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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,

Defendants-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,

Plaintiffs-Respondents

ON PETITION FOR REVIEW FROM
COURT OF APPEALS, DIVISION I

PETITIONERS' ANSWER TO THE BRIEF OF *AMICUS CURIAE*
OF THE ATTORNEY GENERAL OF
THE STATE OF WASHINGTON

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ARGUMENT	3
A. The AG’s Argument Is Based on the False Premise That Premera Contends that “All Private CPA Actions That Refer or Relate To An Insurer’s Rates Are Precluded.”	3
1. The Filed Rate Doctrine Precludes Claims that Attack the Reasonableness of Filed Rates and Seek Recovery of Rates as a Remedy.	3
2. Claims that Do Not Attack the Reasonableness of a Filed Rate or Seek A Refund of A Portion Of the Rate Survive the Filed Rate Doctrine.	4
B. This Court Should Dismiss Plaintiffs’ Claims Because To Rule Otherwise Would “Force The Courts To Determine What The Reasonable Rate Would Be In Order To Assess Damages.”	8
C. The AG’s Effort To Exempt Plaintiffs’ CPA Claim from the Filed Rate Doctrine Violates Precedent and Public Policy.	10
D. RCW 19.86.170 Bars Claims Challenging Those Acts or Practices That Are Specifically “Required or Permitted” Pursuant to the Insurance Code and Therefore Precludes Plaintiffs’ Claims.	11
E. Plaintiffs’ Complaint, While Pled Under the Guise of a CPA Claim, is Really an Overt Attack on the Reasonableness of Rates Approved by the OIC.	14
III. CONCLUSION	15

TABLE OF AUTHORITIES

CASES	Page(s)
<i>AT&T Corp. v. JMC Telecom, LLC</i> , 470 F.3d 525 (3d Cir. 2006).....	8, 9
<i>Gelfound v. Metlife Ins. Co. of Conn.</i> , 998 F.Supp.2d 1356 (S.D. Fla. 2014)	5, 12
<i>Hardy v. Claircom Commc 'ns Grp., Inc.</i> , 86 Wn. App. 488, 937 P.2d 1128 (1997)	10, 11
<i>In re NOS Commc 'ns</i> , MDL No. 1357, 495 F.3d 1052 (9th Cir. 2007).....	4, 5
<i>Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.</i> , 162 Wn.2d 59, 170 P.3d 10 (2007)	6, 7, 11, 13
<i>Joy v. Kaiser Aluminum and Chemical Corp.</i> , 62 Wn. App. 909, 816 P.2d 90 (1991)	14
<i>Marcus v. AT & T Corp.</i> , 138 F.3d 46 (2d Cir. 1998).....	4
<i>Marcus v. AT&T Corp.</i> , 938 F. Supp. 1158 (S.D.N.Y. 1996).....	4
<i>McCarthy Finance Inc. v. Premera</i> , 182 Wn. App. 1, 328 P.3d 940 (2014)	10
<i>Miller v. Wells Fargo Bank, N.A.</i> , 994 F. Supp. 2d 542 (S.D.N.Y. 2014).....	4
<i>Restaurant Dev., Inc. v. Cananwill, Inc.</i> , 114 Wn. App. 194, 55 P.3d 680 (2002)	12
<i>Tenore v. AT & T Wireless Servs.</i> , 136 Wn.2d 322, 962 P.2d 104 (1998).....	4, 10, 11
STATUTES	
RCW 19.86	13

RCW 19.86.020	12
RCW 19.86.170	passim
RCW 48	1, 11, 12
RCW 80.36.360	13

I. INTRODUCTION

The Attorney General of the State of Washington (“AG”) makes two arguments: First, the AG argues that the filed rate doctrine should not act as an automatic bar to private Washington Consumer Protection Act (“CPA”) actions based solely on the fact that the CPA claim “refer[s] or relate[s] to an insurer’s rates.” Second, the AG contends that the CPA’s express language allows Plaintiffs’ CPA claim because the alleged conduct of Petitioners was not specifically “required or permitted” by Title 48, the Insurance Code, or the Office of the Insurance Commissioner (“OIC”).

