



OFFICE OF
INSURANCE COMMISSIONER

FILED 6/10/10
HEARINGS UNIT

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 BRIEF ON REVIEW OF DENIAL
OF PACIFICARE'S MOTION FOR
SUMMARY JUDGMENT RE: STATUTE
OF LIMITATIONS

I. Introduction and Relief Requested

The Washington State Office of the Insurance Commissioner ("OIC"), in response to PacifiCare's request for review of Judge Cindy Burdue's denial of its Motion for Summary Judgment. Because PacifiCare ("PCW" or "the Company"), submits this brief. Judge Burdue has appropriately found that OIC's February 9, 2009 letter and consent order tolled the statute of limitations in this matter. Moreover, even if that were not the case, OIC respectfully submits that Judge Burdue incorrectly disregarded the other basis upon which this motion is fatally flawed: the Insurance Code provides that the statute of limitations on this matter has not yet run.

II. Issue Presented

Judge Burdue has appropriately framed the issue for decision as:

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?

III. Argument And Authority

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

Actions by OIC to fine PCW for violations of the Insurance Code must be commenced within two years after the cause of action has accrued.¹ The cause of action for PCW's payment of royalties to its parent company accrued on November 12, 2008. Therefore, this action would have been timely if filed any time on or before November 12, 2010.

¹ RCW 4.16.005, 4.16.100.

PCW seeks to ignore an entire body of law that governs this matter. Unfortunately, Judge Burdue disregarded the effect of Insurance Code provision RCW 48.03.040 on the method by which OIC is required to pursue a cause of action based upon a financial exam. PCW mistakenly argues that Chapter 4.16 RCW alone governs the time within which OIC may seek to impose a fine in this matter, completely ignoring the administrative nature of this action. The Washington State Insurance Code governs all OIC actions, including setting forth exactly how administrative penalties based upon the findings of a Financial Examination must be pursued. Chapter 4.16 is only one step of the analysis. PCW mistakenly seeks to make it the first and only step.

RCW 48.03.040 sets forth a precise schedule of actions which OIC must follow in order to enter official findings on a Financial Examination. Under this statute, once a Financial Examination is complete, the examiner in charge must make a full written report of the examination to the Commissioner, including conclusions and recommendations, within sixty days. The report must then be filed in the Commissioner's office.

However, the report does not yet become final at that point. First, 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. For purposes of this brief, this period shall be called the "First Dispute Opportunity". If, within this time period, the examined company requests a hearing to consider its objections to the report as proposed, the Commissioner may not file the report for public inspection until after that hearing.² This is the first of two opportunities an examined company is given to request a hearing to dispute the exam findings. Therefore, **OIC could not have sought to unilaterally impose penalties based upon the findings of PCW's Financial Examination – including the payment of royalties which had only just been admitted – prior to that time**, because the final version of the report did not yet exist.

PCW waived its opportunity to request a hearing to contest the proposed report during the First Dispute Opportunity. Therefore, under RCW 48.03.040, the Commissioner had 30 days following the end of the First Review Period to consider the report, together with PCW's written response to the report, and enter an order either adopting the Examination Report, rejecting it, or calling for an investigatory hearing.³

The Commissioner entered the Order Adopting the Examination Report on August 13, 2008.

The Insurance Code provides that a "final administrative decision" that may be appealed under the Administrative Procedure Act had not been made until entry of the Order Adopting the Report on August 13, 2008.⁴ This Administrative Hearing could therefore appropriately find that the statute of limitations for a regulatory action based upon this report will expire on August 13, 2010.

² RCW 48.03.040(3).

³ RCW 48.03.040(4).

⁴ RCW 48.03.040(5).

However, the Insurance Code provides the Company ninety days in which to appeal the adoption of the report.⁵ For purposes of this brief, this period shall be called the “Second Dispute Opportunity”. Given that the report is not final during this period wherein the Company can appeal it, the Order Adopting Findings did not become final until November 12, 2008. **OIC could not have sought to unilaterally impose penalties based upon the findings of PCW’s Financial Examination – including the payment of royalties which had only just been admitted – prior to that time**, because the Report had not yet been adopted and become final. Therefore, the more appropriate finding is that the statutory period during which OIC may impose a penalty based upon the Exam Report will expire on November 12, 2010.

