

FILED

2011 SEP 19 10:12 AM  
KAC  
A 9

Hearings Unit, DIC  
Patricia D. Peterson  
Chief Hearing Officer



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

SUPPLEMENTAL BRIEFING OF  
ABILITY INSURANCE COMPANY

**I. Introduction**

Ability Insurance Company ("Ability") respectfully requests that this court deny enforcement of the OIC orders against it, OIC Orders Nos. 11-0088, 11-0089, and 11-0090 pursuant to Chapter 34.05 RCW, the Administrative Procedure Act. The orders are based on an interpretation of an insurance policy and regulation which is contrary to Washington and Federal law. Ability's interpretation of the insurance policy is in compliance with both Washington and Federal law.

**II. Statement of Facts**

The facts are set out in Ability's hearing brief, and fully incorporated herein.

At the close of the hearing on August 5, 2011, Judge Peterson requested supplemental briefing on specific issues, and provided the parties an opportunity to brief additional items relevant to their positions prior to closing remarks. The sections of this supplemental brief that address the Judge's issues are noted as such with footnotes.

1 **III. Argument and Authority**

2 This case is about interpretation of an insurance policy and regulations. It is also  
3 about the severe sanctions imposed by OIC on Ability for Ability's reasonable interpretation  
4 of an insurance policy, relevant case law, statute and regulation. The reasonableness of  
5 Ability's interpretation is underscored by the fact that OIC's personnel initially agreed with  
6 Ability's position. OIC orders contested here appear to be unusual and extreme positions for  
7 OIC to take.

8 This case is not about Gladys White or her insurance policy. But OIC has presented  
9 significant, sympathetic evidence about Gladys White. Her policy is a useful tool to  
10 illustrate why the agency's interpretation of Ability's policy and WAC 284-54-253 and,  
11 subsequently, Orders No. 11-0088, 11-0089, and 11-0090 are incorrect.

12 **A. Pursuant to Washington case law, statutory interpretation, and**  
13 **the common law of contract, a policy lapses for non-payment of**  
14 **premium on the policy due date**

15 Regulatory construction of WAC 284-54-253 is not necessary to determine when a  
16 policy lapses for non-payment of premium. Washington law is clear: the lapse of a policy  
17 for non-payment of premium occurs on the policy due date. Similarly, if the court engages in  
18 regulatory construction, rules of interpretation and/or construction of policy and regulation  
19 support Ability's position that Gladys White's policy lapsed for non-payment of premiums  
20 on February 9, 2009, the policy due date.

21 1. Interpretation of intent of the parties regarding the policy or  
22 WAC 284-54-253 is unnecessary because neither Ability's  
23 policy nor the regulation is ambiguous

24 a. Rules of construction regarding policies, statutes and  
25 regulations

26 In Washington, insurance policies are construed like any other contract. Harris,  
WASHINGTON INSURANCE LAW, Third Edition § 6.02 (Matthew Bender, Rev. Ed.) *quoting*

---

<sup>1</sup> This section is in response to Order dated August 24, 2011, Request No. 1.

1 *McDonald Indus. v. Rollins Leasing Corp.*, 95 Wn.2d 909, 912, 631 P.2d 947 (1981). Most  
2 insurance policies are standardized contracts that should be interpreted in a consistent  
3 fashion. *Id.* With respect to standardized policies, judges should enforce the actual wording  
4 of the policy. *Id. citing Berg v. Hudesman*, 115 Wn.2d 657, 664, 801 P.2d 222 (1990). “In  
5 interpreting an insurance policy, the court should not allow surrounding circumstances to  
6 devour the policy language.” *Id., quoting Dombrosky v. Farmers Ins. Co.*, 84 Wn. App. 245,  
7 257, 928 P.2d 1127 (1996). “The court considers the policy as a whole, and gives it fair,  
8 reasonable, and sensible construction as would be given to the contract by the average person  
9 purchasing insurance.” *Black v. Nat'l Merit Ins. Co.*, 154 Wn. App. 674, 679, 226 P.3d 175  
10 (2010).

11 The court must distinguish the intent of the parties at the time a contract was executed  
12 from the interpretations “advocated” by the parties at the time of the litigation. Harris,  
13 WASHINGTON INSURANCE LAW, Third Edition § 6.02 (Matthew Bender, Rev. Ed.) *quoting*  
14 *Berg*, 115 Wn.2d at 669.

