

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE OFFICE OF INSURANCE COMMISSIONER

FILED

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IN THE MATTER OF:

PACIFICARE OF WASHINGTON,

Respondent.

Docket No. 2009-INS-0001

Order No. 09-0010
Hearings Unit, DIC
Patricia D. Peterson
Chief Hearing Officer

INITIAL ORDER DENYING
SUMMARY JUDGMENT

Summary Judgment Hearing:

A hearing was held on January 6, 2010, before Cindy L. Burdue, Administrative Law Judge, for argument on Respondent's Summary Judgment Motion. The hearing was recorded by a court reporter, at Respondent's expense.

Appearances:

The Office of the Insurance Commissioner (OIC), represented by Andrea Philhower, Attorney at Law, Staff Attorney; and PacifiCare of Washington (Respondent), represented by Jeffery Gingold Attorney at Law, Lane Powell, PC; with Drew Steen, Attorney at Law, Lane Powell.

Material Considered:

1. Respondent's Motion for Summary Judgment Re Statute of Limitations;
2. Declaration of Jeffrey Gingold, with Exhibits R-1 through R-9;
3. Supplemental Declaration of Jeffrey Gingold, with Exhibit R-10;
4. Exhibit R-11;
5. OIC's Response to Motion for Summary Judgment Re Statute of Limitations, with Exhibits C-1 through C-7;
6. Declaration of Andrea Philhower, Attorney;
7. Declaration of Carl Baker, CPA, Financial Examiner;
8. Declaration of Dennis Edward Julnes, Chief Financial Analyst, OIC;
9. Respondent's Reply Brief to Motion for Summary Judgment;
10. Oral argument of both counsel;
11. All prior Orders and documents comprising the Office of Administrative Hearings' file.

Order Denying Summary Judgment
Re: Statute of Limitations
2009-INS-0001

ISSUE PRESENTED:

Whether the OIC's action for penalties against Respondent PCW is time barred because the OIC notified PCW of a monetary penalty after the expiration of the two year statute of limitations period allowed for imposition of punitive fines by a State agency?

FINDINGS OF FACT:

1. The parties agree that the OIC has a two year statutory period in which to notify PCW of the imposition of a punitive penalty or fine pursuant to 4.16.100(2), and *U.S. Oil & Refining Co. v. Dept. of Ecology*, 96 Wn.2d 85, 633 P.2d 1329 (1981).
2. The gist of PCW's argument is that the OIC was required to file an administrative hearing request or "commence an action" against PCW for the imposition of fines and to toll the statute of limitations within the two year period.
3. The gist of the OIC position is that it may administratively impose fines, pursuant to applicable law, without the need to *first* demand an administrative adjudication or file a lawsuit or other judicial-type suit to "commence an action" for fines against PCW, and that PCW had an immediate right to demand an administrative hearing to contest the order for fines issued by OIC.
4. There is also a legal dispute between the parties over when the two year period legally commences, and whether action by the OIC during that two year period tolled the statutory period.
5. For purposes of this motion, the parties have stipulated to the essential facts and there are no disputed genuine issues of material fact, leaving only the legal issue to be determined: what action was the OIC required to take within the two year statutory period to properly impose punitive fines against PCW, and did OIC take such action timely?
6. For some years, the OIC had "suspected" that PCW was paying illegal franchise or royalty payments to its parent company. PCW "vigorously disputes that the acts in question were wrongful," but *for purposes of this motion* does not assert that there is any genuine issue of material fact on the point which would be relevant to the legal issue under consideration. (Resp's. Motion for SJ, page 7).
7. Relevant here, the OIC conducted two full financial examinations of Respondent PCW, pursuant to RCW 48.03.010: (1) For the period from 1997-2002. The OIC issued Order No. G06-4, dated February 13, 2006, as to the first financial examination; and (2) For the

period from 2003 -2006; the OIC issued Order Number 08-111, formally adopting the second financial examination on August 13, 2008. (Respondent's Motion for SJ, page 1-2; & Ex. R-5; and Decl. Jeffrey Gingold, Ex. R-3; Ex. R-4; Ex. R-6).

8. Although illegal royalty payments were suspected by the OIC during both of these financial examinations, PCW denied these payments, until finally admitted to the OIC during a conference call on August 9, 2007. (Baker Decl., OIC Response to Summary Judgment Motion). Thus, the second financial examination report, issued after that August 9, 2007, date, dealt with these admitted illegal payments at "Instruction 4" of that report. (Ex. R-4, page 4). Final Order Number 08-111, adopting the examination report of the period from 2003-2006, specifies:

Pursuant to RCW 48.31C.050(1)(a-c) and SSAP No. 70, paragraph 8, the Company is ordered to discontinue paying royalty fees either directly or indirectly and to seek reimbursement from the PHPA for all royalty fees paid. Instruction 4, Examination Report, page 4."

