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June 18, 2010

Hearings Unit, DIC
Patricia D. Petersen
Chief Hearing Officer

VIA FACSIMILE & U.S. MAIL

Hon. Patricia Petersen
Chief Hearing Officer
Office of the Insurance Commissioner
Hearings Unit
P.O. Box 40255
Olympia, WA 98504-0255

Re: PacifiCare of Washington
OIC Matter No. 09-0010
OAH Docket No. 2009-INS-0001

Dear Judge Petersen:

Attached is the transcript of the oral argument held in your Court on June 10, 2010 in the above-referenced matter. PacifiCare of Washington referenced the transcript in its Reply in Support of Petition for Review but failed to attach it for your convenience.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

LANE POWELL PC



Andrew W. Steen

AWS:ds

Enc.

cc: Andrea L. Philhower, Esq. (by e-mail to: andreap@oic.wa.gov)
Josie Bayon, Legal Assistant (by e-mail to: JosieB@oicwa.gov)

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

IN THE MATTER OF:)
)
PACIFICARE OF WASHINGTON,) Order No. 09-0010
)
Respondent.)
)

RECONSIDERATION HEARING

Taken at 5000 Capitol Boulevard Southeast
Tumwater, Washington

DATE: June 10, 2010

REPORTED BY: Victoria E. Leckie
CCR No.: 2779

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A P P E A R A N C E S

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Administrative Assistant to the
Chief Hearing Officer

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1 Commissioner alleges that on about 96 occasions Pacificare
2 made indirect royalty payments to its parent company, and
3 that, the Commissioner argues, is a violation of the
4 Insurance Code. And the question today is whether the
5 statute of limitations has run on the Commissioner's
6 disciplinary action with regard to these activities.

7 In very brief, and I know I will hear a lot
8 more detail, Pacificare, as I read this, argues that the
9 Commissioner was aware of these activities, the activities
10 which give rise to this cause of action, no later than
11 August 9 of '07.

12 The Commissioner, however, argues that the
13 Commissioner's Office was aware -- was investigating these
14 activities during that time in '07. However, Pacificare
15 continually denied the activities and it was not until
16 August 9th of '07, in a conference call, that Pacificare
17 admitted to the activities.

18 And then on August 13, '08, there was a final
19 order document exam report issued, which included these
20 activities, and so the Commissioner argues the statute of
21 limitations would not run until August 13, '10, or possibly
22 even 90 days later, if I've got the facts straight; is that
23 correct?

24 MS. PHILHOWER: Essentially
25 JUDGE PETERSEN: Essentially, real briefly.

1 TUMWATER, WASHINGTON; THURSDAY, JUNE 10, 2010
2 10:10 A.M.
3 --o0o--
4

5 P R O C E E D I N G S

6
7 JUDGE PETERSEN: Good morning. Are you ready
8 or would you like a few more minutes to get settled?

9 MS. PHILHOWER: Mr. Gingold just got here, so
10 we might need a few minutes.

11 MR. GINGOLD: Thank you very much.
12 (Pause in the proceedings.)

13 JUDGE PETERSEN: This is June 10, 2010, just
14 shortly after ten o'clock in the morning. This is the
15 matter of Pacificare of Washington concerning the imposition
16 of fines. It's matter number 09-0010.

17 I have read the file. We've had it for some
18 time. And I'm happy that we've addressed some of those
19 issues about timeliness of appealing the denial, OHS's
20 initial denial of motion for summary judgment, Pacificare's
21 motion for summary judgment.

22 And here we are today for oral argument as
23 requested by Pacificare on -- who asked that oral argument
24 be presented prior to my entering a final order.

25 So, very briefly, as I see the file, the

1 All right. I know you'll fill it in. That's as I
2 understand it going through here. So I -- with that in
3 mind, when you're ready, I'd be happy to hear your argument.

4 MR. GINGOLD: Thank you, Your Honor.

5 For the record, my name's Jeff Gingold. I'm
6 an attorney with Lane Powell. And we represent Pacificare
7 of Washington.

8 Judge Petersen, thank you very much for
9 allowing us the opportunity to make these arguments and to
10 appear in person. I very much appreciate that.

11 JUDGE PETERSEN: You're welcome.

12 MR. GINGOLD: And I apologize. I thought I
13 brought a copy of our last submission, petition for review
14 of the initial order, that I had marked in my office to
15 highlight what I believe was a mistake that we made within
16 that document, but this morning, as I'm quickly leafing
17 through, as luck would have it, I can't find it.

18 Basically, if I'm correct in that we made the
19 error, it would be references to an individual by the name
20 of Rebecca DeLatorre, whose name came up as a recipient of
21 the letter that OIC transmitted to Pacificare of Washington
22 on February -- in February of 2009. And that would have
23 been erroneous because those references should show that the
24 letter was from OIC, not from Rebecca DeLatorre.

25 MS. PHILHOWER: I think I know what you're

1 talking about, and I think that's right.
 2 MR. GINGOLD: And I'll be happy to follow up
 3 and specifically identify the points within the document
 4 where that occurred so we can correct it.
 5 JUDGE PETERSEN: Right. If you can do that,
 6 because that sounds to me like that's probably important.
 7 MR. GINGOLD: Yes. Thank you very much.
 8 JUDGE PETERSEN: All right.
 9 MR. GINGOLD: Your Honor, my understanding is
 10 that we weren't going to submit additional briefs, so I
 11 haven't prepared any additional briefs, but what I have
 12 prepared is the narrative, written narrative, of what, with
 13 Your Honor's indulgence, I would like to present orally this
 14 morning. Having had the opportunity to read a transcript of
 15 my oral presentation, I thought it would be helpful to
 16 everyone to write it out. I appreciate Your Honor accepting
 17 that.
 18 By way of introduction, on September 8, 2009,
 19 the Office of Administrative Hearings, OAH, notified
 20 PacifiCare that it would conduct a prehearing conference.
 21 OAH had scheduled a prehearing conference at the request of
 22 the Office of the Insurance Commissioner, OIC, which, as
 23 Your Honor has noted, had accused PacifiCare of making
 24 inappropriate payments to its parent company and sought a
 25 fine of \$400,000.

