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No. 90533-9

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SUPREME COURT OF THE STATE OF WASHINGTON

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

*Respondents.*

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**SUPPLEMENTAL BRIEF OF RESPONDENTS**

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 ORIGINAL

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## I. INTRODUCTION

The unanimous decision by Division I of the Court of Appeals should be affirmed. Respondents McCarthy Finance, Inc., et al., Appellants in the Court of Appeals and Respondents in this proceeding (hereafter “Plaintiffs”), bring claims in this class action litigation alleging nondisclosures and misrepresentations by Petitioners Premera and its affiliates including Washington Alliance for Health Care Insurance Trust (hereafter “Premera” and/or “WAHIT”). Plaintiffs’ claims are not challenges to the health insurance rates charged by Premera and WAHIT.

Premera seeks to extend application of the filed rate doctrine to preclude claims of unfair and deceptive marketing practices in violation of Washington’s Consumer Protection Act, RCW Ch. 19.86 (hereafter “CPA”). Specifically, the acts and practices of Premera and WAHIT have resulted in grossly excessive surplus levels and the Office of the Insurance Commissioner of the State of Washington (hereafter “OIC”) has declared its inability to effectively regulate surplus levels maintained by these non-profit insurers.

## II. STATEMENT OF THE CASE

This case was originally filed in January of 2012. Premera removed the case to the United States District Court for the Western District of Washington. (CP 53-73.) Plaintiffs filed a motion to remand the case back to state court which was granted on May 29, 2012. (CP 74-75.) Plaintiffs' Complaint identifies three putative classes, namely Class A, the "Large Group Market," involving the sale of health insurance policies to employer groups of more than 50 persons; Class B, the "Small Group Market," consists of employee groups of at least one but not more than 50 employees; Class C consists of "Individual Market" health insurance purchasers. (CP 6.)

Premera presently holds a surplus in excess of \$1 billion, (CP 230), an amount that Plaintiffs contend is far in excess of amounts necessary to maintain reasonable solvency.<sup>1</sup>

Plaintiffs contend that the conduct of Premera and WAHIT in amassing this surplus has been unfair, deceptive and in violation of the CPA. Specifically, the WAHIT website claims it is an "employer governed trust."

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<sup>1</sup> It is important to point out the difference between the terms "surplus" and "reserves." "Surplus" is defined as "a company's assets minus its liabilities." (CP 131.) "Reserves" are defined in WAC 284-43-910(8) as "claim reserves," the "claims" that have been reported but not paid plus the "claims" that have not been reported but may be reasonably expected. This lawsuit addresses excessive "surplus" and does not challenge "reserves."

This advertisement is demonstrably false. The employers purchasing coverage for their employees from WAHIT have nothing to do with the governing and management of the trust. (CP 233-235; CP 254.

Additionally, WAHIT, created by Premera to sell Premera and Lifewise policies, falsely advertises that as a result of its “increased buying power” and a “pooling of a large number of employers” it is able to obtain coverage at the “lowest possible cost” and the trust is able to “negotiate and obtain high quality benefits at the most affordable cost.” (CP 254, 259, 261.)

These representations are false, actionable and not an attack on rates.

First, plaintiffs are not making an attack on either the cost or benefit of negotiation. Plaintiffs’ complaint is that defendants’ advertising is false. There is no such “negotiation.” It is false advertising to claim that negotiation occurs. A challenge to such false advertising is not an attack on rates. It is deceptive and misleading advertising that at most has an incidental effect on the rates charged.

Second, a large component of the surplus, approximately \$250 million, is composed of investment profits which are not the direct result of rates that have been charged. (CP 229 and 251-252.) The OIC has clearly and unambiguously stated that the surplus maintained by Premera is

excessive beyond all issues of solvency and financial stability. Legislation has been proposed to limit the amount of surplus that health insurance carriers continue to build. (CP 214.)