15 If the policy language is clear and unambiguous, the court must enforce it as written  
16 and may not modify it or create ambiguity where none exists. *Black*, 154 Wn. App. at 679.  
17 “A clause in an insurance policy is ambiguous only when on its face it is fairly susceptible to  
18 two different interpretations, both of which are reasonable.” *Id.* “If a term is defined in a  
19 policy, then the term will be interpreted in accordance with that policy definition. If a policy  
20 term is not defined, then it will be given its plain, ordinary, and popular meaning. If a term  
21 in a policy is undefined, courts may look to the dictionary to determine the common  
22 meaning. However, to be meaningful, dictionary definitions must be regarded in the context  
23 of the particular insurance policy.” *Black*, 154 Wn. App. at 679-80. A policy containing  
24 undefined terms does not necessarily mean that the policy provision is ambiguous. *See, e.g.,*  
25 *Truck Ins. Exch. v. Rhode*, 49 Wn.2d 465, 473, 303 P.2d 659 (1956) (“An ambiguity will not  
26 be read into a contract.”).

1 If the policy is ambiguous, the ambiguous language is construed in favor of the  
2 insured. *Grange Ins. Assoc. v. Mackenzie*, 37 Wn. App. 703, 704-05, 683 P.2d 221 (1984)  
3 (finding no ambiguity in the policy and, thus, enforcing policy language that excluded  
4 coverage for the insured). “[T]he rule that ambiguous language must be construed in favor  
5 of the insured is merely the practical application of the general rule regarding contracts that a  
6 written agreement should, in case of doubt as to the meaning thereof, be interpreted against  
7 the party who has drawn it.” *McDonald Indus.*, 95 Wn.2d at 912.

8 Rules of statutory construction are similar. “The meaning of a statute is a question of  
9 law reviewed *de novo*. The court's fundamental objective is to ascertain and carry out the  
10 Legislature's intent, and if the statute's meaning is plain on its face, then the court must give  
11 effect to that plain meaning as an expression of legislative intent.” *Dep't of Ecology v.*  
12 *Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). Under the “plain  
13 meaning” rule, examination of the statute in which the provision at issue is found, as well as  
14 related statutes or other provisions of the same act in which the provision is found, is  
15 appropriate as part of the determination whether a plain meaning can be ascertained. *Id.* A  
16 term in a regulation should not be read in isolation but rather within the context of the  
17 regulatory and statutory scheme as a whole; statutory provisions must be read in their  
18 entirety and construed together, not piecemeal. *Id.*, citing *ITT Rayonier, Inc. v. Dalman*, 122  
19 Wn.2d 801, 807, 863 P.2d 64 (1993).

20 The plain meaning of a provision is derived from what the Legislature has said in its  
21 enactments, and that meaning is discerned from all that the Legislature has said in the statute  
22 and related statutes which disclose legislative intent about the provision in question. *Id.* “Of  
23 course, if, after this inquiry, the statute remains susceptible to more than one reasonable  
24 meaning, the statute is ambiguous and it is appropriate to resort to aids to construction,  
25 including legislative history.” *Id.*

26 Insurance regulations within the scope of authority of the Insurance Commissioner

1 have the force of statutes. See RCW 42.02.060; Title 284 WAC. Regulations are analyzed  
2 pursuant to the rules of statutory construction:

3 If the meaning of a rule is plain and unambiguous on its face, then we are to  
4 give effect to that plain meaning. An ambiguity exists, however, if there is  
5 more than one reasonable interpretation of the regulation. If a regulation is  
6 deemed ambiguous, we may resort to statutory construction, legislative  
7 history, and relevant case law in order to resolve the ambiguity. A term in a  
8 regulation should not be read in isolation but rather within the context of the  
9 regulatory and statutory scheme as a whole. We should not construe a  
10 regulation in a manner that is strained or leads to absurd results. Our  
11 paramount concern is to ensure that the regulation is interpreted in a manner  
12 that is consistent with the underlying policy of the statute.

13 *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 52, 239 P.3d 1095 (Wash. 2010).

14 2. Use of the term "lapse" in the policy and WAC 284-54-  
15 253(1)(a) is not ambiguous<sup>2</sup>

16 OIC attempts to find ambiguity in its own regulation, WAC 284-54-253, through an  
17 incomplete examination of bits and pieces of the regulation in isolation, rather than viewing  
18 the regulation as a whole. "Ambiguity is a creature not of definitional possibilities but of  
19 statutory context." *Brown v. Gardner*, 513 U.S. 115, 118, 115 S. Ct. 552, 130 L. Ed. 462  
20 (1994).

