.L. 101-234, Title II, § 203(a), 103 Stat. 1982; Nov. 5, 1990, Pub.L. 101-508, Title IV, §§ 4207(k)(1) [formerly 4027(k)(1)], 4351 [formerly 4351(a)], 4352, 4353(a) to (d)(1), 4354(a), (b), 4355(a) to (c), 4356(a), 4357(a), 4358(a), (b)(1), (2), 104 Stat. 1388-124, 1388-125, 1388-129, 1388-130, 1388-132, 1388-134 to 1388-137; Oct. 31, 1994, Pub.L. 103-432, Title I, §§ 160(d)(4), 171(a) to (d)(3)(B), (4), (e)(1), (2), (f)(1), (g), (h)(1), (j)(2), (k), 108 Stat. 4444 to 4451; Aug. 21, 1996, Pub.L. 104-191, Title II, § 271(a), (b), 110 Stat. 2034, 2036; Aug. 5, 1997, Pub.L. 105-33, Title IV, §§ 4002(j)(2), 4003, 4031(a), (b), (c), 4032(a), 111 Stat. 330, 331, 355, 359; Nov. 10, 1998, Pub.L. 105-362, Title VI, § 601(b)(6), 112 Stat. 3286; Nov. 29, 1999, Pub.L. 106-113, Div. B, § 1000(a)(6) [Title III, § 321(k)(13), (14), Title V, §§ 501(a)(2), 536(a)], 113 Stat. 1536, 1501A-368, 1501A-378, 1501A-390; Dec. 17, 1999, Pub.L. 106-170, Title II, § 205(a), 113 Stat. 1899; Dec. 21, 2000, Pub.L. 106-554, § 1(a)(6) [Title VI, § 618], 114 Stat. 2763, 2763A-562; Dec. 8, 2003, Pub.L. 108-173, Title I, § 104(a), (b), Title VII, § 736(e), 117 Stat. 2161, 2164, 2357; Dec. 26, 2007, Pub.L. 110-161, Div. H, Title I, § 1502(f), 121 Stat. 2250; May 21, 2008, Pub.L. 110-233, Title I, § 104(a), (b), 122 Stat. 899; July 15, 2008, Pub.L. 110-275, Title I, § 104(b), 122 Stat. 2502.)

[FN1] So in original. Probably should be "preexisting".

[FN2] So in original. Probably should be "case".

[FN3] So in original. Probably should be "meet".

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[FN4] So in original. Probably should be preceded by "the".

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Effective: July 15, 2008

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 7. Social Security (Refs & Annos)
Subchapter XVIII. Health Insurance for Aged and Disabled (Refs & Annos)
Part E. Miscellaneous Provisions (Refs & Annos)
§ 1395ss-1. Reimbursement of expenses under health insurance policies; clarification of requirements

Any health insurance policy that provides reimbursement for expenses incurred for items and services for which payment may be made under subchapter XVIII of this chapter but which are not reimbursable by reason of the applicability of deductibles, coinsurance, copayments or other limitations imposed by a Medicare Advantage plan (including a Medicare Advantage private fee-for-service plan) under part C of such subchapter shall comply with the requirements of section 1395ss(o) of this title.

CREDIT(S)

(Pub.L. 110-275, Title I, § 104(c), July 15, 2008, 122 Stat. 2502.)

Current through P.L. 111-82 approved 10-26-09

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Effective:[See Notes]

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 7. Social Security (Refs & Annos)
Subchapter XVIII. Health Insurance for Aged and Disabled (Refs & Annos)
Part B. Supplementary Medical Insurance Benefits for Aged and Disabled (Refs & Annos)
§ 1395u. Provisions relating to the administration of part B of this subchapter

(a) Authority of Secretary to enter into contracts with medicare administrative contractors

The administration of this part shall be conducted through contracts with medicare administrative contractors under section 1395kk-1 of this title.

(b) Applicability of competitive bidding provisions; findings as to financial responsibility, etc., of medicare administrative contractors; contractual duties imposed by contract

(1) Repealed. Pub.L. 108-173, Title IX, § 911(c)(3)(A), Dec. 8, 2003, 117 Stat. 2383

(2)(A), (B) Repealed. Pub.L. 108-173, Title IX, § 911(c)(3)(B)(i), Dec. 8, 2003, 117 Stat. 2383

(C) In the case of residents of nursing facilities who receive services described in clause (i) or (ii) of section 1395x(s)(2)(K) of this title performed by a member of a team, the Secretary shall instruct medicare administrative contractors to develop mechanisms which permit routine payment under this part for up to 1.5 visits per month per resident. In the previous sentence, the term "team" refers to a physician and includes a physician assistant acting under the supervision of the physician or a nurse practitioner working in collaboration with that physician, or both.

(D), (E) Repealed. Pub.L. 108-173, Title IX, § 911(c)(3)(B)(iii), Dec. 8, 2003, 117 Stat. 2383

(3) The Secretary--

(A) shall take such action as may be necessary to assure that, where payment under this part for a service is on a cost basis, the cost is reasonable cost (as determined under section 1395x(v) of this title);

(B) shall take such action as may be necessary to assure that, where payment under this part for a service is on a charge basis, such charge will be reasonable and not higher than the charge applicable, for a comparable ser-

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vice and under comparable circumstances, to the policyholders and subscribers of the medicare administrative contractor, and such payment will (except as otherwise provided in section 1395gg(f) of this title) be made--

(i) on the basis of an itemized bill; or

(ii) on the basis of an assignment under the terms of which (I) the reasonable charge is the full charge for the service, (II) the physician or other person furnishing such service agrees not to charge (and to refund amounts already collected) for services for which payment under this subchapter is denied under section 1320c-3(a)(2) of this title by reason of a determination under section 1320c-3(a)(1)(B) of this title, and (III) the physician or other person furnishing such service agrees not to charge (and to refund amounts already collected) for such service if payment may not be made therefor by reason of the provisions of paragraph (1) of section 1395y(a) of this title, and if the individual to whom such service was furnished was without fault in incurring the expenses of such service, and if the Secretary's determination that payment (pursuant to such assignment) was incorrect and was made subsequent to the third year following the year in which notice of such payment was sent to such individual; except that the Secretary may reduce such three-year period to not less than one year if he finds such reduction is consistent with the objectives of this subchapter (except in the case of physicians' services and ambulance service furnished as described in section 1395y(a)(4) of this title, other than for purposes of section 1395gg(f) of this title);

but (in the case of bills submitted, or requests for payment made, after March 1968) only if the bill is submitted, or a written request for payment is made in such other form as may be permitted under regulations, no later than the close of the calendar year following the year in which such service is furnished (deeming any service furnished in the last 3 months of any calendar year to have been furnished in the succeeding calendar year);

(C) to (E) Repealed. Pub.L. 108-173, Title IX, § 911(c)(3)(C)(iv), Dec. 8, 2003, 117 Stat. 2384

(F) shall take such action as may be necessary to assure that where payment under this part for a service rendered is on a charge basis, such payment shall be determined on the basis of the charge that is determined in accordance with this section on the basis of customary and prevailing charge levels in effect at the time the service was rendered or, in the case of services rendered more than 12 months before the year in which the bill is submitted or request for payment is made, on the basis of such levels in effect for the 12-month period preceding such year;

(G) shall, for a service that is furnished with respect to an individual enrolled under this part, that is not paid on an assignment-related basis, and that is subject to a limiting charge under section 1395w-4(g) of this title--

(i) determine, prior to making payment, whether the amount billed for such service exceeds the limiting charge applicable under section 1395w-4(g)(2) of this title;

(ii) notify the physician, supplier, or other person periodically (but not less often than once every 30 days)

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of determinations that amounts billed exceeded such applicable limiting charges; and

(iii) provide for prompt response to inquiries of physicians, suppliers, and other persons concerning the accuracy of such limiting charges for their services;

(H) shall implement--

(i) programs to recruit and retain physicians as participating physicians in the area served by the medicare administrative contractor, including educational and outreach activities and the use of professional relations personnel to handle billing and other problems relating to payment of claims of participating physicians; and

(ii) programs to familiarize beneficiaries with the participating physician program and to assist such beneficiaries in locating participating physicians;

(I) Repealed. Pub.L. 108-173, Title IX, § 911(c)(3)(C)(vi), Dec. 8, 2003, 117 Stat. 2384

(J), (K) Repealed. Pub.L. 101-234, Title II, § 201(a), Dec. 13, 1989, 103 Stat. 1981

(L) shall monitor and profile physicians' billing patterns within each area or locality and provide comparative data to physicians whose utilization patterns vary significantly from other physicians in the same payment area or locality.

In determining the reasonable charge for services for purposes of this paragraph, there shall be taken into consideration the customary charges for similar services generally made by the physician or other person furnishing such services, as well as the prevailing charges in the locality for similar services. No charge may be determined to be reasonable in the case of bills submitted or requests for payment made under this part after December 31, 1970, if it exceeds the higher of (i) the prevailing charge recognized by the carrier and found acceptable by the Secretary for similar services in the same locality in administering this part on December 31, 1970, or (ii) the prevailing charge level that, on the basis of statistical data and methodology acceptable to the Secretary, would cover 75 percent of the customary charges made for similar services in the same locality during the 12-month period ending on the June 30 last preceding the start of the calendar year in which the service is rendered. In the case of physicians' services the prevailing charge level determined for purposes of clause (ii) of the preceding sentence for any twelve-month period (beginning after June 30, 1973) specified in clause (ii) of such sentence may not exceed (in the aggregate) the level determined under such clause for the fiscal year ending June 30, 1973, or (with respect to physicians' services furnished in a year after 1987) the level determined under this sentence (or under any other provision of law affecting the prevailing charge level) for the previous year except to the extent that the Secretary finds, on the basis of appropriate economic index data, that such higher level is justified by year-to-year economic changes. With respect to power-operated wheelchairs for which payment may be made in accordance with section 1395x(s)(6) of this title, charges determined to be reasonable may not exceed the lowest charge at which

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power-operated wheelchairs are available in the locality. In the case of medical services, supplies, and equipment (including equipment servicing) that, in the judgment of the Secretary, do not generally vary significantly in quality from one supplier to another, the charges incurred after December 31, 1972, determined to be reasonable may not exceed the lowest charge levels at which such services, supplies, and equipment are widely and consistently available in a locality except to the extent and under the circumstances specified by the Secretary. The requirement in subparagraph (B) that a bill be submitted or request for payment be made by the close of the following calendar year shall not apply if (I) failure to submit the bill or request the payment by the close of such year is due to the error or misrepresentation of an officer, employee, fiscal intermediary, carrier, medicare administrative contractor, or agent of the Department of Health and Human Services performing functions under this subchapter and acting within the scope of his or its authority, and (II) the bill is submitted or the payment is requested promptly after such error or misrepresentation is eliminated or corrected. Notwithstanding the provisions of the third and fourth sentences preceding this sentence, the prevailing charge level in the case of a physician service in a particular locality determined pursuant to such third and fourth sentences for any calendar year after 1974 shall, if lower than the prevailing charge level for the fiscal year ending June 30, 1975, in the case of a similar physician service in the same locality by reason of the application of economic index data, be raised to such prevailing charge level for the fiscal year ending June 30, 1975, and shall remain at such prevailing charge level until the prevailing charge for a year (as adjusted by economic index data) equals or exceeds such prevailing charge level. The amount of any charges for outpatient services which shall be considered reasonable shall be subject to the limitations established by regulations issued by the Secretary pursuant to section 1395x(v)(1)(K) of this title, and in determining the reasonable charge for such services, the Secretary may limit such reasonable charge to a percentage of the amount of the prevailing charge for similar services furnished in a physician's office, taking into account the extent to which overhead costs associated with such outpatient services have been included in the reasonable cost or charge of the facility.

(4)(A)(i) In determining the prevailing charge levels under the third and fourth sentences of paragraph (3) for physicians' services furnished during the 15-month period beginning July 1, 1984, the Secretary shall not set any level higher than the same level as was set for the 12-month period beginning July 1, 1983.

(ii)(I) In determining the prevailing charge levels under the third and fourth sentences of paragraph (3) for physicians' services furnished during the 8-month period beginning May 1, 1986, by a physician who is not a participating physician (as defined in subsection (h)(1) of this section) at the time of furnishing the services, the Secretary shall not set any level higher than the same level as was set for the 12-month period beginning July 1, 1983.

(II) In determining the prevailing charge levels under the fourth sentence of paragraph (3) for physicians' services furnished during the 8-month period beginning May 1, 1986, by a physician who is a participating physician (as defined in subsection (h)(1) of this section) at the time of furnishing the services, the Secretary shall permit an additional one percentage point increase in the increase otherwise permitted under that sentence.

(iii) In determining the maximum allowable prevailing charges which may be recognized consistent with the index described in the fourth sentence of paragraph (3) for physicians' services furnished on or after January 1, 1987, by participating physicians, the Secretary shall treat the maximum allowable prevailing charges recog-

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nized as of December 31, 1986, under such sentence with respect to participating physicians as having been justified by economic changes.

(iv) The reasonable charge for physicians' services furnished on or after January 1, 1987, and before January 1, 1992, by a nonparticipating physician shall be no greater than the applicable percent of the prevailing charge levels established under the third and fourth sentences of paragraph (3) (or under any other applicable provision of law affecting the prevailing charge level). In the previous sentence, the term "applicable percent" means for services furnished (I) on or after January 1, 1987, and before April 1, 1988, 96 percent, (II) on or after April 1, 1988, and before January 1, 1989, 95.5 percent, and (III) on or after January 1, 1989, 95 percent.

(v) In determining the prevailing charge levels under the third and fourth sentences of paragraph (3) for physicians' services furnished during the 3-month period beginning January 1, 1988, the Secretary shall not set any level higher than the same level as was set for the 12-month period beginning January 1, 1987.

(vi) Before each year (beginning with 1989), the Secretary shall establish a prevailing charge floor for primary care services (as defined in subsection (i)(4) of this section) equal to 60 percent of the estimated average prevailing charge levels based on the best available data (determined, under the third and fourth sentences of paragraph (3) and under paragraph (4), without regard to this clause and without regard to physician specialty) for such service for all localities in the United States (weighted by the relative frequency of the service in each locality) for the year.

(vii) Beginning with 1987, the percentage increase in the MEI (as defined in subsection (i)(3) of this section) for each year shall be the same for nonparticipating physicians as for participating physicians.

(B)(i) In determining the reasonable charge under paragraph (3) for physicians' services furnished during the 15-month period beginning July 1, 1984, the customary charges shall be the same customary charges as were recognized under this section for the 12-month period beginning July 1, 1983.

(ii) In determining the reasonable charge under paragraph (3) for physicians' services furnished during the 8-month period beginning May 1, 1986, by a physician who is not a participating physician (as defined in subsection (h)(1) of this section) at the time of furnishing the services--

(I) if the physician was not a participating physician at any time during the 12-month period beginning on October 1, 1984, the customary charges shall be the same customary charges as were recognized under this section for the 12-month period beginning July 1, 1983, and

(II) if the physician was a participating physician at any time during the 12-month period beginning on October 1, 1984, the physician's customary charges shall be determined based upon the physician's actual charges billed during the 12-month period ending on March 31, 1985.

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(iii) In determining the reasonable charge under paragraph (3) for physicians' services furnished during the 3-month period beginning January 1, 1988, the customary charges shall be the same customary charges as were recognized under this section for the 12-month period beginning January 1, 1987.

(iv) In determining the reasonable charge under paragraph (3) for physicians' services (other than primary care services, as defined in subsection (i)(4) of this section) furnished during 1991, the customary charges shall be the same customary charges as were recognized under this section for the 9-month period beginning April 1, 1990. In a case in which subparagraph (F) applies (relating to new physicians) so as to limit the customary charges of a physician during 1990 to a percent of prevailing charges, the previous sentence shall not prevent such limit on customary charges under such subparagraph from increasing in 1991 to a higher percent of such prevailing charges.

(C) In determining the prevailing charge levels under the third and fourth sentences of paragraph (3) for physicians' services furnished during periods beginning after September 30, 1985, the Secretary shall treat the level as set under subparagraph (A)(i) as having fully provided for the economic changes which would have been taken into account but for the limitations contained in subparagraph (A)(i).

(D)(i) In determining the customary charges for physicians' services furnished during the 8-month period beginning May 1, 1986, or the 12-month period beginning January 1, 1987, by a physician who was not a participating physician (as defined in subsection (h)(1) of this section) on September 30, 1985, the Secretary shall not recognize increases in actual charges for services furnished during the 15-month period beginning on July 1, 1984, above the level of the physician's actual charges billed in the 3-month period ending on June 30, 1984.

(ii) In determining the customary charges for physicians' services furnished during the 12-month period beginning January 1, 1987, by a physician who is not a participating physician (as defined in subsection (h)(1) of this section) on April 30, 1986, the Secretary shall not recognize increases in actual charges for services furnished during the 7-month period beginning on October 1, 1985, above the level of the physician's actual charges billed during the 3-month period ending on June 30, 1984.

(iii) In determining the customary charges for physicians' services furnished during the 12-month period beginning January 1, 1987, or January 1, 1988, by a physician who is not a participating physician (as defined in subsection (h)(1) of this section) on December 31, 1986, the Secretary shall not recognize increases in actual charges for services furnished during the 8-month period beginning on May 1, 1986, above the level of the physician's actual charges billed during the 3-month period ending on June 30, 1984.

(iv) In determining the customary charges for a physicians' service furnished on or after January 1, 1988, if a physician was a nonparticipating physician in a previous year (beginning with 1987), the Secretary shall not recognize any amount of such actual charges (for that service furnished during such previous year) that exceeds the maximum allowable actual charge for such service established under subsection (j)(1)(C) of this section.

(E)(i) For purposes of this part for physicians' services furnished in 1987, the percentage increase in the MEI is

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3.2 percent.

(ii) For purposes of this part for physicians' services furnished in 1988, on or after April 1, the percentage increase in the MEI is--

(I) 3.6 percent for primary care services (as defined in subsection (i)(4) of this section), and

(II) 1 percent for other physicians' services.

(iii) For purposes of this part for physicians' services furnished in 1989, the percentage increase in the MEI is--

(I) 3.0 percent for primary care services, and

(II) 1 percent for other physicians' services.

(iv) For purposes of this part for items and services furnished in 1990, after March 31, 1990, the percentage increase in the MEI is--

(I) 0 percent for radiology services, for anesthesia services, and for other services specified in the list referred to in paragraph (14)(C)(i),

(II) 2 percent for other services (other than primary care services), and

(III) such percentage increase in the MEI (as defined in subsection (i)(3)) as would be otherwise determined for primary care services (as defined in subsection (i)(4)) of this section.

(v) For purposes of this part for items and services furnished in 1991, the percentage increase in the MEI is--

(I) 0 percent for services (other than primary care services), and

(II) 2 percent for primary care services (as defined in subsection (i)(4) of this section).

(5) Repealed. Pub.L. 108-173, Title IX, § 911(c)(3)(D), Dec. 8, 2003, 117 Stat. 2383

(6) No payment under this part for a service provided to any individual shall (except as provided in section 1395gg of this title) be made to anyone other than such individual or (pursuant to an assignment described in subparagraph (B)(ii) of paragraph (3)) the physician or other person who provided the service, except that (A)

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payment may be made (i) to the employer of such physician or other person if such physician or other person is required as a condition of his employment to turn over his fee for such service to his employer, or (ii) where the service was provided under a contractual arrangement between such physician or other person and an entity, to the entity if, under the contractual arrangement, the entity submits the bill for the service and the contractual arrangement meets such program integrity and other safeguards as the Secretary may determine to be appropriate, (B) payment may be made to an entity (i) which provides coverage of the services under a health benefits plan, but only to the extent that payment is not made under this part, (ii) which has paid the person who provided the service an amount (including the amount payable under this part) which that person has accepted as payment in full for the service, and (iii) to which the individual has agreed in writing that payment may be made under this part, (C) in the case of services described in clause (i) of section 1395x(s)(2)(K) of this title, payment shall be made to either (i) the employer of the physician assistant involved, or (ii) with respect to a physician assistant who was the owner of a rural health clinic (as described in section 1395x(aa)(2) of this title) for a continuous period beginning prior to August 5, 1997 and ending on the date that the Secretary determines such rural health clinic no longer meets the requirements of section 1395x(aa)(2) of this title, payment may be made directly to the physician assistant, (D) payment may be made to a physician for physicians' services (and services furnished incident to such services) furnished by a second physician to patients of the first physician if (i) the first physician is unavailable to provide the services; (ii) the services are furnished pursuant to an arrangement between the two physicians that (I) is informal and reciprocal, or (II) involves per diem or other fee-for-time compensation for such services; (iii) the services are not provided by the second physician over a continuous period of more than 60 days or are provided over a longer continuous period during all of which the first physician has been called or ordered to active duty as a member of a reserve component of the Armed Forces; and (iv) the claim form submitted to the medicare administrative contractor for such services includes the second physician's unique identifier (provided under the system established under subsection (r) of this section) and indicates that the claim meets the requirements of this subparagraph for payment to the first physician. No payment which under the preceding sentence may be made directly to the physician or other person providing the service involved (pursuant to an assignment described in subparagraph (B)(ii) of paragraph (3)) shall be made to anyone else under a reassignment or power of attorney (except to an employer or entity as described in subparagraph (A) of such sentence); but nothing in this subsection shall be construed (i) to prevent the making of such a payment in accordance with an assignment from the individual to whom the service was provided or a reassignment from the physician or other person providing such service if such assignment or reassignment is made to a governmental agency or entity or is established by or pursuant to the order of a court of competent jurisdiction, or (ii) to preclude an agent of the physician or other person providing the service from receiving any such payment if (but only if) such agent does so pursuant to an agency agreement under which the compensation to be paid to the agent for his services for or in connection with the billing or collection of payments due such physician or other person under this subchapter is unrelated (directly or indirectly) to the amount of such payments or the billings therefor, and is not dependent upon the actual collection of any such payment. For purposes of subparagraph (C) of the first sentence of this paragraph, an employment relationship may include any independent contractor arrangement, and employer status shall be determined in accordance with the law of the State in which the services described in such clause are performed, (E) in the case of an item or service (other than services described in section 1395yy(e)(2)(A)(ii) of this title) furnished by, or under arrangements made by, a skilled nursing facility to an individual who (at the time the item or service is furnished) is a resident of a skilled nursing facility, payment shall be made to the facility, (F) in the case of home health services (including medical supplies described in section 1395x(m)(5)of this title, but excluding durable medical equipment to the extent provided for in such section) furnished to an individual who (at the time the item or service is furnished) is under a plan of care of a home health agency, payment shall be made to the agency (without regard to whether or not the item or

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service was furnished by the agency, by others under arrangement with them made by the agency, or when any other contracting or consulting arrangement, or otherwise), (G) in the case of services in a hospital or clinic to which section 1395qq(e) of this title applies, payment shall be made to such hospital or clinic, and (H) in the case of services described in section 1395x(aa)(3) of this title that are furnished by a health care professional under contract with a Federally qualified health center, payment shall be made to the center.

(7)(A) In the case of physicians' services furnished to a patient in a hospital with a teaching program approved as specified in section 1395x(b)(6) of this title but which does not meet the conditions described in section 1395x(b)(7) of this title, the Secretary shall not provide (except on the basis described in subparagraph (C)) for payment for such services under this part--

(i) unless--

(I) the physician renders sufficient personal and identifiable physicians' services to the patient to exercise full, personal control over the management of the portion of the case for which the payment is sought,

(II) the services are of the same character as the services the physician furnishes to patients not entitled to benefits under this subchapter, and

(III) at least 25 percent of the hospital's patients (during a representative past period, as determined by the Secretary) who were not entitled to benefits under this subchapter and who were furnished services described in subclauses (I) and (II) paid all or a substantial part of charges (other than nominal charges) imposed for such services; and

(ii) to the extent that the payment is based upon a reasonable charge for the services in excess of the customary charge as determined in accordance with subparagraph (B).

(B) The customary charge for such services in a hospital shall be determined in accordance with regulations issued by the Secretary and taking into account the following factors:

(i) In the case of a physician who is not a teaching physician (as defined by the Secretary), the Secretary shall take into account the amounts the physician charges for similar services in the physician's practice outside the teaching setting.

(ii) In the case of a teaching physician, if the hospital, its physicians, or other appropriate billing entity has established one or more schedules of charges which are collected for medical and surgical services, the Secretary shall base payment under this subchapter on the greatest of--

(I) the charges (other than nominal charges) which are most frequently collected in full or substantial part with respect to patients who were not entitled to benefits under this subchapter and who were furnished ser-

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vices described in subclauses (I) and (II) of subparagraph (A)(i),

(II) the meaning of the charges (other than nominal charges) which were collected in full or substantial part with respect to such patients, or

(III) 85 percent of the prevailing charges paid for similar services in the same locality.

(iii) If all the teaching physicians in a hospital agree to have payment made for all of their physicians' services under this part furnished to patients in such hospital on an assignment-related basis, the customary charge for such services shall be equal to 90 percent of the prevailing charges paid for similar services in the same locality.

(C) In the case of physicians' services furnished to a patient in a hospital with a teaching program approved as specified in section 1395x(b)(6) of this title but which does not meet the conditions described in section 1395x(b)(7) of this title, if the conditions described in subclauses (I) and (II) of subparagraph (A)(i) are met and if the physician elects payment to be determined under this subparagraph, the Secretary shall provide for payment for such services under this part on the basis of regulations of the Secretary governing reimbursement for the services of hospital-based physicians (and not on any other basis).

(D)(i) In the case of physicians' services furnished to a patient in a hospital with a teaching program approved as specified in section 1395x(b)(6) of this title but which does not meet the conditions described in section 1395x(b)(7) of this title, no payment shall be made under this part for services of assistants at surgery with respect to a surgical procedure if such hospital has a training program relating to the medical specialty required for such surgical procedure and a qualified individual on the staff of the hospital is available to provide such services; except that payment may be made under this part for such services, to the extent that such payment is otherwise allowed under this paragraph, if such services, as determined under regulations of the Secretary--

(I) are required due to exceptional medical circumstances,

(II) are performed by team physicians needed to perform complex medical procedures, or

(III) constitute concurrent medical care relating to a medical condition which requires the presence of, and active care by, a physician of another specialty during surgery,

and under such other circumstances as the Secretary determines by regulation to be appropriate.

(ii) For purposes of this subparagraph, the term "assistant at surgery" means a physician who actively assists the physician in charge of a case in performing a surgical procedure.

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(iii) The Secretary shall determine appropriate methods of reimbursement of assistants at surgery where such services are reimbursable under this part.

(8)(A)(i) The Secretary shall by regulation--

(I) describe the factors to be used in determining the cases (of particular items or services) in which the application of this subchapter to payment under this part (other than to physicians' services paid under section 1395w-4 of this title) results in the determination of an amount that, because of its being grossly excessive or grossly deficient, is not inherently reasonable, and

(II) provide in those cases for the factors to be considered in determining an amount that is realistic and equitable.

(ii) Notwithstanding the determination made in clause (i), the Secretary may not apply factors that would increase or decrease the payment under this part during any year for any particular item or service by more than 15 percent from such payment during the preceding year except as provided in subparagraph (B).

(B) The Secretary may make a determination under this subparagraph that would result in an increase or decrease under subparagraph (A) of more than 15 percent of the payment amount for a year, but only if--

(i) the Secretary's determination takes into account the factors described in subparagraph (C) and any additional factors the Secretary determines appropriate,

(ii) the Secretary's determination takes into account the potential impacts described in subparagraph (D), and

(iii) the Secretary complies with the procedural requirements of paragraph (9).

(C) The factors described in this subparagraph are as follows:

(i) The programs established under this subchapter and subchapter XIX are the sole or primary sources of payment for an item or service.

(ii) The payment amount does not reflect changing technology, increased facility with that technology, or reductions in acquisition or production costs.