After remand from federal court, Premera presented a CR 12(b)(6) motion seeking dismissal of all claims brought by the small groups and individuals, Classes B and C. (CP 97.) The motion was granted. Thereafter, Premera presented a motion for summary judgment under CR 56 (CP 160) to dismiss the claims of Class A, the large groups. This motion was also granted.

On appeal, the Court of Appeals, Division One, issued a published opinion on June 23, 2014 reversing these dismissal orders and remanding the case for further proceedings. (182 Wn.App. 1, 328 P.3d 940.)

### III. ARGUMENT

A. *Standard of Review.* To prevail on a CR 12(b)(6) motion for failure to state a claim upon which relief can be granted, Premera must show that no set of facts entitle plaintiffs to the relief sought. *Fondren v. Klickitat County*, 79 Wn.App. 850, 854, 905 P.2d 928 (1995). CR 12(b)(6) motions are granted sparingly and with care. A complaint survives such a motion if

any state of facts could exist under which the claim could be sustained.

*Orwick v. Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984).

In *McCurry, et al. v. Chevy Chase Bank*, 169 Wn.2d 96, 101, 233 P.3d 861 (2010) this Court ruled that a CR12 (b)(6) motion challenging the legal sufficiency of the plaintiff's allegations must be denied unless no state of facts which plaintiff could prove, consistent with the complaint, would entitle the plaintiff to relief on the claim. A plaintiff states a claim upon which relief can be granted if it is *possible* that facts could be established to support the allegations in the complaint. *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978); *Christensen v. Swedish Hosp.*, 59 Wn.2d 545, 548, 368 P.2d 897 (1962).

In ruling on a motion for judgment on the pleadings, the trial court must accept as true every fact well pleaded by the non-moving party. *Pearson v. Vandermay*, 67 Wash.2d 222, 230, 407 P.2d 143 (1965). Appellate review of a trial court's dismissal under CR 12 is *de novo*. *State, ex rel. Public Disclosure Commission v. 119 Vote No! Comm.*, 135 Wn.2d 618, 957 P.2d 691 (1998).

A motion to dismiss for failure to state a claim is treated as a motion for summary judgment when matters outside the pleadings are presented to

and not excluded by the trial court. *Bruce v. Byrne-Stevens & Assoc. Eng'rs*, 51 Wn.App. 199, 752 P.2d 949 (1988).

In reviewing a summary judgment order, the appellate court engages in the same inquiry as the trial court; all facts and inferences are considered in the light most favorable to the non-moving party. *Shows v. Pemberton*, 73 Wn.App. 107, 866 P.2d 164 (1994).

**B. *The Filed Rate Doctrine and the Tenore case.*** Filed rate cases discuss the two principal interests served by the doctrine, namely (1) the preservation of the role of agencies in setting rates (the “non-justiciability” strand) and (2) prevention of price discrimination if a favorable rate is set for litigants but not available to non-litigants (the “non-discrimination strand). In *Wegoland Ltd. v. Nynex Corp.*, 27 F.3d 17, 19 (2d Cir. 1994) the court discussed the policies advanced by the filed rate doctrine. The regulatory agency should have full authority to assess the reasonableness of rates; the judiciary should not “reconstitute” the rate structure of the industry; and retroactive relief to a plaintiff would lead to discrimination in rates. The *Wegoland* court applied the filed rate doctrine to block allegations of fraud upon the regulatory agency, a direct attack on the approved rates.

In *Tenore v. AT&T Wireless Services*, 136 Wn.2d 322, 962 P.2d 104 (1998), this court at p. 331-332 referred to the two purposes behind the “filed rate” doctrine: (1) to preserve the agency’s primary jurisdiction to determine the reasonableness of rates, and (2) to insure that regulated entities charge only those rates approved by the agency.

