

FILED

2010 JUN 21 A 9:55

Hearings Unit, DIC
Patricia D. Petersen
Chief Hearing Officer

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF

Respondent PacifiCare of Washington, Inc.
Authorized Health Care Service Contractor.

ORDER NO. 09-0010

**PACIFICARE OF WASHINGTON'S
REPLY IN SUPPORT OF ITS
PETITION FOR REVIEW OF
INITIAL DECISION**

PacifiCare of Washington ("PCW") respectfully submits the following brief in support of its Petition for Review and in reply to that response brief submitted by the Office of the Insurance Commissioner ("OIC") on the day of oral argument before Judge Petersen. PCW has no edits to previous submissions.

OIC initiated this action, bringing claims alleging that PCW made improper payments to its parent company, and was subject to a large punitive fine. PCW, however, has provided this Court with undisputed facts and binding Washington law to show that OIC's claims in this matter are barred by the statute of limitations. PCW respectfully requests the Court accept Judge Burdue's correct conclusions, reverse her incorrect conclusions, and grant PCW's motion for summary judgment dismissal.

Despite the extensive briefing, the relevant points of the matter are straightforward. On August 9, 2007, OIC was aware of the allegedly improper payments and had statutory authority to bring its claim to seek a monetary penalty. Accordingly, OIC's cause of action accrued on August 9, 2007, causing the statute of limitations to begin running. It is not disputed that the statute of limitations in this matter is two years. Therefore, the statute was set to expire on August 9, 2009, if not tolled beforehand. Although OIC forwarded an unsigned proposed consent order to PCW on February 9, 2009, this did not (and could not) commence the action or

otherwise toll the statute of limitations. OIC was simply legally incapable of providing true notice of either a penalty (as would be required under *U.S. Oil & Refining Co. v. Dept. of Ecology*, 96 Wn.2d 85, 633 P.2d 1329 (1981)) or of a stage in an adjudicative proceeding to assess that penalty, as is required under RCW 34.05.413 of the APA, which governs this matter. To find otherwise would be to either (a) ignore the statutory requirements imposed on OIC before assessing a penalty, or (b) dismiss the role of the Office of Administrative Hearings (OAH) as the true initiator of adjudicative proceedings. Hence, the proposed consent order – regardless of its language – had none of the legal effects OIC suggests. Therefore, the statute expired on August 9, 2009 and OIC’s claims are now barred.

I. The Cause of Action Accrued on August 9, 2007, and not November 12, 2008.

OIC challenged PCW’s statute of limitations analysis by arguing that its cause of action did not actually accrue until November 12, 2008. Although Judge Burdue properly dismissed this argument, OIC raises it again to this Court. In essence, this argument is as follows:

- A cause of action accrues when a party has the right and ability to pursue its claim.
- OIC learned of the allegedly improper payments while conducting a financial examination.
- The statute governing such financial examinations states that the OIC may pursue claims based on the findings of a financial examination after it is made final.
- As such, only after the financial examination was made final could OIC pursue its claims.
- Therefore, the cause of action accrued only once the financial examination was made final because that was the first time OIC had the right and ability to pursue its claim.

The argument breaks down, however, when it becomes clear that RCW 48.03.040(6)(c) – granting OIC the right to pursue a claim based on findings from a financial examination – is not the exclusive statutory grant of authority to OIC to pursue claims. In various other places in the Washington statutes, the legislature expressly provides OIC with the right to pursue claims as it sees fit – outside the context of a financial examination. *See, e.g.*, RCW 34.05.413(1); RCW 48.04.010(1); RCW 48.02.060(3); RCW 48.02.060(1).

In fact, OIC's attorney expressly conceded, both in oral argument and in its latest brief, that nothing precluded OIC from taking straight enforcement action against PCW as soon as it learned of the allegedly improper payments. See OIC's Brief on Review of Denial of PacifiCare's Motion for Summary Judgment re: Statute of Limitations, at 4-5; Transcript of Oral Argument at 32-34, attached hereto. Since nothing precluded OIC from taking enforcement action, OIC had the right and the ability to bring its claims as soon as it learned of their underlying basis on August 9, 2007. Therefore, even under OIC's definition, its cause of action accrued on August 9, 2007.

