

FILED

JAN 20 2015

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jan 16, 2015, 2:55 pm
BY RONALD R. CARPENTER
CLERK

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

NO. 90533-9

RECEIVED BY E-MAIL

SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners,

v.

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

Respondents.

BRIEF OF *AMICUS CURIAE* OF THE ATTORNEY GENERAL OF
THE STATE OF WASHINGTON IN SUPPORT OF
RESPONDENTS

ROBERT W. FERGUSON
Attorney General

Kimberlee Gunning
Assistant Attorney General
WSBA No. 35366
Consumer Protection Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104



ORIGINAL

TABLE OF CONTENTS

I. IDENTITY AND INTEREST OF *AMICUS*1

II. ISSUES ADDRESSED BY *AMICUS*2

III. STATEMENT OF THE CASE2

IV. ARGUMENT2

 A. Summary of Argument.2

 B. Rigid Application of the Filed Rate Doctrine Would Undermine the Legislature’s Intent that the CPA Be Liberally Construed to Protect Washington Consumers.....4

 C. RCW 19.86.170 Expressly Permits CPA Claims Challenging Insurers’ Unfair or Deceptive Acts or Practices, Unless Those Acts or Practices Are Specifically “Required or Permitted” Pursuant to the Insurance Code.....7

 D. A Private CPA Plaintiff’s Request for Actual Damages Under RCW 19.86.090 in a Case Challenging an Insurer’s Misrepresentations Regarding Its Rates Does Not Mandate Application of the Filed Rate Doctrine.13

V. CONCLUSION16

TABLE OF AUTHORITIES

Cases

<i>Blaylock v. First Am. Title Ins. Co.</i> , 504 F. Supp. 2d 1091 (W.D. Wash. 2007)	11, 12
<i>Ethridge v. Hwang</i> , 105 Wn. App. 447, 20 P.3d 958 (2001)	7
<i>Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.</i> , 162 Wn.2d 59, 170 P.3d 10 (2007)	6, 13, 15, 16
<i>Johnston v. Beneficial Mgmt. Corp. of Am.</i> , 85 Wn.2d 637, 538 P.2d 510 (1975)	6
<i>McCarthy Finance, Inc. v. Premera</i> , 182 Wn. App. 1, 328 P.3d 940 (2014)	1, 3, 4, 9, 11, 14
<i>Nader v. Allegheny Airlines, Inc.</i> , 426 U.S. 290, 96 S. Ct. 1978, 48 L. Ed. 2d 643 (1976)	14
<i>Pain Diagnostics & Rehabilitation Assocs., P.S. v. Brockman</i> , 97 Wn. App. 691, 988 P.2d 972 (1999)	12
<i>Panag v. Farmers Ins. Co. of Washington</i> , 166 Wn.2d 27, 204 P.3d 885 (2009)	5, 13
<i>Salois v. Mut. of Omaha Ins. Co.</i> , 90 Wn.2d 355, 581 P.2d 1349 (1978)	6
<i>Scott v. Cingular Wireless</i> , 160 Wn.2d 843, 161 P.3d 1000 (2007)	2
<i>Short v. Demopolis</i> , 103 Wn.2d 52, 691 P.2d 163 (1984)	5
<i>Singleton v. Naegeli</i> , 142 Wn. App. 598, 175 P.3d 594 (2008)	8

<i>State v. Roadhs</i> , 71 Wn.2d 705, 430 P.2d 586 (1967)	13
<i>Stephens v. Omni Ins. Co.</i> , 138 Wn. App. 151, 159 P.3d 10 (2007)	7
<i>Tenore v. AT&T Wireless Services</i> , 136 Wn.2d 322, 962 P.2d 104 (1998)	14
<i>Vogt v. Seattle-First Nat'l Bank</i> , 117 Wn.2d 541, 817 P.2d 1364 (1991)	5, 7, 9, 10
<i>Washington Natural Gas Co. v. Public Utility Dist. No. 1</i> , 77 Wn.2d 94, 459 P.2d 633 (1969)	12
<i>Young Americans for Freedom v. Gorton</i> , 91 Wn.2d 204, 588 P.2d 195 (1978)	1