(iii) The payment amount for an item or service under this part is substantially higher or lower than the payment made for the item or service by other purchasers.

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(D) The potential impacts of a determination under subparagraph (B) on quality, access, and beneficiary liability, including the likely effects on assignment rates and participation rates.

(9)(A) The Secretary shall consult with representatives of suppliers or other individuals who furnish an item or service before making a determination under paragraph (8)(B) with regard to that item or service.

(B) The Secretary shall publish notice of a proposed determination under paragraph (8)(B) in the Federal Register--

(i) specifying the payment amount proposed to be established with respect to an item or service,

(ii) explaining the factors and data that the Secretary took into account in determining the payment amount so specified, and

(iii) explaining the potential impacts described in paragraph (8)(D).

(C) After publication of the notice required by subparagraph (B), the Secretary shall allow not less than 60 days for public comment on the proposed determination.

(D)(i) Taking into consideration the comments made by the public, the Secretary shall publish in the Federal Register a final determination under paragraph (8)(B) with respect to the payment amount to be established with respect to the item or service.

(ii) A final determination published pursuant to clause (i) shall explain the factors and data that the Secretary took into consideration in making the final determination.

(10)(A)(i) In determining the reasonable charge for procedures described in subparagraph (B) and performed during the 9-month period beginning on April 1, 1988, the prevailing charge for such procedure shall be the prevailing charge otherwise recognized for such procedure for 1987--

(I) subject to clause (iii), reduced by 2.0 percent, and

(II) further reduced by the applicable percentage specified in clause (ii).

(ii) For purposes of clause (i), the applicable percentage specified in this clause is--

(I) 15 percent, in the case of a prevailing charge otherwise recognized (without regard to this paragraph and determined without regard to physician specialty) that is at least 150 percent of the weighted national average

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(as determined by the Secretary) of such prevailing charges for such procedure for all localities in the United States for 1987;

(II) 0 percent, in the case of a prevailing charge that does not exceed 85 percent of such weighted national average; and

(III) in the case of any other prevailing charge, a percent determined on the basis of a straight-line sliding scale, equal to 3/13 of a percentage point for each percent by which the prevailing charge exceeds 85 percent of such weighted national average.

(iii) In no case shall the reduction under clause (i) for a procedure result in a prevailing charge in a locality for 1988 which is less than 85 percent of the Secretary's estimate of the weighted national average of such prevailing charges for such procedure for all localities in the United States for 1987 (based upon the best available data and determined without regard to physician specialty) after making the reduction described in clause (i)(I).

(B) The procedures described in this subparagraph are as follows: bronchoscopy, carpal tunnel repair, cataract surgery (including subsequent insertion of an intraocular lens), coronary artery bypass surgery, diagnostic and/or therapeutic dilation and curettage, knee arthroscopy, knee arthroplasty, pacemaker implantation surgery, total hip replacement, subrapubic prostatectomy, transurethral resection of the prostate, and upper gastrointestinal endoscopy.

(C) In the case of a reduction in the reasonable charge for a physicians' service under subparagraph (A), if a nonparticipating physician furnishes the service to an individual entitled to benefits under this part, after the effective date of such reduction, the physician's actual charge is subject to a limit under subsection (j)(1)(D) of this section.

(D) There shall be no administrative or judicial review under section 1395ff of this title or otherwise of any determination under subparagraph (A) or under paragraph (11)(B)(ii).

(11)(A) In providing payment for cataract eyeglasses and cataract contact lenses, and professional services relating to them, under this part, each carrier shall--

(i) provide for separate determinations of the payment amount for the eyeglasses and lenses and of the payment amount for the professional services of a physician (as defined in section 1395x(r) of this title), and

(ii) not recognize as reasonable for such eyeglasses and lenses more than such amount as the Secretary establishes in guidelines relating to the inherent reasonableness of charges for such eyeglasses and lenses.

(B)(i) In determining the reasonable charge under paragraph (3) for a cataract surgical procedure, subject to clause (ii), the prevailing charge for such procedure otherwise recognized for participating and nonparticipating

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physicians shall be reduced by 10 percent with respect to procedures performed in 1987.

(ii) In no case shall the reduction under clause (i) for a surgical procedure result in a prevailing charge in a locality for a year which is less than 75 percent of the weighted national average of such prevailing charges for such procedure for all the localities in the United States for 1986.

(C)(i) The prevailing charge level determined with respect to A-mode ophthalmic ultrasound procedures may not exceed 5 percent of the prevailing charge level established with respect to extracapsular cataract removal with lens insertion.

(ii) The reasonable charge for an intraocular lens inserted during or subsequent to cataract surgery in a physician's office may not exceed the actual acquisition cost for the lens (taking into account any discount) plus a handling fee (not to exceed 5 percent of such actual acquisition cost).

(D) In the case of a reduction in the reasonable charge for a physicians' service or item under subparagraph (B) or (C), if a nonparticipating physician furnishes the service or item to an individual entitled to benefits under this part after the effective date of such reduction, the physician's actual charge is subject to a limit under subsection (j)(1)(D) of this section.

(12) Repealed. Pub.L. 105-33, Title IV, § 4512(b)(2), Aug. 5, 1997, 111 Stat. 444

(13)(A) In determining payments under section 1395*l*(l) of this title and section 1395w-4 of this title for anesthesia services furnished on or after January 1, 1994, the methodology for determining the base and time units used shall be the same for services furnished by physicians, for medical direction by physicians of two, three, or four certified registered nurse anesthetists, or for services furnished by a certified registered nurse anesthetist (whether or not medically directed) and shall be based on the methodology in effect, for anesthesia services furnished by physicians, as of August 10, 1993.

(B) The Secretary shall require claims for physicians' services for medical direction of nurse anesthetists during the periods in which the provisions of subparagraph (A) apply to indicate the number of such anesthetists being medically directed concurrently at any time during the procedure, the name of each nurse anesthetist being directed, and the type of procedure for which the services are provided.

(14)(A)(i) In determining the reasonable charge for a physicians' service specified in subparagraph (C)(i) and furnished during the 9-month period beginning on April 1, 1990, the prevailing charge for such service shall be the prevailing charge otherwise recognized for such service for 1989 reduced by 15 percent or, if less, 1/3 of the percent (if any) by which the prevailing charge otherwise applied in the locality in 1989 exceeds the locally-adjusted reduced prevailing amount (as determined under subparagraph (B)(i)) for the service.

(ii) In determining the reasonable charge for a physicians' service specified in subparagraph (C)(i) and furnished

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during 1991, the prevailing charge for such service shall be the prevailing charge otherwise recognized for such service for the period during 1990 beginning on April 1, reduced by the same amount as the amount of the reduction effected under this paragraph (as amended by the Omnibus Budget Reconciliation Act of 1990) for such service during such period.

(B) For purposes of this paragraph:

(i) The "locally-adjusted reduced prevailing amount" for a locality for a physicians' service is equal to the product of--

(I) the reduced national weighted average prevailing charge for the service (specified under clause (ii)), and

(II) the adjustment factor (specified under clause (iii)) for the locality.

(ii) The "reduced national weighted average prevailing charge" for a physicians' service is equal to the national weighted average prevailing charge for the service (specified in subparagraph (C)(ii)) reduced by the percentage change (specified in subparagraph (C)(iii)) for the service.

(iii) The "adjustment factor", for a physicians' service for a locality, is the sum of--

(I) The practice expense component (percent), divided by 100, specified in appendix A (pages 187 through 194) of the Report of the Medicare and Medicaid Health Budget Reconciliation Amendments of 1989, prepared by the Subcommittee on Health and the Environment of the Committee on Energy and Commerce, House of Representatives, (Committee Print 101-M, 101st Congress, 1st Session) for the service, multiplied by the geographic practice cost index value (specified in subparagraph (C)(iv) for the locality, and

(II) 1 minus the practice expense component (percent), divided by 100.

(C) For purposes of this paragraph:

(i) The procedures specified (by code and description) in the Overvalued Procedures List for Finance Committee, Revised September 20, 1989, prepared by the Physician Payment Review Commission which specification is of physicians' services that have been identified as overvalued by at least 10 percent based on a comparison of payments for such services under a resource-based relative value scale and of the national average prevailing charges under this part.

(ii) The "national weighted average prevailing charge" specified in this clause, for a physicians' service specified in clause (i), is the national weighted average prevailing charge for the service in 1989 as determined by the Secretary using the best data available.

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(iii) The "percentage change" specified in this clause, for a physicians' service specified in clause (i), is the percent difference (but expressed as a positive number) specified for the service in the list referred to in clause (i).

(iv) The geographic practice cost index value specified in this clause for a locality is the Geographic Overhead Costs Index specified for the locality in table 1 of the September 1989 Supplement to the Geographic Medicare Economic Index: Alternative Approaches (prepared by the Urban Institute and the Center for Health Economics Research).

(D) In the case of a reduction in the prevailing charge for a physicians' service under subparagraph (A), if a nonparticipating physician furnishes the service to an individual entitled to benefits under this part, after the effective date of such reduction, the physician's actual charge is subject to a limit under subsection (j)(1)(D) of this section.

(15)(A) In determining the reasonable charge for surgery, radiology, and diagnostic physicians' services which the Secretary shall designate (based on their high volume of expenditures under this part) and for which the prevailing charge (but for this paragraph) differs by physician specialty, the prevailing charge for such a service may not exceed the prevailing charge or fee schedule amount for that specialty of physicians that furnish the service most frequently nationally.

(B) In the case of a reduction in the prevailing charge for a physician's service under subparagraph (A), if a nonparticipating physician furnishes the service to an individual entitled to benefits under this part, after the effective date of the reduction, the physician's actual charge is subject to a limit under subsection (j)(1)(D) of this section.

(16)(A) In determining the reasonable charge for all physicians' services other than physicians' services specified in subparagraph (B) furnished during 1991, the prevailing charge for a locality shall be 6.5 percent below the prevailing charges used in the locality under this part in 1990 after March 31.

(B) For purposes of subparagraph (A), the physicians' services specified in this subparagraph are as follows:

(i) Radiology, anesthesia and physician pathology services, the technical components of diagnostic tests specified in paragraph (17) and physicians' services specified in paragraph (14)(C)(i).

(ii) Primary care services specified in subsection (i)(4) of this section, hospital inpatient medical services, consultations, other visits, preventive medicine visits, psychiatric services, emergency care facility services, and critical care services.

(iii) Partial mastectomy; tendon sheath injections and small joint arthrocentesis; femoral fracture treatments; trochanteric fracture and endotracheal intubation; thoracentesis; thoracostomy; aneurysm repair; cystourethro-

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scopy; transurethral fulguration and resection; tympanoplasty with mastoidectomy; and ophthalmoscopy.

(17) With respect to payment under this part for the technical (as distinct from professional) component of diagnostic tests (other than clinical diagnostic laboratory tests, tests specified in paragraph (14)(C)(i), and radiology services, including portable x-ray services) which the Secretary shall designate (based on their high volume of expenditures under this part), the reasonable charge for such technical component (including the applicable portion of a global service) may not exceed the national median of such charges for all localities, as estimated by the Secretary using the best available data.

(18)(A) Payment for any service furnished by a practitioner described in subparagraph (C) and for which payment may be made under this part on a reasonable charge or fee schedule basis may only be made under this part on an assignment-related basis.

(B) A practitioner described in subparagraph (C) or other person may not bill (or collect any amount from) the individual or another person for any service described in subparagraph (A), except for deductible and coinsurance amounts applicable under this part. No person is liable for payment of any amounts billed for such a service in violation of the previous sentence. If a practitioner or other person knowingly and willfully bills (or collects an amount) for such a service in violation of such sentence, the Secretary may apply sanctions against the practitioner or other person in the same manner as the Secretary may apply sanctions against a physician in accordance with subsection (j)(2) of this section in the same manner as such section applies with respect to a physician. Paragraph (4) of subsection (j) of this section shall apply in this subparagraph in the same manner as such paragraph applies to such section.

(C) A practitioner described in this subparagraph is any of the following:

(i) A physician assistant, nurse practitioner, or clinical nurse specialist (as defined in section 1395x(aa)(5) of this title).

(ii) A certified registered nurse anesthetist (as defined in section 1395x(bb)(2) of this title).

(iii) A certified nurse-midwife (as defined in section 1395x(gg)(2) of this title).

(iv) A clinical social worker (as defined in section 1395x(hh)(1) of this title).

(v) A clinical psychologist (as defined by the Secretary for purposes of section 1395x(ii) of this title).

(vi) A registered dietitian or nutrition professional.

(D) For purposes of this paragraph, a service furnished by a practitioner described in subparagraph (C) includes

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any services and supplies furnished as incident to the service as would otherwise be covered under this part if furnished by a physician or as incident to a physician's service.

(19) For purposes of section 1395*l*(a)(1) of this title, the reasonable charge for ambulance services (as described in section 1861(s)(7)) provided during calendar year 1998 and calendar year 1999 may not exceed the reasonable charge for such services provided during the previous calendar year (after application of this paragraph), increased by the percentage increase in the consumer price index for all urban consumers (U.S. city average) as estimated by the Secretary for the 12-month period ending with the midpoint of the year involved reduced by 1.0 percentage point.

(c) Advances of funds to medicare administrative contractor; prompt payment of claims

(1) Repealed. Pub.L. 108-173, Title IX, § 911(c)(4)(A), Dec. 8, 2003, 117 Stat. 2384

(2)(A) Each contract under section 1395kk-1 of this title that provides for making payments under this part shall provide that payment shall be issued, mailed, or otherwise transmitted with respect to not less than 95 percent of all claims submitted under this part--

(i) which are clean claims, and

(ii) for which payment is not made on a periodic interim payment basis,

within the applicable number of calendar days after the date on which the claim is received.

(B) In this paragraph:

(i) The term "clean claim" means a claim that has no defect or impropriety (including any lack of any required substantiating documentation) or particular circumstance requiring special treatment that prevents timely payment from being made on the claim under this part.

(ii) The term "applicable number of calendar days" means--

(I) with respect to claims received in the 12-month period beginning October 1, 1986, 30 calendar days,

(II) with respect to claims received in the 12-month period beginning October 1, 1987, 26 calendar days (or 19 calendar days with respect to claims submitted by participating physicians),

(III) with respect to claims received in the 12-month period beginning October 1, 1988, 25 calendar days (or 18 calendar days with respect to claims submitted by participating physicians),

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(IV) with respect to claims received in the 12-month period beginning October 1, 1989, and claims received in any succeeding 12-month period ending on or before September 30, 1993, 24 calendar days (or 17 calendar days with respect to claims submitted by participating physicians), and

(V) with respect to claims received in the 12-month period beginning October 1, 1993, and claims received in any succeeding 12-month period, 30 calendar days.

(C) If payment is not issued, mailed, or otherwise transmitted within the applicable number of calendar days (as defined in clause (ii) of subparagraph (B)) after a clean claim (as defined in clause (i) of such subparagraph) is received, interest shall be paid at the rate used for purposes of section 3902(a) of Title 31 (relating to interest penalties for failure to make prompt payments) for the period beginning on the day after the required payment date and ending on the date on which payment is made.

(3)(A) Each contract under this section which provides for the disbursement of funds, as described in section 1395kk-1(a)(3)(B) of this title, shall provide that no payment shall be issued, mailed, or otherwise transmitted with respect to any claim submitted under this subchapter within the applicable number of calendar days after the date on which the claim is received.

(B) In this paragraph, the term "applicable number of calendar days" means--

(i) with respect to claims submitted electronically as prescribed by the Secretary, 13 days, and

(ii) with respect to claims submitted otherwise, 28 days.

(4) Neither a medicare administrative contractor nor the Secretary may impose a fee under this subchapter--

(A) for the filing of claims related to physicians' services,

(B) for an error in filing a claim relating to physicians' services or for such a claim which is denied,

(C) for any appeal under this subchapter with respect to physicians' services,

(D) for applying for (or obtaining) a unique identifier under subsection (r) of this section, or

(E) for responding to inquiries respecting physicians' services or for providing information with respect to medical review of such services.

(5), (6) Repealed. Pub.L. 108-173, Title IX, § 911(c)(4)(E), Dec. 8, 2003, 117 Stat. 2384

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(d) to (f) Repealed. Pub.L. 108-173, Title IX, § 911(c)(5), Dec. 8, 2003, 117 Stat. 2384

(g) Authority of Railroad Retirement Board to enter into contracts with medicare administrative contractors

The Railroad Retirement Board shall, in accordance with such regulations as the Secretary may prescribe, contract with a medicare administrative contractor or contractors to perform the functions set out in this section with respect to individuals entitled to benefits as qualified railroad retirement beneficiaries pursuant to section 426(a) of this title and section 231f(d) of Title 45.

(h) Participating physician or supplier; agreement with Secretary; publication of directories; availability; inclusion of program in explanation of benefits; payment of claims on assignment-related basis

(1) Any physician or supplier may voluntarily enter into an agreement with the Secretary to become a participating physician or supplier. For purposes of this section, the term "participating physician or supplier" means a physician or supplier (excluding any provider of services) who, before the beginning of any year beginning with 1984, enters into an agreement with the Secretary which provides that such physician or supplier will accept payment under this part on an assignment-related basis for all items and services furnished to individuals enrolled under this part during such year. In the case of a newly licensed physician or a physician who begins a practice in a new area, or in the case of a new supplier who begins a new business, or in such similar cases as the Secretary may specify, such physician or supplier may enter into such an agreement after the beginning of a year, for items and services furnished during the remainder of the year.

(2) The Secretary shall maintain a toll-free telephone number or numbers at which individuals enrolled under this part may obtain the names, addresses, specialty, and telephone numbers of participating physicians and suppliers and may request a copy of an appropriate directory published under paragraph (4). The Secretary shall, without charge, mail a copy of such directory upon such a request.

(3)(A) In any case in which a medicare administrative contractor having a contract under section 1395kk-1 of this title that provides for making payments under this part is able to develop a system for the electronic transmission to such contractor of bills for services, such contractor shall establish direct lines for the electronic receipt of claims from participating physicians and suppliers.

(B) The Secretary shall establish a procedure whereby an individual enrolled under this part may assign, in an appropriate manner on the form claiming a benefit under this part for an item or service furnished by a participating physician or supplier, the individual's rights of payment under a medicare supplemental policy (described in section 1395ss(g)(1) of this title) in which the individual is enrolled. In the case such an assignment is properly executed and a payment determination is made by a medicare administrative contractor with a contract under this section, the contractor shall transmit to the private entity issuing the medicare supplemental policy notice of such fact and shall include an explanation of benefits and any additional information that the Secretary may determine to be appropriate in order to enable the entity to decide whether (and the amount of) any payment is due under the policy. The Secretary may enter into agreements for the transmittal of such information to entities electronically. The Secretary shall impose user fees for the transmittal of information under this subparagraph by a medicare administrative contractor, whether electronically or otherwise, and such user fees shall be collected and retained by the contractor.

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(4) At the beginning of each year the Secretary shall publish directories (for appropriate local geographic areas) containing the name, address, and specialty of all participating physicians and suppliers (as defined in paragraph (1)) for that area for that year. Each directory shall be organized to make the most useful presentation of the information (as determined by the Secretary) for individuals enrolled under this part. Each participating physician directory for an area shall provide an alphabetical listing of all participating physicians practicing in the area and an alphabetical listing by locality and specialty of such physicians.

(5)(A) The Secretary shall promptly notify individuals enrolled under this part through an annual mailing of the participation program under this subsection and the publication and availability of the directories and shall make the appropriate area directory or directories available in each district and branch office of the Social Security Administration, in the offices of medicare administrative contractors, and to senior citizen organizations.

(B) The annual notice provided under subparagraph (A) shall include--

(i) a description of the participation program,

(ii) an explanation of the advantages to beneficiaries of obtaining covered services through a participating physician or supplier,

(iii) an explanation of the assistance offered by medicare administrative contractors in obtaining the names of participating physicians and suppliers, and

(iv) the toll-free telephone number under paragraph (2)(A) for inquiries concerning the program and for requests for free copies of appropriate directories.

(6) The Secretary shall provide that the directories shall be available for purchase by the public. The Secretary shall provide that each appropriate area directory is sent to each participating physician located in that area and that an appropriate number of copies of each such directory is sent to hospitals located in the area. Such copies shall be sent free of charge.

(7) The Secretary shall provide that each explanation of benefits provided under this part for services furnished in the United States, in conjunction with the payment of claims under section 1395*l*(a)(1) of this title (made other than on an assignment-related basis), shall include--

(A) a prominent reminder of the participating physician and supplier program established under this subsection (including the limitation on charges that may be imposed by such physicians and suppliers and a clear statement of any amounts charged for the particular items or services on the claim involved above the amount recognized under this part),

(B) the toll-free telephone number or numbers, maintained under paragraph (2), at which an individual en-

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rolled under this part may obtain information on participating physicians and suppliers,

(C) **(i)** an offer of assistance to such an individual in obtaining the names of participating physicians of appropriate specialty and **(ii)** an offer to provide a free copy of the appropriate participating physician directory, and

(D) in the case of services for which the billed amount exceeds the limiting charge imposed under section 1395w-4(g) of this title, information regarding such applicable limiting charge (including information concerning the right to a refund under section 1395w-4(g)(1)(A)(iv) of this title).

(8) The Secretary may refuse to enter into an agreement with a physician or supplier under this subsection, or may terminate or refuse to renew such agreement, in the event that such physician or supplier has been convicted of a felony under Federal or State law for an offense which the Secretary determines is detrimental to the best interests of the program or program beneficiaries.

(i) Definitions

For purposes of this subchapter:

(1) A claim is considered to be paid on an "assignment-related basis" if the claim is paid on the basis of an assignment described in subsection (b)(3)(B)(ii) of this section, in accordance with subsection (b)(6)(B) of this section, or under the procedure described in section 1395gg(f)(1) of this title.

(2) The term "participating physician" refers, with respect to the furnishing of services, to a physician who at the time of furnishing the services is a participating physician (under subsection (h)(1) of this section); the term "nonparticipating physician" refers, with respect to the furnishing of services, to a physician who at the time of furnishing the services is not a participating physician; and the term "nonparticipating supplier or other person" means a supplier or other person (excluding a provider of services) that is not a participating physician or supplier (as defined in subsection (h)(1) of this section).

(3) The term "percentage increase in the MEI" means, with respect to physicians' services furnished in a year, the percentage increase in the medicare economic index (referred to in the fourth sentence of subsection (b)(3) of this section) applicable to such services furnished as of the first day of that year.

(4) The term "primary care services" means physicians' services which constitute office medical services, emergency department services, home medical services, skilled nursing, intermediate care, and long-term care medical services, or nursing home, boarding home, domiciliary, or custodial care medical services.

(j) Monitoring of charges of nonparticipating physicians; sanctions; restitution

(1)(A) In the case of a physician who is not a participating physician for items and services furnished during a portion of the 30-month period beginning July 1, 1984, the Secretary shall monitor the physician's actual charges

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to individuals enrolled under this part for physicians' services during that portion of that period. If such physician knowingly and willfully bills individuals enrolled under this part for actual charges in excess of such physician's actual charges for the calendar quarter beginning on April 1, 1984, the Secretary may apply sanctions against such physician in accordance with paragraph (2).

(B)(i) During any period (on or after January 1, 1987, and before the date specified in clause (ii)), during which a physician is a nonparticipating physician, the Secretary shall monitor the actual charges of each such physician for physicians' services furnished to individuals enrolled under this part. If such physician knowingly and willfully bills on a repeated basis for such a service an actual charge in excess of the maximum allowable actual charge determined under subparagraph (C) for that service, the Secretary may apply sanctions against such physician in accordance with paragraph (2).

(ii) Clause (i) shall not apply to services furnished after December 31, 1990.

(C)(i) For a particular physicians' service furnished by a nonparticipating physician to individuals enrolled under this part during a year, for purposes of subparagraph (B), the maximum allowable actual charge is determined as follows: If the physician's maximum allowable actual charge for that service in the previous year was--

(I) less than 115 percent of the applicable percent (as defined in subsection (b)(4)(A)(iv) of this section) of the prevailing charge for the year and service involved, the maximum allowable actual charge for the year involved is the greater of the maximum allowable actual charge described in subclause (II) or the charge described in clause (ii), or

(II) equal to, or greater than, 115 percent of the applicable percent (as defined in subsection (b)(4)(A)(iv) of this section) of the prevailing charge for the year and service involved, the maximum allowable actual charge is 101 percent of the physician's maximum allowable actual charge for the service for the previous year.

(ii) For purposes of clause (i)(I), the charge described in this clause for a particular physicians' service furnished in a year is the maximum allowable actual charge for the service of the physician for the previous year plus the product of (I) the applicable fraction (as defined in clause (iii)) and (II) the amount by which 115 percent of the prevailing charge for the year involved for such service furnished by nonparticipating physicians, exceeds the physician's maximum allowable actual charge for the service for the previous year.

(iii) In clause (ii), the "applicable fraction" is--

(I) for 1987, 1/4,

(II) for 1988, 1/3,

(III) for 1989, 1/2, and

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(IV) for any subsequent year, 1.

(iv) For purposes of determining the maximum allowable actual charge under clauses (i) and (ii) for 1987, in the case of a physicians' service for which the physician has actual charges for the calendar quarter beginning on April 1, 1984, the "maximum allowable actual charge" for 1986 is the physician's actual charge for such service furnished during such quarter.

(v) For purposes of determining the maximum allowable actual charge under clauses (i) and (ii) for a year after 1986, in the case of a physicians' service for which the physician has no actual charges for the calendar quarter beginning on April 1, 1984, and for which a maximum allowable actual charge has not been previously established under this clause, the "maximum allowable actual charge" for the previous year shall be the 50th percentile of the customary charges for the service (weighted by frequency of the service) performed by nonparticipating physicians in the locality during the 12-month period ending June 30 of that previous year.

(vi) For purposes of this subparagraph, a "physician's actual charge" for a physicians' service furnished in a year or other period is the weighted average (or, at the option of the Secretary for a service furnished in the calendar quarter beginning April 1, 1984, the median) of the physician's charges for such service furnished in the year or other period.

(vii) In the case of a nonparticipating physician who was a participating physician during a previous period, for the purpose of computing the physician's maximum allowable actual charge during the physician's period of nonparticipation, the physician shall be deemed to have had a maximum allowable actual charge during the period of participation, and such deemed maximum allowable actual charge shall be determined according to clauses (i) through (vi).

(viii) Notwithstanding any other provision of this subparagraph, the maximum allowable actual charge for a particular physician's service furnished by a nonparticipating physician to individuals enrolled under this part during the 3-month period beginning on January 1, 1988, shall be the amount determined under this subparagraph for 1987. The maximum allowable actual charge for any such service otherwise determined under this subparagraph for 1988 shall take effect on April 1, 1988.

(ix) If there is a reduction under subsection (b)(13) of this section in the reasonable charge for medical direction furnished by a nonparticipating physician, the maximum allowable actual charge otherwise permitted under this subsection for such services shall be reduced in the same manner and in the same percentage as the reduction in such reasonable charge.

(D)(i) If an action described in clause (ii) results in a reduction in a reasonable charge for a physicians' service or item and a nonparticipating physician furnishes the service or item to an individual entitled to benefits under this part after the effective date of such action, the physician may not charge the individual more than 125 percent of the reduced payment allowance (as defined in clause (iii)) plus (for services or items furnished during the 12-month period (or 9-month period in the case of an action described in clause (ii)(II)) beginning on the effect-

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ive date of the action) 1/2 of the amount by which the physician's maximum allowable actual charge for the service or item for the previous 12-month period exceeds such 125 percent level.

(ii) The first sentence of clause (i) shall apply to--

(I) an adjustment under subsection (b)(8)(B) of this section (relating to inherent reasonableness),

(II) a reduction under subsection (b)(10)(A) or (b)(14)(A) of this section (relating to certain overpriced procedures),

(III) a reduction under subsection (b)(11)(B) of this section (relating to certain cataract procedures),

(IV) a prevailing charge limit established under subsection (b)(11)(C)(i) or (b)(15)(A) of this section,

(V) a reasonable charge limit established under subsection (b)(11)(C)(ii) of this section, and

(VI) an adjustment under section 1395*l*(l)(3)(B) of this title (relating to physician supervision of certified registered nurse anesthetists).