The AG misstates Premera’s position and misconstrues the Complaint in this case. Premera does not contend that the filed rate doctrine should preclude all private CPA actions based solely on the fact that the claim refers or relates to an insurer’s rates. Premera agrees that some private CPA actions that refer or relate to an insurer’s rates are not precluded by the filed rate doctrine. But here, the filed rate doctrine bars this Complaint because Plaintiffs seek a refund of the portion of premiums they allege was unreasonable and resulted in excessive surplus, and those premiums were rigorously reviewed and approved by the Insurance Commissioner.

It is important to focus on the specific remedy sought by Plaintiffs in their Complaint. The AG goes to great lengths to explain that a CPA claim seeking traditional damages for misrepresentations should not be barred by the filed rate doctrine, but this case is different. Here, Plaintiffs did not bring an action for damages other than a refund of a portion of OIC

approved premiums. *See* CP 4, 5, 10, 15, 17, 19-23, 28 (¶¶ 12, 14, 22, 30(a) & (b), 34, 39, 40-47; XX. PRAYER) (demanding “refunds of the gross and excessive overcharges in premium payments during the four-year period prior to the filing of this complaint plus interest at legal rate”).

In addition, the AG incorrectly construes RCW 19.86.170. Contrary to the AG’s position, RCW 19.86.170 precludes Plaintiffs’ claims in a way that mirrors the filed rate doctrine. There is no escaping that the gravamen of Plaintiffs’ complaint is a challenge to the reasonableness of Premera’s rates which were approved—in other words, “permitted” and “required”—by the OIC.

While the AG notes the public policy concerns that support the CPA, the AG does not discuss the public policy reasons for the filed rate doctrine. Applying the filed rate doctrine to bar Plaintiffs’ overt attack on the reasonableness of Premera’s approved rates is not inconsistent with the CPA. A ruling declining to apply the filed rate doctrine to dismiss Plaintiffs’ Complaint would be contrary to well-established case law in state and federal cases nationwide, including here in Washington.

This Court should adopt the rationale of courts across the country and reinforce the existing rule of law that the filed rate doctrine bars CPA claims to the following extent: Claims challenging the reasonableness of rates rigorously reviewed and approved by regulatory agencies, and seeking as a remedy a refund of the rates paid by the plaintiff, are precluded by the filed rate doctrine. This mandates dismissal of Plaintiffs’ Complaint.

II. ARGUMENT

A. **The AG's Argument Is Based on the False Premise That Premera Contends That "All Private CPA Actions That Refer or Relate to An Insurer's Rates Are Precluded."**

The AG characterizes the issue under review as follows: "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." The AG elaborates as follows: "Defendants/Petitioners Premera 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' concerns." That misstates Premera's position. Premera does not contend that the filed rate doctrine bars all CPA claims that refer or relate to an insurer's rates. Rather, Premera contends that the filed rate doctrine bars claims that attack the reasonableness of rates which have been approved by the OIC and seek a refund of a portion of the approved rate as a remedy.

1. **The Filed Rate Doctrine Precludes Claims That Attack the Reasonableness of Filed Rates and Seek Recovery of Rates as a Remedy.**