The *Tenore* case is the only decision by this court discussing application of the filed rate doctrine. In addition to setting forth the two purposes behind the doctrine, the *Tenore* court severely criticized how the doctrine has been “invoked rigidly even to bar claims of a fraud or misrepresentation,” (*Tenore* at p. 332) citing decisions, including *Taffet v. Southern Co.*, 967 F.2d 1483 (11th Cir. 1992) which held that the doctrine takes away all remedies available to “overcharged or defrauded customers.”

The *Tenore* decision ultimately ruled that (a) plaintiff’s claim of damages from defendant’s failure to disclose in its advertising its practice of “rounding up” telephone charges to the next full minute was merely an indirect attack on rates; (b) defendant’s contention that plaintiff’s claim was merely a disguised form of an attack on the reasonableness of rates was rejected; and (c) since the case did not involve a direct challenge to the rates being charged, the competence of the administrative agency was not involved

and all issues in the case were within the conventional competence of the courts to decide.

C. ***Filed Rate and Preemption Cases Have Identical Legal Effect.*** Throughout these proceedings, Premera has ignored or disregarded preemption cases pursuant to the Federal Communications Act. Yet those cases presented a defense that has the identical legal effect as the filed rate doctrine.

The filed rate doctrine provides that a rate filed with and approved by a regulatory agency is per se reasonable and cannot be the subject of legal action. The Federal Communications Act preemption defense is derived from statute, 47 USC 332(c)(3)(A):

. . . no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

Plaintiffs have cited cases from around the country that find exceptions to the filed rate and preemption defenses. Those cases are referred to in the Court of Appeals opinion.<sup>2</sup>

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<sup>2</sup> See *Spielholz v. Superior Court*, 86 Cal.App. 4th 1366, 104 Cal.Rptr. 2d 197 (2001); *Kellerman v. MCI Telecommunications Corp.*, 112 Ill. 2d 428, 493 N.E.2d 1045 (1986); *Qwest Corp. v. Kelly*, 204 Ariz. 25, 59 P.3d 789 (2002); *Ciamaichelo v. Independence Blue Cross*, 589 Pa. 415, 909 A.2d 1211 (2006).

At the beginning of the argument in the Court of Appeals, the judges asked Premera's counsel the following question:

Your defense of this claim relies heavily on the filed rate doctrine? Is there nationwide a single filed rate doctrine, or on the other hand, is the doctrine of varying interpretations from state to state?

Nationwide there are many limits to the filed rate doctrine which are created in decisions recognizing that if the challenged conduct is not a rate challenge, it does not violate the filed rate doctrine; and also recognizing the statutory preemption cases which reach the same conclusion.

Surprisingly, Premera refuses to accept this point, continuing to assert that the preemption cases are separate and represent something distant from the filed rate doctrine. See, for example, the Brief of Respondent presented to the Court of Appeals on the appeal of this case. The following appears at p. 29:

None of the cases cited by Plaintiffs recognize a false advertising or fraud exception to the filed rate doctrine; most have nothing to do with the doctrine. The primary issue in *Spielholz v. Superior Court*, 86 Cal.App. 4th 1366, 104 Cal.Rptr. 2d 197 (2001), *Ball v. GTE Mobile Net of Cal.*, 81 Cal. App. 4th 529, 96 Cal. Rptr. 2d 801 (2000), and *Kellerman v. MCI Telecom Corp.*, 112 Ill. 2d 428, 493 N.E.2d 1045 (Ill. 1986), like the Washington Supreme Court's decision in *Tenore*, was whether the plaintiffs' state law claims were preempted by the Federal Communications Act

– not whether they were precluded by the filed rate doctrine; neither *Ball* nor *Kellerman* even mention the doctrine.

See also Premera’s Petition for Review to this court at p. 2, describing the decision in *Tenore* as follows:

. . . a case in which the Court found the filed rate doctrine inapplicable because the case did not involve filed rates and the plaintiffs’ request for damages did not ‘implicate rate adjustment.’ Instead, the court focused on whether the claims were preempted – a distinct issue from the filed rate doctrine.