(iii) In clause (i), the term "reduced payment allowance" means, with respect to an action--

(I) under subsection (b)(8)(B) of this section, the inherently reasonable charge established under subsection (b)(8) of this section;

(II) under subsection (b)(10)(A), (b)(11)(B), (b)(11)(C)(i), (b)(14)(A), or (b)(15)(A) of this section or under section 1395*l*(l)(3)(B) of this title, the prevailing charge for the service after the action; or

(III) under subsection (b)(11)(C)(ii) of this section, the payment allowance established under such subsection.

(iv) If a physician knowingly and willfully bills in violation of clause (i) (whether or not such charge violates subparagraph (B)), the Secretary may apply sanctions against such physician in accordance with paragraph (2).

(v) Clause (i) shall not apply to items and services furnished after December 31, 1990.

(2) Subject to paragraph (3), the sanctions which the Secretary may apply under this paragraph are--

(A) excluding a physician from participation in the programs under this chapter for a period not to exceed 5

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years, in accordance with the procedures of subsections (c), (f), and (g) of section 1320a-7 of this title, or

(B) civil monetary penalties and assessments, in the same manner as such penalties and assessments are authorized under section 1320a-7a(a) of this title,

or both. The provisions of section 1320a-7a of this title (other than the first 2 sentences of subsection (a) and other than subsection (b)) shall apply to a civil money penalty and assessment under subparagraph (B) in the same manner as such provisions apply to a penalty, assessment, or proceeding under section 1320a-7a(a) of this title, except to the extent such provisions are inconsistent with subparagraph (A) or paragraph (3).

(3)(A) The Secretary may not exclude a physician pursuant to paragraph (2)(A) if such physician is a sole community physician or sole source of essential specialized services in a community.

(B) The Secretary shall take into account access of beneficiaries to physicians' services for which payment may be made under this part in determining whether to bar a physician from participation under paragraph (2)(A).

(4) The Secretary may, out of any civil monetary penalty or assessment collected from a physician pursuant to this subsection, make a payment to a beneficiary enrolled under this part in the nature of restitution for amounts paid by such beneficiary to such physician which was determined to be an excess charge under paragraph (1).

(k) Sanctions for billing for services of assistant at cataract operations

(1) If a physician knowingly and willfully presents or causes to be presented a claim or bills an individual enrolled under this part for charges for services as an assistant at surgery for which payment may not be made by reason of section 1395y(a)(15) of this title, the Secretary may apply sanctions against such physician in accordance with subsection (j)(2) of this section in the case of surgery performed on or after March 1, 1987.

(2) If a physician knowingly and willfully presents or causes to be presented a claim or bills an individual enrolled under this part for charges that includes a charge for an assistant at surgery for which payment may not be made by reason of section 1395y(a)(15) of this title, the Secretary may apply sanctions against such physician in accordance with subsection (j)(2) of this section in the case of surgery performed on or after March 1, 1987.

(l) Prohibition of unassigned billing of services determined to be medically unnecessary by carrier

(1)(A) Subject to subparagraph (C), if--

(i) a nonparticipating physician furnishes services to an individual enrolled for benefits under this part,

(ii) payment for such services is not accepted on an assignment-related basis,

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(iii) (I) a medicare administrative contractor determines under this part or a peer review organization determines under part B of subchapter XI of this chapter that payment may not be made by reason of section 1395y(a)(1) of this title because a service otherwise covered under this subchapter is not reasonable and necessary under the standards described in that section or (II) payment under this subchapter for such services is denied under section 1320c-3(a)(2) of this title by reason of a determination under section 1320c-3(a)(1)(B) of this title, and

(iv) the physician has collected any amounts for such services,

the physician shall refund on a timely basis to the individual (and shall be liable to the individual for) any amounts so collected.

(B) A refund under subparagraph (A) is considered to be on a timely basis only if--

(i) in the case of a physician who does not request reconsideration or seek appeal on a timely basis, the refund is made within 30 days after the date the physician receives a denial notice under paragraph (2), or

(ii) in the case in which such a reconsideration or appeal is taken, the refund is made within 15 days after the date the physician receives notice of an adverse determination on reconsideration or appeal.

(C) Subparagraph (A) shall not apply to the furnishing of a service by a physician to an individual in the case described in subparagraph (A)(iii)(I) if--

(i) the physician establishes that the physician did not know and could not reasonably have been expected to know that payment may not be made for the service by reason of section 1395y(a)(1) of this title, or

(ii) before the service was provided, the individual was informed that payment under this part may not be made for the specific service and the individual has agreed to pay for that service.

(2) Each medicare administrative contractor with a contract in effect under this section with respect to physicians and each peer review organization with a contract under part B of subchapter XI of this chapter shall send any notice of denial of payment for physicians' services based on section 1395y(a)(1) of this title and for which payment is not requested on an assignment-related basis to the physician and the individual involved.

(3) If a physician knowingly and willfully fails to make refunds in violation of paragraph (1)(A), the Secretary may apply sanctions against such physician in accordance with subsection (j)(2) of this section.

(m) Disclosure of information of unassigned claims for certain physicians' services

(1) In the case of a nonparticipating physician who--

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(A) performs an elective surgical procedure for an individual enrolled for benefits under this part and for which the physician's actual charge is at least $500, and

(B) does not accept payment for such procedure on an assignment-related basis,

the physician must disclose to the individual, in writing and in a form approved by the Secretary, the physician's estimated actual charge for the procedure, the estimated approved charge under this part for the procedure, the excess of the physician's actual charge over the approved charge, and the coinsurance amount applicable to the procedure. The written estimate may not be used as the basis for, or evidence in, a civil suit.

(2) A physician who fails to make a disclosure required under paragraph (1) with respect to a procedure shall refund on a timely basis to the individual (and shall be liable to the individual for) any amounts collected for the procedure in excess of the charges recognized and approved under this part.

(3) If a physician knowingly and willfully fails to comply with paragraph (2), the Secretary may apply sanctions against such physician in accordance with subsection (j)(2) of this section.

(4) The Secretary shall provide for such monitoring of requests for payment for physicians' services to which paragraph (1) applies as is necessary to assure compliance with paragraph (2).

(n) Elimination of markup for certain purchased services

(1) If a physician's bill or a request for payment for services billed by a physician includes a charge for a diagnostic test described in section 1395x(s)(3) of this title (other than a clinical diagnostic laboratory test) for which the bill or request for payment does not indicate that the billing physician personally performed or supervised the performance of the test or that another physician with whom the physician who shares a practice personally performed or supervised the performance of the test, the amount payable with respect to the test shall be determined as follows:

(A) If the bill or request for payment indicates that the test was performed by a supplier, identifies the supplier, and indicates the amount the supplier charged the billing physician, payment for the test (less the applicable deductible and coinsurance amounts) shall be the actual acquisition costs (net of any discounts) or, if lower, the supplier's reasonable charge (or other applicable limit) for the test.

(B) If the bill or request for payment (i) does not indicate who performed the test, or (ii) indicates that the test was performed by a supplier but does not identify the supplier or include the amount charged by the supplier, no payment shall be made under this part.

(2) A physician may not bill an individual enrolled under this part--

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(A) any amount other than the payment amount specified in paragraph (1)(A) and any applicable deductible and coinsurance for a diagnostic test for which payment is made pursuant to paragraph (1)(A), or

(B) any amount for a diagnostic test for which payment may not be made pursuant to paragraph (1)(B).

(3) If a physician knowingly and willfully in repeated cases bills one or more individuals in violation of paragraph (2), the Secretary may apply sanctions against such physician in accordance with subsection (j)(2) of this section.

(o) Reimbursement for drugs and biologicals

(1) If a physician's supplier's, or any other person's bill or request for payment for services includes a charge for a drug or biological for which payment may be made under this part and the drug or biological is not paid on a cost or prospective payment basis as otherwise provided in this part, the amount payable for the drug or biological is equal to the following:

(A) In the case of any of the following drugs or biologicals, 95 percent of the average wholesale price:

(i) A drug or biological furnished before January 1, 2004.

(ii) Blood clotting factors furnished during 2004.

(iii) A drug or biological furnished during 2004 that was not available for payment under this part as of April 1, 2003.

(iv) A vaccine described in subparagraph (A) or (B) of section 1395x(s)(10) of this title furnished on or after January 1, 2004.

(v) A drug or biological furnished during 2004 in connection with the furnishing of renal dialysis services if separately billed by renal dialysis facilities.

(B) In the case of a drug or biological furnished during 2004 that is not described in--

(i) clause (ii), (iii), (iv), or (v) of subparagraph (A),

(ii) subparagraph (D)(i), or

(iii) subparagraph (F), the amount determined under paragraph (4).

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(C) In the case of a drug or biological that is not described in subparagraph (A)(iv), (D)(i), or (F) furnished on or after January 1, 2005, the amount provided under section 1395w-3 of this title, section 1395w-3a of this title, section 1395w-3b of this title, or section 1395rr(b)(13) of this title, as the case may be for the drug or biological.

(D)(i) Except as provided in clause (ii), in the case of infusion drugs furnished through an item of durable medical equipment covered under section 1395x(n) of this title on or after January 1, 2004, 95 percent of the average wholesale price for such drug in effect on October 1, 2003.

(ii) In the case of such infusion drugs furnished in a competitive acquisition area under section 1395w-3 of this title on or after January 1, 2007, the amount provided under section 1395w-3 of this title.

(E) In the case of a drug or biological, consisting of intravenous immune globulin, furnished--

(i) in 2004, the amount of payment provided under paragraph (4); and

(ii) in 2005 and subsequent years, the amount of payment provided under section 1395w-3a of this title.

(F) In the case of blood and blood products (other than blood clotting factors), the amount of payment shall be determined in the same manner as such amount of payment was determined on October 1, 2003.

(G) In the case of inhalation drugs or biologicals furnished through durable medical equipment covered under section 1395x(n) of this title that are furnished--

(i) in 2004, the amount provided under paragraph (4) for the drug or biological; and

(ii) in 2005 and subsequent years, the amount provided under section 1395w-3a of this title for the drug or biological.

(2) If payment for a drug or biological is made to a licensed pharmacy approved to dispense drugs or biologicals under this part, the Secretary may pay a dispensing fee (less the applicable deductible and coinsurance amounts) to the pharmacy. This paragraph shall not apply in the case of payment under paragraph (1)(C).

(3)(A) Payment for a charge for any drug or biological for which payment may be made under this part may be made only on an assignment-related basis.

(B) The provisions of subsection (b)(18)(B) shall apply to charges for such drugs or biologicals in the same manner as they apply to services furnished by a practitioner described in subsection (b)(18)(C).

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(4)(A) Subject to the succeeding provisions of this paragraph, the amount of payment for a drug or biological under this paragraph furnished in 2004 is equal to 85 percent of the average wholesale price (determined as of April 1, 2003) for the drug or biological.

(B) The Secretary shall substitute for the percentage under subparagraph (A) for a drug or biological the percentage that would apply to the drug or biological under the column entitled "Average of GAO and OIG data (percent)" in the table entitled "Table 3.--Medicare Part B Drugs in the Most Recent GAO and OIG Studies" published on August 20, 2003, in the Federal Register (68 Fed. Reg. 50445).

(C)(i) The Secretary may substitute for the percentage under subparagraph (A) a percentage that is based on data and information submitted by the manufacturer of the drug or biological by October 15, 2003.

(ii) The Secretary may substitute for the percentage under subparagraph (A) with respect to drugs and biologicals furnished during 2004 on or after April 1, 2004, a percentage that is based on data and information submitted by the manufacturer of the drug or biological after October 15, 2003, and before January 1, 2004.

(D) In no case may the percentage substituted under subparagraph (B) or (C) be less than 80 percent.

(5)(A) Subject to subparagraph (B), in the case of clotting factors furnished on or after January 1, 2005, the Secretary shall, after reviewing the January 2003 report to Congress by the Comptroller General of the United States entitled "Payment for Blood Clotting Factor Exceeds Providers Acquisition Cost", provide for a separate payment, to the entity which furnishes to the patient blood clotting factors, for items and services related to the furnishing of such factors in an amount that the Secretary determines to be appropriate. Such payment amount may take into account any or all of the following:

(i) The mixing (if appropriate) and delivery of factors to an individual, including special inventory management and storage requirements.

(ii) Ancillary supplies and patient training necessary for the self-administration of such factors.

(B) In determining the separate payment amount under subparagraph (A) for blood clotting factors furnished in 2005, the Secretary shall ensure that the total amount of payments under this part (as estimated by the Secretary) for such factors under paragraph (1)(C) and such separate payments for such factors does not exceed the total amount of payments that would have been made for such factors under this part (as estimated by the Secretary) if the amendments made by section 303 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 had not been enacted.

(C) The separate payment amount under this subparagraph for blood clotting factors furnished in 2006 or a subsequent year shall be equal to the separate payment amount determined under this paragraph for the previous year increased by the percentage increase in the consumer price index for medical care for the 12-month period

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ending with June of the previous year.

(6) In the case of an immunosuppressive drug described in subparagraph (J) of section 1395x(s)(2) of this title and an oral drug described in subparagraph (Q) or (T) of such section, the Secretary shall pay to the pharmacy a supplying fee for such a drug determined appropriate by the Secretary (less the applicable deductible and coinsurance amounts).

(7) There shall be no administrative or judicial review under section 1395ff of this title, section 1395oo of this title, or otherwise, of determinations of payment amounts, methods, or adjustments under paragraphs (4) through (6).

(p) Requiring submission of diagnostic information

(1) Each request for payment, or bill submitted, for an item or service furnished by a physician or practitioner specified in subsection (b)(18)(C) of this section for which payment may be made under this part shall include the appropriate diagnosis code (or codes) as established by the Secretary for such item or service.

(2) In the case of a request for payment for an item or service furnished by a physician or practitioner specified in subsection (b)(18)(C) of this section on an assignment-related basis which does not include the code (or codes) required under paragraph (1), payment may be denied under this part.

(3) In the case of a request for payment for an item or service furnished by a physician not submitted on an assignment-related basis and which does not include the code (or codes) required under paragraph (1)--

(A) if the physician knowingly and willfully fails to provide the code (or codes) promptly upon request of the Secretary or a medicare administrative contractor, the physician may be subject to a civil money penalty in an amount not to exceed $2,000, and

(B) if the physician knowingly, willfully, and in repeated cases fails, after being notified by the Secretary of the obligations and requirements of this subsection, to include the code (or codes) required under paragraph (1), the physician may be subject to the sanction described in subsection (j)(2)(A) of this section.

The provisions of section 1320a-7a of this title (other than subsections (a) and (b)) shall apply to civil money penalties under subparagraph (A) in the same manner as they apply to a penalty or proceeding under section 1320a-7a(a) of this title.

(4) In the case of an item or service defined in paragraph (3), (6), (8), or (9) of subsection 1395x(s) of this title ordered by a physician or a practitioner specified in subsection (b)(18)(C) of this section, but furnished by another entity, if the Secretary (or fiscal agent of the Secretary) requires the entity furnishing the item or service to provide diagnostic or other medical information in order for payment to be made to the entity, the physician or practitioner shall provide that information to the entity at the time that the item or service is ordered by the phys-

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ician or practitioner.

(q) Anesthesia services; counting actual time units

(1)(A) The Secretary, in consultation with groups representing physicians who furnish anesthesia services, shall establish by regulation a relative value guide for use in all localities in making payment for physician anesthesia services furnished under this part. Such guide shall be designed so as to result in expenditures under this subchapter for such services in an amount that would not exceed the amount of such expenditures which would otherwise occur.

(B) For physician anesthesia services furnished under this part during 1991, the prevailing charge conversion factor used in a locality under this subsection shall, subject to clause (iv), be reduced to the adjusted prevailing charge conversion factor for the locality determined as follows:

(i) The Secretary shall estimate the national weighted average of the prevailing charge conversion factors used under this subsection for services furnished during 1990 after March 31, using the best available data.

(ii) The national weighted average estimated under clause (i) shall be reduced by 7 percent.

(iii) The adjusted prevailing charge conversion factor for a locality is the sum of--

(I) the product of (a) the portion of the reduced national weighted average prevailing charge conversion factor computed under clause (ii) which is attributable to physician work and (b) the geographic work index value for the locality (specified in Addendum C to the Model Fee Schedule for Physician Services (published on September 4, 1990, 55 Federal Register pp. 36238-36243)); and

(II) the product of (a) the remaining portion of the reduced national weighted average prevailing charge conversion factor computed under clause (ii) and (b) the geographic practice cost index value specified in subsec. (b)(14)(C)(iv) of this section for the locality.

In applying this clause, 70 percent of the prevailing charge conversion factor shall be considered to be attributable to physician work.

(iv) The prevailing charge conversion factor to be applied to a locality under this subparagraph shall not be reduced by more than 15 percent below the prevailing charge conversion factor applied in the locality for the period during 1990 after March 31, but in no case shall the prevailing charge conversion factor be less than 60 percent of the national weighted average of the prevailing charge conversion factors (computed under clause (i)).

(2) For purposes of payment for anesthesia services (whether furnished by physicians or by certified registered

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nurse anesthetists) under this part, the time units shall be counted based on actual time rather than rounded to full time units.

(r) Establishment of physician identification system

The Secretary shall establish a system which provides for a unique identifier for each physician who furnishes services for which payment may be made under this subchapter. Under such system, the Secretary may impose appropriate fees on such physicians to cover the costs of investigation and recertification activities with respect to the issuance of the identifiers.

(s) Application of fee schedule

(1) Subject to paragraph (3), the Secretary may implement a statewide or other areawide fee schedule to be used for payment of any item or service described in paragraph (2) which is paid on a reasonable charge basis. Any fee schedule established under this paragraph for such item or service shall be updated each year by the percentage increase in the consumer price index for all urban consumers (United States city average) for the 12-month period ending with June of the preceding year, except that for items and services described in paragraph (2)(D)--

(A) for 2009 section 1395m(a)(14)(J)(i) of this title shall apply under this paragraph instead of the percentage increase otherwise applicable; and

(B) for 2014, if subparagraph (A) is applied to the items and services and there has not been a payment adjustment under paragraph (3)(B) for the items and services for any previous year, the percentage increase computed under section 1395m(a)(14)(L)(i) of this title shall apply instead of the percentage increase otherwise applicable.

(2) The items and services described in this paragraph are as follows:

(A) Medical supplies.

(B) Home dialysis supplies and equipment (as defined in section 1395rr(b)(8) of this title).

(C) Repealed. Pub.L. 108-173, Title VI, § 627(b)(2); Dec. 8, 2003, 117 Stat. 2321

(D) Parenteral and enteral nutrients, equipment, and supplies.

(E) Electromyogram devices.

(F) Salivation devices.

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(G) Blood products.

(H) Transfusion medicine.

(3) In the case of items and services described in paragraph (2)(D) that are included in a competitive acquisition program in a competitive acquisition area under section 1395w-3(a) of this title--

(A) the payment basis under this subsection for such items and services furnished in such area shall be the payment basis determined under such competitive acquisition program; and

(B) the Secretary may use information on the payment determined under such competitive acquisition programs to adjust the payment amount otherwise applicable under paragraph (1) for an area that is not a competitive acquisition area under section 1395w-3 of this title, and in the case of such adjustment, paragraphs (8) and (9) of section 1395u(b) of this title shall not be applied.

(t) Requests for payment or bill submitted to include medicare provider number

Each request for payment, or bill submitted, for an item or service furnished to an individual who is a resident of a skilled nursing facility for which payment may be made under this part shall include the facility's medicare provider number.

(u) Each request for payment, or bill submitted, for a drug furnished to an individual for the treatment of anemia in connection with the treatment of cancer shall include (in a form and manner specified by the Secretary) information on the hemoglobin or hematocrit levels for the individual.

CREDIT(S)

(Aug. 14, 1935, c. 531, Title XVIII, § 1842, as added July 30, 1965, Pub.L. 89-97, Title I, § 102(a), 79 Stat. 309, and amended Jan. 2, 1968, Pub.L. 90-248, Title I, §§ 125(a), 154(d), 81 Stat. 845, 863; Oct. 30, 1972, Pub.L. 92-603, Title II, §§ 211(c)(3), 224(a), 227(e)(3), 236(a), 258(a), 262(a), 263(d)(5), 281(d), 86 Stat. 1384, 1395, 1407, 1414, 1447 to 1449, 1455; Oct. 16, 1974, Pub.L. 93-445, Title III, § 307, 88 Stat. 1358; Dec. 31, 1975, Pub.L. 94-182, Title I, § 101(a), 89 Stat. 1051; July 16, 1976, Pub.L. 94-368, §§ 2, 3(a), (b), 90 Stat. 997; Oct. 25, 1977, Pub.L. 95-142, § 2(a)(1), 91 Stat. 1175; Dec. 20, 1977, Pub.L. 95-216, Title V, § 501(b), 91 Stat. 1565; Dec. 5, 1980, Pub.L. 96-499, Title IX, §§ 918(a)(1), 946(a), (b), 948(b), 94 Stat. 2625, 2642, 2643; Aug. 13, 1981, Pub.L. 97-35, Title XXI, § 2142(b), 95 Stat. 798; Sept. 3, 1982, Pub.L. 97-248, Title I, §§ 104(a), 113(a), 128(d)(1), 96 Stat. 336, 340, 367; July 18, 1984, Pub.L. 98-369, Div. B, Title III, §§ 2303(e), 2306(a), (b)(1), (c), 2307(a)(1), (2), 2326(c)(2), (d)(2), 2339, 2354(b)(13), (14), Title VI, § 2663(j)(2)(F)(iv), 98 Stat. 1066, 1070, 1071, 1073, 1087, 1088, 1093, 1101, 1170; Nov. 8, 1984, Pub.L. 98-617, § 3(a)(1), (b)(5), (6), 98 Stat. 3295, 3296; Apr. 7, 1986, Pub.L. 99-272, Title IX, §§ 9219(b)(1)(A), (2)(A), 9301(b)(1), (2), (c)(2) to (4), (d)(1) to (3), 9304(a), 9306(a), 9307(c), 100 Stat. 182 to 188, 190, 193, 194; Oct. 21, 1986, Pub.L. 99-509, Title IX, §§ 9307(c)(2)(A), 9311(c), 9320(e)(3), 9331(a)(1) to (3), (b)(1) to (3), (c)(3)(A), 9332(a)(1), (b)(1), (2),

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(c)(1), (d)(1), 9333(a), (b), 9334(a), 9338(b), (c), 9341(a)(2), 100 Stat. 1995, 1998, 2015, 2018 to 2026, 2028, 2035, 2038; Oct. 22, 1986, Pub.L. 99-514, Title XVIII, § 1895(b)(14)(A), (15), (16)(A), 100 Stat. 2934; Aug. 18, 1987, Pub.L. 100-93, § 8(c)(2), 101 Stat. 692; Dec. 22, 1987, Pub.L. 100-203, Title IV, §§ 4031(a)(2), 4035(a)(2), 4041(a)(1)(B), (3)(A), 4042(a) to (c), 4044(a), 4045(a), (c)(1), (2)(B), (D), 4046(a), 4047(a), 4048(a), (e), 4051(a), 4052(a), 4053(a), formerly 4052(a), 4054(a), formerly 4053(a), 4063(a), 4081(a), 4082(c), 4085(g)(1), (i)(5) to (7), (i)(22)(C), (24) to (27), 4096(a)(1), 101 Stat. 1330-76, 1330-78, 1330-83, 1330-85 to 1330-87, 1330-89, 1330-93, 1330-97, 1330-109, 1330-126, 1330-128, 1330-131, 1330-132, 1330-139; renumbered and amended July 1, 1988, Pub.L. 100-360, Title II, §§ 201(c), 202(c)(1), (e)(1) to (3)(A), (C), (4)(A), (5), (g), 223(b), (c), Title IV, § 411(a)(3)(A), (C)(i), (f)(1)(A), (B), (2)(C) to (F), (3)(A), (B), (4)(A) to (C), (5), (6)(B), (7)(A), (B), (9), (11)(A), (14), (g)(2)(A) to (C), (i)(1)(A), (2), (4)(C)(vi), (j)(4)(A), 102 Stat. 702, 713, 716, 717, 747, 768, 776 to 781, 783, 787, 788, 789, 790, 791; Oct. 13, 1988, Pub.L. 100-485, Title VI, § 608(d)(5)(A) to (D), (F) to (H), (17), (21)(A), (B), (D), (24)(B), 102 Stat. 2414, 2418, 2420, 2421; Dec. 13, 1989, Pub.L. 101-234, Title II, § 201(a)(1), Title III, § 301(b)(2), (6), (c)(2), (d)(3), 103 Stat. 1981, 1985, 1986; Dec. 19, 1989, Pub.L. 101-239, Title VI, §§ 6003(g)(3)(D)(ix), 6102(b), (e)(2) to (4), (9), 6104, 6106(a), 6107(b), 6108(a)(1), (b)(1), (2), 6114(b), (c), 6202(d)(2), 103 Stat. 2153, 2184, 2187, 2188, 2208 to 2210, 2212, 2213, 2218, 2234; Nov. 5, 1990, Pub.L. 101-508, Title IV, §§ 4101(a), (b)(1), 4103, 4105(a)(1), (2), (b)(1), 4106(a)(1), (b)(2), 4108(a), 4110(a), 4118(a)(1), (2), (f)(2)(A) to (C), (i)(1), (j)(2), 4155(c), 104 Stat. 1388-54, 1388-58 to 1388-63, 1388-66, 1388-67, 1388-69 to 1388-71, 1388-87; Nov. 16, 1990, Pub.L. 101-597, Title IV, § 401(c)(2), 104 Stat. 3035; Aug. 10, 1993, Pub.L. 103-66, Title XIII, §§ 13515(a)(2), 13516(a)(2), 13517(b), 13568(a), (b), 107 Stat. 583 to 585, 608; Oct. 31, 1994, Pub.L. 103-432, Title I, §§ 123(b)(1), (2)(B), (c), 125(a), (b)(1), 126(a)(1), (c), (e), (g)(9), (h)(2), 135(b)(2), 151(b)(1)(B), (2)(B), 108 Stat. 4411 to 4416, 4423, 4434; Aug. 21, 1996, Pub.L. 104-191, Title II, §§ 202(b)(2), 221(b), 110 Stat. 1998, 2011; Aug. 5, 1997, Pub.L. 105-33, Title IV, §§ 4201(c)(1), 4205(d)(3)(B), 4302(b), 4315(a), 4316(a), 4317, 4432(b)(2), (4), 4512(b)(2), (c), 4531(a)(2), 4556(a), 4603(c)(2)(B)(i), 4611(d), 111 Stat. 251, 382, 390, 392, 421, 444, 450, 462, 473; Nov. 29, 1999, Pub.L. 106-113, Div. B, § 1000(a)(6) [Title II, § 223(c), Title III, §§ 305(a), 321(k)(4)], 113 Stat. 1536, 1501A-353, 1501A-361, 1501A-366; Dec. 21, 2000, Pub.L. 106-554, Title I, § 1(a)(6) [Title I, §§ 105(d), 114(a), Title II, § 222(a), Title III, § 313(b)(1), (2), Title IV, § 432(b)(2)], 114 Stat. 2763, 2763A-472, 2763A-473, 2763A-487, 2763A-499, 2763A-526; Dec. 8, 2003, Pub.L. 108-173, Title III, §§ 302(d)(3), 303(b), (e), (g)(1), (i)(1), 305(a), Title VI, § 627(b)(2), Title VII, § 736(b)(8), (9), Title IX, §§ 911(c), 952(a), (b), 117 Stat. 2233, 2238, 2252 to 2255, 2321, 2356, 2383, 2427; Feb. 8, 2006, Pub.L. 109-171, Title V, §§ 5114(a)(2), 5202(a)(2), 120 Stat. 45, 47; Dec. 20, 2006, Pub.L. 109-432, Div. B, Title I, § 110(a), Title II, § 205(b)(2), Title IV, § 405(c)(2)(A)(i), 120 Stat. 2985, 2989, 2999; Aug. 3, 2007, Pub.L. 110-54, § 1(a), 121 Stat. 551; Dec. 29, 2007, Pub.L. 110-173, Title I, § 116, 121 Stat. 2507; July 15, 2008, Pub.L. 110-275, Title I, §§ 137, 154(a)(2)(B), 122 Stat. 2540, 2563.)