OIC suggests it is irrelevant that it was able to pursue its claim immediately upon learning of the underlying action. OIC maintains that it enjoys the right to choose how it will proceed when it learns of an alleged violation during a financial examination. Although OIC may choose how it will proceed when it finds what it deems to be inappropriate or illegal conduct, its decision cannot affect the accrual of the cause of action or the resulting statute of limitations period. The statute of limitations is established by the legislature, not OIC. OIC has provided no legal authority for its novel proposition because, in fact, there is none. To the contrary, it is well-settled that a party cannot unilaterally act to extend the statute of limitations at will. See *Dolman v. Dept. of Lab. & Ind.*, 105 Wn.2d 560, 565-66, 716 P.2d 852 (1986) (declining to permit an agency to rely on one method of discovering potential wrongdoing when it has statutory authority to do so in other manners that could be faster and more efficient).

On August 9, 2007, OIC possessed the requisite knowledge and the full legal authority to bring this claim against PacifiCare. Therefore, the cause of action accrued on August 9, 2007.

II. The Statute of Limitations Was Not Tolloed By The February 9, 2009 Consent Order. OIC also challenged PCW's analysis by arguing that its February 9, 2009 proposed consent order tolled the statute of limitations before it expired. Although Judge Burdue was ultimately persuaded to adopt this conclusion, we respectfully maintain that it is incorrect and should be reversed. In essence, OIC's argument appears to be as follows:

- Under *U.S. Oil*, an action is commenced when a party receives notice of the penalty imposed by the agency. Under the APA, an action is commenced when a party receives notice of a stage in the adjudicative proceeding.
- On February 9, 2009, OIC sent to PCW a consent order and transmittal letter that explained how the underlying payments allegedly were improper and inviting PCW to stipulate to a \$400,000 fine as penalty for making such payments.
- The proposed consent order was notice of a penalty because it clearly specified the amount and the conduct giving rise to the penalty.
- The proposed consent order was notice of a stage in the adjudicative proceeding because PacifiCare's understood the adjudicative nature of what would likely follow if it did not agree to sign the consent order.

This argument also fails under both *U.S. Oil* standard and the APA.

First of all, *U.S. Oil* does not apply to or govern this analysis. As PCW has briefed before, *U.S. Oil* has been superseded by the legislature's more recent adoption of RCW 34.05.413(5), which speaks directly to the definition of commencement of an action. Therefore, OIC's arguments relating to *U.S. Oil* and "notice of a penalty" are moot in this context.

Even if *U.S. Oil* were to apply, though, the proposed consent order did not give notice of a penalty (as required under *U.S. Oil*) because OIC cannot unilaterally impose a penalty. OIC requires either a stipulation (as it sought with the proposed consent order) or an order obtained from a hearing before it can assess a fine. *See* RCW 48.44.166. Therefore, it does not matter what the proposed consent order and transmittal letter said – they legally could not give notice of a penalty because there was not yet and could not be any imposition of a penalty. Notice of the possibility of a penalty is simply not sufficient for the purpose tolling the statute of limitations. In fact, despite OIC's best efforts, there still has not been any imposed penalty, which is why this litigation continues. If OIC's argument had any merit, it would not have needed to file a Notice of Request for a Hearing to impose a fine in this matter, which it subsequently did.

Similarly, the proposed consent order did not give notice of a stage in an adjudicative proceeding (as required under the APA) because OIC cannot unilaterally initiate a hearing. Under the governing procedures here, OIC must request a hearing from OAH, after which OAH – not OIC – gives notice to the parties of the first stage in an adjudicative process because OIC

has delegated this authority to the Chief Hearing Officer.¹ Therefore, it does not matter what the consent order and transmittal letter said – they legally could not give notice of a stage in the adjudicative proceeding because there was none until OAH gave the notice.

