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Hearings Unit, D/C
Patricia D. Petersen
Chief Hearing Officer

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BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

In the Matter of
ABILITY INSURANCE COMPANY,
An Authorized Insurer and Respondent

No. 11-0088 and 11-0089
ABILITY INSURANCE COMPANY'S
REPLY TO OIC'S SUPPLEMENTAL
BRIEFING

Ability complied with the terms of Gladys White's policy, the requirements of WAC 284-54-253, and the requirements for tax-qualified long term care plans under 26 U.S.C § 7702B. Ability's interpretation of the beginning date for the five-month reinstatement period is consistent with Washington case law. OIC Orders 11-0088, 11-0089, and 11-0090 should be rescinded.

In its zeal to find coverage for one policyholder at all costs, OIC has lost perspective. The agency continues to fight on all grounds for a solution for one person that would create bad law for all Washington residents with tax-qualified long-term care plans.

I. Ability satisfied WAC 284-54-253's requirement for notice to Gladys White's designee prior to termination of coverage

The purpose of WAC 284-54-253 is for a designee "to receive notice of lapse for nonpayment of premiums at least thirty days prior to the termination of coverage." (Emphasis added.) In its briefing, OIC highlights this same language with a different emphasis (on the words "prior to"). OIC's analysis focuses on "prior to" to the exclusion of

1 the phrase it is modifying, "termination of coverage." OIC claims this regulation means that
2 the date the policy lapses for nonpayment cannot be for at least 65 days after the premium is
3 due. That is not what the regulation requires nor does it track the regulation's purpose: that
4 during the 65 days at issue the coverage cannot terminate. OIC blurs the two and fails to
5 acknowledge the clear distinction between lapse and the termination of coverage.

6 Ability did not terminate Gladys White's coverage during the 65 days after her
7 premium was due. Termination of coverage does not equate to when the policy lapses for
8 nonpayment -- a date that is controlled not by the regulation, but by the policy language.

9 This is illustrated by walking through the Gladys White example:

- 10 1. February 9, 2009. Payment is due. Payment is not received. Gladys White's coverage is not terminated. WAC 284-54-250;
11 Ability Ex. 8, Policy, Part S(3), bates label 00011. Per the policy: "Your policy stays in force during your grace period."
12 This means that Gladys White could file a claim for benefits during the 30 days following February 9, 2009; Ability did not
13 terminate Gladys White's coverage at that time.
- 14 2. March 20, 2009. Payment has not been received, and now Ms. Silvernail, as Gladys White's third-party designee, is sent the
15 notice that in 35 days the policy will lapse for nonpayment. Gladys White's coverage is not terminated. *Id.* This means
16 that Gladys White could file a claim for benefits during the 35-day period following March 20, 2009; Ability did not terminate
17 Gladys White's coverage at that time.
- 18 3. April 26, 2009. Payment has not been received. Gladys White's policy lapses for nonpayment of premium as of the
19 payment due date, February 9, 2009. Gladys White's coverage is now technically terminated, although Ms. White has the
20 right to reinstatement if she requests it within five months of February 9, 2009 and Ability is provided with proof that Ms.
21 White is eligible for benefits under the policy. WAC 284-54-283(2) and (2)(a); Policy, Part M, bates label 00009. This
22 means that Gladys White could file a claim for benefits during the reinstatement period if the reinstatement requirements are
23 met. Otherwise, Ability has terminated Gladys White's coverage and her policy has lapsed for nonpayment of
24 premium as of the premium due date.
- 25 4. Dates subsequent to August 9, 2009. Gladys White's coverage is terminated.

1 As illustrated, the 35-day period following notice to the designee and the
2 reinstatement period are akin to grace periods. The reinstatement period differs from the
3 grace period only in that there are additional requirements beyond premium payment, but if
4 those requirements are met, coverage under the policy continues.

5 WAC 284-54-253 concerns itself with *termination of coverage* under the policy.
6 OIC's interpretation stretches to include a date that is not specified by the regulation: the
7 date the policy lapses for nonpayment of premium. Even the phrase "lapse for non-payment
8 of premium" indicates that such lapse occurs from the date the premium is not paid. This
9 date is not specified in the regulation, nor would it be logical to do so. This date is derived
10 from the policy.

11 OIC's interpretation would require the State to force all companies offering long-term
12 care policies to give 65 free days of coverage. This is contrary to the common law of
13 contracts, to the common understanding of purpose of insurance (company accepts premium
14 in exchange for the *prospective risk*), and Washington case law. *See Safeco Ins. Co. v. Ir.*, 37
15 Wn. App. 554, 558, 681 P.2d 1294 (1984) ("The general rule is that failure of an insured to
16 pay a renewal premium by the due date results in a lapse of coverage as of the last day of the
17 policy period.").