Statutes

RCW 19.86.020	4
RCW 19.86.080	2
RCW 19.86.090	13
RCW 19.86.095	2
RCW 19.86.170	4, 8, 9, 10
RCW 19.86.920	4, 5
RCW 48.30.040	10
RCW 48.44.020(2)	9
RCW 48.44.020(3)	9
RCW 48.44.110	9

Other Authorities

Fla. Stat. § 501.212(4)..... 9

Idaho Code § 48-605(3)..... 9

I. IDENTITY AND INTEREST OF *AMICUS*

Amicus Curiae is the Attorney General of Washington. The Attorney General submits this amicus brief to urge this Court to hold that the common-law filed rate doctrine is not an absolute bar to a plaintiff's ability to bring claims under RCW 19.86, the Consumer Protection Act ("CPA"), based on an insurer's unfair or deceptive misrepresentations regarding the insurer's rates, including misrepresentations about the reasons for increases in insurance premiums.¹

The Attorney General's constitutional and statutory powers include the submission of amicus curiae briefs on matters affecting the public interest. See *Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 212, 588 P.2d 195 (1978). This case presents issues of significant public interest, including the level of protection afforded by the CPA to Washington consumers with respect to the business of insurance. The Attorney General enforces the CPA on behalf of the public,

¹ The Attorney General does not take a position in this amicus brief with respect to whether the CPA may be used as a means by which to challenge a nonprofit health insurer's retention of a surplus in the absence of any misrepresentations, or to challenge an insurer's representation that it is a nonprofit. As the Court of Appeals noted, the Plaintiffs' complaint does not "assert[] any claim regarding the surplus that is not, fundamentally, based on marketing misrepresentations or false statements to the public. Neither does the complaint state any claim that Premera's non-profit status, in and of itself, or its statements to the public that it is a nonprofit provide a basis for any relief." *McCarthy Finance, Inc. v. Premera*, 182 Wn. App. 1, 8, n.4, 328 P.3d 940 (2014).

RCW 19.86.080, and has an interest in the development of CPA case law, RCW 19.86.095, including the availability of private CPA claims:

Private actions by private citizens are now an integral part of CPA enforcement. Private citizens act as private attorneys general in protecting the public's interest against unfair and deceptive acts and practices in trade and commerce. Consumers bringing actions under the CPA do not merely vindicate their own rights; they represent the public interest and may seek injunctive relief even when the injunction would not directly affect their own private interests.

Scott v. Cingular Wireless, 160 Wn.2d 843, 853, 161 P.3d 1000 (2007)
(internal citations omitted).

II. ISSUES ADDRESSED BY AMICUS

Whether the filed rate doctrine bars a CPA claim arising from an insurer's unfair or deceptive misrepresentations to consumers regarding the insurer's rates.

III. STATEMENT OF THE CASE

The Attorney General agrees with the facts of this case as set forth in the Court of Appeals' decision below.

IV. ARGUMENT

A. Summary of Argument.

This case asks the Court to determine whether and when a private plaintiff may bring a CPA claim challenging an insurer's unfair or

deceptive misrepresentations regarding the insurer's rates. Defendants/Petitioners Premera² and the Washington Alliance for Healthcare Insurance Trust and its trustee ("WAHIT") urge the Court to hold that all private CPA actions that refer or relate to an insurer's rates are precluded, pursuant to the common-law filed rate doctrine, and that, as a result, the Insurance Commissioner has exclusive authority to address Plaintiffs'³ concerns. *See* Supplemental Br. of Pet'rs at 10. Plaintiffs argue that such a "rigid application of the [filed rate] doctrine leaves no room for any judicial action that challenges conduct of health insurers which may result in an indirect impact on rates." Supplemental Br. of Resp'ts at 14.

The Attorney General agrees with the Court of Appeals' holding that "the filed rate doctrine has limitations" and that the Superior Court erred as a matter of law when it dismissed Plaintiffs' CPA claims in their entirety. *McCarthy Finance, Inc. v. Premera*, 182 Wn. App. 1, 13, 328 P.3d 940 (2014). First, an overbroad reading of the filed rate doctrine's preclusive effect would undermine the legislative mandate that the CPA

² The Attorney General uses "Premera" herein to collectively refer to Defendants/Petitioners Premera, Premera Blue Cross and LifeWise Health Plan of Washington.