9. Under RCW 48.03, PCW had a specified statutory period after each of the above-referenced final orders were issued by the Insurance Commissioner ("Commissioner") in which to contest the findings and conclusions by demanding a hearing. PCW did not demand a hearing on either order. PCW did fulfill the instructions issued by the Commissioner in each order, which included recouping of the monies paid to the parent company as illegal franchise or royalty payments. (Respondent's Motion for SJ, page 2; Ex. R-5 and R-6).

10. RCW 48.03.040(5) states, regarding the Commissioner's final order accepting a financial examination report of the OIC, as follows:

All orders entered under subsection (4) of this section must be accompanied by findings and conclusions resulting from the commissioner's consideration and review of the examination report, . . . Such an order is considered a final administrative decision and may be appealed under the Administrative Procedure Act, chapter 34.05 RCW, . . .

(emphasis added).

11. The OIC argues that the date from which the two year statute of limitations should be measured is the end of the statutory appeals period after the Commissioner entered the final order. Final Order Number 08-111 was appealable by PCW until November 12, 2008. The OIC urges that it has two full years from that day, or until November 12, 2010, to pursue penalties against PCW for violations specified in that final order, under RCW 48.03.040(6)(c), specifically.

12. Neither of the final orders issued by the Commissioner, adopting the findings of the financial examinations referenced above, sought a *monetary fine* against PCW for illegal payments to its parent company in violation of RCW 48.31, the Washington Holding Company Act for Health Care Service Contractors and Health Maintenance Organizations.

13. On February 9, 2009, the OIC sent to PCW a "Consent Order Levying a Fine," imposing a fine of \$400,000, along with a cover letter explaining to PCW the OIC's findings as to the illegal action which warrants the \$400,000 fine; how the committee at OIC determined that amount of fine to be proper; and allowing PCW to resolve the matter on the basis of an agreed Consent Order Levying a Fine. (Ex. C-2, Consent Order Levying a Fine; and Ex. C-1, February 9, 2009, cover letter to PCW accompanying the Consent Order). The OIC clearly notified PCW it would *enforce* its assessment of the fine through "further administrative action" if PCW did not pay the fine by a set date.

14. PCW did not pay the monetary fines, and on August 14, 2009, the OIC sent to PCW a "Notice of Request for Hearing for Imposition of Fines." (Ex. R-1) PCW argues that the date by which the OIC had to bring its "action" against Respondent for a monetary penalty or fine was August 9, 2009, two years from the August 9, 2007, "discovery" of the violations by PCW's admissions of such violations. PCW further argues that the action for the monetary penalty was not filed or commenced by the OIC until August 14, 2009, when the OIC filed its "Notice of Request for Hearing for Imposition of Fines," which is five days after the expiration of the statutory period ending August 9, 2009 (Ex. R-1).

15. The OIC argues that the date from which its right to assess monetary fines accrued is November 13, 2008, when the Order issued by the Commissioner in the 2003-2006 examination became "final" due to lack of an appeal by PCW. (Citing RCW 48.03.040(6)(c). Alternatively, the OIC argues that it is entitled to assess penalties based on an "equitable estoppel" theory, since PCW was not truthful or forthcoming for so long about the payment of royalties to its parent company.

CONCLUSIONS OF LAW:

Jurisdiction:

1. The Office of Administrative Hearings and the undersigned Administrative Law Judge have jurisdiction over the parties and subject matter herein pursuant to RCW 48.04.010(5), Chapter 34.05 RCW, and Chapter 34.12 RCW. The provisions of Chapter 48 RCW, the Insurance Code, are applicable here.

Summary Judgment Standard and OIC hearing & procedures statute:

2. Summary judgment may be granted if the written record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as matter of law. WAC 10-08-135. The evidence presented, and all reasonable inferences from the facts, must be viewed in the light most favorable to the nonmoving party. *Herron v. King Broadcasting*, 112 Wn.2d 762, 776 P.2d 98 (1989). Where reasonable minds could reach but one conclusion from the admissible facts and evidence, summary judgment should be granted. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

3. The initial burden of showing the absence of material fact rests with the moving party. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Only if the moving party meets this initial showing will the inquiry shift to the non-moving party. *Herron v. King Broadcasting*, 112 Wn.2d 762, 776 P.2d 98 (1989). In that case, the non-moving party must "counter with specific factual allegations revealing a genuine issue of fact. ..." *Int'l. Union of Bricklayers v. Jaska*, 752 F.2d 1401, 1405 (9th Cir. 1985).