21 WAC 284-54-253 is not ambiguous.<sup>3</sup> The use of the term "lapse" as verb and noun  
22 in the same regulation does not make the regulation ambiguous. See, e.g., *General Dynamics*  
23 *Land Systems, Inc. v. Cline*, 540 U.S. 581, 124 S. Ct. 1236, 157 L. Ed. 1094 (2004). In  
24 *General Dynamics*, the U.S. Supreme Court analyzed the use of the term "age" as used by  
25

26  

---

<sup>2</sup> This section is in response to Order dated August 24, 2011, Request No. 3.

<sup>3</sup> The regulation states in part:

(1) Every insurer shall permit an insured to designate at least one additional  
person to receive notice of lapse or termination for nonpayment of premium,  
if the premium is not paid on or before its due date. The designation shall  
include the designee's full name and home address.

(a) The notice shall provide that the contract or certificate will not lapse until  
at least thirty days after the notice is mailed to the insured's designee

1 the Age Discrimination in Employment Act of 1967 ("ADEA"). A collective-bargaining  
2 agreement eliminated General Dynamics' obligation to provide health benefits to  
3 subsequently retired employees, except as to then-current workers at least 50 years old.  
4 Those workers under age 50 brought suit, alleging violation of the ADEA. The question  
5 presented to the Court was whether ADEA's coverage was meant to protect only the older  
6 worker's rights from the younger worker's rights, or if it worked two ways, also protecting  
7 the younger worker's rights against an older worker's rights. 540 U.S. at 585. Plaintiffs  
8 argued that age meant "the length of a person's life," and that this was the proper definition  
9 wherever the ADEA used the word "age." *Id.* at 595. The U.S. Supreme Court clarified:  
10 "[t]he presumption of uniform usage thus relents when a word used has several commonly  
11 understood meanings among which a speaker can alternate in the course of an ordinary  
12 conversation, without being confused or getting confusing." *Id.* at 595-96. The Court found:

13 [T]he word "age" standing alone can be readily understood either as pointing  
14 to any number of years lived, or as common shorthand for the longer span and  
15 concurrent aches that make youth look good. Which alternative was probably  
16 intended is a matter of context; we understand the different choices of  
17 meaning that lie behind a sentence like "Age can be shown by a driver's  
18 license," and the statement, "Age has left him a shut-in." So it is easy to  
19 understand that Congress chose different meanings at different places in the  
20 ADEA, as the different settings readily show.

21 *Id.* at 596 (noting that statutory language must be read in context because a phrase gathers  
22 meaning from the words around it). The Court has warned that disregarding the context of a  
23 term must be guarded against: "The tendency to assume that a word which appears in two or  
24 more legal rules, and so in connection with more than one purpose, has and should have  
25 precisely the same scope in all of them, runs all through legal discussions. It has all the  
26 tenacity of original sin and must constantly be guarded against." *Id.*

Similarly here, the word lapse has multiple, commonly understood meanings. "If a  
term in a policy is undefined, courts may look to the dictionary to determine the common

1 meaning. However, to be meaningful, dictionary definitions must be regarded in the context  
2 of the particular insurance policy.” *Black*, 154 Wn. App. at 680.

3 Lapse can be used as a noun, verb, and transitive verb. See THE AMERICAN  
4 HERITAGE DICTIONARY, Houghton Mifflin Company (4th Ed. 2009).<sup>4</sup> Similar to the use of  
5 the word “age” in *General Dynamics*, the word “lapse” must be read in context.

6 OIC’s interpretation views WAC 284-54-253(1)(a) in a vacuum. OIC asserts that the  
7 sentence “The notice shall provide that the contract or certificate will not lapse until at least  
8 thirty days after the notice is mailed to the insured’s designee” means that termination of  
9 policy benefits cannot end until after the date of notice, rather than the more logical premium  
10 due date.<sup>5</sup> But that interpretation is not logical if the regulation is read in its entirety.