³ For ease of reference, the Attorney General uses "Plaintiffs" herein to refer to the Plaintiffs/Respondents McCarthy Finance, Inc; McCarthy Retail Financing Services, LLC; Hemphill Brothers, Inc.; J.A. Jack & Sons, Inc.; Lane Mt. Silica Co.; Puckett & Redford, PLLC; and Annette Steiner.

must be liberally construed to protect Washington consumers from unfair or deceptive practices in any trade or commerce. *See* RCW 19.86.920. Second, the CPA's express language allows CPA claims by consumers challenging insurers' unfair or deceptive acts or practices, unless those acts or practices are specifically "required or permitted" by Title 48, the Insurance Code. *See* RCW 19.86.170. As the Court of Appeals recognized, "[t]he rigid filed rate standard Premera proposes would significantly undercut" this provision of the CPA. *McCarthy*, 182 Wn. App. at 13. Finally, a private CPA plaintiff's request for damages proximately caused by an insurer's misrepresentations regarding its rates does not require application of the filed rate doctrine because damages would be based on misrepresentations about the rate, not its components.

B. Rigid Application of the Filed Rate Doctrine Would Undermine the Legislature's Intent that the CPA Be Liberally Construed to Protect Washington Consumers.

The CPA prohibits "unfair or deceptive acts or practices in the conduct of *any* trade or commerce[.]" RCW 19.86.020 (emphasis added). It was enacted by the Legislature "to protect the public and foster fair and honest competition." RCW 19.86.920. To achieve this goal, the Legislature directed that the CPA "shall be liberally construed that its beneficial purposes may be served." *Id.* Liberal construction requires

courts to broadly interpret the CPA's scope and coverage. *Vogt v. Seattle-First Nat'l Bank*, 117 Wn.2d 541, 552, 817 P.2d 1364 (1991) (explaining that "'liberal construction' is a command that the coverage of an act's provisions in fact be liberally construed and that its exceptions be narrowly confined"). A broad construction of exemptions to the CPA would conflict with this legislative mandate. *See id.*; *see also Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984) (explaining that the CPA demonstrates "a carefully drafted attempt to bring within its reaches every person who conducts unfair or deceptive acts or practices in any trade or commerce") (emphasis in original).

Applying the filed rate doctrine as a complete bar to Plaintiff's CPA claims, without consideration of the fact that the claims allege misrepresentations in advertising rather than a miscalculation of rates, would be inconsistent with the Legislature's mandate that the CPA be "liberally construed that its beneficial purposes be served" and with this Court's jurisprudence confirming that an expansive interpretation of the CPA is appropriate. RCW 19.86.920; *see Short*, 103 Wn.2d at 61; *cf. Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009) (citing RCW 19.86.920 and rejecting defendants' arguments that would limit the scope of persons protected from unfair or deceptive practices by the CPA).

This Court has previously rejected an argument that a common law doctrine or affirmative defense limits the scope of the CPA. *See, e.g., Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 86, 170 P.3d 10 (2007) (rejecting defendants' argument that voluntary payment doctrine should be applied to a CPA claim as it is to common law contract claims and holding that "the voluntary payment doctrine is inappropriate as an affirmative defense in the CPA context, as a matter of law, because we construe the CPA liberally"). The refusal to apply the same defenses to a CPA claim as apply to common law claims is consistent with the Legislature's mandate that the CPA be "liberally construed." Moreover, it is well-established that the conduct the CPA prohibits, "unfair or deceptive acts or practices," has no common law equivalent. *See Johnston v. Beneficial Mgmt. Corp. of Am.*, 85 Wn.2d 637, 640, 538 P.2d 510 (1975), (explaining that "'unfair or deceptive acts or practices,' like 'unfair methods of competition,' is a new concept and has no common law equivalent. Thus, until the 1970 amendment [allowing for private CPA actions for damages], there was no statutory or common law private right of action based upon such acts or practices") *modified on other grounds, Salois v. Mut. of Omaha Ins. Co.*, 90 Wn.2d 355, 581 P.2d 1349 (1978).

This Court should decline to hold that the filed rate doctrine bars Plaintiffs' CPA claims in their entirety. To do so would contravene the Legislature's intent that the CPA be broadly construed.

C. RCW 19.86.170 Expressly Permits CPA Claims Challenging Insurers' Unfair or Deceptive Acts or Practices, Unless Those Acts or Practices Are Specifically "Required or Permitted" Pursuant to the Insurance Code.