4. Pursuant to RCW 48.44.170, Chapter 48.04 RCW controls hearing rights and procedures under the Insurance Code. RCW 48.04 therefore must be considered and applied, as appropriate, in this case.

What is the commencement date of the OIC's "cause of action" for monetary fines?

Punitive vs. Remedial actions by State:

5. There is no dispute that the OIC can fine PCW for statutory violations. See, RCW 48.44.166. The parties agree that a two year statute of limitations applies to the imposition of penalties in this case, pursuant to RCW 4.16.100(2) and under *U.S. Oil and Refinery v. The Dept. of Ecology*, 192 Wn. 2d 85, 633 P.2d 1329 (1981) (holding that the two year statute of limitations applies to the State when it seeks to impose punitive penalties rather than remedial measures).

6. The OIC does not dispute that the imposition of \$400,000 in fines is punitive rather than remedial, and in fact, specifies that the penalty is imposed particularly in consideration of deceit by PCW over a lengthy period, including lying to the examiner during two consecutive examinations, until it confessed it had been paying improper royalties on August 9, 2007.

Discovery date vs. date of violations:

7. The statutory limitations period runs either from the date of the illegal actions at issue, or the date these could or should have been discovered with reasonable diligence by the "plaintiff" (here, the OIC). See, *U.S. Oil, Id.* The OIC did not *know* until August 9, 2007, that PCW was paying royalties, despite the OIC's questions and suspicions since 2003. August 9, 2007, is the *earliest* date the OIC could have known of the illegal royalty payments: Thus, August 9, 2007, is the "discovery" date of the statutory violations at issue.

8. As is required in a summary judgment motion, viewing facts in the light most favorable to the non-moving party (the OIC), the violations could not have reasonably been discovered by the OIC prior to August 9, 2007. PCW failed to disclose the information needed for the OIC to determine impermissible royalty payments were being made by PCW, and actively hid the information from OIC. Therefore, since the OIC had no way to learn of the illegal payments without the cooperation of PCW, the "discovery" date of the violations is the applicable date here, not the dates on which the illegal payments were actually made by PCW to its parent company. Accord: See, *U.S. Oil v. Dept. of Ecology*, 98 Wn. 2nd 85, 633 P.2d 1329 (1981), wherein the court held that the government agency did not have the information or control necessary to learn of the violations as they occurred, but necessarily learned of the illegalities later.

9. The OIC had *at least* until August 9, 2009, to "commence its action" or administratively impose fines against PCW within the two year period starting August 9, 2007. The cited law supports an application of the "discovery" rule in this matter, which means that the "cause of action" for assessment of fines began on that date: August 9, 2007, and continued during a two year limitations period, to August 9, 2009.

The cause of action does not commence on November 13, 2008, when the Final Order Number 08-111 was no longer appealable by PCW:

10. The OIC argues that the action for fines commenced on November 13, 2008, when the Commissioner's Final Order Number 08-111 was no longer appealable by PCW. The OIC argues that it has until November 13, 2010, two years from the end of the appeal period for that final order, to commence the action for fines. The OIC cites RCW 48.03.040 as authority for its argument that the cause of action for penalties against PCW accrued on November 13, 2008, in connection with the Final Order Number 08-111, which was final that date.

11. RCW 48.03 *et seq.*, does not support a conclusion that a final administrative order, which makes no reference to a monetary penalty for the violations specified therein, could be the starting point in time for the OIC to assess monetary penalties, allowing the OIC a

further two year period in which to do so. RCW 48.03.040(6)c); specifically cited by the OIC as authority that the Commissioner has two years after the entry of that final order on a financial examination to impose fines or take other legal or regulatory action, states,

"If the commissioner determines that regulatory action is appropriate as a result of any examination, he or she may initiate any proceedings or actions as provided by law."

12. The parties did not cite, and I could not locate any regulation or statute which defines "regulatory" as to the Insurance Commissioner or insurance laws of Washington. Nonetheless, there is nothing in the statute which indicates that the cited provision was meant to, or does, extend the time during which the OIC may impose punitive fines on an insurer beyond the two years from when the illegal actions of the insurer were discovered or should have been discovered. Moreover, having no definition of "regulatory," I am not confident that punitive fines are considered "regulatory."