11 The purpose section of WAC 284-54-253 states: “every insurer must provide notice  
12 of lapse for nonpayment of premiums at least thirty days prior to the termination of  
13 coverage.” The regulation provides a safety net for the policyholder; a grace period, during  
14 which policy benefits are not terminated. The same makes no statement regarding on what  
15 date the policy benefits are terminated if the premium is not paid. Logically, that date is  
16 determined by the insured’s policy date because it is tied to the premium due date, specified  
17 by the policy. In WAC 284-54-253 (1)(a), the term “lapse” is being used as a noun, to  
18 describe the instance of lapsing, not as a verb, to indicate the termination of benefits.  
19 Consistent with WAC Title 284-54, this clause means that the policy will remain in force  
20 during the specified grace period, but it has no bearing nor is it attempting to define the date  
21 the lapse of coverage for non-payment occurs. Any other date requires the provision of  
22 insurance for free.

23 Relevant case law must be considered because terms used in regulations should be

24 <sup>4</sup> Lapse used as a noun means the act or an instance of lapsing, or a break in continuity; a pause.  
25 Lapse used as a verb is defined as: to be no longer valid or active; expire. And lapse used as a  
transitive verb is defined as: to allow to lapse.

26 <sup>5</sup> This is not only logical is also consistent with Washington case law as discussed below.

1 interpreted in the context of the statutory and regulatory scheme as a whole. *Overlake Hosp.*  
2 *Ass'n*, 170 Wn.2d at 52. Ability's interpretation followed Washington case law. *See, e.g.,*  
3 *Safeco Ins. Co. v. Ir.*, 37 Wn. App. 554, 558 (1984). The failure of an insured to pay a  
4 renewal premium by a due date results in a lapse of coverage effective after the last day of  
5 the policy period. Offering a grace period for payment of the premium and reinstatement of  
6 the policy does not extend coverage unless payment is made by the extended date. A policy  
7 lapses for non-payment of premium *on the date the premium is due*. *Safeco*, 37 Wn. App. at  
8 558.

9 In *Safeco*, the court addressed the question at issue here: when does a policy lapse for  
10 non-payment of premium in the context of a determination of the difference between  
11 cancellation of a policy, which required notice, and automatic lapse of coverage for non-  
12 payment. While *Safeco* concerns car insurance, it is analogous to the question presented here  
13 about a long-term care policy. The court stated: "[T]he general rule is that failure of an  
14 insured to pay a renewal premium by the due date results in a lapse of coverage as of the last  
15 day of the policy period." *Id.* (emphasis added). Washington case law contradicts OIC's  
16 position.

17 OIC's interpretation runs counter to the *Safeco* case and counter to the common law  
18 of contracts as applied to insurance policies. Insurance is purchased for the unknown; it is  
19 prospective only. In other words, in an insurance contract, the insured pays a premium to the  
20 insurance company for coverage for something that *might* occur within a specified date range  
21 in the future; usually a year, six months, or one month in the future. The insurance company,  
22 by accepting the premiums, bears the risk that insured may require benefits; a *potential* risk,  
23 as explained by the Washington Supreme Court:

24 Insurance is by its nature prospective and not retrospective, as can be seen  
25 from the statutory definition of an insurance contract as "a contract whereby  
26 one undertakes to indemnify another or pay a specified amount upon  
determinable *contingencies*." RCW 48.01.040 (emphasis added). *See also*  
*State v. Universal Serv. Agency*, 87 Wash. 413, 424, 151 P. 768 (1915)

1 (including as part of the definition of an insurance contract "a hazard or peril  
2 insured against whereby the insured or his beneficiary *may* suffer loss or  
3 injury" (emphasis added)); 1 ERIC MILLS HOLMES & MARK S. RHODES,  
4 HOLMES'S APPLEMAN ON INSURANCE, 2D § 1.3, at 13 (1996) ("An  
5 insurance agreement is an aleatory contract. Aleatory is derived from the  
6 Latin 'alea' meaning dice. An insurer's promise is conditioned upon the  
7 occurrence of an uncertain, fortuitous event, that is, a chance event.").  
8 Insurable events are contingent and uncertain precisely because they are  
9 *future and not past* events.

10 *Mendoza v. Rivera-Chavez*, 140 Wn.2d 659, 669, 999 P.2d 29 (2000).

11 Under OIC's interpretation of the regulation, cessation of the insured's benefits  
12 cannot occur until after all the grace periods end, forcing the insurance company to provide  
13 retroactive coverage from the date the premium was due to the end of the grace period. This  
14 defies the definition of insurance because the insured gets to choose, after the fact, to obtain  
15 coverage for a past incident. An insurance company would not received the benefit of its  
16 bargain and would be forced into assuming 100% of the past risk of an incident occurrence  
17 while giving the insured the benefit of coverage and without receiving a prospective  
18 premium.

