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I. SUMMARY OF ANSWER

The Supplemental/Amici Curiae Brief Submitted by National Association of Mutual Insurance Companies and Property Casualty Insurance Association of America (hereafter “Insurer Trade Associations”), representing property/casualty insurers, advocates a bar to all claims under Washington’s Consumer Protection Act, RCW Ch. 19.86 (hereafter “CPA”) against health and other insurers, including claims of misrepresentation and false advertising.

The Insurer Trade Associations claim plaintiffs’ CPA action would result in judicial oversight of approved insurance rates and interfere with the business judgment of insurers regarding the amount of capital (surplus) necessary to support the business.

The Insurer Trade Associations would apply the filed rate doctrine and the “business judgment rule” to preclude any CPA claim leaving all responsibility for oversight of insurance rates and capitalization to the insurance regulators and company management, not the courts. This rigid position is contrary to Washington’s Insurance Code, the CPA, and Washington case law.

II. INTERESTS OF AMICI

The Amici Curiae Brief of the Attorney General of the State of Washington in Support of Respondents demonstrates an interest in supporting the CPA on behalf of the public as well as development of CPA case law, including the availability of private CPA claims. RCW 19.86.095 empowers private citizens to act as private attorneys general in protecting the public's interest against unfair and deceptive acts and practices in trade and commerce.

The Insurer Trade Associations ignore Washington's CPA and mischaracterize plaintiffs' lawsuit as a direct attack on approved insurance rates. They surmise that Association members "are likely to be subject to regulation through civil actions as a result of the Court of Appeals' decision." (Supplemental Amici Curiae Brief at p. 4.) The Insurer Trade Associations seek a hands-off policy insulating the insurance industry from CPA claims. No analysis of Washington law is provided. No reference to the CPA is made.

III. THE FILED RATE DOCTRINE

The Insurer Trade Associations promote the same rigid application of the filed rate doctrine rejected by the Court of Appeals in this case. No

analysis of the Court of Appeals opinion is provided. Applicability of the CPA to claims of misrepresentation by insurers is ignored. In characterizing plaintiffs' case as a simple attack on approved rates, the Insurer Trade Associations (and Premera) refuse to recognize that this case is a CPA claim. Premera, working through the Washington Alliance for Health Care Insurance Trust (WAHIT), the discretionary association that Premera created, has attained a massive surplus in excess of \$1 billion through false advertising and misrepresentations. The Premera defendants claim that through negotiation they have obtained health insurance for their customers at the lowest possible cost. WAHIT has made other false statements in its advertising including a claim that it is an employer governed trust. These false and misleading statements constitute unfair and deceptive acts and practices under the CPA and have contributed heavily to the defendants' surplus.

Plaintiffs' claims are not an attack on approved rates or premiums paid, and accordingly the claims are not and cannot be a violation of the filed rate doctrine. The principal issue before this court and the Court of Appeals is whether or not this is a rate case. Resolution of the issue is not complicated. Plaintiffs are not attacking a billable increment comprising a

portion of the rate. WAHIT asserts it engages in negotiation with third party insurers to obtain the lowest possible cost when in fact it does not engage in any negotiation. Thus, plaintiffs are not attacking any billable increment that WAHIT paid for member insurance. By not engaging in negotiation with other carriers, WAHIT incurred no cost associated with such alleged negotiations. Plaintiffs' claims in this regard cannot be deemed an attack on rates charged by WAHIT because there is no attack on any billable increment that would affect the overall rate charged.

No direct attack on rates is involved in this litigation. In claiming there is no negotiation by WAHIT and that any representation by WAHIT that it negotiates is false and deceptive, plaintiffs are asserting a violation of the CPA. Similarly, WAHIT's false advertisement that it is "employer-governed" is not an attack on rates it pays. Since the employer-governed claim is false, WAHIT spends no money ensuring that it is employer-governed. This false advertising does not involve any billing increment.

The unanimous Court of Appeals decision recognized this point, holding that an attack on false advertising is not an attack on rates and is clearly consistent with cases that provide an exception to the filed rate

doctrine. *McCarthy Finance, Inc. v. Premera*, 182 Wn.App. 1, 15, 328 P.3d 940 (2014), citing out of state cases.