13. In regard to financial examinations by the OIC, RCW 48.03.040(3) and (4) describe the process, and mandate the time periods for OIC to issue and serve its reports and final orders on the examined company. Within the statutory period mandated in the law after the examination and report, the Commissioner must:

- (a) enter an order adopting the report, as filed or with modifications; or,
- (b) enter an order rejecting the report, with directions to reopen the examination for more information; or,
- (c) call for an investigatory hearing for purposes of obtaining further information.

14. "If the examination report reveals that the company is operating in violation of any law, rule, or order of the commissioner, the commissioner may order the company to take any action the commissioner considers necessary and appropriate to cure that violation." RCW 48.03.040(4)(a). As noted in the Findings, the Commissioner's final order on the examination report is considered to be a final administrative order and "may be appealed under the Administrative Procedures Act, chapter 34.05 RCW . . . " RCW 48.03.040(5).

15. There is nothing apparent in the applicable law which prevents the Commissioner from assessing monetary fines in the final order.¹ PCW did not appeal the final order. However, since there was no indication in the Commissioner's Final Order that monetary fines were being or would later be assessed, there was no opportunity for PCW to appeal the imposition of fines; nor any reason for PCW to appeal the final order on the basis that it did not agree with the OIC's imposition of fines:

¹ As noted in the Findings, the OIC also issued to PCW a Commissioner's Final Order which approved the first examination for the 1996 to 2003 period. Likewise, no penalty was assessed by the OIC for the various statutory infractions cited in that Order.

16. Under chapter 48 RCW, neither entry of the Commissioner's final order which can be appealed, nor expiration of the examined company's appeal period for that order, logically appear to be a starting point for a two year statute of limitations period during which the OIC can assess monetary penalties not previously addressed in the final order by the OIC. The statutory period applicable here, during which the OIC can assess monetary fines, therefore cannot run from November 13, 2008, to November 13, 2010.

17. As stated above, the "discovery" of the illegal actions, on August 9, 2007, is the date from which the two year statute of limitations for imposition of punitive penalties must be measured.

18. Under *U.S. Oil, Id.*, the pertinent action by a government agency, by which a cause of action for a penalty is "commenced," is notice of the penalty to the penalized party. Thus, I next examine the record for adequate administrative notice of the penalty prior to the expiration of the two year period ending August 9, 2009.

February 9, 2009, "Consent Order Levying Fine" & Letter from OIC as commencement of action or administrative imposition of penalty:

19. The OIC did not specifically notify PCW of its demand for an *administrative hearing* on the issue of the monetary penalties until August 14, 2009, in the "Notice of Request for Hearing on Imposition of Fines." (Ex. R-1). However, the OIC *did* send to PCW a letter and a "Consent Order Levying Fine," on February 9, 2009, six months before the statute of limitations expired on August 9, 2009. The Consent Order Levying Fine and the attached letter very clearly and specifically notified PCW that \$400,000 in fines "had been imposed" and that payment would be sought administratively if not paid voluntarily.

20. Based on *U.S. Oil*, the OIC commenced its action when it *provided notice* of the penalties sought to PCW. See, *U.S. Oil, Id.* Such notice occurred when OIC served PCW with the Consent Order Levying Fine, on February 9, 2009, demanding payment of \$400,000 as a penalty, along with a letter stating the penalty *had been* imposed by the OIC, and why. *Either party* could have taken subsequent legal action on that notice, simply by filing a hearing demand. RCW 48.04.010(1)(b). PCW now claims that this notice did not toll the statutory period, but its argument is not persuasive, nor is it supported by the law.

21. RCW 48.04.010(1)(b) states that the Commissioner *shall* hold a hearing upon written demand by anyone aggrieved by an act, "threatened act," or by any report, promulgation or order of the Commissioner. Certainly, the Consent Order Levying Fine made it very clear that the OIC found statutory violations and deception by PCW, and set forth a very specific demand for payment of \$400,000 by PCW. The Consent Order and

letter accompanying it make very clear to PCW that further administrative action would be taken to enforce payment if not made voluntarily by PCW. At the very least, the Consent Order and letter constitute "threatened" action by the OIC, from which PCW had administrative hearing rights immediately available.

22. When PCW failed to pay the fine, the OIC was forced to request an administrative hearing to enforce payment of its fine. The fact that it was the OIC which made the hearing demand does not diminish the fact that PCW had full rights to an administrative hearing on February 9, 2009, and had specific notice of the penalties sought by the OIC that day, in the amount of \$400,000.

