



OFFICE OF  
INSURANCE COMMISSIONER

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Hearings Unit, DIC  
Patricia D. Petersen  
Chief Hearing Officer

IN THE MATTER OF

PacifiCare of Washington, Inc.,

Authorized Health Care Service Contractor.

OAH DOCKET NO. 2009-INS-0001  
OIC ORDER NO. 09-0010

OIC'S REPLY TO PACIFICARE'S  
PETITION TO REVIEW INITIAL ORDER

### I. Introduction and Relief Requested

The Washington State Office of the Insurance Commissioner ("OIC") hereby replies to the Petition to Review Initial Order filed by PacifiCare of Washington ("PacifiCare" or "Company"). After full briefing and a hearing on the merits, the Administrative Law Judge correctly determined that OIC's February 9, 2009 letter and proposed Consent Order tolled the statute of limitations in this matter. PacifiCare has provided no new evidence, authority, or even argument supporting its Petition for Review. For that reason, the Petition is redundant and inappropriate. OIC opposes any further waste of resources by holding a hearing on this Petition.

OIC respectfully submits that PacifiCare's Motion for Summary Judgment (MSJ) could and should have been denied on both bases set forth by OIC. The Motion was correctly denied on one of those bases, therefore the Company's Petition for Review should be denied and the initial order should be made final. Alternatively, the reviewing officer should finalize the dismissal of PacifiCare's Motion for Summary Judgment on *both* bases set forth by OIC.

### II. Argument and Authorities

PacifiCare characterizes as undisputed many facts which are actually very much in dispute. As it did in responding to the original Motion, OIC will forego rebuttal of such statements by the Company where they are not relevant to the issue being decided. On a Motion for Summary Judgment, all facts and reasonable inferences must be taken in the light most favorable to OIC as the non-moving party.<sup>1</sup>

<sup>1</sup> See, e.g., Forest Mktg. Enters. v. Dep't. of Natural Res., 125 Wn.App. 126 (2005), citing Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

**A. The Administrative Law Judge Correctly Applied the Law In Determining That The Statute of Limitations was Timely Tolloed by OIC's Actions.**

It is undisputed for purposes of this motion that OIC did not have constructive knowledge of PacifiCare's violations until August 9, 2007. Under RCW 4.16.100, the limitations period for this action would have ended on August 9, 2009. The Administrative Law Judge correctly applied both the Insurance Code and the APA in determining that OIC tolled the statute of limitations by taking enforcement action for these violations six months earlier, on February 9, 2009.

PacifiCare argues that the Administrative Law Judge did not apply the APA, specifically RCW 34.05.413(5). PacifiCare is mistaken. The Administrative Law Judge specifically held that the elements of this statute had been met. PacifiCare, in fact, quoted the finding in which she did so. It is Finding of Fact No. 13, the finding to which PacifiCare takes exception.

RCW 34.05.413(5) states: "An adjudicative proceeding commences when the agency or a presiding officer notifies a party that a prehearing conference, hearing, or other stage of an adjudicative proceeding will be conducted."

Finding of Fact #13 states:

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. 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.

Although PacifiCare would apparently prefer that the finding of fact say "RCW 34.05.413(5) is satisfied because...", the fact that the finding is not couched in the Company's preferred language is not dispositive. The Administrative Law Judge made a factual finding that satisfied the statute.

PacifiCare's erroneous reading of the statute is clear in the language of its heading to "Argument" section III of its petition. That heading reads, "The APA requires notice of a hearing to commence the action." That is simply not the law, as evidenced by the very words of the statute upon which the Company relies. "An adjudicative proceeding commences when the agency or a presiding officer notifies a party that a prehearing conference, hearing *or other stage of an adjudicative proceeding* will be conducted." PacifiCare simply ignores both the italicized language and the plain meaning of RCW 34.05.413(5). Administrative Law Judge Burdue does not. As her Finding of Fact #13 states, she fully comprehends that the statute requires notice to the party of the adjudicative proceeding. That notice was clearly and undeniably provided to

PacifiCare on February 9, 2009. Even the Company does not deny that, but rather seeks to place a strained and unreasonable meaning upon the statute that the plain wording makes clear is incorrect. If only notice of a hearing could satisfy the statute, the statute would not include a list, of which "hearing" is only one element.