1 The parties agreed and Judge Burdue concurred
 2 that it made sense to address the statute of limitations
 3 issue first because its disposition could render further
 4 proceedings unnecessary.
 5 On October 30, 2009, PacifiCare moved for
 6 summary judgment dismissal of the matter on statute of
 7 limitations grounds. On January 6 of this year
 8 Administrative Law Judge Burdue heard oral argument on
 9 PacifiCare's motion. On January 25 of this year Judge
 10 Burdue issued what she styled as an initial order denying
 11 PacifiCare's motion, and OAH has accepted PacifiCare's
 12 petition for review of this decision. And, again, we
 13 express our thanks.
 14 PacifiCare respectfully contends that Judge
 15 Burdue misapplied the law in denying its motion.
 16 Specifically, Judge Burdue wrongly determined that OIC's
 17 presentation to PacifiCare of a proposed consent order
 18 seeking PacifiCare's stipulation to a \$400,000 fine tolled
 19 the running of the applicable statute of limitations.
 20 Judge Burdue also, respectfully, incorrectly
 21 concluded that OIC was under no legal obligation to, quote,
 22 request, file for, or provide notice of an adjudicative or
 23 administrative hearing or action before imposing a fine.
 24 And that's found in Judge Burdue's Conclusions of Law Number
 25 24.

1 Pacificare respectfully requests reversal of
 2 of Judge Burdue's order. Under the Administrative
 3 Procedures Act, the APA, and Washington case law, Your Honor
 4 has full discretion and authority to do so and has no
 5 obligation to give deference to Judge Burdue's legal
 6 determinations.
 7 Furthermore, such a ruling would without
 8 question permit an interlocutory appeal and full disposition
 9 of this issue prior to the expenditure of significant time
 10 and resources on the entire case.
 11 As Your Honor accurately observed in your
 12 letter to the parties dated February 9, 2010, going forward
 13 on the hearing on the merits when the Initial Order Denying
 14 Summary Judgment might be reversed could leave the parties
 15 in a position where they would have gone through the hearing
 16 on the merits for no reason.
 17 Turning now to PacifiCare's position. All
 18 parties, as we understand it, and Judge Burdue correctly
 19 concluded that a two-year statute of limitations applies. A
 20 cause of action accrues for statute of limitations purposes
 21 either at the time of the event giving rise to the cause of
 22 action or at the time at which the wronged party knew or you
 23 should have known about the event.
 24 OIC admits, at the very latest, it became
 25 aware of the subject payments on August 9, 2007. Therefore,

1 under clear Washington law, the two-year statute of
 2 limitations began to run no later than August 9, 2007, and
 3 expired no later than August 9, 2009.
 4 However, OIC did not commence an action
 5 against PacifiCare during this time. Instead, on February
 6 9, 2009, a full 18 months after learning of the payments in
 7 question, OIC sent PacifiCare an unsigned Proposed Consent
 8 Order Levying a Fine. OIC sought PacifiCare's stipulation
 9 to the proposed consent order, including a \$400,000 fine to,
 10 quote, settle the matter in consideration, end of quote.
 11 This proposed consent order did not commence
 12 an action against PacifiCare because, one, it did not give
 13 notice of a fine already imposed, as Judge Burdue felt was
 14 required by U.S. Oil, and, two, it did not give notice of a
 15 stage in a proceeding against PacifiCare, as is required
 16 under the APA.
 17 The proposed consent order could not
 18 constitute notice of a fine because the Commissioner could
 19 not legally impose a fine at that time unless there was a
 20 stipulation. Judge Burdue's Conclusion of Law Number 24
 21 states that, quote, The law does not require the OIC to
 22 request, file for, or provide notice of an adjudicative or
 23 administrative hearing or action before imposing fine, end
 24 of quote.
 25 This statement of law is incorrect. RCW

Page 10

1 48.44.166 permits the Commissioner to levy a fine on a
 2 healthcare service contractor such as PacifiCare only, quote
 3 -- this is an out-of-context quote -- after hearing or upon
 4 stipulation by the registrant, end of quote.
 5 Because the unsigned consent order
 6 represented neither a stipulation or -- nor requisite notice
 7 of a stage of the administrative hearing process, the
 8 Commissioner could not impose a fine. Without a fine, there
 9 could be no notice of a fine imposed. Therefore, even under
 10 Judge Burdue's mistaken reading of U.S. Oil, suggesting that
 11 notice of an imposed penalty was sufficient to commence an
 12 action, the letter of February 9, 2009, and attached
 13 proposed consent order did not constitute commencement of an
 14 action for purposes of tolling the statute of limitations.
 15 Furthermore, as mentioned above, the proposed
 16 consent order did not give notice of a stage in the
 17 proceeding against PacifiCare. Judge Burdue concluded that,
 18 quote, The consent order and letter accompanying it make
 19 very clear to PCW that further administrative action would
 20 be taken to enforce payment if not voluntarily -- if not
 21 made voluntarily by PCW, end of quote, referring to Finding
 22 of Fact, paragraph 13, Conclusions of Law, paragraph 21.
 23 The record does not support any such finding or conclusion.
 24 To the contrary, OIC described the document
 25 in question as a, quote, proposed, end of quote, consent

Page 11

1 order. That's Exhibit C-1 in subject line, page one, and
 2 paragraph six on page two.
 3 Furthermore, OIC made it contingent on PCW's
 4 acceptance. Quote, If we have not heard back from you by
 5 March 9, 2009, this offer must be withdrawn and the OIC will
 6 be forced to explore other options, end of quote, Exhibit
 7 C-1, paragraph seven on page two.
 8 OIC did not in that letter specify what, if
 9 any, options it would explore. Similarly, OIC's letter did
 10 not state that OIC would request or otherwise commence an
 11 administrative hearing.
 12 Finally, OIC did not even sign the proposed
 13 consent order, Exhibit C-2 at page four. This is in stark
 14 contrast with OIC's August 14, 2009, Notice of Request for
 15 Hearing for Imposition of Fines, Exhibit R-1, which for the
 16 first time states that, quote, The Insurance Commissioner
 17 will convene a hearing to consider the allegations and
 18 sanctions to be imposed. That's an out-of-context quote.
 19 And that's at Exhibit R-1, page four, paragraph 18.
 20 This notice regarding commencement of a
 21 proceeding -- commencement of a hearing is precisely what
 22 was missing from OIC's February 9, 2009, communications to
 23 PacifiCare. Regardless, the proposed consent order could
 24 not have constituted notice of a stage in the proceeding
 25 because OIC is not legally entitled to give notice of the