The Court of Appeals opinion recognizes the legal effect of the two doctrines referring to a preemption case as a filed rate doctrine case. The opinion reads as follows at Petitioner’s Appendix, p 11 (182 Wn.App. 1, 14-15):

Other states recognize similar limits to the filed rate doctrine. For example, in *Spielholz v. Superior Court*, plaintiffs alleged that defendants falsely advertised a ‘seamless calling area.’ The California Court of Appeal held that such claims were not a direct attack on rates and that the lawsuit’s potential effect on rates would be ‘merely incidental.’ Similarly, in *Kellerman v. MCI Telecommunications Corp.*, the Illinois Supreme Court held that class action consumer fraud claims based on false advertising practices were ‘not preempted’ where the claims did not ‘challenge the reasonableness’ of the charged rates ‘but only the fact that its advertising did not disclose that . . . additional charges would be made.’ Likewise in *Qwest Corp. v. Kelly*, the Arizona Supreme Court held that the filed rate doctrine did not bar claims that a telecommunications company concealed material facts in marketing and selling its services. As in those cases, we conclude the policyholders’

claims alleging nondisclosures and misrepresentations by Premera and WAHIT are not direct challenges to the rates charged.

If the defense wishes to competently attack the Court of Appeals opinion it should cite and distinguish the legal effect of the cases that the Court of Appeals relies upon in support of its decision. Premera offers no analysis but refers to these cases and discounts them by claiming they have nothing to do with the filed rate doctrine.

**D. *A CPA Challenge to False and Deceptive Practices is Not Barred by the Filed Rate Doctrine.*** The claims of Plaintiffs are not a direct attack on rates. No reexamination of approved rates is necessary. A claim that the excessive surplus amassed by Premera through unfair and deceptive acts and practices in violation of the CPA is not a challenge to the rate approval process.

Approximately \$250 million of the surplus at issue is the result of profits from investments. The OIC has no ability to consider “investment earnings” when reviewing and approving rates. WAC 284-43-915(d) limits consideration of forecasted investment earnings to “assets related to claim reserves or other similar liabilities. . . .” The OIC has proposed legislation which would give it the right to consider surplus levels in approving or

disapproving rates. (CP 117, 209-224.) Under present law the OIC does not have authority to control excess surplus levels through the rate approval process. (CP 128, 211-218.)

**E. *The Rate Approval Process Does Not Address Excessive Surplus.*** The rate approval process for small group and individual markets is significantly different from the approval process for large group plans. In the large group rate approval process, there is no consideration of surplus.

Premera's CR 12(b)(6) motion to dismiss claims brought by small groups (Class B) and individuals (Class C) claimed that the OIC specifically considers a health care service contractor's surplus levels and estimated investment earnings for the contract period. (CP 97-109.)

For small groups and individual plans, the OIC reviews the "methodology, justification and calculations used to determine *contribution to surplus.*" (Emphasis added.) See WAC 284-43-930(3). Yet the OIC has no authority to reduce existing surplus through the rate approval process. The OIC interprets controlling statutes and regulations stating, "We do not have the authority to order a company to use surplus to subsidize or lower its rates." (CP 128.) Additionally, WAC 284-43-915(2), (3) provides that

contributions to surplus will not be required to be less than zero. The OIC cannot address excessive surplus through the rate process.

After obtaining dismissal of the small group and individual claims, Premera moved for summary judgment to dismiss the large group (Class A) claims. Premera claimed that the OIC reviews large group rates and considers contributions to surplus and investment earnings. (CP 160.)