This holding in the Court of Appeals decision is not addressed by Premera nor the Insurer Trade Associations. Their briefing does not analyze holdings in *Spielholz v. Superior Court*, 86 Cal.App. 4th 1366, 1369, 104 Cal.Rptr.2d 197 (2001), *Kellerman v. MCI Telecommunications Corp.*, 112 Ill.2d 428, 436, 444, 493 N.E.2d 1045 (1986) or *Qwest Corp. v. Kelly*, 204 Ariz. 25, 36-37, 59 P.3d 789 (2002), all of which recognize that false advertising can constitute an exception to the filed rate doctrine.

The Insurer Trade Associations acknowledge this court's decision in *Tenore v. AT&T Wireless Services*, 136 Wn.2d 322, 962 P.2d 104 (1998) which criticized how the filed rate doctrine has been rigidly invoked in barring claims of misrepresentation. This court ruled that claims of damages from a defendant's failure to disclose certain charges in its advertising was merely an indirect attack on rates. If there is no direct challenge to the rates being charged, the competence of the administrative agency is not involved and no re-examination of approved rates is necessary. The Insurer Trade Associations attempt to sidestep this ruling, claiming the more fundamental question is whether the case "would require the courts to decide questions of

economic public policy, which are essentially legislative in character.”

(Supplemental Amici Curiae Brief at p. 7.)

Tenore is the only analysis from this Court of the filed rate doctrine. The opinion authored by Justice Charles Z. Smith was approved by all of the justices. The case involved a claim by a plaintiff that the defendant long distance carrier had engaged in false advertising by failing to include in its ads that it followed a practice of “rounding up” the minutes involved in long distance charges. Justice Smith did not overlook the arguments urged by the defendant, including the usual filed rate mantra that if the defense were correct it would require a court to engage in rate regulation, possibly changing a rate previously approved administratively. Justice Smith reviewed the Court of Appeals decision in *Hardy v. Claircom Communications*, 86 Wn.App. 488, 937 P.2d 1128 (1997), and even referred to a Washington, D.C. federal circuit decision that had flatly rejected the same arguments plaintiff was presenting. At issue also was the question of primary jurisdiction because if the plaintiff’s only claim related to rates or charges, the matter should be referred to the FCC, the recognized expert in rate regulation. Justice Smith decided that the filed rate doctrine did not apply, but plaintiff’s claim could be preempted by federal statute if plaintiff’s

claims were in fact a challenge to rates. Ultimately, the defendant claimed that an award of damages would be “tantamount to rate regulation” an argument that Justice Smith rejected, concluding as the U.S. Supreme Court did in *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976) that the claims were not a challenge to rates and that any impact on rates would be merely incidental. This Court ruled that the primary claim based on fraudulent misrepresentation is within the conventional competence of the courts to decide. These conclusions are all relevant to the case at bar.

In a further attempt to distance itself from the *Tenore* decision, the Insurer Trade Associations attempt to distinguish the *Spielholz* case from the facts in this case. An award of damages for false advertising in that case would only have an indirect impact on rates. As here, no direct attack on rates was involved. The court would not be required to second guess an approved rate. Thus, the filed rate doctrine would not be involved.

The Insurer Trade Associations claim the present case is different and plaintiffs’ allegations of false advertising specifically concern the rate. They pose the question, “Did Premera really need that increase due to increased costs?” They conclude that a court cannot address the allegation that an

advertising statement is false without second guessing the rate determination. (Supplemental Amici Curiae Brief at p. 14.)

This argument is ludicrous. It ignores a serious falsehood, ignores the allegation that false advertising has resulted in accumulation of a massive surplus, and immunizes insurers from CPA claims including claims of misrepresentation about the reasons for premium increases. Asserting this is a mere attack on rates disregards the fact that plaintiffs do not attack the rate calculation methodology; do not attack rate components; do not seek a recalculation of rates; and do not allege fraud or misrepresentation by defendants to the Office of the Insurance Commissioner (OIC) during the rate-making process. The CPA claims are addressed to conduct of defendants in dealing with consumers resulting in an exorbitant surplus.¹

IV. COURTS AND SURPLUS

The Insurer Trade Associations at pp. 14-19 of the Supplemental Amici Curiae Brief discuss the importance of “surplus” in general terms. They contend that regulation of surplus should be left to the business judgment of company management or controlled by the Legislature.