18 OIC's interpretation is incorrect.

19 **II. OIC's attempt to analogize to the higher standard of cancellation is**
20 **incorrect**

21 OIC cites no authority for its contention that the reinstatement period is akin to a
22 cancellation. That position defies Washington law. OIC's citation to COUCH ON INSURANCE
23 as support for its proposition is incomplete and misleading. The provision cited by OIC
24 states:

25 The right to cancel [is] distinct from a policy's lapse or expiration by its own
26 terms. When by the terms of the policy all coverage, or certain coverage,
terminates upon the occurrence of a specified event, the termination of
coverage is not a matter of cancellation but is merely a question of the

1 duration of the risk provided by the policy. Cancellation must be
2 distinguished from termination of the policy under its own terms since in the
3 latter case, notice is not generally required.

4 COUCH ON INSURANCE 3d §30:2 (emphasis added). Lapse for nonpayment of premium is
5 termination of the policy under its own terms. Under Washington law, "[t]he term
6 'cancellation' refers to a unilateral act of the insurer terminating coverage during the policy
7 term." *Taxter v. Safeco Ins. Co.*, 44 Wn. App. 121, 126 (1986); *Safeco*, 37 Wn. App. at 558.
8 Termination of a policy for nonpayment of premium is not cancellation. OIC's argument,
9 attempting to hold Ability to a higher standard of notice is incorrect and contrary to
10 Washington case law.

11 OIC's argument that the third-party designee notice of WAC 284-54-253 requires
12 more than mailing of the notice, even under a cancellation notice standard, is also incorrect
13 under Washington law. The Washington Supreme Court has held that an insurer does not
14 have the duty to prove receipt of the notice: "Where an insurer follows the statutory
15 procedures for mailing and sends notice by regular mail, actual receipt by the insured is not
16 required for effective notice." *Cornhusker Cas. Ins. Co. v. Kachman*, 165 Wn.2d 404, 412,
17 198 P.3d 505 (2008) (discussing cancellation and making a distinction between delivery of a
18 notice by certified letter, which does require proof of actual delivery).

19 OIC misstates Ability's position regarding the five-month reinstatement period
20 beginning date. Ability's third-party notice to Cheryl Silvernail complied with WAC 284-
21 54-253(1)(a). Gladys White's coverage did not terminate until 65 days after she failed to pay
22 her premium. When that occurred, her policy lapsed for nonpayment of premium as of the
23 date she failed to pay her premium. The concepts of termination of coverage and lapse of the
24 policy for nonpayment of premium are separate. OIC merges these two concepts to misstate
25 Ability's position but Ability's position is clear, logical, and complies with Washington
26 statutes and regulation, Federal law, and Washington case law.

27 An insurer has no duty to prove a third-party designee's actual receipt of notice. OIC

ABILITY INSURANCE COMPANY'S REPLY TO OIC'S
SUPPLEMENTAL BRIEFING - Page 4 of 11

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
U.S. Bank Centre
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone 206.622.1711 Fax 206.292.0460

1 implies otherwise but makes no citation to regulation, statute or policy with such
2 requirement. In light of OIC's continued unsubstantiated allegations and insinuations that
3 the notice was not mailed, Ability has provided further evidence of mailing. See Declaration
4 of Mike Courtney. Ability's notice to Cheryl Silvernail complied with the regulation and
5 OIC has no legal authority to support its position to the contrary.

6 Similarly, OIC misstates the Court's position on *Bushnell*, and carefully avoids the
7 holding of that case. OIC focuses on one statement, taken out of context, which is dicta.
8 *Bushnell* is not analogous to the facts of this case, the respondents did not make a similar
9 argument about grace periods, and the grace period issue was not discussed in the case.
10 *Bushnell* stands for the proposition that standard form policies with existing standard
11 language in the State of Washington are likely to be found renewable and not continuous
12 policies. OIC avoids discussing the holding of *Bushnell* because it indicates that all statutes,
13 regulations, and federal laws enacted since Ms. White's policy are incorporated into the
14 policy, which undercuts OIC's inexplicable position that federal tax law requirements of
15 HIPAA are inapplicable.

16 **III. Disregard of HIPAA requirements of tax-qualified plans would be an**
17 **unwelcome surprise to thousands of Washington residents with tax-**
18 **qualified long-term care plans in the State**

19 Ability is perplexed to learn that the insurance commissioner considers the federal tax
20 requirements of tax-qualified long-term care insurance policies inapplicable or in some way
21 "optional." To receive the tax-deferred benefits of a long-term care plan, the plan must
22 adhere to the specifications as defined in 26 U.S.C. § 7702B. To be eligible for the benefits
23 under a tax-qualified long-term care plan, the insured must meet the definition of a
24 chronically ill individual as set forth in that section.