As it had the First Dispute Opportunity, PCW waived the Second Dispute Opportunity. The Company did not appeal the adoption of the report. Therefore, the report became final on November 12, 2008. “A cause of action accrues when the party has a right to apply to a court for relief.”⁶ OIC had the right to seek to impose penalties for PCW’s violations in the Exam Report beginning on November 12, 2008, **and not before**. That is the date upon which OIC’s “cause of action ha[d] accrued” under RCW 4.16.100. For this reason, Judge Burdue is mistaken in her statement at Conclusion of Law #15, “There is nothing apparent in the applicable law which prevents the Commissioner from assessing monetary fines in the final order.”

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.⁷ In the case of PCW, the Commissioner determined that the appropriate regulatory action for the violations found in the 2003-2006 Financial Examination was a fine of \$400,000. He has now timely initiated this regulatory action seeking to impose that fine.

Judge Burdue’s ruling is in error at Conclusion of Law No. 11, in which the Judge finds that “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.” She goes on to question the meaning of the word “regulatory” as used in RCW 48.03.040(6)(c), which 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.”

Chapter 48.03 RCW sets forth the requirements under which the findings of an examination must be adopted by the Commissioner. OIC is empowered to take enforcement action based upon that report only when those requirements have been met. Until that point, the examined company has two levels of appeal – the First and Second Dispute Opportunities – at which it may seek a

⁵ RCW 48.04.010(3).

⁶ *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).

⁷ RCW 48.03.040(6)(c).

hearing to dispute the findings in the report. OIC may not take enforcement action until the examined entity has had those hearing opportunities.

Judge Burdue was perhaps confused by her belief, cited in footnote 1 on page 7 of her ruling, that OIC did not assess any penalty for the violations found in the first Financial Examination. That is incorrect. OIC and PCW entered into a consent order resolving the findings of that examination, including a fine of \$60,000, with \$30,000 suspended on condition of no repeat violations within thirty months.⁸ One of the conditions of that order was a repeat examination, the result of which is at issue here.

A finding other than that urged by OIC would ignore the system of examinations set forth in Chapter 48.03. Financial examinations are required of a specific company only once every five years.⁹ Certainly it cannot be argued that the Legislature intended for Companies to be free of consequences for their financial misdeeds three years of every five! Rather, the Legislature set forth a system whereby OIC fully examines the companies, as it did PCW, and then follows a procedure that gives the company two opportunities to request a hearing to dispute findings before the report of the examination becomes final. Then, and only then, are the findings final and therefore eligible to become the basis of a fine. A different finding would strip the companies of those two hearing opportunities, while at the same time nullifying the purpose of full financial examinations – which is to allow OIC to address all of a company’s financial issues at once.

B. PCW’s arguments regarding other potential remedies available to OIC are irrelevant.

PCW argues that OIC was authorized to issue a Cease and Desist order and begin the process of fining PCW for its violations upon discovery of those violations. Not only is this irrelevant, it completely ignores PCW’s own actions in engaging in a willful program of deceit wherein it lied and engaged in false accounting for a decade to hide the fact that it was paying royalties.

This argument is irrelevant because, under the Insurance Code statutes set forth above, OIC was fully authorized to conduct the Financial Examinations and to bring the instant action when the second Report of Financial Examination became final. Whether there may have been another method of enforcement available has no bearing on the legitimacy of the one in which OIC engaged. Moreover, at the time of discovery, PCW was fully engaged in its 3-part program of denying royalty payments, falsely characterizing the payments in its accounting, and making the payments to an intermediary company which then passed them on. PCW should not now be heard to argue that OIC should have had to prove its wrongdoing while that program of deceit was still ongoing. OIC could and did choose another fully authorized course, and was ultimately successful in recovering the payments.

⁸ Exhibit C-8

⁹ RCW 48.03.010(1).

For the foregoing reasons, PCW's Motion is not supported by law and should be denied. Because the statute of limitations on this matter has not yet run, consideration of PCW's Motion should end here. However, there are additional bases upon which the Motion should be denied.