Washington courts have repeatedly rejected the argument that businesses that "operate[] in a highly regulated arena . . . are exempt from liability under the Consumer Protection Act." *See, e.g., Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 172, 159 P.3d 10 (2007) (rejecting defendant's argument that "the plaintiffs are trying to use the Consumer Protection Act to make an end-run around regulatory statutes" governing debt collection), *aff'd, Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 204 P.3d 885 (2009); *Vogt*, 117 Wn.2d at 553-54 (holding that "[a]lthough the Comptroller of the currency has regulatory and supervisory authority over national banks, that authority alone does not result in exemption under the Consumer Protection Act for Seafirst [Bank] in this case"); *Ethridge v. Hwang*, 105 Wn. App. 447, 457, 20 P.3d 958 (2001) (rejecting defendant's argument that CPA claim arising from mobile home tenancy should be exempt from the Consumer Protection Act because of the specific regulations already found in the Mobile Home Landlord Tenant

Act, RCW Ch. 59.20; explaining that “other heavily regulated areas of trade or commerce, such as the legal profession and the banking industry, are subject to the CPA”); *Singleton v. Naegeli*, 142 Wn. App. 598, 611, 175 P.3d 594 (2008) (holding that court reporting firm’s practices were not exempt from the CPA notwithstanding the Department of Licensing’s “close control and regulation of the [court reporting] profession and [its] practices”). Rather, when considering whether certain acts or practices are exempt from the CPA, courts are guided by the “exempted actions or transactions” section of the CPA, which provides that

Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States: PROVIDED, HOWEVER, That actions and transactions prohibited or regulated under the laws administered by the insurance commissioner shall be subject to the provisions of RCW 19.86.020 and all sections of chapter 216, Laws of 1961 and chapter 19.86 RCW which provide for the implementation and enforcement of RCW 19.86.020 except that nothing required or permitted to be done pursuant to Title 48 RCW shall be construed to be a violation of RCW 19.86.020....

RCW 19.86.170.

With respect to insurance, as the statutory language makes clear, actions or transactions are only exempt from the CPA if those actions are

“required or permitted to be done pursuant to Title 48 RCW[,]” the Insurance Code. *See id.* For purposes of RCW 19.86.170, “permitting” an action or transaction requires the Insurance Commissioner to take “overt affirmative actions specifically to permit the actions or transactions engaged in by the person or entity involved in a [CPA] complaint.” *See Vogt*, 117 Wn.2d at 552 (rejecting argument that “mere acquiescence by a regulating agency” is the equivalent of “permission” as defined by RCW 19.86.170).⁴

It is true that the Insurance Commissioner reviews all insurance rates, and has authority “to disapprove any insurance contract if the benefits provided are ‘unreasonable in relation to the amount charged for the contract.’” *McCarthy*, 182 Wn. App. at 9 (quoting RCW 48.44.020(3)). The Insurance Commissioner may disapprove an insurance contract “if it is ambiguous or misleading or if the purchase of health care services is solicited by deceptive advertising.” *Id.* (citing RCW 48.44.020(2), .110). The Insurance Commissioner also has authority to enforce RCW chapter

⁴ In this way, Washington’s CPA differs from other state consumer protection statutes that expressly exempt *all* insurance activities regulated by a state agency from the scope of the consumer protection statute. *See, e.g.*, Fla. Stat. § 501.212(4) (providing that Florida’s consumer protection statute “does not apply to...[a]ny person or activity regulated under laws administered by: The Office of Insurance Regulation of the Financial Services Commission” or “[a]ny person or activity regulated under the laws administered by the former Department of Insurance which are not administered by the Department of Financial Services”); Idaho Code § 48-605(3) (providing that “[n]othing in Idaho’s Consumer Protection Act “shall apply to” persons subject to the Idaho statutes “defining, and providing for the determination by the director of the department of insurance of unfair methods of competition or unfair or deceptive acts or practices in the business of insurance”).