25 OIC misunderstands which provisions are consumer protection provisions. The
26 consumer protection provisions are the following:

1 Under sections 7702B (b) (1) (F), 7702B (g), and 4980C of the Code,
2 qualified long-term care insurance contracts and issuers of those contracts are
3 required to satisfy certain provisions of the Long-Term Care Insurance Model
4 Act (Model Act) and Long-Term Care Insurance Model Regulation (Model
5 Regulation) promulgated by the National Association of Insurance
6 Commissioners (NAIC) for long-term care insurance as of January 1993. The
7 requirements relate to guaranteed renewability, unintentional lapse,
8 disclosure, prohibitions against post-claims underwriting, inflation protection,
9 and prohibitions against pre-existing conditions exclusions and probationary
10 periods. Section 4980C imposes an excise tax on an issuer of a qualified long-
11 term care insurance contract if, after 1996, the issuer fails to satisfy certain
12 requirements, including requirements relating to application forms, reporting,
13 marketing, appropriateness of recommended purchase, standard format
14 outline of coverage, delivery of a shopper's guide, right to return, outline of
15 coverage, and incontestability. Most of these requirements are based on the
16 NAIC Model Act and Regulation.

17 1999-1 C.B. 487 (I.R.S. 1999) (emphasis added). The consumer protection section does not
18 contemplate the eligibility of benefits. The applicable tax code regards *tax benefit*
19 *qualifications*. These qualifications *limit* a benefit; a regulation that would allow more
20 Washington residents to qualify for a tax benefit is a less restrictive regulation. It is the
21 IRS's perspective from which more or less stringent is determined. Washington regulations
22 are not more stringent than the tax requirements for eligibility of these plans, they are *less*
23 *stringent*.

24 To remain tax-qualified, long-term care tax-qualified plans must adhere to the
25 requirements of 26 U.S.C. § 7702B or they lose their tax-qualified benefit. Loss of tax-
26 qualified status has unfavorable tax ramifications for all Washington insureds with such
plans, including Gladys White.

OIC argues that the late-disclosed and conflicting statements by Dr. Mihali render
moot the application of the federal tax law. This is incorrect. Pursuant to requests from OIC,
Dr. Mihali has now submitted two letters regarding Ms. White's condition. Neither letter
was sent to Ability much less received by Ability prior to the reinstatement decision. As late
as March 10, 2011, OIC was still attempting to solicit a letter from Dr. Mihali certifying that

1 Ms. White met the definition of a person who is chronically ill. Ability Ex. 13. On March
2 21, Dr. Mihali instead signed a letter stating that Ms. White had mild cognitive impairment.
3 Ability Ex. 9. The orders in this matter were issued on April 27. Sometime in August, Dr.
4 Mihali signed another letter, this one certifying that Ms. White was unable to perform at least
5 two ADLs and that she has severe cognitive impairment. See OIC's Motion to Supplement
6 the Record. Ability first became aware of this letter when the OIC attempted to add it to this
7 record on September 2, 2011.

8 The two conflicting letters are not germane to issues regarding Orders issued on April
9 27, 2011. These two conflicting letters from Dr. Mihali, both received after the decision was
10 made not to reinstate Ms. White's policy and after OIC issued the orders, are irrelevant to the
11 questions before this Court.

12 **IV. OIC attempts to imply a duty where there is none**

13 Throughout OIC's supplemental briefing, the OIC implies Ability has duties where
14 there are none. There is no duty for an insurer to prove that a third-party designee received
15 the notice in the mail and read it. There is no duty for an insurer to supply a policy to a third-
16 party designee (although Ability would supply a copy of the policy if requested to do so).
17 There is no duty for an insurance company to have an insured evaluated; OIC confuses right
18 with duty. A right for one party, the insurer, corresponds with a duty of the insured, e.g., the
19 duty to submit to an evaluation.

20 There is no legal authority for OIC's position that an insurer must verify the insured's
21 third-party designee form. Such a duty would be impossible to clarify or define. Using
22 OIC's example, if a third-party designee form did list Barbara Boxer or Diane Feinstein, is it
23 truly the insurer's duty to assume that the insured does not have a relationship with either
24 woman? However, the question is academic here; OIC's argument is a distraction with little
25 to do with the issues before this court. Ms. White's form listed her daughter. While it may
26 not have been filled out perfectly, Ms. White's intent was clear. OIC implies that Ability

1 needs to scrutinize Ms. White's response and draw from it a conclusion of cognitive
2 impairment. There is no authority for such a position. Ms. White has four adult children,
3 who obviously care about their mother, and they all live nearby. Yet OIC argues that it is the
4 insurance company, not the family or the physician, that should be on the lookout for
5 evidence of impairment, based upon a reasonable form response received from the insured.
6 Such is not a proper duty for an insurance company.