2008 Acts. Amendments made by Pub.L. 110-275, § 154, shall take effect as of June 30, 2008, see Pub.L. 110-275, § 154(e), set out as a note under 42 U.S.C.A. § 1395m.

Pub.L. 108-173, Title IX, § 952(c), Dec. 8, 2003, 117 Stat. 2427, provided that: "The amendments made by this section [amending subsec. (b)(6) of this section] shall apply to payments made on or after the date of the enactment of this Act [Dec. 8, 2003]."

Current through P.L. 111-82 approved 10-26-09

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RCW 4.56.110
Interest on judgments.

Interest on judgments shall accrue as follows:

(1) Judgments founded on written contracts, providing for the payment of interest until paid at a specified rate, shall bear interest at the rate specified in the contracts: PROVIDED, That said interest rate is set forth in the judgment.

(2) All judgments for unpaid child support that have accrued under a superior court order or an order entered under the administrative procedure act shall bear interest at the rate of twelve percent.

(3) Judgments founded on the tortious conduct of individuals or other entities, whether acting in their personal or representative capacities, shall bear interest from the date of entry at two percentage points above the equivalent coupon issue yield, as published by the board of governors of the federal reserve system, of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the date of entry. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

(4) Except as provided under subsections (1), (2), and (3) of this section, judgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered. The method for determining an interest rate prescribed by this subsection is also the method for determining the "rate applicable to civil judgments" for purposes of RCW 10.82.090.

[2004 c 185 § 2; 1989 c 360 § 19; 1983 c 147 § 1; 1982 c 198 § 1; 1980 c 94 § 5; 1969 c 46 § 1; 1899 c 80 § 6; 1895 c 136 § 4; RRS § 457.]

Notes:

Application -- Interest accrual -- 2004 c 185: See note following RCW 4.56.115.

Application -- 1983 c 147: "The 1983 amendments of RCW 4.56.110 and 4.56.115 apply only to judgments entered after July 24, 1983." [1983 c 147 § 3.]

Effective date -- 1980 c 94: See note following RCW 4.84.250.

RCW 9A.16.110
Defending against violent crime — Reimbursement.

(1) No person in the state shall be placed in legal jeopardy of any kind whatsoever for protecting by any reasonable means necessary, himself or herself, his or her family, or his or her real or personal property, or for coming to the aid of another who is in imminent danger of or the victim of assault, robbery, kidnapping, arson, burglary, rape, murder, or any other violent crime as defined in RCW 9.94A.030.

(2) When a person charged with a crime listed in subsection (1) of this section is found not guilty by reason of self-defense, the state of Washington shall reimburse the defendant for all reasonable costs, including loss of time, legal fees incurred, and other expenses involved in his or her defense. This reimbursement is not an independent cause of action. To award these reasonable costs the trier of fact must find that the defendant's claim of self-defense was sustained by a preponderance of the evidence. If the trier of fact makes a determination of self-defense, the judge shall determine the amount of the award.

(3) Notwithstanding a finding that a defendant's actions were justified by self-defense, if the trier of fact also determines that the defendant was engaged in criminal conduct substantially related to the events giving rise to the charges filed against the defendant the judge may deny or reduce the amount of the award. In determining the amount of the award, the judge shall also consider the seriousness of the initial criminal conduct.

Nothing in this section precludes the legislature from using the sundry claims process to grant an award where none was granted under this section or to grant a higher award than one granted under this section.

(4) Whenever the issue of self-defense under this section is decided by a judge, the judge shall consider the same questions as must be answered in the special verdict under subsection (4) [(5)] of this section.

(5) Whenever the issue of self-defense under this section has been submitted to a jury, and the jury has found the defendant not guilty, the court shall instruct the jury to return a special verdict in substantially the following form:

		answer yes or no
1.	Was the finding of not guilty based upon self-defense?	.....
2.	If your answer to question 1 is no, do not answer the remaining question.	
3.	If your answer to question 1 is yes, was the defendant:	
a.	Protecting himself or herself?	.....
b.	Protecting his or her family?	.....
c.	Protecting his or her property?	.....
d.	Coming to the aid of another who was in imminent danger of a heinous crime?	.....
e.	Coming to the aid of another who was the victim of a heinous crime?	.....
f.	Engaged in criminal conduct substantially related to the events giving rise to the crime with which the defendant is charged?	.....

[1995 c 44 § 1; 1989 c 94 § 1; 1977 ex.s. c 206 § 8. Formerly RCW 9.01.200.]

Notes:

Use of deadly force -- Legislative recognition: See note following RCW 9A.16.040.

RCW 70.44.003
Purpose.

The purpose of chapter 70.44 RCW is to authorize the establishment of public hospital districts to own and operate hospitals and other health care facilities and to provide hospital services and other health care services for the residents of such districts and other persons.

[1982 c 84 § 1.]

RCW 70.44.060
Powers and duties.

All public hospital districts organized under the provisions of this chapter shall have power:

(1) To make a survey of existing hospital and other health care facilities within and without such district.

(2) To construct, condemn and purchase, purchase, acquire, lease, add to, maintain, operate, develop and regulate, sell and convey all lands, property, property rights, equipment, hospital and other health care facilities and systems for the maintenance of hospitals, buildings, structures, and any and all other facilities, and to exercise the right of eminent domain to effectuate the foregoing purposes or for the acquisition and damaging of the same or property of any kind appurtenant thereto, and such right of eminent domain shall be exercised and instituted pursuant to a resolution of the commission and conducted in the same manner and by the same procedure as in or may be provided by law for the exercise of the power of eminent domain by incorporated cities and towns of the state of Washington in the acquisition of property rights: PROVIDED, That no public hospital district shall have the right of eminent domain and the power of condemnation against any health care facility.

(3) To lease existing hospital and other health care facilities and equipment and/or other property used in connection therewith, including ambulances, and to pay such rental therefor as the commissioners shall deem proper; to provide hospital and other health care services for residents of said district by facilities located outside the boundaries of said district, by contract or in any other manner said commissioners may deem expedient or necessary under the existing conditions; and said hospital district shall have the power to contract with other communities, corporations, or individuals for the services provided by said hospital district; and they may further receive in said hospitals and other health care facilities and furnish proper and adequate services to all persons not residents of said district at such reasonable and fair compensation as may be considered proper: PROVIDED, That it must at all times make adequate provision for the needs of the district and residents of said district shall have prior rights to the available hospital and other health care facilities of said district, at rates set by the district commissioners.

(4) For the purpose aforesaid, it shall be lawful for any district so organized to take, condemn and purchase, lease, or acquire, any and all property, and property rights, including state and county lands, for any of the purposes aforesaid, and any and all other facilities necessary or convenient, and in connection with the construction, maintenance, and operation of any such hospitals and other health care facilities, subject, however, to the applicable limitations provided in subsection (2) of this section.

(5) To contract indebtedness or borrow money for corporate purposes on the credit of the corporation or the revenues of the hospitals thereof, and the revenues of any other facilities or services that the district is or hereafter may be authorized by law to provide, and to issue and sell: (a) Revenue bonds, revenue warrants, or other revenue obligations therefor payable solely out of a special fund or funds into which the district may pledge such amount of the revenues of the hospitals thereof, and the revenues of any other facilities or services that the district is or hereafter may be authorized by law to provide, to pay the same as the commissioners of the district may determine, such revenue bonds, warrants, or other obligations to be issued and sold in the same manner and subject to the same provisions as provided for the issuance of revenue bonds, warrants, or other obligations by cities or towns under the Municipal Revenue Bond Act, chapter 35.41 RCW, as may hereafter be amended; (b) general obligation bonds therefor in the manner and form as provided in RCW 70.44.110 and 70.44.130, as may hereafter be amended; or (c) interest-bearing warrants to be drawn on a fund pending deposit in such fund of money sufficient to redeem such warrants and to be issued and paid in such manner and upon such terms and conditions as the board of commissioners may deem to be in the best interest of the district; and to assign or sell hospital accounts receivable, and accounts receivable for the use of other facilities or services that the district is or hereafter may be authorized by law to provide, for collection with or without recourse. General obligation bonds shall be issued and sold in accordance with chapter 39.46 RCW. Revenue bonds, revenue warrants, or other revenue obligations may be issued and sold in accordance with chapter 39.46 RCW.

(6) To raise revenue by the levy of an annual tax on all taxable property within such public hospital district not to exceed fifty cents per thousand dollars of assessed value, and an additional annual tax on all taxable property within such public hospital district not to exceed twenty-five cents per thousand dollars of assessed value, or such further amount as has been or shall be authorized by a vote of the people. Although public hospital districts are authorized to impose two separate regular property tax levies, the levies shall be considered to be a single levy for purposes of the limitation provided for in chapter 84.55 RCW. Public hospital districts are authorized to levy such a general tax in excess of their regular property taxes when authorized so to do at a special election conducted in accordance with and subject to all of the requirements of the Constitution and the laws of the state of Washington now in force or hereafter enacted governing the limitation of tax levies. The said board of district commissioners is authorized and empowered to call a

special election for the purpose of submitting to the qualified voters of the hospital district a proposition or propositions to levy taxes in excess of its regular property taxes. The superintendent shall prepare a proposed budget of the contemplated financial transactions for the ensuing year and file the same in the records of the commission on or before the first day of November. Notice of the filing of said proposed budget and the date and place of hearing on the same shall be published for at least two consecutive weeks, at least one time each week, in a newspaper printed and of general circulation in said county. On or before the fifteenth day of November the commission shall hold a public hearing on said proposed budget at which any taxpayer may appear and be heard against the whole or any part of the proposed budget. Upon the conclusion of said hearing, the commission shall, by resolution, adopt the budget as finally determined and fix the final amount of expenditures for the ensuing year. Taxes levied by the commission shall be certified to and collected by the proper county officer of the county in which such public hospital district is located in the same manner as is or may be provided by law for the certification and collection of port district taxes. The commission is authorized, prior to the receipt of taxes raised by levy, to borrow money or issue warrants of the district in anticipation of the revenue to be derived by such district from the levy of taxes for the purpose of such district, and such warrants shall be redeemed from the first money available from such taxes when collected, and such warrants shall not exceed the anticipated revenues of one year, and shall bear interest at a rate or rates as authorized by the commission.

(7) To enter into any contract with the United States government or any state, municipality, or other hospital district, or any department of those governing bodies, for carrying out any of the powers authorized by this chapter.

(8) To sue and be sued in any court of competent jurisdiction: PROVIDED, That all suits against the public hospital district shall be brought in the county in which the public hospital district is located.

(9) To pay actual necessary travel expenses and living expenses incurred while in travel status for (a) qualified physicians or other health care practitioners who are candidates for medical staff positions, and (b) other qualified persons who are candidates for superintendent or other managerial and technical positions, which expenses may include expenses incurred by family members accompanying the candidate, when the district finds that hospitals or other health care facilities owned and operated by it are not adequately staffed and determines that personal interviews with said candidates to be held in the district are necessary or desirable for the adequate staffing of said facilities.

(10) To employ superintendents, attorneys, and other technical or professional assistants and all other employees; to make all contracts useful or necessary to carry out the provisions of this chapter, including, but not limited to, (a) contracts with private or public institutions for employee retirement programs, and (b) contracts with current or prospective employees, physicians, or other health care practitioners providing for the payment or reimbursement by the public hospital district of health care training or education expenses, including but not limited to debt obligations, incurred by current or prospective employees, physicians, or other health care practitioners in return for their agreement to provide services beneficial to the public hospital district; to print and publish information or literature; and to do all other things necessary to carry out the provisions of this chapter.

[2003 c 125 § 1; 2001 c 76 § 1; 1997 c 3 § 206 (Referendum Bill No. 47, approved November 4, 1997); 1990 c 234 § 2; 1984 c 186 § 59; 1983 c 167 § 172; 1982 c 84 § 15; 1979 ex.s. c 155 § 1; 1979 ex.s. c 143 § 4; 1977 ex.s. c 211 § 1; 1974 ex.s. c 165 § 2; 1973 1st ex.s. c 195 § 83; 1971 ex.s. c 218 § 2; 1970 ex.s. c 56 § 85; 1969 ex.s. c 65 § 1; 1967 c 164 § 7; 1965 c 157 § 2; 1949 c 197 § 18; 1945 c 264 § 6; Rem. Supp. 1949 § 6090-35.]

Notes:

Intent -- 1997 c 3 §§ 201-207: See note following RCW 84.55.010.

Application -- Severability -- Part headings not law -- Referral to electorate -- 1997 c 3: See notes following RCW 84.40.030.

Purpose -- 1984 c 186: See note following RCW 39.46.110.

Liberal construction -- Severability -- 1983 c 167: See RCW 39.46.010 and note following.

Severability -- 1979 ex.s. c 155: "If any provision of this amendatory act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1979 ex.s. c 155 § 3.]

Severability -- 1979 ex.s. c 143: See note following RCW 70.44.200.

Severability -- Effective dates and termination dates -- Construction -- 1973 1st ex.s. c 195: See notes following RCW 84.52.043.

Purpose -- 1970 ex.s. c 56: See note following RCW 39.52.020.

Purpose -- Severability -- 1967 c 164: See notes following RCW 4.96.010.

Eminent domain
by cities: Chapter 8.12 RCW.
generally: State Constitution Art. 1 § 16.

Limitation on levies: State Constitution Art. 7 § 2; RCW 84.52.050.

Port districts, collection of taxes: RCW 53.36.020.

Tortious conduct of political subdivisions, municipal corporations and quasi-municipal corporations, liability for damages: Chapter 4.96 RCW.

RCW 70.44.171
Treasurer — Duties — Funds — Depositaries — Surety bonds, cost.

The treasurer of the county in which a public hospital district is located shall be treasurer of the district, except that the commission by resolution may designate some other person having experience in financial or fiscal matters as treasurer of the district. If the treasurer is not the county treasurer, the commission shall require a bond, with a surety company authorized to do business in the state of Washington, in an amount and under the terms and conditions which the commission by resolution from time to time finds will protect the district against loss. The premium on any such bond shall be paid by the district.

All district funds shall be paid to the treasurer and shall be disbursed by him only on warrants issued by an auditor appointed by the commission, upon orders or vouchers approved by it. The treasurer shall establish a public hospital district fund, into which shall be paid all district funds, and he shall maintain such special funds as may be created by the commission, into which he shall place all money as the commission may, by resolution, direct.

If the treasurer of the district is the treasurer of the county all district funds shall be deposited with the county depositaries under the same restrictions, contracts, and security as provided for county depositaries. If the treasurer of the district is some other person, all funds shall be deposited in such bank or banks authorized to do business in this state as the commission by resolution shall designate, and with surety bond to the district or securities in lieu thereof of the kind, no less in amount, as provided in *RCW 36.48.020 for deposit of county funds. Such surety bond or securities in lieu thereof shall be filed or deposited with the treasurer of the district, and approved by resolution of the commission.

All interest collected on district funds shall belong to the district and be deposited to its credit in the proper district funds.

A district may provide and require a reasonable bond of any other person handling moneys or securities of the district. The district may pay the premium on such bond.

[1967 c 227 § 1.]

Notes:
***Reviser's note:** RCW 36.48.020 was repealed by 1984 c 177 § 21.

RCW 82.04.4297
Deductions — Compensation from public entities for health or social welfare services — Exception.

In computing tax there may be deducted from the measure of tax amounts received from the United States or any instrumentality thereof or from the state of Washington or any municipal corporation or political subdivision thereof as compensation for, or to support, health or social welfare services rendered by a health or social welfare organization or by a municipal corporation or political subdivision, except deductions are not allowed under this section for amounts that are received under an employee benefit plan.

[2002 c 314 § 3; 2001 2nd sp.s. c 23 § 2; 1988 c 67 § 1; 1980 c 37 § 17. Formerly RCW 82.04.430(16).]

Notes:

Findings -- Refund of taxes -- Effective date -- 2002 c 314: See notes following RCW 82.04.4311.

Findings -- 2001 2nd sp.s. c 23: "The legislature finds that the deduction under the business and occupation tax statutes for compensation from public entities for health or social welfare services was intended to provide government with greater purchasing power when government provides financial support for the provision of health or social welfare services to benefited classes of persons. The legislature also finds that both the legislature and the United States congress have in recent years modified government-funded health care programs to encourage participation by beneficiaries in highly regulated managed care programs operated by persons who act as intermediaries between government entities and health or social welfare organizations. The legislature further finds that the objective of these changes is again to extend the purchasing power of scarce government health care resources, but that this objective would be thwarted to a significant degree if the business and occupation tax deduction were lost by health or social welfare organizations solely on account of their participation in managed care for government-funded health programs. In keeping with the original purpose of the health or social welfare deduction, it is desirable to ensure that compensation received from government sources through contractual managed care programs also be deductible." [2001 2nd sp.s. c 23 § 1.]

Effective date -- 2001 2nd sp.s. c 23: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [July 13, 2001]." [2001 2nd sp.s. c 23 § 4.]

Intent -- 1980 c 37: See note following RCW 82.04.4281.

"Health or social welfare organization" defined for RCW 82.04.4297 -- Conditions for exemption -- "Health or social welfare services" defined: RCW 82.04.431.

RCW 82.04.4311
Deductions — Compensation received under the federal medicare program by certain hospitals or health centers.

(1) A public hospital that is owned by a municipal corporation or political subdivision, or a nonprofit hospital, or a nonprofit community health center, or a network of nonprofit community health centers, that qualifies as a health and social welfare organization as defined in RCW 82.04.431, may deduct from the measure of tax amounts received as compensation for health care services covered under the federal medicare program authorized under Title XVIII of the federal social security act; medical assistance, children's health, or other program under chapter 74.09 RCW; or for the state of Washington basic health plan under chapter 70.47 RCW. The deduction authorized by this section does not apply to amounts received from patient copayments or patient deductibles.

(2) As used in this section, "community health center" means a federally qualified health center as defined in 42 U.S.C. 1396d as existing on August 1, 2005.

[2005 c 86 § 1; 2002 c 314 § 2.]

Notes:

Effective date -- 2005 c 86: "This act takes effect August 1, 2005." [2005 c 86 § 2.]

Findings -- 2002 c 314: "The legislature finds that the provision of health services to those people who receive federal or state subsidized health care benefits by reason of age, disability, or lack of income is a recognized, necessary, and vital governmental function. As a result, the legislature finds that it would be inconsistent with that governmental function to tax amounts received by a public hospital or nonprofit hospital qualifying as a health and social welfare organization, when the amounts are paid under a health service program subsidized by federal or state government. Further, the tax status of these amounts should not depend on whether the amounts are received directly from the qualifying program or through a managed health care organization under contract to manage benefits for a qualifying program. Therefore, the legislature adopts this act to provide a clear and understandable deduction for these amounts, and to provide refunds for taxes paid as specified in section 4 of this act." [2002 c 314 § 1.]

Refund of taxes -- 2002 c 314: "A public hospital owned by a municipal corporation or political subdivision, or a nonprofit hospital that qualifies as a health and social welfare organization under RCW 82.04.431, is entitled to:

(1) A refund of business and occupation tax paid between January 1, 1998, and April 2, 2002, on amounts that would be deductible under section 2 of this act; and

(2) A waiver of tax liability for accrued, but unpaid taxes that would be deductible under section 2 of this act." [2002 c 314 § 4.]

Effective date -- 2002 c 314: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [April 2, 2002]." [2002 c 314 § 5.]

RCW 82.32.050
Deficient tax or penalty payments — Notice — Interest — Limitations — Time extension or correction of an assessment during state of emergency.

(1) If upon examination of any returns or from other information obtained by the department it appears that a tax or penalty has been paid less than that properly due, the department shall assess against the taxpayer such additional amount found to be due and shall add thereto interest on the tax only. The department shall notify the taxpayer by mail, or electronically as provided in RCW 82.32.135, of the additional amount and the additional amount shall become due and shall be paid within thirty days from the date of the notice, or within such further time as the department may provide.

(a) For tax liabilities arising before January 1, 1992, interest shall be computed at the rate of nine percent per annum from the last day of the year in which the deficiency is incurred until the earlier of December 31, 1998, or the date of payment. After December 31, 1998, the rate of interest shall be variable and computed as provided in subsection (2) of this section. The rate so computed shall be adjusted on the first day of January of each year for use in computing interest for that calendar year.

(b) For tax liabilities arising after December 31, 1991, the rate of interest shall be variable and computed as provided in subsection (2) of this section from the last day of the year in which the deficiency is incurred until the date of payment. The rate so computed shall be adjusted on the first day of January of each year for use in computing interest for that calendar year.

(c) Interest imposed after December 31, 1998, shall be computed from the last day of the month following each calendar year included in a notice, and the last day of the month following the final month included in a notice if not the end of a calendar year, until the due date of the notice. If payment in full is not made by the due date of the notice, additional interest shall be computed until the date of payment. The rate of interest shall be variable and computed as provided in subsection (2) of this section. The rate so computed shall be adjusted on the first day of January of each year for use in computing interest for that calendar year.

(2) For the purposes of this section, the rate of interest to be charged to the taxpayer shall be an average of the federal short-term rate as defined in 26 U.S.C. Sec. 1274(d) plus two percentage points. The rate set for each new year shall be computed by taking an arithmetical average to the nearest percentage point of the federal short-term rate, compounded annually. That average shall be calculated using the rates from four months: January, April, and July of the calendar year immediately preceding the new year, and October of the previous preceding year.

(3) During a state of emergency declared under RCW 43.06.010(12), the department, on its own motion or at the request of any taxpayer affected by the emergency, may extend the due date of any assessment or correction of an assessment for additional taxes, penalties, or interest as the department deems proper.

(4) No assessment or correction of an assessment for additional taxes, penalties, or interest due may be made by the department more than four years after the close of the tax year, except (a) against a taxpayer who has not registered as required by this chapter, (b) upon a showing of fraud or of misrepresentation of a material fact by the taxpayer, or (c) where a taxpayer has executed a written waiver of such limitation. The execution of a written waiver shall also extend the period for making a refund or credit as provided in RCW 82.32.060(2).

(5) For the purposes of this section, "return" means any document a person is required by the state of Washington to file to satisfy or establish a tax or fee obligation that is administered or collected by the department of revenue and that has a statutorily defined due date.

[2008 c 181 § 501; 2007 c 111 § 106; 2003 c 73 § 1; 1997 c 157 § 1; 1996 c 149 § 2; 1992 c 169 § 1; 1991 c 142 § 9; 1989 c 378 § 19; 1971 ex.s. c 299 § 16; 1965 ex.s. c 141 § 1; 1961 c 15 § 82.32.050. Prior: 1951 1st ex.s. c 9 § 5; 1949 c 228 § 20; 1945 c 249 § 9; 1939 c 225 § 27; 1937 c 227 § 17; 1935 c 180 § 188; Rem. Supp. 1949 § 8370-188.]

Notes:

Part headings not law -- 2008 c 181: See note following RCW 43.06.220.

Part headings not law -- 2007 c 111: See note following RCW 82.16.120.

Findings -- Intent -- 1996 c 149: "The legislature finds that a consistent application of interest and penalties is in the best interest of the residents of the state of Washington. The legislature also finds that the goal of the department of revenue's interest and penalty system should be to encourage taxpayers to voluntarily comply with Washington's tax code in a timely manner. The administration of tax programs requires that there be consequences for those taxpayers who do not timely satisfy their reporting and tax obligations, but these consequences should not be so severe as to discourage taxpayers from voluntarily satisfying their tax obligations.

It is the intent of the legislature that, to the extent possible, a single interest and penalty system apply to all tax programs administered by the department of revenue." [1996 c 149 § 1.]

Effective date -- 1996 c 149: "This act shall take effect January 1, 1997." [1996 c 149 § 20.]

Effective date -- Applicability -- 1992 c 169: "(1) This act shall take effect July 1, 1992.

(2) This act is effective for all written waivers that remain enforceable as of July 1, 1992." [1992 c 169 § 4.]

Effective date -- 1991 c 142 §§ 9-11: "Sections 9 through 11 of this act shall take effect January 1, 1992." [1991 c 142 § 13.]

Severability -- 1991 c 142: See RCW 82.32A.900.

Effective dates -- Severability -- 1971 ex.s. c 299: See notes following RCW 82.04.050.

RCW 82.32.105
Waiver or cancellation of penalties or interest — Rules.

(1) If the department of revenue finds that the payment by a taxpayer of a tax less than that properly due or the failure of a taxpayer to pay any tax by the due date was the result of circumstances beyond the control of the taxpayer, the department of revenue shall waive or cancel any penalties imposed under this chapter with respect to such tax.

(2) The department shall waive or cancel the penalty imposed under RCW 82.32.090(1) when the circumstances under which the delinquency occurred do not qualify for waiver or cancellation under subsection (1) of this section if:

(a) The taxpayer requests the waiver for a tax return required to be filed under RCW 82.32.045, 82.14B.061, 82.23B.020, 82.27.060, 82.29A.050, or 84.33.086; and

(b) The taxpayer has timely filed and remitted payment on all tax returns due for that tax program for a period of twenty-four months immediately preceding the period covered by the return for which the waiver is being requested.

(3) The department shall waive or cancel interest imposed under this chapter if:

(a) The failure to timely pay the tax was the direct result of written instructions given the taxpayer by the department; or

(b) The extension of a due date for payment of an assessment of deficiency was not at the request of the taxpayer and was for the sole convenience of the department.

(4) The department of revenue shall adopt rules for the waiver or cancellation of penalties and interest imposed by this chapter.

[1998 c 304 § 13; 1996 c 149 § 17; 1975 1st ex.s. c 278 § 78; 1965 ex.s. c 141 § 8.]

Notes:

Findings -- Effective dates -- 1998 c 304: See notes following RCW 82.14B.020.

Findings -- Intent -- Effective date -- 1996 c 149: See notes following RCW 82.32.050.

Construction -- Severability -- 1975 1st ex.s. c 278: See notes following RCW 11.08.160.

RCW 82.32.160
Correction of tax — Administrative procedure — Conference — Determination by department.

Any person having been issued a notice of additional taxes, delinquent taxes, interest, or penalties assessed by the department, may within thirty days after the issuance of the original notice of the amount thereof or within the period covered by any extension of the due date thereof granted by the department petition the department in writing for a correction of the amount of the assessment, and a conference for examination and review of the assessment. The petition shall set forth the reasons why the correction should be granted and the amount of the tax, interest, or penalties, which the petitioner believes to be due. The department shall promptly consider the petition and may grant or deny it. If denied, the petitioner shall be notified by mail, or electronically as provided in RCW 82.32.135, thereof forthwith. If a conference is granted, the department shall fix the time and place therefor and notify the petitioner thereof by mail or electronically as provided in RCW 82.32.135. After the conference the department may make such determination as may appear to it to be just and lawful and shall mail a copy of its determination to the petitioner, or provide a copy of its determination electronically as provided in RCW 82.32.135. If no such petition is filed within the thirty-day period the assessment covered by the notice shall become final.

The procedures provided for herein shall apply also to a notice denying, in whole or in part, an application for a pollution control tax exemption and credit certificate, with such modifications to such procedures established by departmental rules and regulations as may be necessary to accommodate a claim for exemption or credit.