As Administrative Law Judge Burdue properly found, clear notice of the adjudicative proceeding was provided on February 9, 2009, tolling the statute of limitations a full six months prior to its expiration. Even if RCW 34.05.413(5) could be satisfied only by notice of a hearing, the Administrative Law Judge properly found that the February 9 letter provides such notice. The Company was notified of the imposition of a fine, the amount of that fine, and that further administrative action would be taken to enforce the fine if it was not paid voluntarily. As the Company itself points out, the Insurance Code provides that that further administrative action is a hearing. PacifiCare does not even attempt to claim that it did not understand the situation – it did. PacifiCare immediately retained counsel who began work with OIC on this matter. The Company's only argument is that the cordial wording of the February 9 notice might have allowed PacifiCare to hope the OIC would not collect the fine it had imposed. As PacifiCare puts this argument in its Petition, "the documents did not say a fine had been imposed; they did not say a fine would be imposed; OIC did not even explicitly threaten to impose a fine if PacifiCare did not do certain things." It is unclear how the February 9 communication could be interpreted any other way. In any event, as PacifiCare's own action in immediately retaining counsel and engaging with OIC demonstrates, this is an empty argument. PacifiCare was and is well aware that was exactly the effect of the letter and consent order. The only question was whether the Company was going to pay the fine voluntarily or require OIC to seek a hearing. Not only the letter but the spirit of RCW 34.05.413(5) was fully met by the OIC's February 9, 2009 letter. The Administrative Law Judge's initial opinion is correct.

PacifiCare argues that the U.S. Oil case<sup>2</sup> was superceded by RCW 34.05.413(5). If the Company is correct, the argument ends here and the initial order dismissing PacifiCare's MSJ should be finalized. If U.S. Oil has not been superceded, it is yet more mandatory authority requiring the denial of PacifiCare's motion. PacifiCare again argues that U.S. Oil is distinguishable on the basis that the fine assessment in that case was unilaterally binding, while the fine assessment by OIC was not, absent a hearing. However, the Administrative Law Judge properly found that U.S. Oil is on point here.

In its Petition, PacifiCare misstates the meaning of the U.S. Oil opinion in the same way it misstates the meaning of RCW 34.05.413(5) by ignoring the language that is inconsistent with the Company's position. U.S. Oil and RCW 34.05.413(5) are entirely consistent with one another in that both state that the statute of limitations is tolled when an agency provides notice of an adjudication. The U.S. Oil court explicitly spelled this out. That court held that a notice of fine assessment by the Department of Ecology ("DOE") tolled the statute because "the penalized party can either pay the penalty or have the claim fully adjudicated by the otherwise available

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<sup>2</sup> U.S. Oil & Refining Co. v. Department of Ecology, 96 Wn.2d 85 (1981).

administrative and judicial forums, with no liability actually arising until the completion of all available judicial review. The notice has much the same effect as a complaint or summons, and hence the action should toll when the notice is served.”<sup>3</sup> PacifiCare completely ignores the court’s explanation of *why* the notice was sufficient because, as PacifiCare has acknowledged,<sup>4</sup> the same is true of the OIC’s notice to PacifiCare.

Moreover, PacifiCare ignores the holding in Dolman v. Department of Labor and Industries,<sup>5</sup> also cited in both parties’ briefing on the Motion for Summary Judgment. In Dolman, the Washington Supreme Court built on U.S. Oil and determined that the statute of limitations was tolled when the Department of Labor and Industries (L&I) issued a notice of assessment of penalties. Although PacifiCare erroneously claimed otherwise in its Motion,<sup>6</sup> the notice of assessment did not become “self-executing absent any action by the aggrieved party.”<sup>7</sup> In fact, elsewhere in its brief PacifiCare notes that the statutory scheme under which L&I was operating required the assessment to be filed in Superior Court, which was never done.<sup>8</sup> Thus, Dolman is directly on point on this issue because the notice of assessment had the same effect as OIC’s February 9 letter. (The court’s ruling in Dolman also supports OIC’s position on the issue in the next section, which will be discussed below.)