48.30's prohibitions on "unfair practices and frauds" in the business of insurance, including the prohibition of "false, deceptive or misleading representation[s] or advertising in the conduct of the business of insurance, or relative to the business of insurance, or relative to any person engaged therein." RCW 48.30.040. Under RCW 19.86.170, however, the Insurance Commissioner's authority to *regulate* unfair or deceptive misrepresentations in the conduct of insurance, including deceptive advertising that "solicit[s]" the purchase of health care insurance, does not exempt such unfair or deceptive practices from the scope of the CPA. Misrepresentations such as those Plaintiffs allege here would only be exempt from the CPA if the Insurance Commissioner took "overt affirmative actions specifically to permit" Premera and WAHIT to make such statements. *See Vogt*, 117 Wn.2d at 552.

Thus, to qualify for the exemption set forth in RCW 19.86.170's plain language, Premera and WAHIT must point to a particular provision of Title 48, an insurance regulation or other "overt affirmative action[]" by the Insurance Commissioner that either *requires* or *permits* the representations Plaintiffs challenge here. They cannot do so. There is no statute or regulation promulgated by the Insurance Commissioner that specifically permits Premera and WAHIT to: (1) claim that WAHIT is an "employer governed trust"; (2) "advertis[e] in WAHIT mailings that it 'negotiate[s]' to

obtain high quality benefits at the ‘lowest possible cost’ or ‘most affordable cost’”; (3) “assert[] that WAHIT is a ‘member governed group’”; and (4) “‘falsely stat[e] publicly that the reasons for the annual premium increases are because of increases in the cost of medical, hospital and health care’ and ‘conceal[ing] from the plaintiffs and class members the fact that the percentage increases in those costs were not required to justify the increase in premiums[.]’” *McCarthy*, 182 Wn. App. at 18 (quotation marks in original). Nor can Premera or WAHIT show that the Insurance Commissioner has otherwise taken affirmative action to require or permit such representations. In sum, whether the Insurance Commissioner *regulates* false advertising and the representations insurers make to solicit consumers to purchase insurance plans is irrelevant to whether insurers can bring a CPA claim challenging those misrepresentations. Insurers are shielded from a CPA action only when the Insurance Commissioner has affirmatively authorized the alleged unfair or deceptive conduct. *Cf. Blaylock v. First Am. Title Ins. Co.*, 504 F. Supp. 2d 1091, 1104 (W.D. Wash. 2007).

Permitting the Plaintiffs to bring CPA claims based on Premera and WAHIT’s alleged misrepresentations is also consistent with the Legislature’s intent with respect to remedies provided by the Insurance Code. *See, e.g., Pain Diagnostics & Rehabilitation Assocs., P.S. v. Brockman*, 97

Wn. App, 691, 697, 988 P.2d 972 (1999). “In creating the insurance regulatory scheme, the Legislature and the insurance commissioner did not intend to provide protection or remedies for individual interests; they only intended to create a mechanism for regulating the insurance industry.” *Id.* Except for situations when a plaintiff alleges he or she was “unreasonably denied a claim for coverage,” the CPA is the vehicle for private individuals to seek relief from the courts for violations of the Insurance Code. *See id.* (“private causes of action for violations of the insurance statutes and regulations must be brought under the CPA”); *see also Blaylock*, 504 F. Supp. 2d at 1103 (explaining that where an Insurance Commissioner’s regulation regarding the unlawful conduct at issue in that case was “keyed precisely to the language of the CPA.... It is difficult to understand why this language would be so precisely replicated if the Commissioner did not anticipate that such unfair practices could be reached in private actions”).

“Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio* – specific inclusions exclude implication.” *Washington Natural Gas Co. v. Public Utility Dist. No. 1*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969) (citing *State v. Roadhs*, 71 Wn.2d 705,

707, 430 P.2d 586 (1967)). If the Legislature did not see fit to exclude all acts or practices that in some way relate to insurance rates from the purview of the CPA, the Court should not do so. The alleged misrepresentations that give rise to Plaintiffs' CPA claim were not authorized by the Insurance Code or by any other statute, and there is no evidence that the Insurance Commissioner "took overt affirmative action" to "permit" Premera and WAHIT to make the statements they did. Thus, their actions are not exempted by RCW 19.86.170 and fall within the scope of the CPA.

D. A Private CPA Plaintiff's Request for Actual Damages Under RCW 19.86.090 in a Case Challenging an Insurer's Misrepresentations Regarding Its Rates Does Not Mandate Application of the Filed Rate Doctrine.