However, unlike the small group and individual rate approval process, review of large group negotiated rates by the OIC is limited to examination of Premera's Large Group Rating Model which has nothing to do with surplus levels. Premera submits the Large Group Rating Model to the OIC. The model weighs numerous factors, none of which include surplus or contribution to surplus. (CP 346 at ¶ 6.) Any objection the OIC makes is only to the Large Group Rating Model, not the negotiated rate with large groups. Surplus levels are not mentioned. (CP 346 at ¶ 7.) The Large Group Rating Model is a starting point for setting large group rates. The actual rate for large groups may deviate from the Large Group Rating Model. (CP 347 at ¶ 10.)

After the rate for any large group is negotiated and agreed upon, Premera then files the actual large group "contract" with the OIC. (CP 348

at ¶ 11.) There is no individual approval of each contract. In the large group rate “approval” process, there is no review of surplus.

**F. *Rigid Application of the Filed Rate Doctrine Would Undercut the CPA and Insurance Code.*** Premera urges broad application of the filed rate doctrine to preclude plaintiffs’ claims based on false advertising, fraud, concealment, and violation of the CPA. This rigid application of the doctrine leaves no room for any judicial action that challenges conduct of health insurers which may result in an indirect impact on rates. Any such consumer action challenging conduct of a health insurer could be blocked by application of the filed rate doctrine and/or doctrines of primary jurisdiction and exhaustion of administrative remedies.

In the present action, CPA claims of excessive surplus resulting from unfair and deceptive business practices are not challenges to the existing rate structure, the rate approval process or the OIC’s authority to regulate health insurers. In fact, Commissioner Mike Kreidler of the OIC acknowledges the OIC’s lack of meaningful control of health insurers’ surpluses.

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 policyholders 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.

Premera attempts to undermine the very purpose of the CPA, which is to offer broad protection to the citizens of Washington. See *Dix v. ICT Group, Inc.*, 125 Wn.App. 929, 937, 106 P.3d 841 (2005).

**G. *Doctrines of Primary Jurisdiction and Exhaustion of Remedies Do Not Preclude CPA Claims.*** The OIC, through the Insurance Commissioner, has publicly stated an inability to effectively regulate the accumulation of surplus. (CP 214, Transcript at pp. 6-7 and 11.)

The CPA expressly allows claims against insurers subject to OIC regulation, provided the claim is not based on activity allowed by insurance statutes and regulations. RCW 19.86.170.

The doctrine of primary jurisdiction does not involve “jurisdiction” in the technical sense. The court in its discretion may refer a matter to the administrative agency which has the ability to address a specific issue. *Kerr v. Dept. of Game*, 14 Wn.App. 427, 429, 542 P.2d 467 (1975). In the present case, the agency has no ability to regulate or control excess surplus. Additionally, there is no mechanism for pursuit of CPA claims at the administrative level.

Similarly, the doctrine of exhaustion of administrative remedies is inapplicable. Plaintiffs must exhaust administrative remedies only if an adequate administrative remedy is available. RCW 48.04.010(1) and (3) allow the OIC to grant a hearing to an aggrieved person. No authority exists to compel insurers to disgorge surplus accumulated as a result of marketing misrepresentations. Premera presents no facts in support of its contention that an adequate remedy exists. Violations of the CPA are not cognizable by the OIC. See *State v. Tacoma-Pierce County Multiple Listing Service*, 95 Wn.2d 280, 283-84, 622 P.2d 1190 (1980).

The Court of Appeals decision correctly concluded that the doctrines of primary jurisdiction and exhaustion of remedy were inapplicable to the circumstances presented in this case.

### III. CONCLUSION

The decision of the Court of Appeals should be affirmed and this matter remanded for further proceedings.

Respectfully submitted this 5th day of January, 2015.

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Dated this 5th day of January, 2015.

/s/ Mary Berghammer  
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Supreme Court No. 90533-9

Filing attorney: Frank R. Siderius, WSBA 7759, telephone: 206/624-2800; email: [franks@sidlon.com](mailto:franks@sidlon.com)

Dear Clerk: We attach for filing in your court "Supplemental Brief of Respondents."

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