Page 12

1 first stage in a proceeding.
 2 The Insurance Commissioner has delegated to
 3 the Chief Hearing Officer authority concerning hearings.
 4 OIC can request scheduling of a hearing, and the Chief
 5 Hearing Officer then schedules the matter and sends the
 6 parties notice of the initial stage in a proceeding.
 7 Therefore, even if the February 9, 2009,
 8 proposed consent order had included the language that was
 9 that it did not contain but was contained in the August 14,
 10 2009, submission, it would merely constitute notice of a
 11 request for a hearing. Notice of an actual hearing would
 12 have to come from the Chief Hearing Officer.
 13 After PacifiCare declined to stipulate to the
 14 February 9, 2009, proposed consent order, the only way OIC
 15 could lawfully impose a fine upon PacifiCare was through a
 16 hearing to obtain an order imposing a fine. PacifiCare was
 17 under no legal obligation to accept the proposed
 18 stipulation.
 19 Unlike an OIC cease and desist order or an
 20 action to revoke or suspend a license where the registrant
 21 must take affirmative action to request a hearing and a stay
 22 to prevent automatic application of an OIC order, within the
 23 context of OIC seeking to impose a fine, an unaccepted
 24 consent order of the type in question has no legal effect
 25 whatsoever until and unless a hearing is convened to obtain

Page 13

1 an order authorizing the imposition of a fine.
 2 Accordingly, Judge Burdue's finding and
 3 conclusion that PacifiCare's failure to consider the
 4 proposed consent order as a threatened action and then
 5 demand a hearing has no bearing on whether OIC timely
 6 commenced a hearing within the two-year statute of
 7 limitations, referring to Finding of Fact Number 9 and
 8 Conclusion of Law Number 21.
 9 The cause of action accrues when the party
 10 with a claim is able and legally entitled to seek relief on
 11 that claim. This ability and legal right to bring a claim
 12 has nothing to do with when an action is commenced, only
 13 when a cause of action accrues.
 14 Moreover, the standard only applies to the
 15 party with the claim, in this case OIC, not the party who
 16 may have to defend against the claim, in this case
 17 PacifiCare.
 18 If what OIC suggests were actually true, then
 19 all any plaintiff would ever have to do would be to inform a
 20 potential defendant of his or her potential claims. Because
 21 that potential defendant has the right to go to court and
 22 seek declaratory relief, the statute of limitations on those
 23 claims would be tolled indefinitely. This is not the law.
 24 The burden to comply with the statute of
 25 limitations rests squarely on the plaintiff. That party may

1 be given allowances to ensure the full benefit of the
2 allotted time period, but it is the responsibility of the
3 party with the claim, in this case OIC, to commence its
4 action within that time period.

5 As mentioned, the two-year statute of
6 limitations expired on August 9, 2009. The only way to toll
7 the statute of limitations is to commence an action or
8 obtain a tolling agreement, which was not done in this case.

9 The APA, which clearly governs procedure in
10 administrative actions such as this, specifically states
11 that an action is commenced when a party is notified that a
12 prehearing conference or other stage in the adjudicative
13 proceeding will be conducted, RCW 34.05.413(5).

14 PacifiCare did not receive such notice prior
15 to the expiration of the two-year statute of limitations.
16 OAH sent notice of a prehearing conference on September 8,
17 2009. OIC did not provide notice that it was even
18 requesting a hearing until August 14, 2009. Regardless,
19 under either date, the action for an order to impose a fine
20 on PacifiCare was not commenced until after August 9, 2009,
21 the date on which the statute of limitations expired. Thus,
22 the matter should have been dismissed as time-barred.

23 With respect to OIC's response, in the
24 summary judgment briefing OIC disputed the commencement
25 issue with two primary arguments. First, OIC unsuccessfully

1 argued that the cause of action actually accrued after
2 August 9, 2007, as Your Honor had indicated in your summary
3 recitation of the facts.

4 First OIC suggested that it did not actually
5 accrue at that time when it found out about the allegedly
6 improper payments. Rather, it only accrued once OIC had
7 issued its report on financial examination and uncovered the
8 payments in question.

9 Judge Burdue correctly rejected OIC's
10 argument, noting that because there is no indication in the
11 Commissioner's final order that monetary fines were being or
12 would later be assessed, there is no opportunity for
13 PacifiCare to appeal the imposition of fines, nor any reason
14 for PacifiCare to appeal imposition of fines that had not
15 been imposed, nor, might I add, were there any particular
16 reasons to further prolong this situation by objecting to
17 the content of the order.

18 Judge Burdue's correct decision, we believe,
19 should be confirmed. That Conclusion of Law is number 15.

20 Two different articulations of the legal
21 standard of when a cause of action accrues were quoted in
22 the summary judgment briefing with respect to OIC's
23 response. The first articulation was that a cause of action
24 accrues either at the date of the underlying actions at
25 issue or at the dates these actions could or should have

1 been discovered with reasonable diligence, as we've
2 discussed previously.

3 Our understanding is that OIC, PacifiCare and
4 Judge Burdue all acknowledge that these payments had been
5 known to OIC by August 9, 2007, and that that was the date
6 on which the cause of action accrued. OIC, as I mentioned,
7 does not agree with the latter.

8 The second articulation was that a cause of
9 action accrues when a plaintiff has a right to bring his or
10 her action. This articulation exists to avoid penalizing
11 potential plaintiffs who learn of underlying actions but
12 somehow are legally delayed in bringing their claims on the
13 actions.

14 This happens in rare situations, such as when
15 a plaintiff is required to take statutory pre-suit
16 procedural steps when suing governmental entities, such as
17 municipalities, or in now practice situations when
18 healthcare providers are being sued. The rationale is
19 similar to the rationale for the discovery rule, that the
20 plaintiff should have the benefit of the full statute of
21 limitations and not have that time period curtailed by
22 forces beyond its control.

23 Judge Burdue considered this articulation as
24 well and properly concluded that there is no legal basis for
25 concluding that OIC was precluded from bringing an action to

1 impose a fine until after it issued its examination report.