OIC respectfully submits that the Administrative Law Judge’s determination that the statute of limitations on this matter was tolled on February 9, 2009 was correct, both factually and legally. The initial opinion on this issue should be finalized.

**B. The Statute of Limitations on Matter No. 09-0010 Does Not Expire Until the Second Half of 2010.**

Unfortunately, the initial opinion indicates that OIC did not clearly articulate the legal basis of its position that the adoption of the Financial Examination Report is the event that started the statute of limitations on this fine running. Because the Administrative Law Judge apparently misunderstood the statutory Financial Examination process, she mistakenly found that the OIC’s cause of action accrued earlier than it actually did. OIC requests that the Reviewing Officer reconsider this issue.

This is not an action based solely on the illegal royalty payments. If it was, then it would make sense to apply only the discovery rule to the statute of limitations issue. However, this is an administrative action based upon PacifiCare’s illegal royalty payments in violation of the Insurance Code *as demonstrated by a Financial Examination*. This distinction is critical.

<sup>3</sup> PacifiCare’s Motion for Summary Judgment re: Statute of Limitations, at pg. 10, ll 8-14 (internal citations omitted).

<sup>4</sup> *Id.*, at ll 5-17.

<sup>5</sup> Dolman v. Dep’t. of Labor and Industries, 105 Wn.2d 560 (1986).

<sup>6</sup> Motion for Summary Judgment re: Statute of Limitations, pg. 10 at line 25 – pg. 11 at line 5.

<sup>7</sup> *Id.*, at pg. 11, ll 4-5.

<sup>8</sup> *Id.* at pg. 10, ll 14-17.

Violations of the sort committed by PacifiCare are detectable only through a detailed, on the ground, Financial Examination of the Company's books. It is for that reason that such a Financial Examination of each insurer is mandated to occur every five years.<sup>9</sup>

In itself, the fact that these examinations are mandated only every five years demonstrates that the findings of such exams are contemplated differently than other violations of the Insurance Code. For example, assume that a PacifiCare policyholder had discovered these illegal royalty payments and sought to sue the Company on that basis, or complained to OIC and OIC brought an action for the violations. In that situation, the statute of limitations would begin to run on the date the policyholder or OIC discovered the violations.

The legislature has passed statutes requiring that the findings of Financial Examinations be treated differently. This is necessary for two reasons. First, Financial Examinations are exhaustive and expensive. Neither OIC nor insurers have the resources to routinely undergo these examinations more than once every five years. Second, the findings must, by definition, be subject to enforcement action by OIC. Otherwise it would make no sense to conduct the exams. Since the exams are conducted only every five years, OIC must have the authority to conduct enforcement activity covering the entire five-year period of the exam. If it did not, companies would have three "free" years out of every five during which they could commit financial violations that OIC might discover through its Financial Exams, but about which it could do nothing. That is not the law.

The law is this: Under the Insurance Code, once a Financial Examination is complete, the examiner in charge must make a full written report of the examination, including conclusions and recommendations. The report must be filed in the Commissioner's office. The OIC must provide a copy of the Examination Report to the examined company not less than ten or more than thirty days prior to the filing of the report for public examination, at which time the examined company has the right to a hearing on its objections to the proposed report.<sup>10</sup> If, like PacifiCare, the examined company does not request a hearing to contest the proposed report, the Commissioner then has 30 days following the end of that period to consider the report, together with the examined company's written response to the report, and enter an order either adopting the Examination Report, rejecting it, or calling for an investigatory hearing.<sup>11</sup> If the Commissioner adopts the Report, the examined company then has a second opportunity to appeal it.<sup>12</sup>

As a result of this statutory scheme, the Report of Examination, upon which OIC's fine at issue is based, *was not final and could not serve as the basis for the fine* until November 12, 2008. That is why the distinction that this was a fine based upon the exam findings is so critical. That is why the statute of limitations on imposing this fine does not expire until November 12, 2010.