19 Such an interpretation would also allow one month of insurance coverage free per  
20 benefit period, because the insured could simply wait out each grace period before deciding  
21 whether or not to renew the policy. Insurance policies are contracts. Both parties should  
22 obtain the benefits and carry out the duties for which they bargained. It is not within OIC's  
23 authority to rewrite insurance contracts, partially eliminating the benefit of the bargain for  
24 the insurance companies. See *Coventry Assocs. v. Am. Sates Ins.*, 136 Wn.2d 269, 280, 961  
25 P.2d 033 (1998); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 336, 779 P.2d 249 (1989).  
26 Furthermore, there is absolutely no evidence that such was the intent of the parties at the time  
the contract was entered into. OIC's position is incorrect.

Review of relevant regulation, Washington case law, and the common law of  
contracts all support Ability's position on this issue. OIC is attempting to manufacture

1 ambiguity by asserting an unsupportable position. The regulation is not ambiguous.

2 3. Since the policy and regulation are not ambiguous they must be  
3 enforced as written

4 For a term in an insurance policy or in a regulation to be ambiguous, the policy or  
5 regulation must, on its face, be fairly susceptible to two different *reasonable* interpretations.  
6 *Black*, 154 Wn. App. at 679. OIC's interpretation is not reasonable, as explained above. The  
7 policy and regulation language are clear and unambiguous. The court must not create  
8 ambiguity where none exists. *Id.* Thus, the policy and regulation must be enforced as  
9 written. *Id.*

10 B. Gladys White's policy was properly terminated for non-payment  
11 prior to her reinstatement request, and her reinstatement request  
12 occurred after the five-month reinstatement period

13 Gladys White's policy and related events serve to illustrate the correct interpretation  
14 of the regulation and policy. Gladys White's premium was due on February 8, 2009.

15 On February 19, 2009, two notices were sent to Gladys White, the Final Premium  
16 Notice and the Past Due Premium Notice. On March 20, 2009, notice was sent to Cheryl  
17 Silvernail, pursuant to WAC 284-54-253. When no payment was received within 35 days of  
18 the notice to Cheryl Silvernail, the policy coverage lapsed as of February 9, 2009, the  
19 premium due date. *Safeco*, 37 Wn. App. at 558.

20 Pursuant to WAC 284-54-253(2) and Part M of Gladys White's policy, Gladys White  
21 or a person acting on her behalf could have requested reinstatement of her policy for five  
22 months after the policy lapsed or terminated due to nonpayment of premium. Thus, the  
23 reinstatement period for Gladys White's policy was from February 9, 2009 to July 9, 2009.

24 Cheryl Silvernail did not contact Ability regarding benefit coverage for Gladys White  
25 until August 4, 2009. The reinstatement period had ended prior to the time Ms. Silvernail  
26 contacted Ability. Gladys White's policy had been terminated for non-payment of premium.  
Pursuant to the state regulations and the insurance policy, Ability had no obligation to

1 consider reinstatement of Gladys White's policy after July 9, 2009. OIC Orders 11-0088 and  
2 11-0089 are wrong because they require a contrary and strained interpretation of Washington  
3 regulation. The fact that Ability did consider the reinstatement request does not change the  
4 fact that it was not required to do so.

5 C. Gladys White's policy properly requires proof that the insured is  
6 a chronically ill person as defined by 26 U.S.C. § 7702B<sup>6</sup>

7 There appears to be a misstatement in the Order dated August 24, 2011, No. 2(b):  
8 "E.g., the Ability policy does not state that, because of federal law, it is actually significantly  
9 more difficult for the insured to qualify for coverage under that policy than the wording of  
10 that policy states." This is incorrect. The policy language tracks the language of the federal  
11 law. The actual wording of the policy states:

12 To be eligible for any type of benefit under this policy, your Doctor must  
13 show that you are chronically ill. A chronically ill person has been certified  
14 by a Licensed Health Care Practitioner as:

15 (1) Being unable to perform (without Substantial Assistance from another  
16 individual) at least two Activities of Daily Living for a period of at least 90  
17 days due to loss of functional capacity;

18 (2) Having a level of disability similar (as determined under regulations  
19 prescribed by the Secretary in consultation with the Secretary of Health and  
20 Human Services) to the level of disability described in clause (1); or

21 (3) Requiring substantial supervision to protect such individual from threats to  
22 health and safety due to severe Cognitive Impairment.