The actual issue before the Court is whether the filed rate doctrine bars a claim challenging the reasonableness of approved rates, and seeking return of allegedly excessive premiums from surplus. Plaintiffs claim they are entitled to recover a portion of their premiums that went into Premera's surplus because Premera misrepresented the reasons for its rates. Such

allegations run squarely into the filed rate doctrine. *See Marcus v. AT&T Corp.*, 938 F. Supp. 1158, 1170 (S.D.N.Y. 1996)) (“Any remedy that requires a refund of a portion of the filed rate—whether an award of damages for fraud on an agency or an award of damages for fraud on consumers—is barred.”), *aff’d*, *Marcus v. AT&T Corp.*, 138 F.3d 46, 57-62 (2d Cir. 1998) (“regulatory bodies have institutional competence to address rate-making issues; ... courts lack the competence to set ... rates; and ... the interference of courts in the rate-making process would subvert the authority of rate-setting bodies and undermine the regulatory regime”); *Miller v. Wells Fargo Bank, N.A.*, 994 F. Supp. 2d 542, 553-54 (S.D.N.Y. 2014) (the filed rate doctrine “‘applies even when a claim is based on fraud or impropriety in the method by which the rate is determined’”) (quoting *Simon v. KeySpan Corp.*, 694 F.3d 196, 205 (2d Cir. 2012)); *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 331, 962 P.2d 104 (1998) (“This doctrine provides, in essence, that any ‘filed rate’—a rate filed with and approved by the governing regulatory agency—is per se reasonable and cannot be the subject of legal action against the private entity that filed it.”).

2. Claims That Do Not Attack the Reasonableness of a Filed Rate or Seek a Refund of a Portion of the Rate Survive the Filed Rate Doctrine.

Not all CPA claims against an entity with regulated rates are barred. “[T]o the extent that . . . plaintiffs assert claims that neither attack the rates nor require reference to the filed-rate for a calculation of damages,” “the filed-rate doctrine is inapplicable.” *In re NOS Commc’ns*, MDL No. 1357, 495 F.3d 1052, 1060 (9th Cir. 2007). For example, in *NOS*, “Sound Travel

allege[d] that NOS violated the Washington Consumer Protection Act by marketing false billing information and by failing to notify consumers of differences between the quoted price and the actual price.” *Id.* at 1057. Sound Travel sought “damages due to economic loss,” *i.e.*, the difference between what it paid and the quoted price. *See id.* The court stated that the filed rate doctrine would bar the plaintiff’s claims unless they could “present a model of damages that does not [implicate the filed–rate doctrine].” *Id.* (quoting *Transmission Agency of N. Cal. v. Sierra Pac. Power Co.*, 295 F.3d 918, 933 (9th Cir. 2002)) (brackets in original). Applying this test, the court held that “claims under the Washington Consumer Protection Act and Nevada Consumer Fraud Statute are not preempted by the filed–rate doctrines,” because “[t]hese claims do not necessarily require a determination of the validity or reasonableness of the tariffs”—the damages were the difference between the quoted tariff and the tariff that was paid. *Id.* at 1059. However, some of the plaintiffs’ claims were barred by the filed rate doctrine: “In contrast, damages based on the difference between what NOS and Affinity charged, at the filed–rate, and what . . . plaintiffs’ previous carrier charged, are precluded.” *Id.* at 1060-61; *see also Gelfound v. Metlife Ins. Co. of Conn.*, 998 F.Supp.2d 1356, 1360 (S.D. Fla. 2014) (“the filed rate doctrine does not preclude a consumer from suing for damages by having been deprived of benefits which were promised”) (quoting *Richardson v. Standard Guar. Ins. Co.*, 853 A.2d 955, 967 (N.J. Super. 2004)).

Here, Plaintiffs ultimately claim that the OIC approved

unreasonable rates for Premera, and demand a refund of the difference between what allegedly would have been reasonable and what the OIC approved. Plaintiffs allege that as a result of allegedly unreasonable rates charged by Premera, they are entitled to recover the sums they have contributed to allegedly excessive surplus. *See* CP 4, 5, 10, 15, 17, 19-23 (¶¶ 12, 14, 22, 30(a) & (b), 34, 39, 40-47).