Two points are worth noting in clarification of this simple proposition. First, the transmission of the proposed stipulation through an unsigned consent order was not, in itself, a stage in the adjudicative process. As discussed at length in PCW's prior briefing in this matter, the consent order is an offer made by OIC to settle the matter without resorting to an adjudicative proceeding. It is not required that OIC do so prior to requesting a hearing, nor is it required that OIC follow up by actually requesting a hearing. It is no part of the process of an adjudicative proceeding.

In the absence of a stipulation to a proposed consent order, OIC is required to request a hearing from OAH in order to commence the adjudicative proceeding. OIC has provided no legal support to suggest otherwise – that circulating an unsigned, proposed consent order can circumvent OAH's authority to initiate an adjudicative proceeding in this context. Therefore, the unsigned consent order cannot be a stage in the adjudicative process because that process must be initiated by OAH, on request from a party. OIC effectively admitted this by filing its Notice of Request for Hearing after the statute of limitations expired.

Second, PCW's awareness that OIC probably intended to seek a hearing if it could not get the consent order signed does not constitute "notice of a stage in the adjudicative proceeding". In its February 9, 2009 letter, OIC merely stated that if the proposed consent order was not accepted, OIC would "explore other options." Exhibit C-1, page 2. It was not until after the statute of limitations expired that OIC filed a notice of a request for a hearing. OIC fails to recognize that the statute of limitations is not a mere technicality. OIC had the ability to request commencement of a hearing or to seek a tolling agreement. It did neither. Regardless of what

¹ See explanation of this delegation and process on OIC's website, at http://www.insurance.wa.gov/orders/hearingsunit_overview.shtml

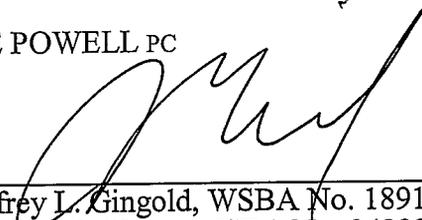
OIC put in its consent order or transmittal letter, that letter did not and could not constitute legal notice of a stage in the adjudicative process.

The notion that OIC could toll the statute of limitations simply by notifying a company that it intended to pursue its options is contradicted by all the relevant authority and defeats the entire purpose of a statute of limitations. Until it decided to request a hearing, all OIC could do was send out proposed orders and threatening letters – as it did on February 9, 2009. But this is not enough to commence an action or toll the statute of limitations. OIC should not be permitted to circumvent the statutory restrictions placed on it regarding fines and should not be permitted to usurp the delegated authority of OAH. Most importantly, OIC should not be permitted to evade the statute of limitations simply by sending out documents whose lack of legal significance is underscored by the fact that they were not even signed.

PCW respectfully requests this Court reverse Judge Burdue’s conclusions of law with respect to the February 9, 2009 consent letter, and grant PCW’s motion for summary judgment.

DATED this 18th day of June, 2010.

LANE POWELL PC

By 

Jeffrey L. Gingold, WSBA No. 18915
Andrew G. Yates, WSBA No. 34239
Andrew W. Steen, WSBA No. 38408
Attorneys for PacifiCare of Washington Inc.

CERTIFICATE OF SERVICE

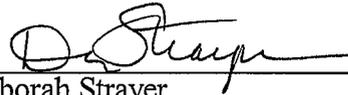
I assert that true and exact copies of PacifiCare of Washington's Reply in Support of its Petition for Review of Initial Decision were hand-delivered by ABC-LMI and mailed postage prepaid on June 18, 2010, to the following parties at the following addresses:

Hon. Patricia Peterson
Chief Hearing Officer
Office of the Insurance Commissioner
PO Box 40255
5000 Capitol Blvd
Tumwater, WA 98504-0255

Andrea Philhower
Legal Affairs Division
Office of the Insurance Commissioner
PO Box 40255
5000 Capitol Blvd
Tumwater, WA 98504-0255

Wendy Galloway
Admin. Asst. to Chief Hearing Officer
Office of the Insurance Commissioner
PO Box 40255
5000 Capitol Blvd
Tumwater, WA 98504-0255

DATED this 18th day of June, 2010.



Deborah Strayer
Legal Assistant