23 See OIC Ex. 1, Gladys White Policy ("Policy"), Part G -ELIGIBILITY FOR THE  
24 PAYMENT OF BENEFITS. Compare this language to that of the federal law, which  
25 requires:

26 (c) Qualified long-term care services. For purposes of this section—

(1) In general. The term "qualified long-term care services" means necessary  
diagnostic, preventive, therapeutic, curing, treating, mitigating, and  
rehabilitative services, and maintenance or personal care services, which--  
(A) **are required by a chronically ill individual**, and

<sup>6</sup> This section is in response to Order dated August 24, 2011, and addresses Request Nos. 2(a) and 2(b).

1 (B) are provided pursuant to a plan of care prescribed by a licensed health  
2 care practitioner.

3 (2) Chronically ill individual.

4 (A) In general. **The term "chronically ill individual" means any individual  
5 who has been certified by a licensed health care practitioner as—**

6 (i) **being unable to perform (without substantial assistance from  
7 another individual) at least 2 activities of daily living for a period of at  
8 least 90 days due to a loss of functional capacity,**

9 (ii) having a level of disability similar (as determined under regulations  
10 prescribed by the Secretary in consultation with the Secretary of Health and  
11 Human Services) to the level of disability described in clause (i), or

12 (iii) requiring substantial supervision to protect such individual from  
13 threats to health and safety due to **severe cognitive impairment.**

14 Such term shall not include any individual otherwise meeting the  
15 requirements of the preceding sentence unless within the preceding 12-month  
16 period a licensed health care practitioner has certified that such individual  
17 meets such requirements.

18 26 U.S.C. § 7702B (emphasis added).

19 Ability's policy tracks the federal law requirements. It must mirror the federal law  
20 requirement or it is not a tax-qualified long-term care plan. Thus, it is no more difficult for  
21 the insured to qualify for coverage under federal law than under the wording of the policy.  
22 The difference is between federal law and the policy on one hand and WAC 284-54-040 on  
23 the other, which states:

24 (3) Eligibility for the payment of benefits based on the inability of the insured  
25 to perform certain activities shall not be more restrictive than requiring a  
26 deficiency in the ability to perform not more than three of the following  
activities of daily living

(a) "Activities of daily living" on which an insurer intends to rely as a  
measure of functional incapacity shall be defined in the policy, and shall  
include at least all of the following: . . .

(b) For purposes of this section, the determination of a deficiency shall not be  
more restrictive than:

(i) Requiring the hands-on assistance of another person to perform the

1 prescribed activities of daily living; or

2 (ii) If the deficiency is due to the presence of a cognitive impairment,  
3 supervision or verbal cuing by another person is needed in order to protect the  
4 insured or others.

5 Therefore, in this section Ability addresses the issues relating to differences between  
6 the Washington regulation as contained in WAC 284-54-040 and the Federal tax code as  
7 reflected in Ability's policy.

8 1. Ability's policies may incorporate all Washington regulations  
9 and statutes not pre-empted by Federal law

10 Whether Ability's long-term care policy incorporates subsequently-enacted  
11 Washington regulations and statutes requires an examination of (1) the conformity clause in  
12 the policy and (2) Washington case law regarding renewable and non-renewable policies.

13 Conformity clauses in insurance contracts require conformity with only those statutes  
14 and regulations in effect at the time of contract formation between the insurer and the  
15 insured. Conformity clauses do not require the policies be rewritten in response to  
16 subsequent law and regulation enactment. The policy language will control unless the policy  
17 language is in direct conflict with the statute or regulation language. Here, the policy form  
18 has the following conformity clause:

19 **Conformity with State Statutes:** The provisions of the policy must conform  
20 with the laws of the state in which you reside on the Policy Date. If any do  
21 not, this clause amends them so that they do conform.

22 *See, e.g., Gladys White's policy, Part S, ¶ 13.*

23 "It must be recognized that policies routinely contain conformity clauses stating that  
24 the policy is subject to all applicable laws, such a clause incorporates the sections of the law  
25 directly applicable to the issuance and content of the particular policy." 15-113 APPLEMAN  
26 ON INSURANCE § 113.4, *quoting Lessard v. Milwaukee Ins. Co.*, 514 N.W.2d 556, 559 (1994)  
("A conformity clause in an insurance policy operates to substitute a statutory provision for a  
policy provision only where the two provisions are in direct conflict."). "However, the

1 conformity clause does not mean that the parties agree to change the policy terms to conform  
2 to statutes enacted during the policy period. It only applies to statutes in force upon  
3 issuance.” *Id.*, quoting *Prudential Prop. & Cas. Ins. Co. v. Scott*, 161 Ill. App. 3d 372  
4 (1987). “Thus, a provision must be in direct conflict with the particular statute before the  
5 conformity clause operates to substitute statutory provisions for the policy provisions.” *Id.*,  
6 quoting *Atwater Creamery Co. v. Western Nat’l Mut. Ins. Co.*, 366 N.W.2d 271 (1985).