This is not a case in which Plaintiffs allege that Premera misrepresented the benefits it would provide; Plaintiffs instead allege that Premera misrepresented the method by which its rates were determined. This is not, for example, a case in which plaintiffs allege that Premera said the policy would cover dental services, but it actually did not. That hypothetical case would not be barred by the filed rate doctrine because the measure of damages would be that typically allowed by the CPA, *i.e.*, the costs the policyholder incurred receiving dental services in reliance on the misrepresentation. In that example, there would be no need to deconstruct the rate to award damages. Nor is this a case in which, for example, the allegation is that Premera stated that “this is the cheapest policy on the market,” that in fact a competitor offered a lower priced policy, and that as a result, plaintiffs are entitled to the difference between the price of the policies. Again, that hypothetical case would not be barred by the filed rate doctrine because the measure of damages would be that typically allowed by the CPA, *i.e.*, the financial impact to the purchaser, measured by the price difference between the two policies.

The AG discusses *Indoor Billboard/Wash., Inc. v. Integra Telecom*

of Wash., Inc., 162 Wn.2d 59, 170 P.3d 10 (2007), which likewise illustrates a claim that Premera agrees would not be foreclosed by the filed rate doctrine, even though the plaintiff therein alleged a CPA claim that referred or related to an insurer's rates. But that case is very different from the case at bar. *Indoor Billboard* involved a challenge to a surcharge that the defendant falsely represented to consumers had been approved by the responsible regulatory agency. *See id.* at 65-68. In fact, not only was the rate never reviewed or approved by the regulator, the defendant neither owed nor paid the surcharge. *Id.*

The plaintiff, Indoor Billboard, alleged that the defendant, Integra, engaged in an unfair or deceptive act or practice by assessing its Washington local exchange customers a surcharge known as a "presubscribed interexchange carrier charge." *Id.* at 63. Integra, a "competitive telecommunications company" ("CTC"), claimed immunity from a CPA suit because the Washington Utilities and Transportation Commission regulates "the rates, services, facilities, and practices of . . . telecommunications companies." *Id.* at 71-72 (quoting former RCW 80.01.040(3) (1985)). But it was undisputed that Integra had falsely stated that the surcharge was a pass-through of a charge it had paid, and that the FTC explicitly approved this "pass-through charge." *Id.* at 65-68. In fact, in *Indoor Billboard*, the regulators never approved the surcharge as part of the rate, nor did Integra actually pay the charge. *Id.*

Indoor Billboard does not provide a rationale for why the filed rate doctrine should not apply in this case. The case at bar is completely

different. Here, there is no dispute that the rates were approved by the Insurance Commissioner.

B. This Court Should Dismiss Plaintiffs' Claims Because to Rule Otherwise Would "Force The Courts to Determine What the Reasonable Rate Would Be in Order to Assess Damages."

This Court should reverse the Court of Appeals and reinstate the trial court's dismissal of the Complaint in its entirety because Plaintiffs' claims would require the factfinder to determine what a reasonable rate would be in order to award damages. *See AT&T Corp. v. JMC Telecom, LLC*, 470 F.3d 525, 535 (3d Cir. 2006) ("JMC's claim of negligent misrepresentation fails; to rule otherwise would force the courts to determine what the reasonable rate would be in order to assess damages and, therefore, violate the filed rate doctrine").

The AG's brief notes that a plaintiff's injury must be proximately caused by the unfair or deceptive act at issue, and the plaintiff's remedy would be "actual damages." AG's Brief, at 13-14. But the only remedy Plaintiffs seek here is a refund of a portion of the allegedly excessive premiums that were approved by the regulator that went into surplus. That is precisely what is barred by the filed rate doctrine.