[2007 c 111 § 110; 1989 c 378 § 22; 1975 1st ex.s. c 158 § 4; 1967 ex.s. c 26 § 49; 1963 ex.s. c 28 § 8; 1961 c 15 § 82.32.160. Prior: 1939 c 225 § 29, part; 1935 c 180 § 199, part; RRS § 8370-199, part.]

Notes:

Part headings not law -- 2007 c 111: See note following RCW 82.16.120.

Effective date -- 1975 1st ex.s. c 158: See note following RCW 82.34.050.

Effective date -- 1967 ex.s. c 26: See note following RCW 82.01.050.

WAC 458-20-100 Agency filings affecting this section

Appeals.

(1) **Introduction.**

(a) This rule explains the procedures for administrative review of actions of the department or of its officers and employees in the assessment or collection of taxes, as provided in RCW 82.01.060(4), including, but not limited to:

(i) An assessment of tax, interest, or penalties;

(ii) The denial of a refund, credit, or deferral request;

(iii) The issuance of a balance due notice or a notice of delinquent taxes, including a notice of collection action; and

(iv) The issuance of an adverse ruling on future liability from the taxpayer information and education section.

(b) Persons seeking administrative review of a business license revocation, a cigarette license revocation or suspension, a log export enforcement action, or orders to county officials under Title 84 RCW should refer to the following rules:

(i) WAC 458-20-10001 for information on the revocation of a certificate of registration or the revocation or suspension of a cigarette license; or

(ii) WAC 458-20-10002 for information on log export enforcement actions and orders to county officials issued under RCW 84.08.120 and 84.41.120.

(2) **Preappeal supervisor's conference and preappeal rulings on future liability.**

(a) **Supervisor's conferences.** Taxpayers are encouraged to request a supervisor's conference when they disagree with an action proposed by the department. Taxpayers should make their request for the conference with the division of the department that proposes to issue an assessment or take some other action in dispute. Supervisor's conferences provide an opportunity to resolve issues prior to the review provided in this rule.

(b) **Rulings.** Taxpayers may request an opinion on future reporting instructions and tax liability from the department's taxpayer information and education section of the taxpayer services division. The request must be in writing, contain all pertinent facts concerning the question presented, and may contain a statement of the taxpayer's views concerning the correct application of the law. The department will advise the taxpayer in writing of its opinion in a tax ruling. The tax ruling must state all pertinent facts upon which the opinion is based and, if the taxpayer's name has been disclosed, is binding upon both the taxpayer and the department under the facts stated. It will remain binding until the facts change, the applicable statute or rule changes, a published appellate court decision not subject to review changes a prior interpretation of law, the department publicly announces a change in the policy upon which this ruling is based, or the taxpayer is notified in writing that the ruling is no longer valid. Any change in the ruling will have prospective application only. Rulings on future tax liability are subject to review as provided in this rule.

(3) **How are appeals started?** A taxpayer starts a review of a departmental action by filing a written petition. Petitions should be addressed to:

Appeals Division

Washington State Department of Revenue

P.O. Box 47460

Olympia, Washington 98504-7460

A form petition is available on the department's web site at http://dor.wa.gov or upon request from the appeals division. Taxpayers may use the form petition or prepare one of their own. The taxpayer or its authorized representative must sign the petition, which must contain the following information:

(a) The taxpayer's name, address, registration/UBI number, telephone number, fax number, e-mail address, and contact person;

(b) If represented, the representative's name, address, telephone number, fax number, and e-mail address;

(c) Identifying information from the assessment notice, balance due notice, or other document being appealed;

(d) The amount of tax, interest, or penalties in controversy, and the time period at issue;

(e) The type of appeal requested (see subsection (6) of this section);

(f) Whether an in-person hearing in Olympia or Seattle, a telephone hearing, or no hearing is requested; and

(g) A brief explanation of each issue or area of dispute and an explanation why each issue or area of dispute should be decided in the taxpayer's favor. To the extent known or available, taxpayers should cite applicable rules, statutes, or supporting case law and provide copies of records that support the taxpayer's position.

If a petition does not provide the required information, the department will notify the taxpayer in writing that the petition is not accepted for review. The notice will provide a period of time for the taxpayer to cure the defects in the petition. If a taxpayer is represented, the taxpayer should also have on file with the department a confidential tax information authorization.

(4) **To be timely, when must a petition be filed or extensions requested?** A taxpayer must file a petition with the department within thirty days after the date the departmental action has occurred.

(a) The appeals division may grant an extension of time to file a petition if the taxpayer's request is made within the thirty-day filing period. Requests for extensions may be in writing or by telephone, and must be directed to the department's appeals division.

(b) A petition or request for extension is timely if it is postmarked or received within the thirty-day filing period.

(c) The appeals division may not grant an extension of time to file a petition for refund that would exceed the time limits in WAC 458-20-229 (Refunds). A request for a refund of taxes paid must be filed within four years after the close of the tax year in which the taxes were paid. See WAC 458-20-229 for procedures on seeking a refund.

(d) The appeals division will notify taxpayers in writing when a petition is rejected as not timely.

(5) **How are appeals scheduled, heard, and decided?** The appeals division will acknowledge receipt of the petition and identify the administrative law judge (ALJ) assigned to the appeal. ALJs are attorneys trained in the interpretation of the Revenue Act and precedents established by prior rulings and court decisions. They are employed by the department to provide an informal, final review of agency actions.

(a) **Scheduling.** The ALJ will notify parties of the time when any additional documents or arguments must be submitted. If a party fails to comply with a scheduling letter or established timelines, the ALJ may decline to consider arguments or documents submitted after the scheduled timelines. A status conference in complex cases may be scheduled to provide for the orderly resolution of the case and to narrow issues and arguments for hearing.

(b) **Hearings.** Hearings may be by telephone or in-person. The ALJ may decide the case without a hearing if legal or factual issues are not in dispute, the taxpayer does not request a hearing, or the taxpayer fails to appear at a scheduled hearing or otherwise fails to respond to inquiries from the department. The appeals division will notify the taxpayer by mail whether a hearing will be held, whether the hearing will be in-person or by telephone, the location of any in-person hearing, and the date and time for any hearing in the case. The date and time for a hearing may be continued at the ALJ's discretion. Other departmental employees may attend a hearing, and the ALJ will notify the taxpayer when other departmental employees are attending. The taxpayer may appear personally or may be represented by an attorney, accountant, or any other authorized person. All hearings before an ALJ are conducted informally and in a nonadversarial, uncontested manner.

(c) **Hearing and posthearing submissions.** If a taxpayer asks to submit additional records or documents at a hearing, the taxpayer must explain why they were not submitted under the deadlines established in the scheduling letter. The ALJ has the discretion to allow late submissions by the taxpayer or the department and, if allowed, will provide the other party with additional time to respond. If additional document production or additional briefing is allowed by the ALJ, posthearing, such briefing or documents usually must be submitted within thirty days after the hearing, unless good cause is shown for additional time. ALJs have the discretion to allow additional time for further fact-finding, including scheduling an additional hearing, as necessary in a particular case.

(d) **Determinations.** Following the hearing, if any, and review of all submissions, the ALJ will issue a determination consistent with the applicable statutes, rules, case law, and department precedents. The appeals division will notify the taxpayer in writing of the decision. The determination of the ALJ is the final decision of the department and is binding upon the taxpayer unless a petition for reconsideration is timely filed by the taxpayer and accepted by the department.

(6) **Are all appeals the same?** No, in addition to regular appeals, called mainstream appeals, an appeal may also be assigned as a small claims or executive level appeal based on the amount at issue or the complexity of the issues. In addition, an appeal may be expedited under certain urgent circumstances.

(a) **Small claims appeals.** Except as set forth in (a)(i), (ii), or (iii) of this subsection, when the tax at issue in the appeal is twenty-five thousand dollars or less and the total amount of the tax plus penalties and interest at issue in the appeal is fifty thousand dollars or less, the appeal will be heard as a small claims appeal.

(i) The department may decline to hear an appeal as a small claims appeal if the department finds the appeal is not suitable for small claims resolution. Appeals with multiple or complex issues, issues of first impression, issues of industry-wide application, or constitutional issues are generally not suitable for small claims resolution.

(ii) The appeals division will notify the taxpayer in writing when an appeal is to be heard as a small claims appeal. The taxpayer may request in writing that the matter not be heard as a small claims appeal. Such requests will be granted if received or postmarked within fifteen days following the date of the notice.

(iii) In the petition the taxpayer may affirmatively request that the petition not be heard as a small claims appeal. Such requests will be granted.

Taxpayers should provide all evidence and supporting authority prior to or during the small claims hearing. Within ten working days of a small claims hearing, the department will issue an abbreviated written decision (determination) containing only the department's conclusions. The determination in a small claims appeal is the final action of the department.

(b) **Executive level appeals.** If an appeal involves an issue of first impression (one for which no agency precedent has been established) or an issue that has industry-wide significance or impact, a taxpayer may request that the petition be heard at the executive level. The request must specify the reasons why an executive level appeal is appropriate. The appeals division will grant or deny the request and will notify the taxpayer of that decision in writing. If granted, the director or the director's designee and an ALJ will hear the matter. The appeals division, on its own initiative, may also choose to hear an appeal at the executive level. The appeals division will notify the taxpayer if the department chooses to hear an appeal at the executive level.

Following the executive level hearing, the appeals division will issue a proposed determination, which becomes final thirty days from the date of issuance unless the taxpayer or another division of the department timely files an objection to the proposed determination. Objections must identify specific errors of law or fact. Unless an extension is granted, objections must be postmarked or received by the appeals division within thirty days from the date the proposed determination was issued. The taxpayer or operating division filing objections must also provide the other party with a copy of its objections. The ALJ will issue the final determination, which may or may not reflect changes based on the objections. Although rare, the ALJ and the director's designee, in consultation with the director, may grant a second hearing to hear argument on the objections. The determination in an executive level appeal is the final action of the department.

(c) **Expedited appeals.** On a very limited basis it may be necessary to expedite the review of a petition. Taxpayers or other divisions in the department requesting expedited review must make the request in writing to the appeals division, with a copy supplied to the other party. The appeals division will grant or deny such requests solely at its discretion. The appeals division will advise the taxpayer and the affected division of its decision pertaining to the expedited review request. This decision is not subject to appeal. Expedited review will be limited to appeals where it is clear that:

(i) There is a particular and extraordinary business necessity;

(ii) Document review is the only issue;

(iii) Only a legal issue remains in an appeal following a remand to an operating division;

(iv) A jeopardy warrant or bankruptcy is likely; or

(v) Urgent review is necessary within the department.

If expedited review is at the taxpayer's request, the determination in an expedited appeal is the final action of the department. If expedited review is requested by the department, the taxpayer may petition for reconsideration as

provided in subsection (7) of this section.

(7) **Request for reconsideration.** If a taxpayer believes that an error has been made in a determination, the taxpayer may, within thirty days of the issuance of the determination, petition in writing for reconsideration of the decision. Small claim appeals, executive appeals, and appeals expedited at the request of the taxpayer are not subject to reconsideration. The request for reconsideration must specify mistakes in law or fact contained in the determination and should also provide legal authority as to why those mistakes necessitate the reconsideration of the determination. A taxpayer may request an executive level reconsideration when the determination decided an issue of first impression or an issue that has industry-wide impact or significance. The request for executive reconsideration must also specify the reasons why executive level review is appropriate.

The appeals division may, without a hearing, grant or deny the request for reconsideration. If the request is denied, the department will mail to the taxpayer written notice of the denial and the reason for the denial. The denial is then the final action of the department. If the request is granted, a hearing on reconsideration may be conducted or a determination may be issued without a hearing. A reconsideration determination is the final action of the department.

(8) **Appeals to board of tax appeals.** A taxpayer may appeal a denial of a petition for correction of an assessment under RCW 82.32.160 or a denial of a petition for refund under RCW 82.32.170 to the board of tax appeals. The board of tax appeals also has jurisdiction to hear appeals taken from department decisions rendered under RCW 82.34.110 (relating to pollution control facilities tax exemptions and credits) and82.49.060 (relating to watercraft excise tax). The board of tax appeals does not have jurisdiction to hear appeals from determinations involving rulings of future tax liability issued by the taxpayer information and education section. See RCW 82.03.130 (1)(a) and 82.03.190. A taxpayer filing an appeal with the board of tax appeals must pay the tax by the due date, unless arrangements are made with the department for a stay of collection under RCW 82.32.200. See WAC 458-20-228 (Returns, remittances, penalties, extensions, interest, stay of collection).

(9) **Thurston County superior court.** A taxpayer may also pay the tax in dispute and petition for a refund in Thurston County superior court. The taxpayer must comply with the requirements of RCW 82.32.180.

(10) **Settlements.** At any time during the appeal process, the taxpayer or the department may propose to compromise the matter by settlement. Taxpayers interested in settling a dispute should submit a written offer to the ALJ. The offer should identify the amount in dispute, why the dispute should be settled, the amount offered in settlement, and why the amount being offered is reasonable.

(a) Settlement may be appropriate when:

(i) The issue is nonrecurring. An issue is nonrecurring when the law has changed so future periods are treated differently than the periods under appeal; or the taxpayer's position or business activity has changed so that in future periods the issue under consideration is changed or does not exist; or the taxpayer agrees to a prospective change;

(ii) A conflict exists between precedents, such as statutes, rules, excise tax bulletins, or specific written instructions to the taxpayer;

(iii) A strict application of the law would have unduly harsh consequences which may be only relieved by an equitable doctrine; or

(iv) There is uncertainty of the outcome of the appeal if it were presented to a court. Factors to be considered include the relative degrees of certainty and the costs for both the taxpayer and the state. This category includes cases which involve factual issues that might require extensive expert testimony to resolve.

(b) Settlement is not appropriate when:

(i) The same issue in the taxpayer's appeal is being litigated by the department;

(ii) The taxpayer challenges a long-standing departmental policy or a rule that the department will not change unless the policy or rule is declared invalid by a court of record;

(iii) The taxpayer presents issues that have no basis upon which relief for the taxpayer can be granted or given. Settlement will not be considered if the taxpayer's offer of settlement is simply to eliminate the inconvenience or cost of further negotiation or litigation, and is not based upon the merits of the case;

(iv) The taxpayer's only argument is that a statute is unconstitutional; or

(v) The taxpayer's only argument is financial hardship. Financial hardship issues are properly discussed with the department's compliance division.

(c) Each settlement is concluded by a closing agreement signed by both the department and the taxpayer as provided by RCW 82.32.350 and is binding on both parties as provided in RCW 82.32.360. A closing agreement has no precedential value.

[Statutory Authority: RCW 82.32.300, 82.01.060 (2) and (4). 05-20-036, § 458-20-100, filed 9/29/05, effective 11/1/05. Statutory Authority: RCW 82.32.300. 90-24-049, § 458-20-100, filed 11/30/90, effective 1/1/91; 83-07-032 (Order ET 83-15), § 458-20-100, filed 3/15/83; Order ET 75-1, § 458-20-100, filed 5/2/75; Order ET 70-3, § 458-20-100 (Rule 100), filed 5/29/70, effective 7/1/70.]

OTHER AUTHORITIES

Instāns, instant-, present. See INSTANT.] —**in•stan'ta•ne'i•ty** (ĭn-stăn'-tə-nē'ĭ-tē, ĭn'stən-) *n.* —**in'stan•ta'ne•ous•ly** *adv.* —**in'stan•ta'-ne•ous•ness** *n.*

in•stan•ter (ĭn-stăn'tər) *adv.* Without delay; instantly. [Medieval Latin, from Latin, urgently, from *īnstāns, instant-*, present. See INSTANT.]

in•stan•ti•ate (ĭn-stăn'shē-āt') *tr.v.* **-at•ed, -at•ing, -ates** To represent (an abstract concept) by a concrete or tangible example: *"Two apples . . . both instantiate the single universal redness"* (J. Holloway). [Latin *instantia*, example; see INSTANCE + -ATE[1].] —**in•stan'ti•a'tion** *n.* —**in•stan'tia•tive** (-stăn'shə-tĭv) *adj.*

in•stant•ly (ĭn'stənt-lē) *adv.* **1.** At once. **2.** With insistence; urgently. ❖ *conj. Chiefly British* As soon as.

instant replay *n.* **1a.** The recording and immediate playback of part of a live television broadcast, as of a sports play. **b.** The part so recorded and replayed. **2.** *Informal* Something repeated directly or soon after its original occurrence.

in•star[1] (ĭn-stär') *tr.v.* **-starred, -star•ring, -stars** To stud with or as if with stars.

in•star[2] (ĭn'stär') *n.* A stage of an insect or other arthropod between molts. [New Latin *īnstar*, from Latin, image, form.]

in•state (ĭn-stāt') *tr.v.* **-stat•ed, -stat•ing, -states** To establish in office; install.

in•stau•ra•tion (ĭn'stô-rā'shən) *n.* **1.** Renovation; restoration. **2.** The institution or establishment of something. [Latin *īnstaurātiō, īnstaurātiōn-*, from *īnstaurātus*, past participle of *Īnstaurāre*, to renew. See **stā-** in Appendix I.]

in•stead (ĭn-stĕd') *adv.* **1.** In the place of something previously mentioned; as a substitute or an equivalent: *Having planned to drive, we walked instead.* **2.** In preference; as an alternative: *yearned instead for a home and family.* [Middle English *in sted of*, in place of : *in*, in; see IN[1] + *stede*, place; see STEAD + *of*, of; see OF.]

instead of *prep.* In place of; rather than: *ordered chicken instead of fish.*

in•step (ĭn'stĕp') *n.* **1.** The arched middle part of the human foot between the toes and the ankle. **2.** The part of a shoe or stocking covering the instep. [Middle English.]

in•sti•gate (ĭn'stĭ-gāt') *tr.v.* **-gat•ed, -gat•ing, -gates** **1.** To urge on; goad. **2.** To stir up; foment. [Latin *īnstīgāre, īnstīgāt-*. See **steig-** in Appendix I.] —**in'sti•ga'tion** *n.* —**in'sti•ga'tive** *adj.* —**in'sti•ga'-tor** *n.*

in•still also **in•stil** (ĭn-stĭl') *tr.v.* **-stilled, -still•ing, -stills** also **-stils** **1.** To introduce by gradual, persistent efforts; implant: *"Morality . . . may be instilled into their minds"* (Thomas Jefferson). **2.** To pour in (medicine, for example) drop by drop. [Middle English *instillen*, from Latin *īnstillāre* : *in-*, into; see IN-[2] + *stillāre*, to drip, drop (from *stilla*, drop).] —**in'stil•la'tion** (ĭn'stə-lā'shən) *n.* —**in•still'er** *n.* —**in•still'ment** *n.*

in•stinct (ĭn'stĭngkt') *n.* **1.** An inborn pattern of behavior that is characteristic of a species and is often a response to specific environmental stimuli: *the spawning instinct in salmon; altruistic instincts in social animals.* **2.** A powerful motivation or impulse. **3.** An innate capability or aptitude: *an instinct for tact and diplomacy.* ❖ *adj.* (ĭn-stĭngkt') **1.** Deeply filled or imbued: *words instinct with love.* **2.** *Obsolete* Impelled from within. [Middle English, from Latin *īnstīnctus*, impulse, from past participle of *instinguere*, to incite : *in-*, intensive pref.; see IN-[2] + *stinguere*, to prick; see **steig-** in Appendix I.]

in•stinc•tive (ĭn-stĭngk'tĭv) *adj.* **1.** Of, relating to, or prompted by instinct. **2.** Arising from impulse; spontaneous and unthinking: *an instinctive mistrust of bureaucrats.* —**in•stinc'tive•ly** *adv.*

Synonyms *instinctive, instinctual, intuitive, visceral* These adjectives mean derived from or prompted by a natural tendency or impulse: *an instinctive fear of snakes; instinctual behavior; an intuitive perception; visceral revulsion.* See also synonyms at **spontaneous.**

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in•stinc•tu•al (ĭn-stĭngk'chōō-əl) *adj.* Of, relating to, or derived from instinct. See synonyms at **instinctive.** —**in•stinc'tu•al•ly** *adv.*

in•sti•tute (ĭn'stĭ-tōōt', -tyōōt') *tr.v.* **-tut•ed, -tut•ing, -tutes** **1a.** To establish, organize, and set in operation. **b.** To initiate; begin. See synonyms at **found[1]**. **2.** To establish or invest in an office or a position. ❖ *n.* **1a.** Something instituted, especially an authoritative rule or precedent. **b. institutes** A digest of the principles or rudiments of a particular subject, especially a legal abstract. **2.** An organization founded to promote a cause: *a cancer research institute.* **3a.** An educational institution, especially one for the instruction of technical subjects. **b.** The building or buildings housing such an institution. **4.** A usually short, intensive workshop or seminar on a specific subject. [Middle English *instituten*, from Latin *īnstituere, īnstitūt-*, to establish : *in-*, in; see IN-[2] + *statuere*, to set up; see **stā-** in Appendix I.] —**in'sti•tut'er, in'sti•tu'-tor** *n.*

in•sti•tu•tion (ĭn'stĭ-tōō'shən, -tyōō'-) *n.* **1.** The act of instituting. **2a.** A custom, practice, relationship, or behavioral pattern of importance in the life of a community or society: *the institutions of marriage and the family.* **b.** *Informal* One long associated with a specified place, position, or function. **3a.** An established organization or foundation, especially one dedicated to education, public service, or culture. **b.** The building or buildings housing such an organization. **c.** A place for the care of persons who are destitute, disabled, or mentally ill.

in•sti•tu•tion•al (ĭn'stĭ-tōō'shə-nəl, -tyōō'-) *adj.* **1.** Of or relating to an institution or institutions. **2.** Organized as or forming an institution: *institutional religion.* **3.** Characteristic or suggestive of an institution, especially in being uniform, dull, or unimaginative: *institutional furniture; a pale institutional green.* **4.** Of or relating to the pr institutes of a subject such as law. —**in'sti•tu'tion•al•ly** *ad*

in•sti•tu•tion•al•ism (ĭn'stĭ-tōō'shə-nə-lĭz'əm, -tyōō Adherence to or belief in established forms, especially belief in religion. **2.** Use of public institutions for the care of people wh ically or mentally disabled, criminally delinquent, or incapab pendent living. —**in'sti•tu'tion•al•ist** *n.*

in•sti•tu•tion•al•ize (ĭn'stĭ-tōō'shə-nə-līz', -tyōō'-) *t* **-iz•ing, -iz•es** **1a.** To make into, treat as, or give the chara institution to. **b.** To make part of a structured and usually lished system: *a society that has institutionalized injustice.* **2.** person) in the care of an institution. —**in'sti•tu'tion•al•** (-lĭ-zā'shən) *n.*

instr. *abbr.* **1.** instructor **2.** instrument **3.** instrumental

in•stroke (ĭn'strōk') *n.* An inward stroke, especially a pis moving away from the crankshaft.

in•struct (ĭn-strŭkt') *v.* **-struct•ed, -struct•ing, -struct** To provide with knowledge, especially in a methodical way. See at **teach.** **2.** To give orders to; direct. —*intr.* To serve as an i [Middle English *instructen*, from Latin *īnstruere, īnstrūct-*, to pr struct : *in-*, on; see IN-[2] + *struere*, to build; see **ster-[2]** in Apper

in•struc•tion (ĭn-strŭk'shən) *n.* **1.** The act, practice, or p of instructing. **2a.** Imparted knowledge. **b.** An imparted or item of knowledge; a lesson. **3.** *Computer Science* A sequence o tells a central processing unit to perform a particular operatio contain data to be used in the operation. **4a.** An authoritative to be obeyed; an order. Often used in the plural: *had instruct home by midnight.* **b. instructions** Detailed directions on p *read the instructions for assembly.* —**in•struc'tion•al** *adj.*

in•struc•tive (ĭn-strŭk'tĭv) *adj.* Conveying knowledge or tion; enlightening. —**in•struc'tive•ly** *adv.* —**in•struc'tive•**

in•struc•tor (ĭn-strŭk'tər) *n.* **1.** One who instructs; a teac college or university teacher who ranks below an assistant p —**in•struc'tor•ship'** *n.*

in•stru•ment (ĭn'strə-mənt) *n.* **1.** A means by which som done; an agency. **2.** One used by another to accomplish a pu dupe. **3.** An implement used to facilitate work. See synonyms **4.** A device for recording, measuring, or controlling, especiall device functioning as part of a control system. **5.** *Music* A d playing or producing music: *a keyboard instrument.* **6.** A legal do such as a deed, will, mortgage, or insurance policy. ❖ *tr.v.* **-ment•ed, -ment•ing, -ments** **1.** To provide or equip with ments. **2.** *Music* To compose or arrange for performance. **3.** To a legal document to. [Middle English, from Old French, from L *strūmentum*, tool, implement, from *instruere*, to prepare. See INS

in•stru•men•tal (ĭn'strə-mĕn'tl) *adj.* **1.** Serving as a m agency; implemental: *was instrumental in solving the crime.* **2.** C ing to, or accomplished with an instrument or tool. **3.** *Music* Pe on or written for an instrument. **4.** *Grammar* Of, relating to, the case used typically to express means, agency, or accompanin Of or relating to instrumentalism. ❖ *n.* **1a.** *Grammar* The instru case. **b.** A word or form in the instrumental case. **2.** *Music* A co tion for one or more instruments, usually without vocal accompa —**in'stru•men'tal•ly** *adv.*

in•stru•men•tal•ism (ĭn'strə-mĕn'tl-ĭz'əm) *n.* A pr theory that ideas are instruments that function as guides of actio validity being determined by the success of the action.

in•stru•men•tal•ist (ĭn'strə-mĕn'tl-ĭst) *n.* **1.** *Music* O plays an instrument. **2.** An advocate or a student of instrume ❖ *adj.* Of, relating to, or advocating instrumentalism.

in•stru•men•tal•i•ty (ĭn'strə-mĕn-tăl'ĭ-tē) *n., pl.* **-ties** state or quality of being instrumental. **2.** A means; an agency. **3.** sidiary branch, as of a government, by means of which functions icies are carried out.

in•stru•men•ta•tion (ĭn'strə-mĕn-tā'shən) *n.* **1.** The appl or use of instruments. **2.** *Music* **a.** The study and practice of arr music for instruments. **b.** The arrangement or orchestration re from such practice. **c.** A list of instruments used in an orchestratio The study, development, and manufacture of instruments, as for tific or industrial use. **b.** Instruments for a specific purpose. **4.** I mentality.

instrument board *n.* See **instrument panel.**

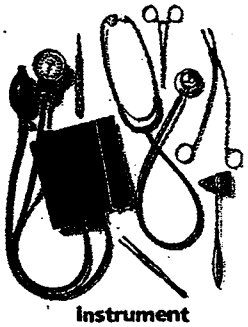
instrument flying *n.* Aircraft navigation by reference to i ments only.

instrument landing *n.* An aircraft landing made by means struments and ground-based radio equipment only.

instrument panel *n.* A mounted array of instruments used erate a machine, especially the dashboard of an automotive vehicl craft, or motorboat. Also called *instrument board.*

in•sub•or•di•nate (ĭn'sə-bôr'dn-ĭt) *adj.* Not submissive thority: *has a history of insubordinate behavior.* —**in'sub•or'di•n** —**in'sub•or'di•nate•ly** *adv.* —**in'sub•or'di•na'tion** *n.*

Synonyms *insubordinate, rebellious, mutinous, factious, se* These adjectives mean in opposition to and usually in defiance of lished authority. *Insubordinate* implies failure or refusal to recogn submit to the authority of a superior: *was fired for being insubord Rebellious* implies open defiance of authority or resistance to contr *bellious students demonstrating on campus. Mutinous* pertains to against constituted authority, especially that of a naval or military mand: *mutinous sailors defying the captain. Factious* implies divisiv dissension or disunity within



Instrument
variety of medical instruments

§ 3-104(a). See NEGOTIABLE INSTRUMENT. **3.** A means by which something is achieved, performed, or furthered <an instrument of social equality>.

inchoate instrument. An unrecorded instrument that must, by law, be recorded to serve as effective notice to third parties. • Until the instrument is recorded, it is effective only between the parties to the instrument.

incomplete instrument. A paper that, although intended to be a negotiable instrument, lacks an essential element. • An incomplete instrument may be enforced if it is subsequently completed. UCC § 3-115. [Cases: Bills and Notes ⚷144. C.J.S. *Bills and Notes; Letters of Credit* §§ 127, 129–130, 143.]

indispensable instrument. The formal written evidence of an interest in intangibles, so necessary to represent the intangible that the enjoyment, transfer, or enforcement of the intangible depends on possession of the instrument.

perfect instrument. An instrument (such as a deed or mortgage) that is executed and filed with a public registry.

sealed instrument. See SEALED INSTRUMENT.

instrumental crime. See CRIME.

instrumentality, *n.* **1.** A thing used to achieve an end or purpose. **2.** A means or agency through which a function of another entity is accomplished, such as a branch of a governing body.

instrumentality rule. The principle that a corporation is treated as a subsidiary if it is controlled to a great extent by another corporation. — Also termed *instrumentality theory.*

instrumenta noviter reperta (in-strə-**men**-tə **noh**-və-tər ri-**pər**-tə). [Law Latin] *Hist.* Instruments newly discovered. See EX INSTRUMENTIS DE NOVO REPERTIS.

instrument of accession. *Int'l law.* A document formally acknowledging the issuing state's consent to an existing treaty, and exchanged with the treaty parties or deposited with a designated state or international organization. See ACCESSION (3).

instrument of appeal. *Hist. English law.* A document used to appeal a judgment of divorce rendered by a trial judge of the Probate, Divorce and Admiralty Division to the full panel of the court. • The use of the instrument of appeal ended in 1881, when appeals were taken to the Court of Appeal rather than the full panel of the Probate, Divorce and Admiralty Division.

instrument of crime. See CRIMINAL INSTRUMENT.

instrument of ratification. *Int'l law.* A document formally acknowledging the issuing state's confirmation and acceptance of a treaty, and exchanged by the treaty parties or deposited with a designated state or international organization. See RATIFICATION (4).

instrumentum (in-stroo-**men**-təm). [Latin] *Hist.* A document, deed, or instrument; esp., a document that is not under seal, such as a court roll.

insubordination. 1. A willful disregard of an employer's instructions, esp. behavior that gives the employer cause to terminate a worker's employment. [Cases: Master and Servant ⚷30(5). C.J.S. *Employer-Employee Relationship* §§ 65, 71.] **2.** An act of disobedience to proper authority; esp., a refusal to obey an order that a superior officer is authorized to give.

in subsidium (in səb-**sid**-ee-əm). [Latin] *Hist.* In aid of.

insufficient evidence. See EVIDENCE.

insufficient funds. See NOT SUFFICIENT FUNDS.

insula (**in**-s[y]ə-lə), *n.* [Latin] *Roman law.* **1.** An island. **2.** A detached house or block of apartments leased to tenants.

insular, *adj.* **1.** Of, relating to, from, or constituting an island <insular origin>. **2.** Isolated from, uninterested in, or ignorant of things outside a limited scope <insular viewpoint>.

insular area. A territory or commonwealth. • This phrase is used by some writers to denote the genus of which the terms *territory* and *commonwealth* are species. See COMMONWEALTH (2); TERRITORY (1).

insular court. See COURT.

insular possession. See POSSESSION.

in suo (in s[y]oo-oh). [Latin] *Hist.* In reference to one's own affairs.

in suo genere (in s[y]oo-oh **jen**-ər-ee). [Latin] *Hist.* Of their own kind. • The phrase usu. referred to certain writings that were binding even though they lacked the formal requirements.

in suo ordine (in s[y]oo-oh **or**-də-nee). [Latin] *Hist.* In his order.