7       *See also Vadheim v. Cont’l Ins. Co.*, 107 Wn.2d 836, 839-40, 734 P.2d 17 (1987). In  
8 *Vadheim*, the Court addressed whether the policy clause requiring conformity with state  
9 statutes required amendment of the insurance contract to conform with a statute revised so  
10 that underinsured coverage be of the same amount as the insured’s third party liability  
11 coverage. The court found that since the state statutes were not remedial it was the language  
12 of the insurance contract, and not subsequent statutory policy, which controlled  
13 underinsurance coverage. *Id.* Thus, the conformity clause in Gladys White’s policy has little  
14 effect on possible incorporation of subsequently-enacted laws and regulations.

15       The more decisive issue is whether the insurance contract is continuous or renewable,  
16 and whether it was the intent of the parties to create a continuous contract. *See, e.g., Tebb v.*  
17 *Continental Casualty Co.*, 71 Wn.2d 710, 430 P.2d 597 (1967); *Bushnell v. Medico Ins. Co.*,  
18 159 Wn. App. 874, 246 P.3d 856 (2011). In *Tebb*, the accident and health insurance policy  
19 of Mr. Tebb, with a policy date of April 29, 1942, had no grace period. A statutory grace  
20 period was enacted in 1951. Mr. Tebb’s premium was due on September 1, 1964. but was  
21 not paid. Mr. Tebb died on September 7, 1964, from an accident. The insurer refused to  
22 pay. The Washington State Supreme Court defined the issue thus:

23  
24       These contentions can be resolved by answering a single question. Under the  
25 provision of this policy does the acceptance of a renewal premium by the  
26 defendant effectuate a new contract between the parties or does the  
acceptance merely extend the old policy? If a new contract is entered into the  
grace period provided by statute is incorporate therein. If it is a continuous

1 contract the statutory grace period is not applicable.  
2 *Tebb*, 72 Wn.2d at 712. The policy in question gave the insurer option to accept or reject any  
3 renewal premium, so there was no automatic continuation of the policy by payment of  
4 premium, consequently the court found that the policy was renewable. *Id.* at 714 (“This  
5 renewal, subject to the defendant’s consent, is, in our opinion, the conclusive indication that  
6 the parties intended a new contract would be created upon the acceptance of the renewal  
7 premium.”). The court found the statutory grace period was incorporated into the contract.

8 In *Bushnell*, the policy had a three-day hospital stay requirement, which was valid at  
9 the time the policy was issued. Subsequent enactment of Chapter 48.84 RCW, which was  
10 not retroactive, prohibited a hospital stay requirement. When the insured requested benefits  
11 without the policy’s required hospital stay, the insurer declined to pay. 159 Wn. App. at 878-  
12 79. The *Bushnell* Court parsed the renewal provision of the policy such that the insurer’s  
13 reservation of the right to terminate all policies of the similar class in the State was evidence  
14 of the parties’ intent to create a renewable policy, although the insurer could not refuse to  
15 renew any individual policy. *Id.* at 887. The court further found evidence of a renewable  
16 policy in the Term of Coverage provision, because it stated “Each time you renew your  
17 policy, the new terms begins when the old term ends.” *Id.* The *Bushnell* Court held that the  
18 policy in question was renewable as the language of the policy did not indicate intent to  
19 create a continuous contract. *Id.* Thus, the court found there was no three-day hospital stay  
20 requirement in the policy. *Id.*

21 The *Bushnell* Court did not have the authority to overturn the Washington Supreme  
22 Court decision in *Tebb*. Therefore, the two cases must be harmonized. Washington case law  
23 appears to require an explicit statement of intent to form a continuous policy if standard  
24 policy forms, which contain the common policy provisions found in the policy at issue in  
25 *Bushnell*, are used.