Here, Plaintiffs allege that due to Premera's "deceptive" conduct, "[t]he premiums charged by the defendants for the insurance coverage have resulted in profits of billions of dollars, profits in excess of the costs to the defendants in providing the coverage and unnecessary in view of their investment profits and surplus levels." CP 10-11 (¶22). Plaintiffs allege that as a result of these allegedly excessive rates, Premera accumulated a

“massive” surplus. *See* CP 4, 5, 10, 15, 17, 19-23 (¶¶ 12, 14, 22, 30(a) & (b), 34, 39, 40-47). As to WAHIT, the Complaint also focuses on its allegation that Premera has accumulated excessive surplus, alleging that WAHIT has been a means to that end. The Complaint alleges that WAHIT was “formed . . . by the PREMERA and LifeWise defendants for the purpose of marketing and selling health insurance policies,” and that WAHIT “is merely a conduit of the PREMERA defendants and the premiums paid to WAHIT for these coverages are not retained by WAHIT, but are funneled directly to the PREMERA companies.” CP 3, 10 (¶¶ 7, 21).

Plaintiffs allege their damages from Premera and WAHIT are the sum “of the excess premiums paid to the defendants,” and ask that “excess surplus . . . be refunded to the subscribers who have paid the high premiums causing the excess.”¹ CP 15-16, 28 (¶¶ 30(d), 65-66). Allowing these claims would require a court to go back and determine for each past year what portion of Premera’s OIC-approved rates were excessive, if any. Or to put it another way, prosecution of these claims “would force the courts to determine what the reasonable rate would be in order to assess damages,” and, therefore, violate the filed rate doctrine. *JMC Telecom, LLC*, 470 F.3d at 535. The Complaint seeks the precise remedy that is precluded by the filed rate doctrine—a recalculation and refund of rates that were approved

¹ Although Plaintiffs focus on their allegations of “false advertising” by WAHIT (*e.g.*, allegedly representing it was an employer-governed trust when allegedly it was not), the remedy Plaintiffs seek from WAHIT in their Complaint is identical to what they seek from Premera: a refund for premiums that were allegedly too high.

by the agency with the expertise and authority to review and approve rates as designated by the Legislature.

C. The AG's Effort to Exempt Plaintiffs' CPA Claim from the Filed Rate Doctrine Violates Precedent and Public Policy.

The AG's brief speaks only to the reasons for the Consumer Protection Act, but never discusses the important underlying public policy reasons for the filed rate doctrine. *See* Premera's Supplemental Brief at 12-13 (discussing policy reasons for the filed rate doctrine). The AG urges this Court to overrule existing Washington law on the filed rate doctrine without even considering the policy reasons the doctrine exists in Washington and other jurisdictions. Indeed, even the Court of Appeals in this case agreed that the filed rate doctrine applies to health insurance rates. *McCarthy Finance Inc. v. Premera*, 182 Wn. App. 1, 13, 328 P.3d 940 (2014) ("Given the extensive legislative and regulatory framework applicable to health insurance rates, the filed rate doctrine applies to health insurance."). The AG's position on Plaintiffs' claim would require this Court to overrule, for example, *Hardy v. Claircom Commc'ns Grp., Inc.*, 86 Wn. App. 488, 937 P.2d 1128 (1997), which affirmed dismissal of a CPA claim based on the filed rate doctrine. In *Hardy*, the Court of Appeals "[c]onclud[ed] that 'any court-imposed award of damages would by definition result in [plaintiffs] paying something other than the filed rate'"; therefore, "the *Hardy* court held that the claims were barred by the filed rate doctrine." *McCarthy*, 182 Wn. App. at 12 (quoting *Hardy*, 86 Wn. App. at 494-95); *see also Tenore*, 136 Wn.2d at 331, 962 P.2d 104 (noting that

pursuant to the doctrine, “any ‘filed rate’—a rate filed with and approved by the governing regulatory agency—is per se reasonable and cannot be the subject of legal action against the private entity that filed it”).

The AG does not address any of Premera’s authority establishing the filed rate doctrine, including *Hardy*, nor does the AG address the critical public policy and separation of powers rationales supporting the doctrine.² See Premera’s Supplemental Brief, pp. 12-13. For the reasons discussed above, this authority, and the public policy interests and concerns that motivated the courts, fully support dismissal of Plaintiffs’ claims here.