23. PCW argues that the OIC did not provide adequate notice of the imposition of the fines by the Consent Order Levying Fine. PCW claims to view the Consent Order Levying Fine as merely an offer to settle the matter. However, a "matter" to settle does not exist without the Consent Order Levying Fine. This *is* the document issued by the OIC (along with the attached letter), to inform PCW of its demand for and intent to collect those monies.

24. The law does not require the OIC to request, file for, or provide notice of an adjudicative or administrative hearing or "action" before imposing a fine. RCW 48.44.166 allows OIC to impose a fine in lieu of revocation or suspension of license to conduct insurance business in Washington. RCW 48.44.160 states that the OIC can act, "subject to a hearing *if one is requested*," to revoke, suspend, or refuse a new license or renewal of license by an insurer. PCW's argument confuses the initiation of "adjudicative proceedings" with the agency's right to issue an order levying a fine, which triggers a *subsequent right* to an adjudicative proceeding by the fined party, PCW, or to OIC for enforcement of its assessed fine.

25. The undisputed facts demonstrate that the OIC sent PCW its administrative order for penalty payment on February 9, 2009, by issuing the Consent Order Levying Fine and the accompanying letter which explained the process and informed PCW that the penalty *had been imposed*. The documents did not say a fine "would be" imposed, nor did OIC threaten to impose a fine if PCW did not do certain things. Instead, that February 9, 2009, letter states,

"The OIC has determined that **the appropriate penalty for these violations is a fine** against PacifiCare of Washington **in the amount of \$400,000**. . . . **Attached is a Consent Order imposing this fine.**"

(Emphasis added).

26. The OIC also explains that PCW "... may resolve this matter now without the need for further administrative action by ... [signing the Consent Order] and paying the fine."

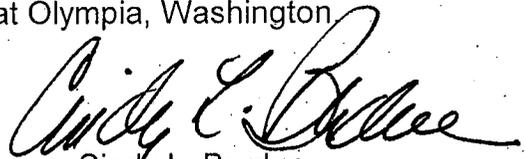
27. PCW was therefore placed on administrative notice of a specific penalty imposed by the OIC in the Consent Order Levying Fine dated February 9, 2009. That action by the OIC carried a right to hearing on the issue, and therefore is the action by the OIC which tolls the statute of limitations for imposing a fine against PCW. See, *U.S. Oil, Id.*

28. Thus, because the the OIC acted administratively, within the law, to impose a fine on PCW on February 9, 2009, 18 months after the statutory two year period began to run on August 9, 2007, with the discovery by OIC of PCW's violations, this matter may not, as a matter of law, be dismissed for lack of jurisdiction. Summary judgment on that issue must be denied to PCW.

ORDER:

IT IS HEREBY ORDERED Respondent PCW's Motion for Summary judgment is **DENIED** on the issue whether the statute of limitations bars the imposition of penalties by the OIC against PCW.

Dated and Mailed this 25th day of January, 2010, at Olympia, Washington



Cindy L. Burdue
Administrative Law Judge
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REVIEW RIGHTS

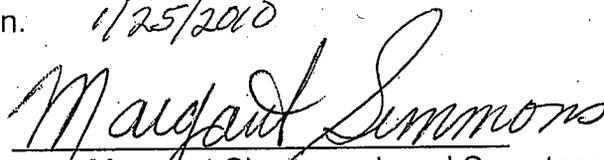
Pursuant to RCW 34.05.464 and WAC 10-08-211, any party to an adjudicative proceeding may file a Petition for Review of an Initial Order. The Petition for Review shall be filed with the agency head within **twenty (20) days** of the date of service of the Initial Order. Copies of the Petition must be served upon all other parties or their representatives at the time the Petition for Review is filed. The Petition for Review must specify the portions of the Initial Order to which exception is taken and must refer to the evidence of record which is relied upon to support the petition.

Any party may file a Reply to a Petition for Review. The Reply shall be filed with the office where the Petition for Review was filed within ten days of the date of service of the Petition for Review and copies of the Reply shall be served upon all other parties or their representatives at the time the Reply is filed.

A Petition for Review or Reply filed at the address of the Office of Administrative Hearings shall be deemed service upon the agency head. The Petition and Reply shall be forwarded to the Insurance Commissioner to be consolidated with the hearing file.

Certificate of Service

I certify that I mailed a copy of this order to the below-identified parties at their respective addresses postage prepaid on the date stated herein. *1/25/2010*


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