> "In suo ordine .... A cautioner who is entitled to the benefit of discussion can only be called upon, for fulfilment of the obligation which he guaranteed, in his order — that is, after the principal creditor has been discussed. So, also an heir can only be made liable for the moveable debts of his ancestor, after the executor who succeeded to the moveable estate has been discussed, and where the moveable estate has proved insufficient to meet those debts." John Trayner, *Trayner's Latin Maxims* 277 (4th ed. 1894).

insurable, *adj.* Able to be insured <an insurable risk>. — **insurability,** *n.*

insurable interest. See INTEREST (2).

insurable value. The worth of the subject of an insurance contract, usu. expressed as a monetary amount. [Cases: Insurance ⚷2171. C.J.S. *Insurance* §§ 1108–1109, 1204.]

insurance. 1. A contract by which one party (the *insurer*) undertakes to indemnify another party (the *insured*) against risk of loss, damage, or liability arising from the occurrence of some specified contingency, and usu. to defend the insured or to pay for a defense regardless of whether the insured is ultimately found liable. • An insured party usu. pays a premium to the insurer in exchange for the insurer's assumption of the insured's risk. Although indemnification provisions are most common in insurance policies, parties to any type of contract may agree on indemnification arrangements. [Cases: Insurance ⚷1001. C.J.S. *Insurance* § 2.] **2.** The amount for which someone or something is covered by such an agreement. — **insure,** *vb.*

> "Insurance, or as it is sometimes called, assurance, is a contract by which one party, for a consideration, which is

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 1624

Chapter 23, Laws of 2001

(partial veto)

57th Legislature
2001 Second Special Legislative Session

HEALTH OR SOCIAL WELFARE SERVICES--TAX DEDUCTION

EFFECTIVE DATE: 7/13/01

Passed by the House June 4, 2001
Yeas 87 Nays 0

FRANK CHOPP
Speaker of the House of Representatives

CLYDE BALLARD
Speaker of the House of Representatives

Passed by the Senate June 14, 2001
Yeas 48 Nays 0

BRAD OWEN
President of the Senate

Approved July 13, 2001, with the exception of section 3, which is vetoed.

GARY LOCKE
Governor of the State of Washington

CERTIFICATE

We, Timothy A. Martin and Cynthia Zehnder, Co-Chief Clerks of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 1624** as passed by the House of Representatives and the Senate on the dates hereon set forth.

TIMOTHY A. MARTIN
Chief Clerk

CYNTHIA ZEHNDER
Chief Clerk

FILED

July 13, 2001 - 3:14 p.m.

Secretary of State
State of Washington

H-2165.1

SUBSTITUTE HOUSE BILL 1624

Passed Legislature - 2001 2nd Special Session

State of Washington 57th Legislature 2001 Regular Session

By House Committee on Finance (originally sponsored by Representatives Morris, Cairnes, Reardon, Conway, Dunshee, Ogden, Pennington, Van Luven, Doumit, Veloria, Dickerson, Fromhold, Anderson and Edwards)

Read first time . Referred to Committee on .

1 AN ACT Relating to the business and occupation tax deduction for
2 health or social welfare services as applied to government-funded
3 health benefits paid through managed care organizations; amending RCW
4 82.04.4297; creating new sections; and declaring an emergency.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 NEW SECTION. **Sec. 1.** The legislature finds that the deduction
7 under the business and occupation tax statutes for compensation from
8 public entities for health or social welfare services was intended to
9 provide government with greater purchasing power when government
10 provides financial support for the provision of health or social
11 welfare services to benefited classes of persons. The legislature also
12 finds that both the legislature and the United States congress have in
13 recent years modified government-funded health care programs to
14 encourage participation by beneficiaries in highly regulated managed
15 care programs operated by persons who act as intermediaries between
16 government entities and health or social welfare organizations. The
17 legislature further finds that the objective of these changes is again
18 to extend the purchasing power of scarce government health care
19 resources, but that this objective would be thwarted to a significant

degree if the business and occupation tax deduction were lost by health or social welfare organizations solely on account of their participation in managed care for government-funded health programs. In keeping with the original purpose of the health or social welfare deduction, it is desirable to ensure that compensation received from government sources through contractual managed care programs also be deductible.

Sec. 2. RCW 82.04.4297 and 1988 c 67 s 1 are each amended to read as follows:

In computing tax there may be deducted from the measure of tax amounts received from the United States or any instrumentality thereof or from the state of Washington or any municipal corporation or political subdivision thereof as compensation for, or to support, health or social welfare services rendered by a health or social welfare organization or by a municipal corporation or political subdivision, except deductions are not allowed under this section for amounts that are received under an employee benefit plan. <u>For purposes of this section, "amounts received from" includes amounts received by a health or social welfare organization that is a nonprofit hospital or public hospital from a managed care organization or other entity that is under contract to manage health care benefits for the federal medicare program authorized under Title XVIII of the federal social security act; for a medical assistance, children's health, or other program authorized under chapter 74.09 RCW; or for the state of Washington basic health plan authorized under chapter 70.47 RCW, to the extent that these amounts are received as compensation for health care services within the scope of benefits covered by the pertinent government health care program.</u>

***<u>NEW SECTION.</u>** Sec. 3. This act applies to taxes collected after the effective date of this act, including taxes collected on reporting periods prior to the effective date of this act.*

***Sec. 3 was vetoed. See message at end of chapter.**

<u>NEW SECTION.</u> **Sec. 4.** This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately.

Passed the House June 4, 2001.
Passed the Senate June 14, 2001.
Approved by the Governor July 13, 2001, with the exception of certain items that were vetoed.
Filed in Office of Secretary of State July 13, 2001.

Note: Governor's explanation of partial veto is as follows:

"I am returning herewith, without my approval as to section 3, Substitute House Bill No. 1624 entitled:

"AN ACT Relating to the business and occupation tax deduction for health or social welfare services as applied to government-funded health benefits paid through managed care organizations;"

Substitute House Bill No. 1624 authorizes a business and occupation (B&O) tax deduction for amounts received by a health or social welfare organization that is a non-profit hospital or a public hospital, from a managed care organization or other entity that is under contract with the federal or state government to manage certain health care benefits. The deduction is equal to the amount of payments the entity receives for health benefits for Medicare; medical assistance, children's health, or other programs authorized pursuant to RCW 74.09; or the Washington Basic Health Plan. The credit amount is limited to the extent these payments are received as compensation for health care services within the scope of benefits covered by the pertinent government health care program.

Section 3 of this bill would have applied the deduction to taxes collected in the future, on reporting periods prior to the effective date of this act. The retroactive nature of the provision is not fair to taxpayers who have timely reported and remitted their taxes. Taxpayers who failed to pay their taxes due before the effective date of this bill would have been rewarded for being delinquent, while those who paid on time would not receive a refund (such refunds are prohibited by Article VIII, Section 7 of the Washington Constitution as interpreted by the Washington Supreme Court).

For this reason, I have vetoed section 3 of Substitute House Bill No. 1624.

With the exception of section 3, Substitute House Bill No. 1624 is approved."

CERTIFICATION OF ENROLLMENT

HOUSE BILL 2732

Chapter 314, Laws of 2002

57th Legislature
2002 Regular Session

SUBSIDIZED HEALTH CARE--TAX DEDUCTION

EFFECTIVE DATE: 4/2/02

Passed by the House February 18, 2002
Yeas 97 Nays 1

FRANK CHOPP
Speaker of the House of Representatives

Passed by the Senate March 12, 2002
Yeas 48 Nays 0

BRAD OWEN
President of the Senate

Approved April 2, 2002

GARY LOCKE
Governor of the State of Washington

CERTIFICATE

I, Cynthia Zehnder, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **HOUSE BILL 2732** as passed by the House of Representatives and the Senate on the dates hereon set forth.

CYNTHIA ZEHNDER
Chief Clerk

FILED

April 2, 2002 - 10:36 a.m.

Secretary of State
State of Washington

HOUSE BILL 2732

Passed Legislature - 2002 Regular Session

State of Washington 57th Legislature 2002 Regular Session

By Representatives Gombosky, Cairnes, Berkey, Nixon, Morris, Armstrong, Esser, Fromhold, Ogden, Conway, Hunt, Van Luven, Veloria, Romero, Reardon, Edwards, Chase, Morell, Santos, Kenney and Wood

Read first time 01/25/2002. Referred to Committee on Finance.

1 AN ACT Relating to the tax treatment of revenue from federal or
2 state subsidized health care; amending RCW 82.04.4297; adding a new
3 section to chapter 82.04 RCW; creating new sections; and declaring an
4 emergency.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 NEW SECTION. **Sec. 1.** The legislature finds that the provision of
7 health services to those people who receive federal or state subsidized
8 health care benefits by reason of age, disability, or lack of income is
9 a recognized, necessary, and vital governmental function. As a result,
10 the legislature finds that it would be inconsistent with that
11 governmental function to tax amounts received by a public hospital or
12 nonprofit hospital qualifying as a health and social welfare
13 organization, when the amounts are paid under a health service program
14 subsidized by federal or state government. Further, the tax status of
15 these amounts should not depend on whether the amounts are received
16 directly from the qualifying program or through a managed health care
17 organization under contract to manage benefits for a qualifying
18 program. Therefore, the legislature adopts this act to provide a clear

and understandable deduction for these amounts, and to provide refunds for taxes paid as specified in section 4 of this act.

NEW SECTION. **Sec. 2.** A new section is added to chapter 82.04 RCW to read as follows:

A public hospital that is owned by a municipal corporation or political subdivision, or a nonprofit hospital that qualifies as a health and social welfare organization as defined in RCW 82.04.431, may deduct from the measure of tax amounts received as compensation for health care services covered under the federal medicare program authorized under Title XVIII of the federal social security act; medical assistance, children's health, or other program under chapter 74.09 RCW; or for the state of Washington basic health plan under chapter 70.47 RCW. The deduction authorized by this section does not apply to amounts received from patient copayments or patient deductibles.

Sec. 3. RCW 82.04.4297 and 2001 2nd sp.s. c 23 s 2 are each amended to read as follows:

In computing tax there may be deducted from the measure of tax amounts received from the United States or any instrumentality thereof or from the state of Washington or any municipal corporation or political subdivision thereof as compensation for, or to support, health or social welfare services rendered by a health or social welfare organization or by a municipal corporation or political subdivision, except deductions are not allowed under this section for amounts that are received under an employee benefit plan. ((~~For purposes of this section, "amounts received from" includes amounts received by a health or social welfare organization that is a nonprofit hospital or public hospital from a managed care organization or other entity that is under contract to manage health care benefits for the federal medicare program authorized under Title XVIII of the federal social security act; for a medical assistance, children's health, or other program authorized under chapter 74.09 RCW; or for the state of Washington basic health plan authorized under chapter 70.47 RCW, to the extent that these amounts are received as compensation for health care services within the scope of benefits covered by the pertinent government health care program.~~))

1 NEW SECTION. **Sec. 4.** A public hospital owned by a municipal
2 corporation or political subdivision, or a nonprofit hospital that
3 qualifies as a health and social welfare organization under RCW
4 82.04.431, is entitled to:
5 (1) A refund of business and occupation tax paid between January 1,
6 1998, and the effective date of this act on amounts that would be
7 deductible under section 2 of this act; and
8 (2) A waiver of tax liability for accrued, but unpaid taxes that
9 would be deductible under section 2 of this act.

10 NEW SECTION. **Sec. 5.** This act is necessary for the immediate
11 preservation of the public peace, health, or safety, or support of the
12 state government and its existing public institutions, and takes effect
13 immediately.

Passed the House February 18, 2002.
Passed the Senate March 12, 2002.
Approved by the Governor April 2, 2002.
Filed in Office of Secretary of State April 2, 2002.

also : such use of public institutions ⟨with declining family solidarity ~ became increasingly important in the care of the sick, the unwanted, the aged⟩ **b** : the characteristics (as regimentation, standardization, and impersonality) that are associated with institutional life ⟨there was no ~ about this happy home⟩ **3 a** : the doctrines and teachings of institutional economics **b** : a theory that regards the establishment and maintenance of institutions (as for education, charity, and social activities) as an essential function of a church

in·sti·tu·tion·al·ist \-ᵊləst, -ələ-\ *n* -s **1** : a writer on or of institutes esp. of the law **2** : an adherent to, teacher of, or believer in any form of institutionalism : a defender of traditional institutions

in·sti·tu·tion·al·iza·tion \-ᵊlə'zāshən, -ᵊl,ī'z-, -ələ'z-, -ə,lī'z-\ *n* -s **1** : the quality or state of being or becoming institutionalized ⟨a pleasant custom always has a tendency toward ~⟩ **2** : the action or a result of institutionalizing ⟨the ~ of the insane⟩

in·sti·tu·tion·al·ize \-ᵊl,īz, -ə,līz\ *vt* -ED/-ING/-S *see -ize in Explan Notes* [*institutional* + *-ize*] **1** : to give the character of an institution to : make into or treat like an institution ⟨modern society tends to ~ its burdens⟩; *esp* : to incorporate into a system of organized and often highly formalized belief, practice, or acceptance ⟨the Japanese *institutionalized* suicide⟩ ⟨*institutionalized* graft⟩ **2** : to place in or commit to the care of a specialized institution (as for the insane, alcoholics, epileptics, delinquent youth, or the aged) **3** : to accustom (a person) so firmly to the care and supervised routine of an institution as to make incapable of managing a life outside

in·sti·tu·tion·ary \¦==¦t(y)üshə,nerē, (ˈ)=¦t(y)ü-, -shnərē, -ri\ *adj* : of or relating to institution in office ⟨an ~ banquet⟩

in·sti·tu·tion·ize \,==ˈt(y)üshə,nīz, =ˈt(y)-\ [*institution* + *-ize*] *vt* -ED/-ING/-S : INSTITUTIONALIZE 1

institutions *pl of* INSTITUTION

in·sti·tu·tive \ˈ==,t(y)üd·iv, ˈ=,t(y)-\ *adj* [L *institutus* (past part. of *instituere* to institute) + E *-ive* — more at INSTITUTE] **1** : tending to institute : concerned with or leading to the institution of something ⟨~ factors⟩ ⟨an ~ meeting⟩ **2** *obs* : characterized or formed by institution : CONVENTIONAL

in·sti·tu·tor \-üd·ə(r), -ütə-\ *n* -s [L, fr. *institutus* (past part.) + *-or*] : one that institutes: as **a** : FOUNDER, ORDAINER, ESTABLISHER ⟨the ~ of this pleasant custom⟩ **b** *archaic* : TEACHER, INSTRUCTOR **c** : a Protestant Episcopal bishop or a priest delegated by him who institutes a rector or assistant minister into a parish or church

in·sti·tu·tress \¦==¦t(y)ü·trəs, (ˈ)=¦t(y)-\ *also* **in·sti·tu·trix** \-ü·triks\ *n, pl* **institutress·es** \-ü·trəsəz\ *also* **institutrix·es** \-ü·triksəz\ *or* **institutri·ces** \,==ˈt(y)ü·trə,sēz, =ˈt(y)-; ,==(,)t(y)üˈtrī(,)sēz\ [*institutress* fr. *instituter* + *-ess*; *institutrix* fr. *institutor*, after such pairs as E *director*: *directrix*] : a female institutor

instl *abbr* installation

instmt *abbr* instrument

instn *abbr* **1** institution **2** instruction

in store *adv (or adj)* : at or from the point where stored with subsequent storage and shipping costs to be paid by the buyer ⟨goods sold *in store*⟩ ⟨payment to be made *in store*⟩ — compare EX STORE, FREE ON BOARD

instore *vt* [ME *instoren*, fr. ML *instaurare*, fr. L, to renew, restore — more at INSTAURATION] *obs* : FURNISH, PROVIDE

instr *abbr* **1** instruction; instructor **2** instrument; instrumental

1**instreaming** \ˈinz,t-, ˈin,st-\ *adj* [2*in* + *streaming*, pres. part. of *stream* (after *stream in*, v.)] : streaming in : entering like flowing water

2**instreaming** \"\ *n* [4*in* + *streaming*, gerund of *stream* (after *stream in*, v.)] : the action of entering like a stream of water : a flowing in ⟨the . . . ~ of beauty and truth —Cecil Sprigge⟩

in·strengthen \ənzˈt-,ənˈst-\ *vt* [2*in-* + *strengthen*] : to give an inner strength to : strengthen in body or spirit

instrn *abbr* instruction

instroke \ˈinz,t-,ˈin,st-\ *n* [4*in* + *stroke*] : an inward stroke; *specif* : a stroke in which the piston in a steam or other engine is moving away from the crankshaft — opposed to *outstroke*

1**instruct** *adj* [ME *instructe*, fr. L *instructus* (past part.)] **1** *obs* : INSTRUCTED **2** *obs* : PROVIDED, EQUIPPED

2**in·struct** \ənzˈtrəkt, ənˈst-\ *vb* -ED/-ING/-S [ME *instructen*, fr. L *instructus*, past part. of *instruere*, fr. *in-* 2in- + *struere* to build, establish — more at STRUCTURE] *vt* **1** : to give special knowledge or information to: as **a** : to train in some special field : give skill or knowledge in some art or field of specialization : educate in respect to a particular subject or area of knowledge ⟨had a tutor to ~ him in English⟩ **b** : to provide with information about something : APPRISE ⟨~*ed* us that the toilets were downstairs⟩ ⟨the senses ~ us of most material dangers⟩ **c** : to impart knowledge systematically to ⟨~*ed* three generations of children in the village school⟩ **2 a** : to furnish with directions based on informed or technical awareness of a problem ⟨the judge ~*ed* the jury⟩ **b** : to give an order or command to esp. authoritatively, formally, and with attention to clearness : DIRECT ⟨~*s* the eleven companions to await on the hill the outcome of the fight —R.M.Lumiansky⟩ **3 a** *archaic* : to put in order : PREPARE **b** : to actuate and establish the controls of (an automatic electronic machine) **4** *Scots law* : to prove or establish on the basis of evidence : PROVE, CONFIRM ~ *vi* : to serve as an instructor ⟨~*ed* in the public schools for many years⟩ **syn** see COMMAND, TEACH

instructed *adj* **1** : EDUCATED, CULTURED ⟨the ~ person is usually tolerant⟩ ⟨planned by an ~ taste⟩ **2 a** : furnished with and restricted in action by specific instructions ⟨sent ~ delegates to the convention⟩ **b** : ordered by informed authority : DIRECTED ⟨an ~ verdict⟩ — **in·struct·ed·ly** *adv* — **in·struct·ed·ness** *n* -ES

in·struct·ible \-ktəbəl\ *adj* [L *instructus* (past part.) + E *-ible*] : capable of being instructed or taught ⟨~ children⟩ ⟨a very ~ subject⟩

in·struc·tion \-kshən\ *n* -s [ME *instruccioun*, fr. MF&LL; MF *instruction*, fr. LL *instruction-*, *instructio*, fr. L, act of constructing, act of arranging, fr. *instructus* (past part. of *instruere* to instruct) + *-ion-*, *-io* -ion — more at INSTRUCT] **1** : something that instructs or is imparted in order to instruct: as **a** : LESSON, PRECEPT ⟨children should profit from the ~*s* of their elders⟩ **b** *obs* : INFORMATION, NEWS, REPORT **c** (1) : something given by way of direction or order — usu. used in pl. ⟨gave the maid ~*s* to wait for the grocer⟩ (2) : information in the form of an outline of procedures : DIRECTIONS — usu. used in pl. ⟨the ~*s* for assembling the model⟩ **2** : the action, practice, or profession of one that instructs : TEACHING ⟨new theories of ~⟩ ⟨engaged in ~ rather than active service⟩ **3** : the quality or state of being instructed ⟨where ~ is more widely diffused —Havelock Ellis⟩

in·struc·tion·al \-shənᵊl,-shnəl\ *adj* **1** : relating to, serving for, or promoting instruction : EDUCATIONAL ⟨~ methods⟩ ⟨used for ~ purposes⟩ ⟨the director of ~ services⟩ **2** : containing or conveying instruction or information ⟨an ~ film⟩

instruction card *n* : JOB SHEET

in·struc·tive \-ktiv, -tēv *also* -təv\ *adj* [prob. fr. MF *instructif*, fr. L *instructus* (past part.) + MF *-if* -ive] : conveying knowledge : serving to instruct or inform ⟨experience furnishes very ~ lessons⟩ ⟨such experiences are ~⟩ — **in·struc·tive·ly** \-təvlē, -li\ *adv* — **in·struc·tive·ness** \-tivnəs, -tēv- *also* -təv-\ *n* -ES

in·struc·tor \-ktə(r)\ *n* -s [ME *instructour*, fr. MF or ML; MF

-mentum -ment] **1 a** : a means whereby something is achieved, performed, or furthered ⟨the modern university is the ~ for preserving, enlarging, and disseminating our ever-increasing body of knowledge —Harlan Hatcher⟩ **b** : a person or group made use of by another as a means or aid : DUPE, TOOL ⟨suspecting . . . that I only wished to make an ~ of him —W.H.Hudson †1922⟩ **2** : UTENSIL, IMPLEMENT ⟨surgical ~*s*⟩ ⟨~*s* of torture⟩ **3** : an implement used to produce music esp. as distinguished from the human voice — see PERCUSSION INSTRUMENT, STRINGED INSTRUMENT, WIND INSTRUMENT **4** *obs* : an organ of the body **5 a** : a legal document (as a deed, will, bond, lease, agreement, mortgage, note, power of attorney, ticket on carrier, bill of lading, insurance policy, warrant, writ) evidencing legal rights or duties esp. of one party to another **b** : something capable of being presented as evidence to a court for inspection **c** : an act recorded in writing by a notary : a notarial act **6 a** : a measuring device for determining the present value of a quantity under observation; *broadly* : a device (as for controlling, recording, regulating, computing) that functions on data obtained by such a measuring device **b** : an electrical or mechanical device used in navigating an airplane; *specif* : such a device used as the sole means of navigating when there is limited or no visibility **syn** see IMPLEMENT, MEAN — **on instruments** : by means of airplane instruments ⟨flying *on instruments*⟩

2**in·stru·ment** \-,ment, -,mənt — *see* 2-MENT\ *vt* -ED/-ING/-S **1** : to address a legal instrument (as a petition) to **2** : to prepare or score for one or more musical instruments ⟨~ a sonata for orchestra⟩ : ORCHESTRATE **3** : to equip (as a process, machine, or vehicle) with instruments ⟨the whole factory is well ~*ed* —*Farm Chemicals*⟩ ⟨an ~*ed* satellite⟩

1**in·stru·men·tal** \¦==¦mentᵊl\ *adj* [ME, fr. ML *instrumentalis*, fr. L *instrumentum* + *-alis* -al] **1** : serving as a means or intermediary determining or leading to a particular result : being an instrument that functions in the promotion of some end or purpose ⟨this novel was ~ in bringing on open conflict⟩ ⟨an ~ act leading to a reward⟩ **2** : relating to, composed for, or performed on a musical instrument ⟨~ music⟩ ⟨~ ensemble⟩ — compare VOCAL **3** : of, relating to, or done with an instrument ⟨~ design⟩ ⟨~ navigation⟩ **4 a** : of, relating to, or being a case in grammar expressing means or agency ⟨English shows a surviving trace of the ~ case in *the* of "the more the merrier"⟩ **b** : being a suffixal element that denotes means or agency **5** : based on or in accordance with instrumentalism — **in·stru·men·tal·ly** \-ᵊlē,-ᵊli\ *adv*

2**instrumental** \"\ *n* -s **1** *obs* : INSTRUMENT, MEANS **2** : the instrumental case or a word in that case **3** : a composition played on or for playing on a musical instrument — compare VOCAL

instrumental goods *n pl* : PRODUCER GOODS

in·stru·men·tal·ism \,==ˈmentᵊl,izəm\ *n* -s [1*instrumental* + *-ism*] : a conception that the significant factor of a thing is its value as an instrument; *specif* : the doctrine that ideas are instruments of action and that their usefulness determines their truth

1**in·stru·men·tal·ist** \-ᵊləst\ *n* -s [1*instrumental* + *-ist*] **1 a** : a player of a musical instrument **b** : a composer of instrumental music **2** : a proponent of instrumentalism