To recover under the CPA, a private plaintiff's injury⁵ must be proximately caused by the unfair or deceptive act at issue. *Indoor Billboard*, 162 Wn.2d at 84. In other words, "[a] plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." *Id.* The standard for awarding damages in a private CPA action is set forth in the statute: "the actual damages sustained by [the plaintiff]." RCW 19.86.090.

Injury in a private plaintiff's CPA case arising from an insurer's unfair or deceptive misrepresentations to consumers regarding the

⁵ As this Court has explained, for purposes of the CPA, "[i]njury' is distinct from 'damages.'" *Panag*, 166 Wn.2d at 58; "Monetary damages need not be proved; unquantifiable damages may suffice." *Id.* Here, Plaintiffs do seek money damages.

insurer's rates, and resulting damages, would be measured by that well-established standard: what injury did the plaintiff suffer as a proximate cause of the insurer's misrepresentations? And, if the plaintiff did sustain an injury proximately caused by those misrepresentations, what were the plaintiff's actual damages? Certainly, as the Court of Appeals recognized, "[a] CPA claim for damages caused by misrepresentation[s] in marketing insurance or in other public statements warrants consideration of the amount paid for the policy[.]" See *McCarthy*, 182 Wn. App. at 16. But determination of such actual damages by the finder of fact does not mean that the court or a jury would determine what premium rates would be appropriate or reasonable. While it is conceivable that persistent damage awards against an insurer might ultimately affect an insurer's rates, that impact on the rates would *not* be a result of a court or jury engaging in rate-setting. As this Court concluded in *Tenore*, "[an] award of damages is not per se rate regulation, and as the United States Supreme Court has observed, does not require a court to 'substitute its judgment for the agency's on the reasonableness of a rate.' Any court is competent to determine an award of damages." *Tenore v. AT&T Wireless Services*, 136 Wn.2d 322, 344-45, 962 P.2d 104 (1998) (quoting *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 299, 96 S. Ct. 1978, 48 L. Ed. 2d 643 (1976)).

This Court considered a similar issue in *Indoor Billboard*, where one issue on appeal was whether the Superior Court or the Washington Utilities and Transportation Commission (“WUTC”) had subject matter jurisdiction to decide the plaintiff’s CPA claim challenging a telecommunications company’s collection of a surcharge from its customers, which the company had described in an alleged deceptive manner on its statements. *Indoor Billboard*, 162 Wn.2d at 71-73. The defendant, Integra Telecom of Washington, Inc. (“Integra”), argued that the WUTC had exclusive jurisdiction to decide if it “charged an unreasonable or unlawful rate.” *Id.* at 71. Like the Insurance Commissioner here, with respect to insurance rates, the WUTC is the agency charged with regulation of the rates of certain businesses, in this case, telecommunications companies. *Id.* As this Court explained, “[t]he WUTC is vested with exclusive jurisdiction to decide complaints concerning the ‘reasonableness of any rate, toll, rental, or charge[]...for any service performed by any public service company’ or ‘charge in excess of the lawful rate in force at the time such charge was made.’” *Id.* at 71-72 (quoting RCW 80.04.220-.240). Integra argued that the WUTC had exclusive jurisdiction “because the [CPA] claim was for reimbursement of unreasonable rates and charges rather than damages under the CPA.” *Id.* at 72. The Court rejected that argument on two grounds. First, the Court

held that Integra was not immune to CPA claims pursuant to RCW 19.86.170. *Id.* at 72-73. Second, because the plaintiff alleged that “Integra engaged in the unfair and deceptive act or practice of charging and collecting a surcharge *unfairly or deceptively described* as a [particular kind of charge].” *Id.* at 73 (emphasis in original). In other words, the plaintiff’s claim was not a direct challenge to the regulated charge, but to how the rate was represented to consumers. Accordingly, the Court rejected defendants’ characterization of the monetary relief the plaintiff requested as “reimbursement of an unreasonable rate” and held that all the plaintiff sought was “damages under the CPA. *Id.*”

Those same principles apply here. The CPA claim challenging Premera and WAHIT’s misrepresentations is not exempted from the scope of the CPA pursuant to RCW 19.86.170. And, awarding a plaintiff actual damages pursuant to the CPA, to compensate him or her for injuries proximately caused by insurer’s misrepresentations regarding its rates, can be distinguished from reimbursing that plaintiff an “unreasonable” rate.