2 Judge Burdue correctly reasoned that the
3 cause of action accrued on August 9, '07, the date when OIC
4 learned of the underlying actions and the date on which OIC
5 first had the ability and the right to seek monetary
6 penalties, which, again, were not the subject of the order
7 coming out of the examination report.

8 PacifiCare agrees with Judge Burdue's
9 articulation. And I should add that the benefits of the
10 discovery rule have been taken into account by considering
11 August 9, 2007, the date when OIC first became aware that it
12 had a claim.

13 The second OIC argument is one with which
14 Judge Burdue, in our respectful opinion, incorrectly agreed
15 and concluded that February 9, '09, consent order, proposed
16 consent order, tolled the statute of limitations.

17 The OIC disputed the running of the statute
18 of limitations by stating that on February 9, '09, when it
19 transmitted the unsigned Consent Order Levying a Fine that
20 that stopped the clock, and, as indicated, Judge Burdue
21 accepted this counter argument.

22 OIC's proposed consent order, as we
23 previously discussed, could not have operated to toll the
24 statute of limitations. In this context, the only way to
25 toll the statute is to commence the underlying action.

1 In its latest round of briefing -- I
 2 apologize. I've not had the opportunity to read the
 3 document that OIC has submitted today, so I'm not sure if
 4 there's anything different or additional in there. Our
 5 understanding was that OIC had conceded that the
 6 commencement of an administrative action is indeed governed
 7 by RCW 34.05.413(5), the statute which we've indicated Judge
 8 Burdue unfortunately failed to apply, even though it had
 9 been enacted after the U.S. Oil decision that she relied on
 10 for her commencement analysis.

11 That statute explicitly states an action is
 12 commenced only when the agency or presiding officer notifies
 13 a party that a prehearing conference, hearing or other stage
 14 of an adjudicative proceeding will be conducted. Judge
 15 Burdue's ruling failed to properly recognize and apply the
 16 statutory definition. OIC now argues that the February 9,
 17 '09, consent order satisfies this requirement.

18 With all due respect, we believe this is
 19 incorrect for several reasons. One, as previously
 20 discussed, OIC doesn't have the right to schedule a
 21 prehearing conference, hearing or any other stage in the
 22 adjudicative proceeding of the type in question without
 23 going through the Chief Hearing Officer. As such, OIC is
 24 legally incapable of commencing the action on its own and it
 25 could not have unilaterally given notice of such an event

1 an administrative action. Nevertheless, even if the Court
 2 were to find that the question is governed by the language
 3 of U.S. Oil -- I'll omit the citation of the 1981 case --
 4 rather than the APA, OIC still failed to toll the statute of
 5 limitations.

6 This language of U.S. Oil states that an
 7 action is commenced when the accused party receives notice
 8 of the penalty imposed. Regardless of what OIC said or
 9 threatened in its letter, OIC is legally incapable of fining
 10 PacifiCare without a hearing or a stipulation.

11 And I apologize for not including this in the
 12 narrative that I've submitted to the Court, Your Honor, but
 13 I would like to add as well, it's interesting that in the
 14 U.S. Oil case the agency involved was the Department of
 15 Ecology, which had the statutory right to unilaterally
 16 impose a fine upon a violator, and the burden of proceeding
 17 was on the violator to commence a hearing in order to
 18 prevent that fine from automatically taking effect, I
 19 respectfully submit a completely different circumstance from
 20 the Insurance Code as currently constituted where the
 21 Insurance Commissioner clearly does not have the right to
 22 unilaterally impose a fine. It must either obtain a
 23 stipulation or make sure that it has properly commenced a
 24 hearing.

25 Returning to my narrative, as submitted,

1 for its proposed consent order and transmittal letter.

2 Two, under RCW 34.05.413(5), notification
 3 only commences an action if it informs a party that a stage
 4 of the adjudicative proceeding will be conducted. OIC and
 5 Judge Burdue cited the language in the proposed consent
 6 order and its transmittal letter to show that this was done.

7 However, it doesn't matter what the document
 8 said because, as previously discussed, legal -- OIC was
 9 legally incapable of commencing an action on its own in the
 10 first place and Judge Burdue failed to recognize the purpose
 11 of the two documents in question and failed to recognize
 12 that they couldn't have constituted notification that a
 13 stage in the adjudicative proceeding would be conducted.

14 These two documents represented an offer from
 15 OIC that PacifiCare could stipulate to pay a settlement of
 16 \$400,000 precisely for the purpose of avoiding any stage of
 17 the adjudicative process, not for the purpose of commencing
 18 the process.

19 Had PacifiCare accepted the offer in the
 20 proposed consent order, there would not have been any
 21 adjudicative process. Therefore, these documents without
 22 specific notice of a hearing being convened could not have
 23 been notice that a stage would occur.

24 The APA, specifically 34.05.413(5), is
 25 directly on point and governs this issue of commencement of

1 without either of those things, all OIC can give is notice
 2 of its intent to assess a fine. This is not enough even
 3 under U.S. Oil.

4 In conclusion, Judge Burdue's initial order
 5 misconstrued key facts and misapplied the law in concluding
 6 that OIC's February 9, 2009, transmittals tolled the statute
 7 of limitations.

8 Based on the evidence presented and the
 9 applicable law, we respectfully submit that PacifiCare's
 10 motion for summary judgment should have been granted. Doing
 11 so will also clearly permit immediate appeal of this issue,
 12 obviating the potentially wasteful and time-consuming
 13 prospect of proceeding with the entire case and then
 14 possibly having the statute of limitations issue reversed on
 15 appeal.

16 Accordingly, we respectfully request that
 17 Your Honor grant PacifiCare's request and grant its motion
 18 for summary judgment. Thank you very much.

19 JUDGE PETERSEN: Thank you. Good morning.

20 MS. PHILHOWER: Good morning, Your Honor.

21 For the record, my name is Andrea Philhower. I'm a staff
 22 attorney with the Office of the Insurance Commissioner.

23 The OIC has two bases upon which PacifiCare's
 24 motion for summary judgment could properly be denied. The
 25 first is the basis upon which Judge Burdue correctly denied

Page 22

1 the motion. The second is the basis upon which she -- an
 2 argument that she dismissed. Let's put it that way. And it
 3 is our position that the denial on the first basis was
 4 appropriate but that the dismissal of the second basis was
 5 an error.