¹ A significant portion of the surplus, approximately \$250 million, is composed of investment profits which are not the direct results of rates charged. (CP 229 and 251-252.)

Acknowledging that the Washington Legislature has not acted to control surplus, they mischaracterize plaintiffs' case as an attempt to overturn legislative policy by resort to the courts.

Once again, the Insurer Trade Associations ignore Washington's CPA. A claim under the CPA may be predicated upon a *per se* violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest. *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013).

The Insurer Trade Associations would seek to limit CPA claims to *per se* violations only. If the Legislature has not addressed a particular business practice, under this view, the unregulated act would not be susceptible to a CPA claim because of legislative policy.

The Insurer Trade Associations and Premera disregard the broad sweep of the CPA. The CPA addresses "injuries" rather than "damages." Quantifiable monetary loss is not required. See *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 431, 334 P.3d 529 (2014), citing *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27 at 58, 204 P.3d 885 (2009). In *Frias* a CPA plaintiff could establish injury based on unlawful debt collection

practices even where there is no dispute as to the validity of the underlying debt. In the present action, insurance premiums were lawfully charged under the existing regulatory scheme but the deceptive acts and practices of the Premera defendants are challenged by plaintiffs.

Plaintiffs allege the massive surplus held by Premera is the direct and proximate result of CPA violations. Injury to plaintiff class members is obvious. A non-profit insurance carrier should be held accountable to its “shareholders,” the general public. As noted by the Court of Appeals in its decision in this case, both the Insurance Code, RCW Ch. 48.44 and the CPA anticipate that policy holders may litigate claims against insurers and their agents. This is particularly true where the Insurance Commissioner has declared he is unable to effectively regulate surplus levels maintained by non-profit insurers. (CP 128, 211-218.)

The Insurer Trade Associations argue that insurance is safer when decisions about surplus are left to the business judgment of the company’s management. Washington does not recognize a “business judgment” exception to the CPA. As noted by the amici curiae brief of the Attorney General of the State of Washington, 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. Integral Telecom of Washington, Inc.*, 162 Wn.2d 59, 86, 170 P.3d 10 (2007).

The Insurer Trade Associations place reliance on *State Farm Mut. Auto. Ins. Co. v. Superior Court*, 114 Cal.App.4th 434 (2003) for the proposition that decisions relating to surplus should be left to the business judgment of management or the Legislature. “Courts are not in the business of deciding. . . what the right amount of surplus should be.” (Supplemental Amici Curiae Brief at p. 17.) But the *State Farm* case is factually and legally distinguishable. That case did not involve a consumer action based on false representations by insurers leading to excessive surplus. Rather, policy holders contended the insurance company’s board of directors did not pay dividends as promised. The court held the decision concerning the declaration of a dividend, where a legal dividend fund is available, rests within the sole discretion of the board of directors. “Courts are reluctant to interfere with the exercise of the directors’ business judgment unless the withholding is fraudulent, oppressive, or totally without merit.” (*State Farm, supra* at 450.)

In the present action, plaintiffs challenge the accumulation of excess surplus as a result of false and deceptive acts and practices of the Premera

defendants. No business judgment shield protects these defendants from plaintiffs' CPA claims. Misrepresentation and false statements to consumers are not "business judgment" decisions justifying deference from the courts.

V. CONCLUSION

This is a CPA claim challenging unfair and deceptive acts of health insurers. This is not a rate case warranting application of the filed rate doctrine. The broad application of the CPA overrides the rigid and narrow application of the filed rate doctrine promoted by the Insurer Trade Associations.

The Court of Appeals decision should be affirmed and the case remanded to the trial court for further proceedings.

Respectfully submitted this 5th day of February, 2015.

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Dear Clerk: We attach for filing in your court "Answer of Respondents to Supplemental/Amici Curiae Brief Submitted by National Association of Mutual Insurance Companies and Property Casualty Insurance Association of America."

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