C. The Statute of Limitations was Timely Tolloed on February 9, 2009 by OIC's letter and proposed Consent Order.

Judge Burdue correctly found that OIC's action was timely under RCW 4.16.005 and -.100. Under the doctrine of Equitable Estoppel, OIC did not have constructive knowledge of PCW's violations until August 9, 2007. Under RCW 4.16.100, the limitations period for this action would have ended on August 9, 2009. Judge Burdue correctly followed the mandatory authority of U.S. Oil and Refinery v. The Dept. of Ecology, 192 Wn.2d 85, 633 P.2d 1329 (1981), finding that OIC tolled the statute of limitations by taking enforcement action for these violations six months earlier, on February 9, 2009.

1. PCW is Equitably Estopped From Benefitting From Its Misdeeds. Therefore, the statute of limitations on this matter did not begin to run until August 9, 2009.

This issue is conceded by PCW, at least for purposes of its Motion for Summary Judgment.¹⁰

2. OIC tolled the statute of limitations by taking enforcement action for these violations six months before the limitations period would have ended, on February 9, 2009.

PCW cites the dispositive cases on this issue in its Motion. Both U.S. Oil & Refining Co. v. Dept. of Ecology¹¹ and Dolman v. Dep't of Labor & Industries¹² are mandatory authority requiring that PCW's Motion be denied. PCW attempted to distinguish these cases, arguing that the fine assessments at issue were unilaterally binding, while the February 9, 2009 fine assessment by OIC was not. However, as PCW explains, citing the language of the case, and Judge Burdue agreed, 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 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."¹³ As PCW acknowledges,¹⁴ this is precisely the situation that occurred when OIC sent PCW its notice of fine assessment and proposed Consent Order. Judge Burdue's Conclusions of Law 20 through 28 make this finding, and should be upheld.

¹⁰ See, e.g., PacificCare of Washington's Petition for Review of Initial Decision at pg. 5, ll 2-5.

¹¹ 96 Wn.2d 85 (1981)

¹² 105 Wn. 2d 560 (1986)

¹³ PCW's Motion for Summary Judgment re: Statute of Limitations, at pg. 10, ll 8-14 (internal citations omitted).

¹⁴ *Id.*, at ll 5-17.

Although PacifiCare argues in its Petition for Review that “[t]he APA requires notice of a hearing to commence the action”¹⁵, that is simply not the law. The words of the statute upon which the Company relies are: “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’s argument ignores both the italicized language and the plain meaning of RCW 34.05.413(5). Administrative Law Judge Burdue, however, appropriately found at Finding of Fact #13, that notice to PCW of the instant adjudicative proceeding 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.

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. PacifiCare does not even attempt to claim that it did not understand the situation, but instead makes the argument – thin, at best - that the February 9 documents did not explicitly notify it that a fine had been imposed. The February 9 communication speaks for itself to dispel such an assertion, as does PacifiCare’s own behavior following receipt of the communication. As ALJ Burdue’s opinion correctly finds, not only the letter but the spirit of RCW 34.05.413(5) was fully met by the OIC’s February 9, 2009 letter.

Under the Insurance Code, the statute of limitations does not run on this matter until November 12, 2010. However, even if that were not the case, it is undisputed that the statute of limitations would still not have run until August 9, 2009. Under the APA and mandatory case law, the statute was tolled by OIC action on February 9, 2009. Therefore, OIC respectfully submits that there is no basis upon which to dismiss this action and PCW’s Motion should be denied.

Executed at Tumwater, Washington, this 10th day of June, 2010.

MIKE KREIDLER
Insurance Commissioner

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

¹⁵ Heading to “Argument” section III of PacifiCare’s Petition for Review, at pg. 7, line 14.
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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 BRIEF ON REVIEW OF DENIAL OF PACIFICARE'S MOTION FOR SUMMARY JUDGMENT RE: STATUTE OF LIMITATIONS on the following individuals in the manner indicated:

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SIGNED this 10th day of June, 2010, at Tumwater, Washington.


Andrea L. Philhower