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<sup>9</sup> RCW 48.03.010(1).

<sup>10</sup> RCW 48.03.040(3).

<sup>11</sup> RCW 48.03.040(4).

<sup>12</sup> RCW 48.03.040(5) and RCW 48.04.010(3).

The statutory scheme is mandatory - OIC has no authority to waive it. Nor should it - this statutory scheme provides not one, but two levels of appeal for the protection of the examined company. This ensures that the examined company has full opportunity to be heard and present evidence challenging any findings to which it objects. That is why imposition of a fine prior to adoption of the final report would be premature. And that is why the Insurance Code provides that, when the Examination Report is final, the Insurance Commissioner is explicitly authorized to "initiate any proceedings or actions as provided by law" if he or she determines that regulatory action is appropriate as a result of the examination.<sup>13</sup>

"A cause of action accrues when the party has a right to apply to a court for relief."<sup>14</sup> OIC had the right to apply to a court for relief for PacifiCare's violations as set forth in the Exam Report beginning on November 12, 2008. That is the date upon which OIC's "cause of action ha[d] accrued" under RCW 4.16.100. Therefore, the statute of limitations on this matter will expire on November 12, 2010.

The Insurance Code provides that an order adopting a Report of Examination "is considered a final administrative decision and may be appealed under the Administrative Procedure Act, chapter 34.05 RCW." This is statutory authority for the OIC's position that an action upon the Report of Examination accrues on the date the adoption of that Report becomes final because, until then, there is no Report upon which to base the fine. The opinion in Dolman illustrates the difference between the result under the Insurance Code, and that under the general Statute of Limitations of Chapter 4.16 RCW or a different statutory scheme.

In Dolman, L&I was operating under a statute which specifically provided that any action to collect delinquent sums "must be brought within three years of the date any such sum became due."<sup>15</sup> Thus, even though the statutory framework allowed audits of companies subject to L&I premiums, it specifically limited actions on the findings of those audits to three years *from the date the sum became due*, regardless of when the audit was conducted. It is significant to note, however, that the statute allowed such actions to be brought for three years, rather than the two years that would have been allowed under RCW 4.16.100(2). The court held that this statute (combined with agency practice) required the three year cutoff, despite the fact that there might have been a different result based upon the date of the audit results. Since there is no such statute in the Insurance Code, the appropriate result under Dolman is that OIC's action on the Examination Report is timely as long as it is brought within two years from the date of the adoption of that Report.

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<sup>13</sup> RCW 48.03.040(6)(c).

<sup>14</sup> U. S. Oil & Ref. Co. v. State, 96 Wn.2d 85 (1981), *citing*, Lybecker v. United Pac. Ins. Co., 67 Wn.2d 11, 15, 406 P.2d 945 (1965) (add'l citations omitted).

<sup>15</sup> Dolman, 105 Wn.2d at 563, *citing* RCW 51.16.190(1).

OIC respectfully submits that the statute of limitations on this matter has not yet run, and PacifiCare's Motion for Summary Judgment should be denied on this basis, as well as the basis of the OIC's February 9, 2009 letter imposing the fine.

Executed at Tumwater, Washington, this 22<sup>nd</sup> day of February, 2010.

MIKE KREIDLER  
Insurance Commissioner

By: Andrea L. Philhower  
Andrea L. Philhower  
Staff Attorney - Legal Affairs

CERTIFICATE OF MAILING

The undersigned certifies under the penalty of perjury under the laws of the state of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing OIC'S REPLY TO PACIFICARE'S PETITION FOR REVIEW OF INITIAL ORDER on the following individuals in the manner indicated:

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SIGNED this 22<sup>nd</sup> day of February, 2010, at Tumwater, Washington.

Jodie Thompson  
Jodie Thompson