2**in·stru·men·tal·ist** \¦==¦===\ *adj* : advocating instrumentalism : INSTRUMENTAL

in·stru·men·tal·i·ty \,== mən·ˈtaləd·ē, -,men- -, -lətē, -i\ *n* -ES **1** : the quality or state of being instrumental : a condition of serving as an intermediary ⟨the agreement was reached through the ~ of the governor⟩ **2 a** : something by which an end is achieved : MEANS ⟨precious metals purified through the ~ of heat⟩ ⟨*instrumentalities* of production⟩ ⟨mechanical *instrumentalities*⟩ **b** : something that serves as an intermediary or agent through which one or more functions of a controlling force are carried out : a part, organ, or subsidiary branch esp. of a governing body ⟨the judicial *instrumentalities* of the federal government⟩ ⟨a Chilean government ~ devoted to developing the country's natural resources —*Ethyl News*⟩ **syn** see MEAN

in·stru·men·tal·ize \,==ˈmentᵊl,īz\ *vt* -ED/-ING/-S : to render instrumental : DIRECT, ORGANIZE, ADAPT

instrumental theory *n* : INSTRUMENTALISM

in·stru·men·tar·ium \,inztrəmən·ˈta(a)rēəm, ,inst-, -,men -\ *n, pl* **instrumentar·ia** \-ēə\ [NL, prob. fr. ML, case for storing papers, cartulary, fr. L *instrumentum* instrument + *-arium*] : the equipment needed for a particular surgical, medical, or dental procedure; *also* : the professional instruments of a surgeon, physician, or dentist

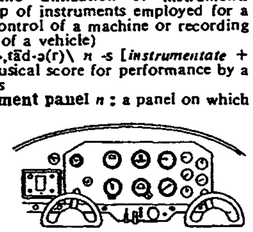
in·stru·men·ta·ry \¦==¦mentərē, -n-trē\ *adj* : of or relating to a legal instrument ⟨an ~ witness⟩

in·stru·men·tate \ˈinztrəmən-,tāt, ˈin(t)strə-\ *vt* -ED/-ING/-S [1*instrument* + *-ate* (after *orchestrate*)] : INSTRUMENT 2

in·stru·men·ta·tion \,===ˈtāshən, -,men- -\ *n* -s [1*instrument* + *-ation*] **1** : a use of or operation with instruments: as **a** : the use of one or more instruments in treating a patient (as in the passing of a cystoscope) **b** : the application of instruments esp. for observation, measurement, or control (as in a manufacturing process or the operation of a machine or vehicle) **2** : MEANS, AGENCY, INSTRUMENTALITY **3 a** [F, fr. *instrument* (fr. MF, fr. L *instrumentum* instrument) + *-ation*] : the arrangement or composition of music for instruments esp. for a band or orchestra — compare ORCHESTRATION **b** : the act or manner of playing musical instruments **c** : the arrangement and distribution of instruments (as in a band or orchestra) **4 a** : a branch of science concerned with the development, manufacture, and utilization of instruments **b** : instruments or the group of instruments employed for a particular purpose (as the control of a machine or recording the data about the function of a vehicle)

in·stru·men·ta·tor \ˈ==mən-,tād·ə(r)\ *n* -s [*instrumentate* + *-or*] : one that arranges a musical score for performance by a specific group of instruments

instrument board *or* **instrument panel** *n* : a panel on which instruments are mounted; *esp* : DASHBOARD 2



instrument board

instrumented *past of* INSTRUMENT

instrument flight *n* : an airplane flight made on instruments : blind flight

instrument flying *n* : navigation solely according to information given by instruments within an airplane usu. including radio or radar devices : blind flying — contrasted with *contact flying*

instrumenting *pres part of* INSTRUMENT

instrument landing *n* : a landing made with no external visibility and solely by means of instruments within an airplane and by ground radio directive devices : blind landing

instrument landing system *n* : a system for airplane landings in which the pilot is guided by radio beams — abbr. *ILS*; compare GROUND-CONTROLLED APPROACH

in·stru·ment·man \ˈ===,man\ *n, pl* **instrumentmen** : a surveyor who operates a transit, level, or similar instrument

instrument rating *n* : a license or rating given to an airplane pilot authorized to do instrument flying

instruments *pl of* INSTRUMENT, *pres 3d sing of* INSTRUMENT

instrument weather *n* : weather in which the ground is so invisible from the air that instrument flying is required

tion ⟨the bankers of Antwerp placed no limit on their enterprise: economic activity was not subordinate; it had become, from the medieval point of view, ~ —Stringfellow Barr⟩

syn REBELLIOUS, MUTINOUS, SEDITIOUS, FACTIOUS, CONTUMACIOUS: INSUBORDINATE applies to disobedience of orders, infraction of rules, or a generally disaffected attitude toward authority, often in military or other organization similarly constituted ⟨*insubordinate* deckhands confined to the brig⟩ ⟨*insubordinate* native troops feeling that they were being discriminated against⟩ REBELLIOUS may suggest forceful resistance to or insurgence against authority in addition to insubordination and temperamental opposition ⟨*rebellious* mountaineers proposing to set up their own independent republic⟩ ⟨temperamentally *rebellious*, instinctively disliking externally imposed authority —Francis Biddle⟩ MUTINOUS suggests either opposing authority by destroying discipline and order or the forceful overthrow of authority ⟨for more than a year Cortes stayed in the new land, a desolate sandy waste, while the *mutinous* soldiers cursed him —*Amer. Guide Series: Calif.*⟩ ⟨the guards might be overpowered, the palace forced, the king a prisoner in the hands of his *mutinous* subjects —T.B.Macaulay⟩ SEDITIOUS suggests treasonable activities, esp. those designed to weaken or overthrow a government or foster separatist tendencies ⟨*seditious* factionalism went on a rampage and began to wreck our foreign policy —Max Ascoli⟩ ⟨revolutions that were not made in Boston, by Boston gentlemen, were quite certain to be wicked and *seditious* —V.L.Parrington⟩ FACTIOUS suggests an addiction to factions with contentious perversity and irreconcilability threatening central constituted authority ⟨Florence . . . wearing out her soul by *factious* struggles —Margaret Oliphant⟩ ⟨the opposition will be vigilant but not *factious*. We shall not oppose merely for the sake of opposition —Clement Attlee⟩ CONTUMACIOUS indicates persistent, willful, or overt defiance of authority and disobedience, sometimes contemptuous, of authority ⟨a fine was appointed for every failure to obey the bishop's summons; he was empowered to excommunicate *contumacious* persons —F.M.Stenton⟩ ⟨magistrates and populace were incensed at a refusal of customary marks of courtesy and respect for the laws, which in their eyes was purely *contumacious* —W.R.Inge⟩

2**insubordinate** \"\ *n* : an insubordinate person

in·subordinately \¦in+\ *adv* : in an insubordinate manner : with insubordination

in·subordination \"+\ *n* [prob. fr. F, fr. *in-* 1in- + *subordination*] : the quality or state of being insubordinate : defiance of authority : MUTINY

in·substantial \"+\ *adj* [prob. fr. F *insubstantiel*, fr. LL *insubstantialis*, fr. *in-* 1in- + *substantialis* substantial] : not substantial: as **a** : lacking substance or reality : IMAGINARY, APPARITIONAL ⟨an ~ mirage floating near the horizon⟩ **b** : lacking firmness or solidity of structure : FLIMSY, FRAIL ⟨delicate ~ wrists and ankles⟩ — **in·substantiality** \"+\ *n*

in·subvertible \"+\ *adj* [LL *insubvertibilis*, fr. *in-* 1in- + L *subvertere* to overturn, overthrow + *-ibilis* -ible — more at SUBVERT] : incapable of being overthrown or altered in course or orientation ⟨the ~ physical laws⟩

in·success \"+\ *n* [1*in-* + *success*] : lack of success : FAILURE

insucken \ˈ=,==\ *adj* [1*in* + *sucken*] *Scot* : situated in or astricted to a sucken

in·sufferable \(ˈ)in, ən+\ *adj* [1*in-* + *sufferable*] : incapable of being endured ⟨an ~ injury⟩ : intolerable esp. by reason of pompous assurance or assumed superiority ⟨~ self-importance⟩ ⟨a thoroughly ~ child⟩ — **in·sufferableness** \"+\ *n* — **in·sufferably** \"+\ *adv*

in·suf·fi·cience \¦insə¦fishən(t)s\ *n* -s [ME, fr. MF or LL; MF, fr. LL *insufficientia*] : INSUFFICIENCY

in·suf·fi·cien·cy \-shensē, -si\ *n* [LL *insufficientia*, fr. *insufficient-*, *insufficiens* insufficient + *-ia* -y] **1** : the quality or state of being insufficient : lack of sufficiency: as **a** : lack of mental or moral fitness : INABILITY, INCOMPETENCY ⟨the ~ of a man for an office⟩ **b** : lack of adequate supply of something (as force, quality, quantity) : INADEQUACY ⟨~ of provisions⟩ **c** : lack of physical power or capacity : IMPOTENCE; *specif* : inability of an organ or body part to function normally ⟨cardiac ~⟩ ⟨renal ~⟩ **2** : something insufficient ⟨sadly aware of his own neglects and *insufficiencies*⟩

in·suf·fi·cient \-shənt\ *adj* [ME, fr. MF, fr. LL *insufficient-*, *insufficiens*, fr. *in-* 1in- + L *sufficient-*, *sufficiens* sufficient — more at SUFFICIENT] : not sufficient: as **a** : lacking in strength, power, ability, capacity, or skill : INCOMPETENT, UNFIT ⟨a person ~ to discharge the duties of an office⟩ **b** *obs* : not sufficiently furnished or supplied : deficient or lacking in something **c** : inadequate to some implied or designated need, use, or purpose ⟨provisions ~ in quantity⟩ — **in·suf·fi·cient·ly** *adv*

in·suf·flate \ˈin(t)sə,flāt, ənˈsə-\ *vt* -ED/-ING/-S [LL *insufflatus*, past part. of *insufflare*, fr. L *in-* 2in- + *sufflare* to blow, sufflate — more at SUFFLATE] **1** : to blow or breathe upon or into : subject to insufflation ⟨~ a room with insecticide⟩ **2** : to blow or breathe (something) onto a surface or into a void : practice insufflation of ⟨*insufflated* the metallic powder onto the hot surface⟩ ⟨*insufflated* the drug into the depths of the wound⟩

in·suf·fla·tion \,in(t)səˈflāshən\ *n* -s [MF, fr. LL *insufflation-*, *insufflatio*, fr. *insufflatus* (past part.) + L *-ion-*, *-io* -ion] : an act or the action of breathing or blowing on, into, or in: as **a** : the breathing upon a person or thing in the ritual of various liturgical churches to symbolize (as at baptism) the inspiration of a new spiritual life and the expulsion of evil spirits **b** : the act of blowing (as a gas, powder, or vapor) into a cavity of the body ⟨~ of gas into a fallopian tube to determine its patency⟩

in·suf·fla·tor \ˈin(t)sə,flād·ə(r), ənˈsə-\ *n* -s [*insufflate* + *-or*] : a device for insufflating: as **a** : an injector for forcing air into a furnace **b** : a device used in medical insufflation (as of a drug) **c** : a device for blowing the powder used in developing latent fingerprints (as in criminal investigation)

in·su·la \ˈin(t)s(y)ələ, ˈinshə-\ *n, pl* **insu·lae** \-,lē, ˈin(t)sə,lī\ **1** [L, lit., island — more at ISLE] : an ancient Roman building or a group of buildings standing together forming a block or square and usu. constituting an apartment building **2** [NL, fr. L] : ISLAND OF REIL

in·su·lant \ˈin(t)sələnt *sometimes* ˈin(t)syəl- *or* ˈinshəl-\ *n* -s [1*insulate* + *-ant*] : INSULATION

1**in·su·lar** \-lə(r)\ *adj* [LL *insularis*, fr. L *insula* island + *-aris* -ar — more at ISLE] **1 a** : of or relating to an island : being or having the characteristics of an island : dwelling or situated on or forming an island **b** *usu cap* (1) : of or relating to Great Britain or to the British isles as distinct from the continent of Europe — compare CONTINENTAL (2) : of, relating to, or characteristic of the Insular hand **2 a** : INSULATED, ISOLATED, DETACHED ⟨an ~ building⟩ **b** *of a plant or animal* : having a restricted or isolated natural range or habitat **3 a** : of or relating to the people of an island **b** : resulting from isolation or characteristic of isolated people **c** : NARROW, CIRCUMSCRIBED, ILLIBERAL, PREJUDICED **4** [NL *insula* + E *-ar*] : of or relating to an island of cells or tissue (as the islets of Langerhans or islands of Reil)

2**insular** \"\ *n* -s : ISLANDER

insular celtic *n, usu cap I&C* : the Celtic languages excluding Gaulish

insular hand *or* **insular script** *n, usu cap I* : a script characterized by thick initial strokes and heavy shading developed

RULES

C

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Code of Federal Regulations Currentness
Title 42. Public Health
Chapter IV. Centers for Medicare & Medicaid Services, Department of Health and Human Services (Refs & Annos)
Subchapter B. Medicare Program
Part 413. Principles of Reasonable Cost Reimbursement; Payment for End-Stage Renal Disease Services; Optional Prospectively Determined Payment Rates for Skilled Nursing Facilities (Refs & Annos)
Subpart A. Introduction and General Rules

§ 413.1 Introduction.

(a) Basis, scope, and applicability--

(1) Statutory basis--

(i) Basic provisions.

(A) Section 1815 of the Act requires that the Secretary make interim payments to providers and periodically determine the amount that should be paid under Part A of Medicare to each provider for the services it furnishes.

(B) Section 1814(b) of the Act (for Part A) and section 1833(a) (for Part B) provide for payment on the basis of the lesser of a provider's reasonable costs or customary charges.

(C) Section 1861(v) of the Act defines "reasonable cost".

(ii) Additional provisions.

(A) Section 1138(b) of the Act specifies the conditions for Medicare payment for organ procurement costs.

(B) Section 1814(j) of the Act provides for exceptions to the "lower of costs or charges" provisions.

(C) Sections 1815(a) and 1833(e) of the Act provide the Secretary with authority to request information from providers to determine the amount of Medicare payment due providers.

(D) Section 1833 (a)(4) and (i)(3) of the Act provide for payment of a blended amount for certain surgical services furnished in a hospital's outpatient department.

(E) Section 1833(n) of the Act provides for payment of a blended amount for outpatient hospital diagnostic procedures such as radiology.

(F) Section 1834(c)(1)(C) of the Act establishes the method for determining Medicare payment for screening mammograms performed by hospitals.

(G) Section 1834(g) of the Act provides that payment for critical access hospital (CAH) outpatient services is the reasonable costs of the CAH in providing these services, as determined in accordance with section 1861(v)(1)(A) of the Act and the applicable principles of cost reimburse-

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ment in this part and in part 415 of this chapter.

(H) Section 1881 of the Act authorizes payment for services furnished to ESRD patients.

(I) Section 1883 of the Act provides for payment for post-hospital SNF care furnished by a rural hospital that has swing-bed approval.

(J) Sections 1886 (a) and (b) of the Act impose a ceiling on the rate of increase in hospital inpatient costs.

(K) Section 1886(h) of the Act provides for payment to a hospital for the services of interns and residents in approved teaching programs on the basis of a "per resident" amount.

(2) Scope. This part sets forth regulations governing Medicare payment for services furnished to beneficiaries by--

(i) Hospitals and critical access hospital (CAH);

(ii) Skilled nursing facilities (SNFs);

(iii) Home health agencies (HHAs);

(iv) End-stage renal disease (ESRD) facilities;

(v) Organ procurement agencies (OPAs) and histocompatibility laboratories.

(vi) [Reserved by 72 FR 66400]

(vii) [Reserved by 72 FR 66400]

(3) Applicability. The payment principles and related policies set forth in this part are binding on CMS and its fiscal intermediaries, on the Provider Reimbursement Review Board, and on the entities listed in paragraph (a)(2) of this section.

(b) Reasonable cost reimbursement. Except as provided under paragraphs (c) through (h) of this section, Medicare is generally required, under section 1814(b) of the Act (for services covered under Part A) and under section 1833(a)(2) of the Act (for services covered under Part B) to pay for services furnished by providers on the basis of reasonable costs as defined in section 1861(v) of the Act, or the provider's customary charges for those services, if lower. Regulations implementing section 1861(v) are found generally in this part beginning at § 413.5.

(c) Outpatient maintenance dialysis and related services. Section 1881 of the Act authorizes special rules for the coverage of and payment for services furnished to ESRD patients. Sections 413.170 and 413.174 implement various provisions of section 1881. In particular § 413.170 establishes a prospective payment method for outpatient maintenance dialysis services that applies both to hospital-based and independent ESRD facilities, and under which Medicare pays for both home and infacility dialysis services furnished on or after August 1, 1983.

(d) Payment for inpatient hospital services.

(1) For cost reporting periods beginning before October 1, 1983, the amount paid for inpatient hospital services is determined on a reasonable cost basis.

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(2) Payment to short-term general hospitals located in the 50 States and the District of Columbia for the operating costs of hospital inpatient services for cost reporting periods beginning on or after October 1, 1983, and for the capital-related costs of inpatient services for cost reporting periods beginning on or after October 1, 1991, are determined prospectively on a per discharge basis under part 412 of this chapter except as follows:

(i) Payment for capital-related costs for cost reporting periods beginning before October 1, 1991, medical education costs, kidney acquisition costs, and the costs of certain anesthesia services, is described in § 412.113 of this chapter.

(ii) Payment to children's hospitals that are excluded from the prospective payment systems under subpart B of part 412 of this chapter, and hospitals outside the 50 States and the District of Columbia is on a reasonable cost basis, subject to the provisions of § 413.40.

(iii) Payment to hospitals subject to a State reimbursement control system is described in paragraph (e) of this section.

(iv) For cost reporting periods beginning before January 1, 2005, payment to psychiatric hospitals (as well as separate psychiatric units (distinct parts) of short-term general hospitals) that are excluded under subpart B of part 412 of this chapter from the prospective payment system is on a reasonable cost basis, subject to the provisions of § 413.40.

(v) For cost reporting periods beginning on or after January 1, 2005, payment to inpatient psychiatric facilities that meet the conditions of § 412.404 of this chapter, is made under the prospective payment system described in subpart N of part 412 of this chapter.

(vi) For cost reporting periods beginning before January 1, 2002, payment to rehabilitation hospitals (as well as separate rehabilitation units (distinct parts) of short-term general hospitals), that are excluded under subpart B of part 412 of this subchapter from the prospective payment systems is made on a reasonable cost basis, subject to the provisions of § 413.40.

(vii) For cost reporting periods beginning on or after January 1, 2002, payment to rehabilitation hospitals (as well as separate rehabilitation units (distinct parts) of short-term general hospitals) that meet the conditions of § 412.604 of this chapter is based on prospectively determined rates under subpart P of part 412 of this subchapter.

(viii) For cost reporting periods beginning before October 1, 2002, payment to long-term care hospitals that are excluded under subpart B of Part 412 of this subchapter from the prospective payment systems is on a reasonable cost basis, subject to the provisions of § 413.40.

(ix) For cost reporting periods beginning on or after October 1, 2002, payment to the long-term hospitals that meet the condition for payment of §§ 412.505 through 412.511 of this subchapter is based on prospectively determined rates under subpart O of Part 412 of this subchapter.

(e) State reimbursement control systems. Beginning October 1, 1983. Medicare reimbursement for inpatient hospital services may be made in accordance with a State reimbursement control system rather than under the Medicare reimbursement principles

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set forth in this part, if the State system is approved by CMS. Regulations implementing this alternative reimbursement authority are set forth in Subpart C of Part 403 of this chapter.

(f) Services of qualified nonphysician anesthetists. For cost reporting periods, or any part of a cost reporting period, beginning on or after January 1, 1989, costs incurred for the services of qualified nonphysician anesthetists are not paid on a reasonable cost basis unless the provisions of § 412.113(c)(2) of this chapter apply. These services are paid under the special rules set forth in § 405.553 of this chapter.

(g) Payment for services furnished in SNFs.

(1) Except as specified in paragraph (g)(2)(ii) of this section, the amount paid for services furnished in cost reporting periods beginning before July 1, 1998, is determined on a reasonable cost basis or, where applicable, in accordance with the prospectively determined payment rates for low-volume SNFs established under section 1888(d) of the Act, as set forth in subpart I of this part.

(2) The amount paid for services (other than those described in § 411.15(p)(2) of this chapter)--

(i) That are furnished in cost reporting periods beginning on or after July 1, 1998, to a resident who is in a covered Part A stay, is determined in accordance with the prospectively determined payment rates for SNFs established under section 1888(e) of the Act, as set forth in subpart J of this part.

(ii) That are furnished on or after July 1, 1998, to a resident who is not in a covered Part A stay, is determined in accordance with any applicable Part B fee schedule or, for a particular item or service to which no fee schedule applies, by using the existing payment methodology utilized under Part B for such item or service.

(h) Payment for services furnished by HHAs. The amount paid for home health services as defined in section 1861(m) of the Act (except durable medical equipment and the covered osteoporosis drug as provided for in that section) that are furnished beginning on or after October 1, 2000 to an eligible beneficiary under a home health plan of care is determined according to the prospectively determined payment rates for HHAs set forth in part 484, subpart E of this chapter.

[57 FR 33898, July 31, 1992; 57 FR 39829, Sept. 1, 1992; 58 FR 30670, May 26, 1993; 56 FR 6578, Feb. 11, 1994; 59 FR 13459, March 22, 1994; 60 FR 33136, June 27, 1995; 60 FR 37594, July 21, 1995; 60 FR 50441, Sept. 29, 1995; 62 FR 31, Jan. 2, 1997; 62 FR 46032, 46037, Aug. 29, 1997; 63 FR 26309, May 12, 1998; 65 FR 18537, April 7, 2000; 65 FR 40535, June 30, 2000; 65 FR 41211, July 3, 2000; 65 FR 46796, July 31, 2000; 66 FR 41394, Aug. 7, 2001; 67 FR 44077, July 1, 2002; 67 FR 56055, Aug. 30, 2002; 69 FR 66981, Nov. 15, 2004; 72 FR 66400, Nov. 27, 2007]

SOURCE: 51 FR 34794, Sept. 30, 1986; 54 FR 37274, Sept. 7, 1989; 55 FR 2652, Jan. 26, 1990; 55 FR 15175, April 20, 1990; 55 FR 33699, Aug. 17, 1990; 55 FR 36071, Sept. 4, 1990; 55 FR 53522, Dec. 31, 1990; 56 FR 8842, March 1, 1991; 56 FR 43709, Sept. 4, 1991; 56 FR 54545, Oct. 22, 1991; 56 FR 59219, Nov. 25, 1991; 58 FR 30670, May 26, 1993; 58 FR 46340, Sept. 1, 1993; 59 FR 1285, Jan. 10, 1994; 59 FR 26964, May 25, 1994; 59 FR 49834, Sept. 30, 1994; 60 FR 33135, June 27, 1995; 60 FR 45849, Sept. 1, 1995; 61 FR 37014, July 16, 1996; 63 FR 310, Jan. 5, 1998; 63 FR 15737, March 31, 1998; 63 FR 41004, July 31,

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1998; 64 FR 41541, 41682, July 30, 1999; 64 FR 42612, Aug. 5, 1999; 65 FR 47108, Aug. 1, 2000; 66 FR 39932, Aug. 1, 2001; 66 FR 41394, Aug. 7, 2001; 67 FR 50114, Aug. 1, 2002; 68 FR 45471, Aug. 1, 2003; 69 FR 49252, Aug. 11, 2004; 69 FR 66981, Nov. 15, 2004; 71 FR 31046, May 31, 2006; 71 FR 48141, Aug. 18, 2006; 72 FR 47412, Aug. 22, 2007; 72 FR 66931, Nov. 27, 2007; 73 FR 30267, May 23, 2008, unless otherwise noted.

AUTHORITY: Secs. 1102, 1812(d), 1814(b), 1815, 1833(a), (i), and (n), 1861(v), 1871, 1881, 1883, and 1886 of the Social Security Act (42 U.S.C. 1302, 1395d(d), 1395f(b), 1395g, 1395l(a), (i), and (n), 1395x(v), 1395hh, 1395rr, 1395tt, and 1395ww); and sec. 124 of Public Law 106-133 (113 Stat. 1501A-332).

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Part 413. Principles of Reasonable Cost Reimbursement; Payment for End-Stage Renal Disease Services; Optional Prospectively Determined Payment Rates for Skilled Nursing Facilities (Refs & Annos)
Subpart A. Introduction and General Rules

§ 413.5 Cost reimbursement: General.

(a) In formulating methods for making fair and equitable reimbursement for services rendered beneficiaries of the program, payment is to be made on the basis of current costs of the individual provider, rather than costs of a past period or a fixed negotiated rate. All necessary and proper expenses of an institution in the production of services, including normal standby costs, are recognized. Furthermore, the share of the total institutional cost that is borne by the program is related to the care furnished beneficiaries so that no part of their cost would need to be borne by other patients. Conversely, costs attributable to other patients of the institution are not to be borne by the program. Thus, the application of this approach, with appropriate accounting support, will result in meeting actual costs of services to beneficiaries as such costs vary from institution to institution. However, payments to providers of services for services furnished Medicare beneficiaries are subject to the provisions of §§ 413.13 and 413.30.

(b) Putting these several points together, certain tests have been evolved for the principles of reimbursement and certain goals have been established that they should be designed to accomplish. In general terms, these are the tests or objectives:

(1) That the methods of reimbursement should result in current payment so that institutions will not be disadvantaged, as they sometimes are under other arrangements, by having to put up money for the purchase of goods and services well before they receive reimbursement.

(2) That, in addition to current payment, there should be retroactive adjustment so that increases in costs are taken fully into account as they actually occurred, not just prospectively.

(3) That there be a division of the allowable costs between the beneficiaries of this program and the other patients of the provider that takes account of the actual use of services by the beneficiaries of this program and that is fair to each provider individually.

(4) That there be sufficient flexibility in the methods of reimbursement to be used, particularly at the beginning of the program, to take account of the great differences in the present state of development of recordkeeping.

(5) That the principles should result in the equitable treatment of both nonprofit organizations and profit-making organizations.

(6) That there should be a recognition of the need of hospitals and other providers to keep pace with growing needs and to make improvements.

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(c) As formulated herein, the principles given recognition to such factors as depreciation, interest, bad debts, educational costs, compensation of owners, and an allowance for a reasonable return on equity capital (in the case of certain proprietary providers). With respect to allowable costs some items of inclusion and exclusion are:

(1) An appropriate part of the net cost of approved educational activities will be included.

(2) Costs incurred for research purposes, over and above usual patient care, will not be included.

(3) [Reserved]

(4) The value of services provided by nonpaid workers, as members of an organization (including services of members of religious orders) having an agreement with the provider to furnish such services, is includable in the amount that would be paid others for similar work.

(5) Discounts and allowances received on the purchase of goods or services are reductions of the cost to which they relate.

(6) Bad debts growing out of the failure of a beneficiary to pay the deductible, or the coinsurance, will be reimbursed (after bona fide efforts at collection).

(7) Charity and courtesy allowances are not includable, although "fringe benefit" allowances for employees under a formal plan will be includable as part of their compensation.

(8) A reasonable allowance of compensation for the services of owners in profitmaking organizations will be allowed providing their services are actually performed in a necessary function.

(9) Reasonable cost of physicians' direct medical and surgical services (including supervision of interns and residents in the care of individual patients) furnished in a teaching hospital may be reimbursed as a provider cost (as described in § 415.162 of this chapter) if elected as provided for in § 415.160 of this chapter.