7 OIC's position appears to be that it can impose duties on insurers without authority
8 from statute, regulation, or insurance policies. Or, OIC is capriciously holding Ability to a
9 standard that is higher than statutes, regulations, and the policy require. This is an improper
10 position for OIC to take.

11 V. No request for reinstatement was made during the five-month
12 reinstatement period.

13 OIC's argument that WAC 284-54-253(2) allows an unlimited and indefinite time for
14 insureds to provide evidence that they meet the definition of a chronically ill person is
15 missing the point. That question is not at issue here. Gladys White's policy contains the
16 following reinstatement provision:

17 RESTORATION OF BENEFITS IN THE EVENT OF POLICY LAPSE DUE
18 TO COGNITIVE IMPAIRMENT OR LOSS OF FUNCTIONAL
19 CAPACITY. If coverage under this policy ends due to nonpayment of
20 premium, you or any person acting on your behalf will have 5 months to
21 request reinstatement of the policy on the grounds that you suffered from
22 Cognitive Impairment or loss of functional capacity at the time of lapse. We
23 will require the same evidence of Cognitive Impairment or loss of functional
24 capacity that is required for eligibility for benefits under this policy. We also
25 must receive the back premium from the date of default. If these conditions
26 are met, we will reinstate the policy without evidence of insurability. The
27 coverage will be at the same level that existed prior to the date of the lapse.
28 This provision does not apply to a policy that terminated because you
29 requested cancellation or because we paid the maximum dollar amount.

30 Ability Ex. 8, Policy, bates label 00009. Gladys White or someone acting on her behalf did
31 not request reinstatement of the policy within the five-month reinstatement period.

1 Even if this Court were addressing that question, it still would not matter under the
2 facts of this case. Don Lawler testified that although it was not required for Ability to do so,
3 he reviewed the evidence of eligibility for benefits provided to Ability and made the decision
4 not to reinstate Ms. White's policy. The evidence did not satisfy the policy language. OIC's
5 argument that evidence of eligibility for benefits can be submitted at any time is not an issue
6 in this case and is yet another red herring.

7 **VI. Conclusion**

8 OIC's supplemental briefing contained "facts" that consisted of argument and
9 credibility determinations reserved for the fact-finder. Findings of fact are unnecessary here;
10 as the court has pointed out this case involves issues of law. The evidence and law supports
11 the following conclusions of law:

12 (1) WAC 284-54-283 is not ambiguous and the use of the term "lapse" in the context
13 of the regulation is not ambiguous. The regulation provides insureds with protections
14 regarding termination of coverage and does not address the date the policy terminates for
15 nonpayment of premium, which is dictated by the policy itself.

16 (2) A policy lapses or terminates for nonpayment of premium from the date the
17 premium was due.

18 (3) The five-month reinstatement period runs five months from the date the premium
19 was due.

20 (4) Washington tax-qualified long-term care policies incorporate the requirements of
21 26 U.S.C. § 7702B.

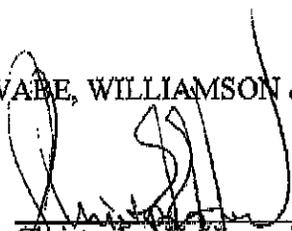
22 Given the above, OIC orders 11-0088, 11-0089, and the fine request of 11-0090 are
23 based upon an incorrect interpretation of regulation and policy and should be rescinded.

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Dated this 28th day of September, 2011.

SCHWABE, WILLIAMSON & WYATT, P.C.

By:



Christopher H. Howard, WSBA #11074
Virginia R. Nicholson, WSBA #39601
Attorneys for Respondent
Ability Insurance Company

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of September, 2011, I caused to be served the foregoing ABILITY INSURANCE COMPANY'S REPLY TO OIC'S SUPPLEMENTAL BRIEFING on the following parties at the following addresses:

Alan Michael Singer
Staff Attorney, Legal Affairs Division
Office of the Insurance Commissioner
State of Washington
PO Box 40255
Olympia WA 98504-0255
Fax: 360-586-0152

OIC Hearings Unit
Office of Insurance Commissioner
PO Box 40255
Olympia WA 98504-0255
Fax: 360-664-2782

by:

- U.S. Postal Service, ordinary first class mail
- U.S. Postal Service, certified or registered mail,
- return receipt requested
- hand delivery
- facsimile
- electronic service
- other (specify) _____

Chante Taylor
Chante Tayler

CERTIFICATE OF SERVICE - 1

PDX/122574/181300/VNI/8150471.1

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
U.S. Bank Centre
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone 206.622.1711 Fax 206.292.0460