D. RCW 19.86.170 Bars Claims Challenging Those Acts or Practices That Are Specifically “Required or Permitted” Pursuant to the Insurance Code and Therefore Precludes Plaintiffs’ Claims.

In addition to the filed rate doctrine, RCW 19.86.170 also requires dismissal of this action. The statute expressly provides that “nothing required or permitted to be done pursuant to Title 48 RCW [the Washington

² The AG notes that this Court previously declined to apply the common law “voluntary payment doctrine” to limit a CPA claim because the CPA should be liberally construed. See AG’s Brief at 6 (citing *Indoor Billboard*, 162 Wn.2d at 86). The AG concludes by extension, without any supporting authority, that the CPA should therefore preclude application of the filed rate doctrine as well. In making that leap, the AG completely ignores the public policy considerations behind the filed rate doctrine and the significant distinctions between it and the voluntary payment doctrine. This Court noted that the Washington voluntary payment doctrine had only been applied in cases issued over forty years before *Indoor Billboard*, and only as a defense to a breach of contract claim. *Indoor Billboard*, 162 Wn.2d at 86. By contrast, the filed rate doctrine’s purposes and policy concerns are the reason that courts, including in Washington, have continually enforced the filed rate doctrine as a defense to consumer protection laws. See, e.g., *Hardy*, 86 Wn. App. at 494-95; *Tenore*, 136 Wn. 2d at 332-33 & n.41 (collecting numerous cases).

Insurance Code] shall be construed to be a violation of RCW 19.86.020 [the CPA].”

The AG argues that in order for Premera to claim immunity from a CPA claim under RCW 19.86.170, the OIC must have taken “overt affirmative actions” to permit Premera’s alleged wrongdoing: “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.’” AG’s Brief at 9 (quoting *Vogt v. Seattle v. First Nat’l Bank*, 117 Wn.2d 541, 552, 817 P.2d 1364 (1991)).

Whatever Plaintiffs allege about misrepresentations purportedly made by Premera regarding its rates, Premera only charged premiums required and permitted by the OIC pursuant to its authority under Title 48. Premera did not have discretion to charge a rate different from that which the OIC had approved. *See, e.g.*, RCW 48.44.020, 48.44.040, 48.44.070; *Restaurant Dev.t, Inc. v. Cananwill, Inc.*, 114 Wn. App. 194, 55 P.3d 680 (2002) (“The IPFCA is part of Title 48. Cananwill did nothing with regard to its financing arrangement with RDI that is not required or permitted to be done under the IPFCA. Thus, Cananwill did not violate RCW 19.86.020.”). RCW 19.86.170 is consistent with the filed rate doctrine. *See Gelfound*, 998 F.Supp.2d at 1360 (“The ‘filed rate’ doctrine forbids a regulated entity to charge rates other than the rates approved by the regulator.”) (quoting *Hill v. BellSouth Telecomms., Inc.*, 364 F.3d 1308, 1315 (11th Cir. 2004)). Therefore, the rates charged by Premera cannot be challenged because they

were “required” *and* “permitted” by the OIC, and are therefore immune under RCW 19.86.170. RCW 19.86.170 immunizes Premera from Plaintiffs’ claim here for the same reasons that the filed rate doctrine bars the claim.

In *Indoor Billboard*, upon which the AG relies, the court applied RCW 19.86.170 consistently with the filed rate doctrine. The Court held that RCW 19.86.170 did not immunize Integra from a CPA claim for charging and collecting a surcharge unfairly or deceptively, because, as discussed above, the plaintiff did not attack a charge that had been approved by the FCC or a relevant state agency. 162 Wn.2d at 65-68. Therefore, the courts were not required to unravel a rate approved by the FCC or state regulators. *See id.*

A second reason that the Court withheld immunity under RCW 19.86.170 from Integra was because RCW 80.36.360—which does not apply here—specifically exempts actions or transactions of CTCs from the immunity granted under RCW 19.86.170: “We conclude that because Integra is a CTC, and cannot claim immunity from CPA claims under RCW 19.86.170, and Indoor Billboard clearly alleged a valid claim under chapter 19.86 RCW, the trial court had subject matter jurisdiction to decide Indoor Billboard’s claim.” *Id.* at 74. Unlike CTCs, Premera is not subject to a statutory exemption to the RCW 19.86.170 immunity from CPA claims. And here, unlike in *Indoor Billboard*, the OIC rigorously regulates Premera’s rates.