6 And what really the issue comes down to,
 7 actually, in both scenarios is language. The argument that
 8 PacifiCare makes with respect to the basis -- the first
 9 basis, and that is the tolling of the statute by the
 10 February 9 communication, is an argument that OIC was
 11 required to provide a date of a hearing. And that is simply
 12 not what the APA requires.

13 PacifiCare is correct that the APA RCW
 14 34.05.413(5) does govern this action, but what that statute
 15 says and what PacifiCare wishes it said are two different
 16 things. What that statute actually says is that an
 17 adjudicative proceeding commences when the agency, OIC, or
 18 presiding officer notifies a party that a prehearing
 19 conference, hearing or other stage of an adjudicative
 20 proceeding will be conducted. There is no other way to
 21 interpret the February 9 communication.

22 OIC has full authority to impose a fine, has
 23 -- and that is, in fact, what OIC had done. We had
 24 determined that a fine of \$400,000 was appropriate for the
 25 violations found in the financial exam. What OIC requires a

Page 23

1 hearing to do is to unilaterally levy that fine. And the
 2 offer that was being made to PacifiCare was to avoid the
 3 hearing that it was required to unilaterally levy that fine.

4 The fine had already been imposed. The fine
 5 has been imposed. The fine is \$400,000. And that is all of
 6 the information that is required under the APA, that is all
 7 of the information that is required under U.S. Oil, and it
 8 was all the information that PacifiCare required to do what
 9 the next stage was. That's exactly what PacifiCare did.

10 So the wording of the February 9
 11 communication and PacifiCare's subsequent actions make very
 12 clear that the notice was given and received exactly in the
 13 manner in which it was intended, and that is all that is
 14 required under the APA.

15 The stage of the adjudicative proceeding that
 16 had already occurred was the imposition of the fine. The
 17 unilateral imposition of the fine, the unilateral levying of
 18 the fine -- I'm trying to use two different words to make it
 19 clear when I'm talking about one versus the other -- is the
 20 stage that would have required a hearing had PacifiCare not
 21 agreed to pay the fine, which is, in fact, what happened.

22 When you look at the Finding of Fact --
 23 excuse me, Conclusion of Law Number 15 in Judge Burdue's
 24 ruling, what you see is that Judge Burdue is saying there's
 25 nothing apparent in the law that prevents the Commissioner

Page 24

1 from assessing monetary fines in the final order.

2 I disagree with that. We disagree with that
 3 conclusion because of the statutory structure within which
 4 OIC has to treat findings of a financial exam, and I'm going
 5 to get into that more when we talk about basis number two.
 6 But what she says that is correct is that -- or that is also
 7 incorrect, excuse me, is that there's no indication that
 8 monetary fines were being or would later be assessed and no
 9 opportunity for PacifiCare to appeal the imposition of those
 10 fines. That is, of course, incorrect because this is what
 11 we're doing right now; PacifiCare is appealing the
 12 imposition of those fines.

13 And what I have provided to PacifiCare and to
 14 Your Honor in Exhibit C-8 is the correction of footnote
 15 number one here that indicates that no penalty was assessed
 16 by OIC for the various infractions in the first financial
 17 examination. In fact, PacifiCare and the OIC entered into a
 18 consent order levying a \$60,000 fine, of which 30,000 was
 19 suspended, and that is what Exhibit C-8 is; it's simply a
 20 copy of that consent order.

21 The process that OIC follows and has always
 22 followed and, in fact, has followed with PacifiCare is
 23 exactly the process that OIC is following here.

24 So basis number one, which is the basis upon
 25 which Judge Burdue correctly denied the motion for summary

Page 25

1 judgment, is that the February 9 communication fully
 2 satisfied the APA and U.S. Oil. Both the letter and the
 3 spirit of the APA were met there.

4 PacifiCare's argument basically boils down to
 5 you had to give us a date. That simply isn't the law.

6 Looking then to basis number two, which is
 7 the statutory structure of a financial exam, it is -- the
 8 reason that my response to Your Honor's description of this
 9 case was essentially that's correct is that there is a
 10 critical distinction to be made between a straight action
 11 based on violations found in isolation and an action based
 12 on violations found as a result of a financial examination.
 13 There has to be.

14 These kinds of violations -- this is a
 15 perfect example -- can only be found in a detailed
 16 examination of a company's financial records. Those
 17 detailed examinations are mandated to occur only once every
 18 five years, and the reason for that is that they are
 19 exhaustive and they're very expensive.

20 And certainly if PacifiCare's argument was
 21 correct, that findings on an examination, a financial
 22 examination, have to be -- can only cover the last two
 23 years, that would mean that the legislature had given
 24 companies three free years to do whatever they want and OIC
 25 could never penalize them for those actions unless we happen

1 to get lucky enough to find them in isolation.
 2 That is not the law. The law is that once
 3 every five years we're required to do a financial
 4 examination of a company. That's exactly what occurred with
 5 respect to PacifiCare.
 6 During the first financial examination
 7 PacifiCare engaged in this program of denial that these
 8 payments were being made, hiding them by mislabeling them in
 9 their financial records and also the shell game where they
 10 paid the findings to a sister -- paid the royalties to a
 11 sister company and then the sister company paid them to the
 12 parent. All of that was going on during the first financial
 13 examination, and that is why in the first financial
 14 examination these royalties do not appear in the findings.
 15 During the second financial examination the
 16 company continued to deny that these royalties were being
 17 paid, but during this February -- excuse me -- August 9
 18 conversation, telephone conference, the company at long last
 19 admitted that the royalties were being paid, and that is why
 20 August 9 is the date -- the discovery rule date that we all
 21 agree on that started the statute running -- would have
 22 started the statute running if we were talking about a
 23 straight finding in isolation, but what we're talking about
 24 here is a finding as part of a financial examination, and so
 25 the rules of RCW 44.03 come into play.