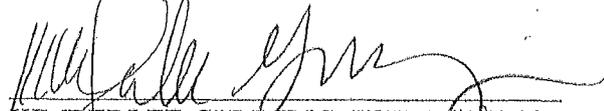
V. CONCLUSION

The Attorney General respectfully requests that the Court hold that an insurer is not immune from CPA claims arising from unfair or deceptive misrepresentations solely because the misrepresentations refer

or relate to its rates or because the plaintiff's recovery may ultimately impact the insurer's rates.

RESPECTFULLY SUBMITTED this 16th day of January, 2015.

ROBERT W. FERGUSON
Attorney General



KIMBERLEE GUNNING, WSBA #35366

Assistant Attorney General
Attorneys for Amicus Curiae
Attorney General of Washington

NO. 90533-9

RECEIVED BY E-MAIL

SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners,

v.

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

Respondents.

DECLARATION OF
SERVICE

NATALIA CORDUNEANU declares as follows:

I certify that on January 16, 2015, I caused to be filed with the
Supreme Court, via electronic filing, the Motion for Leave to File *Amicus*
Curiae Brief of the Attorney General of Washington, Brief of *Amicus*
Curiae of the Attorney General of Washington, and Declaration of

Service. I also caused to be delivered, via electronic mail true and accurate copies of said documents to the following parties:

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

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

Randall W. Redford
Puckett & Redford, PLLC
901 5th Avenue, Ste. 800
Seattle, WA 98164
rredford@puckettredford.com

Joseph C. Brown
J.C. Brown Law Office
200 Aplets Way
Cashmere, WA 98815
jbrown@jcbrownlawoffice.com

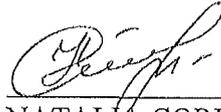
Frank R. Siderius
Raymond H. Siderius
C.R. Lonegran, Jr.
SIDERIUS LONEGRAN &
MARTIN
500 Union Street, Suite 847
Seattle, WA 98101
FrankS@sidlon.com

Vanessa O. Wells
HOGAN LOVELLS US LLP
4085 Campbell Avenue, Ste. 100
Menlo Park, CA 94025
vanessa.wells@hoganlovells.com

Christian E. Mammen
HOGAN LOVELLS US LLP
3 Embarcadero Center, Ste. 1500
San Francisco, CA 94111-4038
chris.mammen@hoganlovells.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Executed in Seattle, WA, this 16th day of January, 2015.



NATALIA CORDUNEANU

OFFICE RECEPTIONIST, CLERK

To: Corduneanu, Natalia (ATG)
Cc: Gunning, Kimberlee (ATG); 'paytong@lanepowell.com'; 'KOSullivan@perkinscoie.com'; 'rredford@puckettredford.com'; 'jbrown@jcbrownlawoffice.com'; 'FrankS@sidlon.com'; 'vanessa.wells@hoganlovells.com'; 'chris.mammen@hoganlovells.com'
Subject: RE: Premera, et. al. v. McCarthy, et. al.

Received 1-16-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Corduneanu, Natalia (ATG) [mailto:NataliaC@ATG.WA.GOV]
Sent: Friday, January 16, 2015 2:52 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Gunning, Kimberlee (ATG); 'paytong@lanepowell.com'; 'KOSullivan@perkinscoie.com'; 'rredford@puckettredford.com'; 'jbrown@jcbrownlawoffice.com'; 'FrankS@sidlon.com'; 'vanessa.wells@hoganlovells.com'; 'chris.mammen@hoganlovells.com'
Subject: Premera, et. al. v. McCarthy, et. al.

Case name: Premera, et. al. v. McCarthy, et. al.

Case number: 90533-9

Person filing the document: Kimberlee Gunning, (206) 389-2733, Bar No. 35366, KimberleeG@atg.wa.gov

Attached is the Motion for Leave to File Amicus Curiae Brief, Brief of Amicus Curiae of the Attorney General of Washington, and Declaration of Service.

Thank you for your cooperation in this matter.

Natalia Corduneanu

Legal Assistant
Tel.: 206-389-3995; Email: nataliac@atg.wa.gov

WA State Attorney General's Office
Consumer Protection Division
800 Fifth Avenue, Suite 2000, Seattle, WA 98104