(d) In developing these principles of reimbursement for the Medicare program, all of the considerations inherent in allowances for depreciation were studied. The principles, as presented, provide options to meet varied situations. Depreciation will essentially be on an historical cost basis but since many institutions do not have adequate records of old assets, the principles provide an optional allowance in lieu of such depreciation for assets acquired before 1966. For assets acquired after 1965, the historical cost basis must be used. All assets actually in use for production of services for Medicare beneficiaries will be recognized even though they may have been fully or partially depreciated for other purposes. Assets financed with public funds may be depreciated. Although funding of depreciation is not required, there is an incentive for it since income from funded depreciation is not considered as an offset which must be taken to reduce the interest expense that is allowable as a program cost.

(e) A return on the equity capital of proprietary facilities, as described in § 413.157, is an allowance in addition to the reasonable cost of covered services furnished to beneficiaries.

(f) Renal dialysis items and services furnished under the ESRD provision are reimbursed and reported under §§ 413.170 and 413.174 respectively. For special rules concerning health maintenance organizations (HMOs), and providers of services and oth-

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er health care facilities that are owned or operated by an HMO, or related to an HMO by common ownership or control, see §§ 417.242(b)(14) and 417.250(c) of this chapter.

[51 FR 37398, Oct. 22, 1986; 52 FR 21225, June 4, 1987; 52 FR 23398, June 19, 1987; 57 FR 39829, Sept. 1, 1992; 60 FR 63189, Dec. 8, 1995; 61 FR 63748, Dec. 2, 1996]

SOURCE: 51 FR 34794, Sept. 30, 1986; 54 FR 37274, Sept. 7, 1989; 55 FR 2652, Jan. 26, 1990; 55 FR 15175, April 20, 1990; 55 FR 33699, Aug. 17, 1990; 55 FR 36071, Sept. 4, 1990; 55 FR 53522, Dec. 31, 1990; 56 FR 8842, March 1, 1991; 56 FR 43709, Sept. 4, 1991; 56 FR 54545, Oct. 22, 1991; 56 FR 59219, Nov. 25, 1991; 58 FR 30670, May 26, 1993; 58 FR 46340, Sept. 1, 1993; 59 FR 1285, Jan. 10, 1994; 59 FR 26964, May 25, 1994; 59 FR 49834, Sept. 30, 1994; 60 FR 33135, June 27, 1995; 60 FR 45849, Sept. 1, 1995; 61 FR 37014, July 16, 1996; 63 FR 310, Jan. 5, 1998; 63 FR 15737, March 31, 1998; 63 FR 41004, July 31, 1998; 64 FR 41541, 41682, July 30, 1999; 64 FR 42612, Aug. 5, 1999; 65 FR 47108, Aug. 1, 2000; 66 FR 39932, Aug. 1, 2001; 66 FR 41394, Aug. 7, 2001; 67 FR 50114, Aug. 1, 2002; 68 FR 45471, Aug. 1, 2003; 69 FR 49252, Aug. 11, 2004; 69 FR 66981, Nov. 15, 2004; 71 FR 31046, May 31, 2006; 71 FR 48141, Aug. 18, 2006; 72 FR 47412, Aug. 22, 2007; 72 FR 66931, Nov. 27, 2007; 73 FR 30267, May 23, 2008, unless otherwise noted.

AUTHORITY: Secs. 1102, 1812(d), 1814(b), 1815, 1833(a), (i), and (n), 1861(v), 1871, 1881, 1883, and 1886 of the Social Security Act (42 U.S.C. 1302, 1395d(d), 1395f(b), 1395g, 1395l(a), (i), and (n), 1395x(v), 1395hh, 1395rr, 1395tt, and 1395ww); and sec. 124 of Public Law 106-133 (113 Stat. 1501A-332).

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Part 413. Principles of Reasonable Cost Reimbursement; Payment for End-Stage Renal Disease Services; Optional Prospectively Determined Payment Rates for Skilled Nursing Facilities (Refs & Annos)
Subpart F. Specific Categories of Costs

§ 413.89 Bad debts, charity, and courtesy allowances.

(a) Principle. Bad debts, charity, and courtesy allowances are deductions from revenue and are not to be included in allowable cost. However, subject to the limitations described under paragraph (h) of this section and the exception for services described under paragraph (i) of this section, bad debts attributable to the deductibles and coinsurance amounts are reimbursable under the program.

(b) Definitions--

(1) Bad debts. Bad debts are amounts considered to be uncollectible from accounts and notes receivable that were created or acquired in providing services. "Accounts receivable" and "notes receivable" are designations for claims arising from the furnishing of services, and are collectible in money in the relatively near future.

(2) Charity allowances. Charity allowances are reductions in charges made by the provider of services because of the indigence or medical indigence of the patient. Cost of free care (uncompensated services) furnished under a Hill-Burton obligation are considered as charity allowances.

(3) Courtesy allowances. Courtesy allowances indicate a reduction in charges in the form of an allowance to physicians, clergy, members of religious orders, and others as approved by the governing body of the provider, for services received from the provider. Employee fringe benefits, such as hospitalization and personnel health programs, are not considered to be courtesy allowances.

(c) Normal accounting treatment: Reduction in revenue. Bad debts, charity, and courtesy allowances represent reductions in revenue. The failure to collect charges for services furnished does not add to the cost of providing the services. Such costs have already been incurred in the production of the services.

(d) Requirements for Medicare. Under Medicare, costs of covered services furnished beneficiaries are not to be borne by individuals not covered by the Medicare program, and conversely, costs of services provided for other than beneficiaries are not to be borne by the Medicare program. Uncollected revenue related to services furnished to beneficiaries of the program generally means the provider has not recovered the cost of services covered by that revenue. The failure of beneficiaries to pay the deductible and coinsurance amounts could result in the related costs of covered services being borne by other than Medicare beneficiaries. To assure that such covered service costs are not borne by others, the costs attributable to the deductible and coinsurance amounts that remain unpaid are added to the Medicare share of allowable costs. Bad debts

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arising from other sources are not allowable costs.

(e) Criteria for allowable bad debt. A bad debt must meet the following criteria to be allowable:

(1) The debt must be related to covered services and derived from deductible and coinsurance amounts.

(2) The provider must be able to establish that reasonable collection efforts were made.

(3) The debt was actually uncollectible when claimed as worthless.

(4) Sound business judgment established that there was no likelihood of recovery at any time in the future.

(f) Charging of bad debts and bad debt recoveries. The amounts uncollectible from specific beneficiaries are to be charged off as bad debts in the accounting period in which the accounts are deemed to be worthless. In some cases an amount previously written off as a bad debt and allocated to the program may be recovered in a subsequent accounting period; in such cases the income therefrom must be used to reduce the cost of beneficiary services for the period in which the collection is made.

(g) Charity allowances. Charity allowances have no relationship to beneficiaries of the Medicare program and are not allowable costs. These charity allowances include the costs of uncompensated services furnished under a Hill-Burton obligation. (Note: In accordance with section 106(b) of Pub.L. 97-248 (enacted September 3, 1982), this sentence is effective with respect to any costs incurred under Medicare except that it does not apply to costs which have been allowed prior to September 3, 1982, pursuant to a final court order affirmed by a United States Court of Appeals.) The cost to the provider of employee fringe-benefit programs is an allowable element of reimbursement.

(h) Limitations on bad debts.

(1) Hospitals. In determining reasonable costs for hospitals, the amount of bad debt otherwise treated as allowable costs (as defined in paragraph (e) of this section) is reduced--

(i) For cost reporting periods beginning during fiscal year 1998, by 25 percent;

(ii) For cost reporting periods beginning during fiscal year 1999, by 40 percent;

(iii) For cost reporting periods beginning during fiscal year 2000, by 45 percent; and

(iv) For cost reporting periods beginning during a subsequent fiscal year, by 30 percent.

(2) Skilled nursing facilities. For cost reporting periods beginning during fiscal year 2006 or during a subsequent fiscal year, the amount of skilled nursing facility bad debts for coinsurance otherwise treated as allowable costs (as defined in paragraph (e) of this section) for services furnished to a patient who is not a dual eligible individual is reduced by 30 percent. A dual eligible individual is defined for this section as an individual that is entitled to benefits under Part A of Medicare and is determined eligible by the State for medical assistance under Title XIX of the Act as described under paragraph (2) of the definition of a "full-benefit dual eligible individual" at § 423.772 of this chapter.

(i) Exception. Bad debts arising from covered ser-

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vices paid under a reasonable charge-based methodology or a fee schedule are not reimbursable under the program.

[57 FR 33898, July 31, 1992; 60 FR 63189, Dec. 8, 1995; 63 FR 41005, July 31, 1998; 66 FR 32195, June 13, 2001; 66 FR 39932, Aug. 1, 2001; 69 FR 49254, Aug. 11, 2004; 71 FR 48142, Aug. 18, 2006; 71 FR 69785, Dec. 1, 2006]

SOURCE: 51 FR 34794, Sept. 30, 1986; 54 FR 37274, Sept. 7, 1989; 55 FR 2652, Jan. 26, 1990; 55 FR 15175, April 20, 1990; 55 FR 33699, Aug. 17, 1990; 55 FR 36071, Sept. 4, 1990; 55 FR 53522, Dec. 31, 1990; 56 FR 8842, March 1, 1991; 56 FR 43709, Sept. 4, 1991; 56 FR 54545, Oct. 22, 1991; 56 FR 59219, Nov. 25, 1991; 58 FR 30670, May 26, 1993; 58 FR 46340, Sept. 1, 1993; 59 FR 1285, Jan. 10, 1994; 59 FR 26964, May 25, 1994; 59 FR 49834, Sept. 30, 1994; 60 FR 33135, June 27, 1995; 60 FR 45849, Sept. 1, 1995; 61 FR 37014, July 16, 1996; 63 FR 310, Jan. 5, 1998; 63 FR 15737, March 31, 1998; 63 FR 41004, July 31, 1998; 64 FR 41541, 41682, July 30, 1999; 64 FR 42612, Aug. 5, 1999; 65 FR 47108, Aug. 1, 2000; 66 FR 39932, Aug. 1, 2001; 66 FR 41394, Aug. 7, 2001; 67 FR 50114, Aug. 1, 2002; 68 FR 45471, Aug. 1, 2003; 69 FR 49252, Aug. 11, 2004; 69 FR 66981, Nov. 15, 2004; 71 FR 31046, May 31, 2006; 71 FR 48141, Aug. 18, 2006; 72 FR 47412, Aug. 22, 2007; 72 FR 66931, Nov. 27, 2007; 73 FR 30267, May 23, 2008, unless otherwise noted.

AUTHORITY: Secs. 1102, 1812(d), 1814(b), 1815, 1833(a), (i), and (n), 1861(v), 1871, 1881, 1883, and 1886 of the Social Security Act (42 U.S.C. 1302, 1395d(d), 1395f(b), 1395g, 1395l(a), (i), and (n), 1395x(v), 1395hh, 1395rr, 1395tt, and 1395ww); and sec. 124 of Public Law 106-133 (113 Stat. 1501A-332).

42 C. F. R. § 413.89, 42 CFR § 413.89
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C

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Chapter IV. Centers for Medicare & Medicaid Services, Department of Health and Human Services (Refs & Annos)
Subchapter G. Standards and Certification (Refs & Annos)
Part 489. Provider Agreements and Supplier Approval (Refs & Annos)
Subpart B. Essentials of Provider Agreements

§ 489.21 Specific limitations on charges.

Except as specified in subpart C of this part, the provider agrees not to charge a beneficiary for any of the following:

(a) Services for which the beneficiary is entitled to have payment made under Medicare.

(b) Services for which the beneficiary would be entitled to have payment made if the provider--

(1) Had in its files the required certification and recertification by a physician relating to the services furnished to the beneficiary;

(2) Had furnished the information required by the intermediary in order to determine the amount due the provider on behalf of the individual for the period with respect to which payment is to be made or any prior period;

(3) Had complied with the provisions requiring timely utilization review of long stay cases so that a limitation on days of service has not been imposed under section 1866(d) of the Act (see subpart K of part 405 and part 482 of this chapter for utilization review requirements); and

(4) Had obtained, from the beneficiary or a person acting on his or her behalf, a written request for payment to be made to the provider, and had properly filed that request. (If the beneficiary or person on his or her behalf refuses to execute a written request, the provider may charge the beneficiary for all services furnished to him or her.)

(c) Inpatient hospital services furnished to a beneficiary who exhausted his or her Part A benefits, if CMS reimburses the provider for those services.

(d) Custodial care and services not reasonable and necessary for the diagnosis or treatment of illness or injury, if--

(1) The beneficiary was without fault in incurring the expenses; and

(2) The determination that payment was incorrect was not made until after the third year following the year in which the payment notice was sent to the beneficiary.

(e) Inpatient hospital services for which a beneficiary would be entitled to have payment made under Part A of Medicare but for a denial or reduction in payments under regulations at § 412.48 of this chapter or under section 1886(f) of the Act.

(f) Items and services furnished to a hospital inpatient (other than physicians' services as described in

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§ 415.102(a) of this chapter or the services of an anesthetist as described in § 405.553(b)(4) of this chapter) for which Medicare payment would be made if furnished by the hospital or by other providers or suppliers under arrangements made with them by the hospital. For this purpose, a charge by another provider or supplier for such an item or service is treated as a charge by the hospital for the item or service, and is also prohibited.

(g) [Reserved]

(h) Items and services (other than those described in §§ 489.20(s)(1) through (15)) required to be furnished under § 489.20(s) to a resident of an SNF (defined in § 411.15(p) of this chapter), for which Medicare payment would be made if furnished by the SNF or by other providers or suppliers under arrangements made with them by the SNF. For this purpose, a charge by another provider or supplier for such an item or service is treated as a charge by the SNF for the item or service, and is also prohibited.

[45 FR 22937, April 4, 1980; 48 FR 39838, Sept. 1, 1983; 49 FR 324, Jan. 3, 1984; 51 FR 22052, June 17, 1986; 52 FR 27765, July 23, 1987; 60 FR 63189, Dec. 8, 1995; 64 FR 41683, July 30, 1999; 65 FR 46796, July 31, 2000; 65 FR 62646, Oct. 19, 2000; 66 FR 39601, July 31, 2001]

SOURCE: 45 FR 22937, Apr. 4, 1980; 51 FR 16789, May 6, 1986; 51 FR 24492, July 3, 1986; 51 FR 34788, Sept. 30, 1986; 51 FR 41338, Nov. 14, 1986; 52 FR 27765, July 23, 1987; 53 FR 38835, Sept. 30, 1988; 54 FR 29717, July 14, 1989; 56 FR 48879, Sept. 26, 1991; 59 FR 32120, June 22, 1994; 59 FR 56250, Nov. 10, 1994; 60 FR 50441, Sept. 29, 1995; 64 FR 66279, Nov. 24, 1999; 64 FR 67052, Nov. 30, 1999; 69 FR 69268, Nov. 26, 2004; 71 FR 71334, Dec. 8, 2006; 72 FR 47412, Aug. 22, 2007, unless otherwise noted.

AUTHORITY: Secs. 1102, 1819, 1820(e), 1861, 1864(m), 1866, 1869, and 1871 of the Social Security Act (42 U.S.C. 1302, 1395i-3, 1395x, 1395aa(m), 1395cc, 1395ff, and 1395hh).

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Subchapter G. Standards and Certification (Refs & Annos)
Part 489. Provider Agreements and Supplier Approval (Refs & Annos)
Subpart A. General Provisions

§ 489.3 Definitions.

For purposes of this part--

Immediate jeopardy means a situation in which the provider's noncompliance with one or more requirements of participation has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident.

Physician-owned hospital means any participating hospital (as defined in § 489.24) in which a physician, or an immediate family member of a physician (as defined in § 411.351 of this chapter), has an ownership or investment interest in the hospital. The ownership or investment interest may be through equity, debt, or other means, and includes an interest in an entity that holds an ownership or investment interest in the hospital. This definition does not include a hospital with physician ownership or investment interests that satisfy the requirements at § 411.356(a) or (b) of this chapter.

Provider agreement means an agreement between CMS and one of the providers specified in § 489.2(b) to provide services to Medicare beneficiaries and to comply with the requirements of section 1866 of the Act.

[48 FR 39837, Sept. 1, 1983; 51 FR 24492, July 3, 1986; 54 FR 5373, Feb. 2, 1989; 54 FR 29717, July 14, 1989; 54 FR 53611, Dec. 29, 1989; 59 FR 56250, Nov. 10, 1994; 60 FR 50119, Sept. 28, 1995; 72 FR 47412, Aug. 22, 2007; 73 FR 48757, Aug. 19, 2008]

SOURCE: 45 FR 22937, Apr. 4, 1980; 51 FR 16789, May 6, 1986; 51 FR 24492, July 3, 1986; 51 FR 34788, Sept. 30, 1986; 51 FR 41338, Nov. 14, 1986; 52 FR 27765, July 23, 1987; 53 FR 38835, Sept. 30, 1988; 54 FR 29717, July 14, 1989; 56 FR 48879, Sept. 26, 1991; 59 FR 32120, June 22, 1994; 59 FR 56250, Nov. 10, 1994; 60 FR 50441, Sept. 29, 1995; 64 FR 66279, Nov. 24, 1999; 64 FR 67052, Nov. 30, 1999; 69 FR 69268, Nov. 26, 2004; 71 FR 71334, Dec. 8, 2006; 72 FR 47412, Aug. 22, 2007, unless otherwise noted.

AUTHORITY: Secs. 1102, 1819, 1820(e), 1861, 1864(m), 1866, 1869, and 1871 of the Social Security Act (42 U.S.C. 1302, 1395i-3, 1395x, 1395aa(m), 1395cc, 1395ff, and 1395hh).

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Part 489. Provider Agreements and Supplier Approval (Refs & Annos)
Subpart C. Allowable Charges

§ 489.30 Allowable charges: Deductibles and coinsurance.

(a) Part A deductible and coinsurance. The provider may charge the beneficiary or other person on his or her behalf:

(1) The amount of the inpatient hospital deductible or, if less, the actual charges for the services;

(2) The amount of inpatient hospital coinsurance applicable for each day the individual is furnished inpatient hospital services after the 60th day, during a benefit period; and

(3) The posthospital SNF care coinsurance amount.

(4) In the case of durable medical equipment (DME) furnished as a home health service, 20 percent of the customary charge for the service.

(b) Part B deductible and coinsurance.

(1) The basic allowable charges are the $75 deductible and 20 percent of the customary (insofar as reasonable) charges in excess of that deductible.

(2) For hospital outpatient services, the allowable deductible charges depend on whether the hospital can determine the beneficiary's deductible status.

(i) If the hospital is unable to determine the deductible status, it may charge the beneficiary its full customary charges up to $75.

(ii) If the beneficiary provides official information as to deductible status, the hospital may charge only the unmet portion of the deductible.

(3) In either of the cases discussed in paragraph (b)(2) of this section, the hospital is required to file with the intermediary, on a form prescribed by CMS, information as to the services, charges, and amounts collected.

(4) The intermediary must reimburse the beneficiary if reimbursement is authorized and credit the expenses to the beneficiary's deductible if the deductible has not yet been met.

(5) In the case of DME furnished as a home health service under Medicare Part B, the coinsurance is 20 percent of the customary (insofar as reasonable) charge for the services, with the following exception: If the DME is used DME purchased by or on behalf of the beneficiary at a price at least 25 percent less than the reasonable charge for comparable new equipment, no coinsurance is required.

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[51 FR 41350, Nov. 14, 1986; 53 FR 6649, March 2, 1988; 53 FR 12945, April 20, 1988]

SOURCE: 45 FR 22937, Apr. 4, 1980; 51 FR 16789, May 6, 1986; 51 FR 24492, July 3, 1986; 51 FR 34788, Sept. 30, 1986; 51 FR 41338, Nov. 14, 1986; 52 FR 27765, July 23, 1987; 53 FR 38835, Sept. 30, 1988; 54 FR 29717, July 14, 1989; 56 FR 48879, Sept. 26, 1991; 59 FR 32120, June 22, 1994; 59 FR 56250, Nov. 10, 1994; 60 FR 50441, Sept. 29, 1995; 64 FR 66279, Nov. 24, 1999; 64 FR 67052, Nov. 30, 1999; 69 FR 69268, Nov. 26, 2004; 71 FR 71334, Dec. 8, 2006; 72 FR 47412, Aug. 22, 2007, unless otherwise noted.

AUTHORITY: Secs. 1102, 1819, 1820(e), 1861, 1864(m), 1866, 1869, and 1871 of the Social Security Act (42 U.S.C. 1302, 1395i-3, 1395x, 1395aa(m), 1395cc, 1395ff, and 1395hh).

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RULE 14.2
WHO IS ENTITLED TO COSTS

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be required to pay costs. A "nominal party" is one who is named but has no real interest in the controversy.

RULE 14.3
EXPENSES ALLOWED AS COSTS

(a) Generally. Only statutory attorney fees and the reasonable expenses actually incurred by a party for the following items which were reasonably necessary for review may be awarded to a party as costs: (1) preparation of the original and one copy of the report of proceedings, (2) copies of the clerk's papers, (3) preparation of a brief or other original document to be reproduced by the clerk, as provided in rule 14.3(b), (4) transmittal of the record on review, (5) expenses incurred in superseding the decision of the trial court, but not ordinarily greater than the usual cost of a commercial surety bond, (6) the lesser of the charges of the clerk for reproduction of briefs, petitions, and motions, or the costs incurred by the party reproducing briefs as authorized under rule 10.5(a), (7) the filing fee, and (8) such other sums as provided by statute. If a party has incurred an expense for one of the designated items, the item is presumed to have been reasonably necessary for review, which presumption is rebuttable. The amount paid by a party for the designated item is presumed reasonable, which presumption is rebuttable.

(b) Special Rule for Cost of Preparing Brief or Other Original Document. The costs awarded for preparing a brief or other original document is an amount per page fixed from time to time by the Supreme Court. The cost for preparing a brief or other original document will only be awarded for a brief or document which substantially complies with these rules and only for the actual number of pages of the brief or document including the front cover and appendix. If a brief or document is unreasonably long, costs will be awarded only for a reasonable number of pages.

(c) Special Rule for Indigent Review. An Indigent may not recover costs from the State for expenses paid with public funds as provided in Title 15. The clerk or commissioner will claim costs due from other parties which reimburse the State for expenses paid with public finds as provided in Title 15.

[Amended effective July 1, 1976; July 2, 1976; September 1, 1985; September 1, 1994]

References

Rule 18.1, Attorney Fees and Expenses; RCW 4.84, Costs.

RULE 14.4
COST BILL

(a) Generally. Except as provided in sections (b) and (c), a party seeking costs on review must file a cost bill with the appellate court and serve a copy of the cost bill on all parties within 10 days after the filing of an appellate court decision terminating review. If a party seeks costs for an expense incurred after the time to file a cost bill has expired, that party must serve on all parties and file a supplemental cost bill with the appellate court within 10 days after the expense was incurred. If a decision terminating review is modified to the extent that a different party is entitled to costs, the party seeking costs must file a cost bill with the appellate court and serve a copy of the cost bill on all parties within 10 days after the filing of the decision which modifies the original decision terminating review.

(b) When Costs Abide Final Result and There Is no Second Review. If the costs on review are to abide the final determination in the trial court and that final determination is not reviewed by the appellate court, a party seeking costs must, within 30 days after the time to seek review of the trial court decision has expired, file with the appellate court and serve on each party: (1) a cost bill for costs on review, or if a cost bill was filed for the earlier review, a copy of the cost bill previously filed in the appellate court, (2) a copy of the final determination of the trial court, and (3) an affidavit stating that a notice of appeal or notice for discretionary review of the decision finally determining the case has not been filed.

(c) When Costs Abide Final Result and There Is a Second Review. If the costs on review are to abide the final determination of the case by the trial court and that final determination is reviewed by the appellate court, the costs of the earlier review will be taxed at the same time the costs of the later review are taxed. A party seeking costs of the earlier review must file (1) a cost bill for costs on the earlier review or, if a cost bill was filed for the earlier review, a copy of the cost bill for the earlier review, and (2) a cost bill for the later review.

References

Form 10, Cost Bill; Rule 12.5, Mandate.

RAP RULE 18.1
ATTORNEY FEES AND EXPENSES

(a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court. The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

(c) Affidavit of Financial Need. In any action where applicable law mandates consideration of the financial resources of one or more parties regarding an award of attorney fees and expenses, each party must serve upon the other and file a financial affidavit no later than 10 days prior to the date the case is set for oral argument or consideration on the merits; however, in a motion on the merits pursuant to rule 18.14, each party must serve and file a financial affidavit along with its motion or response. Any answer to an affidavit of financial need must be filed and served within 7 days after service of the affidavit.

(d) Affidavit of Fees and Expenses. Within 10 days after the filing of a decision awarding a party the right to reasonable attorney fees and expenses, the party must serve and file in the appellate court an affidavit detailing the expenses incurred and the services performed by counsel.

(e) Objection to Affidavit of Fees and Expenses; Reply. A party may object to a request for fees and expenses filed pursuant to section (d) by serving and filing an answer with appropriate documentation containing specific objections to the requested fee. The answer must be served and filed within 10 days after service of the affidavit of fees and expenses upon the party. A party may reply to an answer by serving and filing the reply documents within 5 days after the service of the answer upon that party.

(f) Commissioner or Clerk Awards Fees and Expenses. A commissioner or clerk will determine the amount of the award, and will notify the parties. The determination will be made without a hearing, unless one is requested by the commissioner or clerk.

(g) Objection to Award. A party may object to the commissioner's or clerk's award only by motion to the appellate court in the same manner and within the same time as provided in rule 17.7 for objections to any other rulings of a commissioner or clerk.

(h) Transmitting Judgment on Award. The clerk will include the award of attorney fees and expenses in the mandate, or the certificate of finality, or in a supplemental judgment. The award of fees and expenses may be enforced in the trial court.

(i) Fees and Expenses Determined After Remand. The appellate court may direct that the amount of fees and expenses be determined by the trial court after remand.

(j) Fees for Answering Petition for Review. If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals,

and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review. A party seeking attorney fees and expenses should request them in the answer to the petition for review. The Supreme Court will decide whether fees are to be awarded at the time the Supreme Court denies the petition for review. If fees are awarded, the party to whom fees are awarded should submit an affidavit of fees and expenses within the time and in the manner provided in section (d). An answer to the request or a reply to an answer may be filed within the time and in the manner provided in section (e). The commissioner or clerk of the Supreme Court will determine the amount of fees without oral argument, unless oral argument is requested by the commissioner or clerk. Section (g) applies to objections to the award of fees and expenses by the commissioner or clerk.

[Amended to become effective December 29, 1998; December 5, 2002; September 1, 2003; September 1, 2006.]

RULE 9.7
PREPARING CLERK'S PAPERS AND EXHIBITS FOR APPELLATE COURT

(a) Clerk's Papers. The clerk of the trial court shall make copies at cost, not to exceed 50 cents a page, of those portions of the clerk's papers designated by the parties and prepare them for transmission to the appellate court. The clerk shall assemble the copies and number each page of the clerk's papers in chronological order of filing, and bind in volumes of no more than 200 pages. The clerk shall prepare a cover sheet for the papers with the title "Clerk's Papers" and prepare an alphabetical index to the papers. The clerk shall promptly send a copy of the index to each party. The reproduction costs must be paid to the trial court clerk within 14 days of receipt of the index. Failure to do so may result in sanctions under rule 18.9. Upon receipt of payment, the clerk shall forward the clerk's papers to the appellate court.

(b) Exhibits. The clerk of the trial court shall assemble those exhibits designated by the parties and prepare them for transmission to the appellate court. Exhibits which are papers should be assembled in the order the exhibits are numbered with a cover sheet which lists the exhibits and is titled "Exhibits."

(c) Certified Record of Administrative Adjudicative Orders. When an administrative agency has certified the record of an administrative order for review by the superior court, the clerk of the superior court shall transmit to the appellate court the original record certified by the administrative agency.