1 The rules very specifically describe how the
 2 OIC has to treat those findings, and they give two levels of
 3 appeal to the company to appeal those findings before they
 4 ever become final. And it is only after those two levels of
 5 appeal have occurred -- the first one -- and I describe this
 6 in more detail in my brief.
 7 JUDGE PETERSEN: Yeah, I've read it.
 8 MS. PHILHOWER: The first one is an
 9 opportunity to request a hearing to oppose any findings
 10 before those findings become public, and the second is to
 11 impose any findings before the order adopting the findings
 12 is entered.
 13 And it is only after those two levels of
 14 appeal have occurred that the findings become final, that
 15 the findings are adopted by the OIC. That date, the date
 16 the findings are adopted by the OIC, is the date upon which
 17 OIC has the right to penalize the company as a result of
 18 those findings. That is why the statute of limitations for
 19 penalties on these findings of the second financial exam
 20 hasn't even run yet. It hasn't been two years since that
 21 order was adopted.
 22 Now, you'll notice that Exhibit C-8 shows
 23 that this consent order was entered into. And that is, of
 24 course, not a unilateral imposition of fines. That was the
 25 company agreeing with OIC to pay the fine that was imposed.

1 That's exactly what is being objected to here. But the same
 2 -- the same process applied in both cases.
 3 So what you see is that it's critical that
 4 this is not a straight independent finding of these
 5 violations. It's a finding of these violations as a part of
 6 a financial exam. And so the adoption of the findings of
 7 those financial exams is the event that needs to occur
 8 before we can penalize based on those findings, because the
 9 company has two levels of appeal to object to those findings
 10 before those findings become final.
 11 Looking at the arguments made by PacifiCare,
 12 what you will see is that the argument on the APA is purely
 13 semantic and is just not correct. It's just not a correct
 14 reading of that statute. It's not a correct reading of U.S.
 15 Oil. And the alleged requirement that a date has to be
 16 provided in order to meet that statute is simply incorrect.
 17 What has to be provided is notice. That notice was amply
 18 provided, and that's what Judge Burdud found in her ruling,
 19 and that was correct.
 20 Looking at the basis -- looking at the
 21 findings of the financial exam, what I think I did wrong in
 22 the hearing was not to explain more clearly why there's a
 23 difference between a straight finding independent of a
 24 financial exam and a finding on a financial exam. And so I
 25 didn't give Judge Burdud a clear understanding of why that

1 statutory scheme makes a difference.
 2 And because that statutory scheme does make a
 3 difference, there was nothing upon which OIC could fine the
 4 company until the date that that final adoption of the
 5 financial exam results occurred. And that's why the statute
 6 of limitations has not yet run on this matter.
 7 And that is what I have to say. Thank you
 8 very much.
 9 JUDGE PETERSEN: Would you like to --
 10 MR. GINGOLD: Thank you, Your Honor.
 11 Your Honor, in view of the fact that I've not
 12 had an opportunity prior to today to take a look at OIC's
 13 submission this morning, determine whether or not there's a
 14 -- it would be appropriate or necessary to respond to it, I
 15 request that we have that opportunity.
 16 Also, with respect to Ms. Philhower's
 17 comments, it's interesting, I think, to hear OIC take the
 18 position that the exhibit submitted this morning, the first
 19 examination report, includes a fine because there isn't any
 20 question that that order and examination would have come and
 21 gone already. That was the first exam report.
 22 And if OIC is taking the position that it's
 23 got the right to maintain an action for a fine at this time
 24 because it already fined them in the order, completely
 25 disproportionate and differently from what they're

1 attempting to do now, I respectfully submit that there are a
2 whole bunch of additional legal arguments that come into
3 play with regard to the propriety to come back again, not
4 only after the statute of limitations but to take a second
5 bite.

6 I think it's a somewhat -- respectfully, I
7 think it's a somewhat misleading argument by OIC because the
8 consent order in question that OIC argued and presented to
9 Judge Burdue was not this first consent order, it was a
10 second consent order. And that consent order, despite the
11 fact that at the time -- apologize -- not consent. The
12 order entering that financial examination report --
13 apologize for my --

14 JUDGE PETERSEN: No, I understand.

15 MR. GINGOLD: That report was done at a time
16 when OIC clearly knew that what it was claiming PacifiCare
17 had done over a long period of time, had been in OIC's mind,
18 anyway, done. And they didn't need any more information.
19 They already had the information.

20 There is no reason in the world why an
21 exception to the statute of limitations should be made that
22 would allow OIC to unilaterally effectively extend the
23 statute of limitations beyond two years from discovery.
24 They've already received the benefit of the discovery rule
25 in going with the August 9, 2007, date rather than each of

1 the dates going back to 2001 and earlier, in fact, predating
2 even the adoption of the holding company act in question.
3 Different issue.

4 So Judge Burdue's analysis of this issue we
5 believe was correct. There was nothing in the consent order
6 relating to the financial examination report that in any way
7 discussed fining PacifiCare for anything contained in that
8 consent -- in that order.

9 And I think it is interesting that OIC would
10 now point to the first examination report where they did
11 include fines for what they found in the course of their
12 examination. So it's completely unclear, to me, anyway, why
13 it is that they wouldn't have done the same thing in the
14 second order accepting the financial examination if they
15 intended to go forward and impose a financial penalty. They
16 clearly had the ability and did it previously.

17 So I respectfully submit that that line of
18 logic is not logical and should not be accepted from OIC.

19 The notion as well that the Insurance
20 Commissioner is legally precluded under the Insurance Code
21 from taking enforcement action, including seeking to impose
22 a fine upon a registrant any time that a financial
23 examination happens to be in process, I respectfully submit,
24 is not an accurate reflection of the way the Insurance Code
25 has been interpreted and applied by OIC when the

1 Commissioner discovers a violation that needs to be
2 addressed.

3 And there is -- Judge Burdue, we respectfully
4 submit, correctly concluded that there isn't any law
5 supporting the notion that the Commissioner had to wait
6 until the examination -- second examination report had been
7 completed. That effectively would create a precedent which
8 while it might be beneficial to other clients of mine in the
9 future in delaying what the Commissioner could do, I
10 respectfully submit is not the law and would not present it
11 as such to Your Honor as the law.

12 So, in summary, for the reasons that we
13 previously articulated, I would appreciate the opportunity
14 to review -- if Your Honor's inclined to accept the
15 arguments that OIC's made through the submission this
16 morning, I would appreciate the opportunity to analyze it
17 and respond to it.