The AG argues that there is no immunity under RCW 19.86.170 unless the OIC has specifically permitted the misrepresentations that the Plaintiffs allege. This misses the point at issue in this case by focusing on the alleged misrepresentation and ignoring the remedy sought; here, the immunized action is the charging of an approved rate, and that is precisely what Plaintiffs challenge in their Complaint. RCW 19.86.170 precludes Plaintiffs' claims because Plaintiffs have chosen to seek as their remedy a refund of the portion of their rates that went into surplus, despite the fact that the OIC explicitly authorized and approved those rates and contribution to surplus.

E. Plaintiffs' Complaint, While Pled Under the Guise of a CPA Claim, Is Really an Overt Attack on the Reasonableness of Rates Approved by the OIC.

If Plaintiffs prevail here, all plaintiffs will have to do in the future to avoid the filed rate doctrine will be to allege a CPA cause of action. Plaintiffs' Complaint is a claim challenging the reasonableness of rates and seeks a refund of a portion of the rate that went to surplus. Plaintiffs have cast their Complaint as a CPA false advertising claim. But artful pleading should not allow them to avoid the public policy concerns supporting application of the filed rate doctrine. *Cf. Joy v. Kaiser Aluminum and Chem. Corp.*, 62 Wn. App. 909, 911-12, 816 P.2d 90 (1991) ("Artful pleading as a state claim will not avoid preemption."). Plaintiffs allege that Premera charged them too much for their health insurance, and the only damages Plaintiffs seek in the case are for reimbursement of some portion of the OIC-approved premiums that went into Premera's surplus. Such a

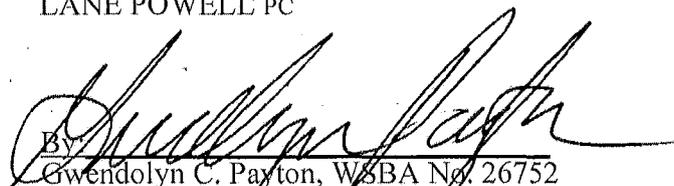
claim should be barred by the filed rate doctrine.

III. CONCLUSION

This Court should reverse the decision of the Court of Appeals and remand with instructions to reinstate the trial court's dismissal. The Complaint challenges the reasonableness of rates rigorously reviewed and approved by the Insurance Commissioner and seeks as a remedy a refund of premiums paid by the Plaintiffs. That is precisely the type of claim barred by the filed rate doctrine.

RESPECTFULLY SUBMITTED this 5th day of February, 2015.

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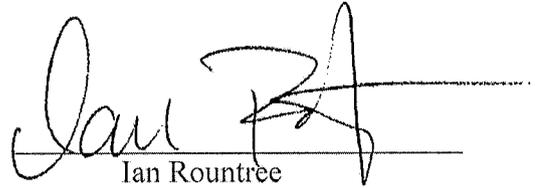
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Subject: Premera, et al. v McCarthy, et al.; On Petition for review from Court of Appeals, Division I - Supplemental Brief of Petitioners; Case No. 90553-9

Clerk of Supreme Court:

Attached for filing in the above referenced case, please see:

- PETITIONERS' ANSWER TO THE BRIEF OF AMICUS CURIAE OF THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON.

Please respond via email to confirm receipt and filing of the brief.

Thank you for your assistance and feel free to contact me directly with any questions or concerns.

Best,

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