18 Otherwise, I respectfully request again that
19 Your Honor grant our motion for acceptance of our summary
20 judgment and dismissal of the matter on statute of
21 limitations grounds.

22 JUDGE PETERSEN: Ms. Philhower, what does
23 preclude the Commissioner taking a straight action when the
24 facts surrounding these alleged violations are known, taking
25 a straight enforcement action, and at the same time or when

1 the timing is appropriate with regard to the
2 every-five-years financial exam going through that course as
3 well?

4 MS. PHILHOWER: There is nothing that
5 precludes that. If, for example, there was an emergency,
6 you know, something that the Commissioner felt had to be
7 addressed immediately -- and almost always when those things
8 occur, the examination team works with the company and they
9 fix it right then, and there isn't any need for, you know, a
10 hearing or those kinds of things.

11 My point is that the Commissioner has -- has
12 the choice, has the option, the statutorily created option
13 in Chapter 48.03, to follow the financial examination
14 process. And the benefit of the financial examination
15 process is that it puts all of the financial errors or all
16 of the violations that are found into one basket and it can
17 all be handled at one time. So there's a benefit of
18 resources and, you know, economy of resource use that is
19 created through Chapter 48.03.

20 And I -- so the answer to your question is
21 there is nothing that would have precluded the Commissioner
22 from taking a separate action, but neither is there anything
23 that requires the Commissioner to do that.

24 I do want to clarify what Exhibit C-8 is.
25 And, you know, it's certainly understandable that it might

1 look confusing having just seen it this morning for the
2 first time. It really is offered only for the purpose of
3 correcting footnote one in Judge Burdue's ruling, which
4 states that there was no fine for the findings of the
5 financial exam number one. There was. This is the consent
6 order that levied it.

7 If you look at Exhibit R-5, that is the order
8 adopting the financial examination number one. And the
9 reason that I'm showing you that is that the process that is
10 being followed here with respect to financial examination
11 number two is the exact same process that was followed with
12 respect to financial examination number one.

13 Order -- Exhibit R-5 is the order adopting
14 the examination. It does not impose any financial -- excuse
15 me. It does not impose any fine. That fine for this exam
16 adopted in order G06-4 is imposed or levied through this
17 consent order. So it's the exact same process we followed
18 with exam number one that's being followed with respect to
19 exam number two.

20 MR. GINGOLD: Your Honor, just briefly. Your
21 Honor's question as to the Commissioner's inability to take
22 action is a great question, very appropriate question, and
23 the answer also I think is very important because what we've
24 heard is that nothing precluded the Commissioner from taking
25 action immediately against PacifiCare, that it was the

1 haven't had this question before, because it has been maybe
2 eight years, I don't know, a number of years, but prior to
3 that I'm not real aware of any actions taken in the form of
4 the consent order type of format. Well, maybe with some few
5 exceptions, but not with such regularity. So it's
6 interesting.

7 MS. PHILHOWER: I'm not sure I'm
8 understanding what the question is you're seeing as new.

9 JUDGE PETERSEN: Well, I don't really know.
10 I have to read it all again. But the type of enforcement
11 action with this consent order is rather new in recent
12 years. And so if it had been a straight order, maybe it
13 wouldn't be such a difficult question. I don't know. I'll
14 have to look at it again to see if that makes any
15 difference.

16 But I'm speculating that maybe it's arisen
17 only now because this form of disciplinary order is -- has
18 not been used so much in past years. I don't know. I don't
19 know. I have to read it. I have to consider all this
20 again. I have read all the briefs at least twice. And
21 we'll go over U.S. Oil again. I want you to find it.
22 Actually, I have it. Never mind. Yeah, maybe that's why.
23 But it's a good question. I'm glad that you brought it
24 here.

25 I wanted to make one other -- I'm not quite

1 Commissioner's, quote, option to wait or not wait.

2 That, I respectfully submit, flies directly
3 in the face of Washington case law that says no party has
4 the right to determine to extend the statute of limitations
5 for their own convenience. And that's essentially what
6 would be going on here if OIC's argument were adopted. So I
7 respectfully urge Your Honor to reject that argument.

8 JUDGE PETERSEN: Well, why don't we -- today
9 is Thursday, so why didn't we take until the end of next
10 week to go ahead and clarify, if you'd like, the -- correct
11 the information about the letter of February '09, the
12 Rebecca DeLatorre letter, if you'd like to clarify that.

13 And then if you'd like to respond to the
14 Commissioner's -- the filing that the Commissioner made
15 today by the end of next week, that would be fine.

16 MR. GINGOLD: Thank you.

17 JUDGE PETERSEN: I'll review it again. It's
18 an interesting question. I don't think it's a question
19 we've had. I mean, I don't think so. I don't think we've
20 had it in -- in fact, over -- this consent order process has
21 been something that's rather new over the last number of
22 years, and so it's interesting. It's probably a new
23 question because of the nature of the consent order.

24 I'm not making any comment on the consent
25 order. I mean, it's fine. But -- maybe that's why we

1 sure about PacifiCare -- the one comment here that -- the
2 third paragraph in your summary. It says, Furthermore, such
3 a ruling would without question permit an interlocutory
4 appeal and full disposition of this issue prior to the
5 expenditure of significant time. What do you mean by that?

6 MR. GINGOLD: Thank you, Your Honor.
7 Specifically what I mean is that we had exchanged
8 communications among Your Honor and both parties discussing
9 PacifiCare's ability to take up the issue of the statute of
10 limitations prior to Judge Burdue hearing the entire case.

11 And we acknowledge that there is something
12 less than complete clarity in the law with regard to
13 PacifiCare's right as a matter of an interlocutory appeal to
14 take up the issue in the event that the decision at this
15 level is adverse to PacifiCare. But there's no question, as
16 we understand it, that OIC would have the right to take an
17 immediate appeal of any decision granting our request for
18 summary judgment on the statute of limitations issue.

19 And, therefore, rather than either getting
20 into a procedural discussion, if you will, concerning
21 PacifiCare's right to go further up at this stage, on this
22 issue, it would be a very clean determination. OIC,
23 assuming it still would want to pursue the issue, would
24 absolutely have the right to do it.

25 And then we would have the benefit, the same

Page 38

1 benefit, actually, that led us to take the issue first, in
 2 the beginning of the case, to determine the outcome of that
 3 before OIC's expenditure of its resources, PacifiCare's
 4 expenditure of its resources, and OAH's expenditure of
 5 resources on the case in chief, when, as Your Honor
 6 correctly observed previously, ultimately whenever the
 7 matter goes up, if it's determined that the statute of
 8 limitations motion should have been granted and the matter
 9 dismissed, all that time and effort by all of the parties
 10 and by the Court would have been wasted.

11 JUDGE PETERSEN: Well, I'm not -- I felt, as
 12 you know, in the last correspondence that given a reading of
 13 the statute -- and I actually looked into some authorities
 14 as much as I could. I felt that hearing this summary
 15 judgment that's on appeal now before me was discretionary
 16 with me, not required.

17 I'm not making a comment about appeal to
 18 Superior Court. In fact, I'm not gonna make a comment about
 19 that. I'm not implying that there's the right to go to
 20 Superior Court no matter what the decision on this summary
 21 judgment motion is. I'm not implying that.

22 I'm only -- my opinion was that hearing it on
 23 appeal before me and entry of a final decision on motion for
 24 summary judgment is discretionary with me. This not being a
 25 final order on the merits, anything less than that would be

Page 39

1 discretionary. But I do not mean to say that there's a
 2 right to appeal to Superior Court on this motion for summary
 3 judgment after the final order is entered now.

4 MR. GINGOLD: Your Honor, we appreciate your
 5 clarification and certainly do not have any disagreement
 6 with your clarification whatsoever. All that I meant to do
 7 was to basically say that the rationale for your limited
 8 focus on this issue, that rationale is also applicable more
 9 broadly, notwithstanding the focus that you had intended and
 10 what you have communicated.

11 JUDGE PETERSEN: Applicable more broadly
 12 to --

13 MR. GINGOLD: To the question of getting a
 14 final -- an absolutely final determination on the statute of
 15 limitations issue before expenditure of considerable
 16 resources.

17 JUDGE PETERSEN: Absolutely final from me
 18 or --

19 MR. GINGOLD: Just a general -- I under --
 20 I'm not saying that you -- that you did not intend it to be
 21 a limited statement only to this level. All I'm saying is
 22 that, in my humble opinion, the logic that you expressed
 23 with regard to this particular hearing was very good logic.
 24 It was valuable, certainly, for purposes of today. And I
 25 think it would also be good logic further up the --

Page 40

1 JUDGE PETERSEN: Well, that is not -- there
 2 are arguments against that as well, so there are arguments
 3 on both sides of that. For purposes of the specific
 4 proceeding, especially because this was a dispositive
 5 motion, I used my discretion to grant this, but the same
 6 logic, it would not be clearly applicable to taking this to
 7 Superior Court on appeal at this time prior to the hearing
 8 on the merits. That remains to be seen.

9 In my opinion, it's not the same -- it's not
 10 squarely -- the justification to go to Superior Court on
 11 this prior to the hearing on the merits, it would be --
 12 there are arguments on both sides of that, and I do not want
 13 my opinion in this -- for this decision to be heard before
 14 me for my final order to be used as justification to go to
 15 Superior Court at this point because there are reasons why
 16 it would and reasons why it would not be, clearly.

17 MR. GINGOLD: And I'll clarify my comment, if
 18 I might. If -- and I understand -- certainly have no idea
 19 how this turns out and I'm not trying to predict it because
 20 I know that that would be a bad idea. But if it were to
 21 turn out that our motion were to be granted, the case then
 22 would be dismissed because it couldn't proceed at this
 23 level. And for that reason I don't think there's any
 24 question from a legal standpoint, completely apart from any
 25 communications from Your Honor, OIC then would have the

Page 41

1 right to appeal that decision.

2 MS. PHILHOWER: Because it wouldn't be
 3 interlocutory at that point.

4 MR. GINGOLD: Right, it would be a final
 5 determination. So that's -- it took me a long time to get
 6 to it. I'm sorry.

7 JUDGE PETERSEN: I think in our
 8 correspondence we were a little -- we went awry a little bit
 9 in the correspondence or perhaps Judge Burdud did by the use
 10 of the word interlocutory.

11 MS. PHILHOWER: Yeah, yeah.

12 JUDGE PETERSEN: Because that has a meaning
 13 that usually means to Superior Court in the midst of a
 14 proceeding at the administrative level. And when it was
 15 used to mean interlocutory as in in come from OAH in the
 16 middle of OAH's proceedings to me for an appeal, that was
 17 where I was off somewhat or that's not usually used in the
 18 context of going from OAH to me for a final decision.
 19 Usually it's used, rather, in -- from administrative
 20 proceeding to Superior Court.

21 But I think -- but we worked it out. Took a
 22 little time, but we worked it out. I think we got our
 23 process all right.

24 Well, it's an interesting case, and I will
 25 await for your filing. If the Insurance Commissioner has

1 any other information -- I think that you both filed a lot
 2 of good information and authorities, and I will look
 3 forward, then, to the end of next week and then I'll --
 4 MR. GINGOLD: Your Honor, thank you very much
 5 again. Very much appreciate your time.
 6 JUDGE PETERSEN: You're very welcome.
 7 (The hearing concluded
 8 at 11:20 a.m.)
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Reconsideration Hearing

CERTIFICATE

STATE OF WASHINGTON)
) ss
 COUNTY OF KITSAP)

I, the undersigned officer of the Court,
 under my commission as a Notary Public in and for
 the State of Washington, hereby certify that the
 foregoing hearing was taken stenographically
 before me and thereafter transcribed under my
 direction;

That the transcript of the hearing is a full,
 true and correct transcript of the testimony, including
 questions and answers and all objections, motions,
 and exceptions of counsel made and taken at the
 time of the foregoing hearing;

That I am neither attorney for, nor a
 relative or employee of any of the parties to the
 action; further, that I am not a relative or
 employee of any attorney or counsel employed by the
 parties hereto, nor financially interested in its
 outcome.

IN WITNESS WHEREOF, I have hereunto set my
 hand and seal this 10th of June 2010.

Victoria E. Leckie
 NOTARY PUBLIC in and for the
 State of Washington, residing
 at Port Orchard .
 My commission expires 5/15/11.

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