26 The form used for Gladys White’s policy contains a Term of Coverage provision and

1 a Guaranteed Renewable provision similar to those in the policy the *Bushnell* Court found  
2 renewable. Apart from the Guaranteed Renewable provision, the Gladys White policy does  
3 not contain an explicit statement of intent to form a continuous policy. Therefore, it is likely  
4 that the policy would not be found to be a continuous policy under the *Bushnell* case. Those  
5 statutes and regulations enacted subsequent to the policy date are presumably incorporated  
6 upon each renewal of the policy, unless preempted by Federal law.

7 Chapter WAC 284-83, implemented after Chapter WAC 284-54, uses the following  
8 definition:

9 "Qualified long-term care insurance contract" or "federally tax-qualified long-  
10 term care insurance contract" means: (a) An individual or group insurance  
11 contract that meets the requirements of section 7702B(b) of the internal  
12 revenue code of 1986, as amended; or (b) The portion of a life insurance  
13 contract that provides long-term care insurance coverage by rider or as part of  
14 the contract and that satisfies the requirements of sections 7702B(b) and (e) of  
15 the internal revenue code of 1986, as amended.

16 RCW 48.83.020(8). Thus, Washington regulations enacted after HIPAA was enacted to  
17 incorporate the proper definitions. *See also* OIC's proposed rules WSR-11-15-082, filed July  
18 20, 2011, which contains the following definitions:

19 **WAC 284-83-140 Qualified long-term care insurance policies --**  
20 **Additional standards for benefit triggers.** (1) For purposes of this section  
21 the following definitions apply:

22 (a) "Qualified long-term care services" means services that meet the  
23 requirements of Section 7702B (c)(1) of the Internal Revenue Code of 1986,  
24 as amended, including: Necessary diagnostic, preventive, therapeutic,  
25 curative, treatment, mitigation and rehabilitative services, and maintenance or  
26 personal care services which are required by a chronically ill individual, and  
are provided pursuant to a plan of care prescribed by a licensed health care  
practitioner.

(b)(i) "Chronically ill individual" has the meaning of Section 7702B (c)(2)  
of the Internal Revenue Code of 1986, as amended.

WAC 284-54-050, which appears to have a less-stringent standard than the federal  
law requires, is outdated. The proper definition of a chronically ill individual should be

1 incorporated into all tax-qualified policies in Washington State. Gladys White's policy is a  
2 tax-qualified policy. OIC's argument relies upon irrelevant regulations. Furthermore, any  
3 conflict between WAC 284-54-050 and 26 U.S.C. § 7702B must be resolved by the  
4 preemption of Washington regulation by the federal tax code.

5 2. Ability's policy properly uses the definitions of chronically ill  
6 individual as defined by HIPAA

7 The Federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"),  
8 P.L. 104-191, preempts state law and regulation. Ms. White's long-term care policy, and all  
9 others using the same long-term policy form, has the following in all capital letters and in  
10 bold typeface on the very first page: "**A QUALIFIED LONG-TERM CARE POLICY**  
11 **FOR FEDERAL TAX PURPOSES.**" Ability's policy, requiring evidence that the insured  
12 meets the definition of a chronically ill individual, is correct and required for a tax-qualified  
13 long-term care plan. Although Washington regulations may contain slightly different  
14 standards to obtain benefits under a long-term care policy, such different standards are in  
15 conflict with Federal Tax law and are preempted by the federal standard for tax-qualified  
16 policies.

17 Under the preemption doctrine, states are deemed powerless to apply their own law  
18 due to restraints deliberately imposed by federal legislation. *Veit v. Burlington N. Santa Fe*  
19 *Corp.*, 171 Wn.2d 88, 99, 249 P.3d 607 (2011), *quoting Alverado v. Wash. Pub. Power*  
20 *Supply Sys.*, 111 Wn.2d 424, 430-31, 759 P.2d 427 (1988); U.S. Const. art. VI (federal law  
21 is the "supreme law of the land"). Preemption may occur in several ways, including conflict  
22 exemption: "Congress may preempt local law by explicitly defining the extent to which its  
23 enactments preempt laws (express preemption). Preemption may also occur where the  
24 federal government intends to exclusively occupy a field (field preemption) and where it is  
25 impossible to comply with both state and federal law (conflict preemption)." *Id.* HIPAA  
26 expressly preempts state law regarding qualified long-term care plans in part. *See, e.g.*, 45

1 C.F.R. § 160.203, expressly preempting state law regarding section 262 of PL 104-91  
2 (HIPAA privacy provisions).

3 “Even if Congress has not indicated an intent to ‘occupy the field,’ state law is still  
4 preempted to the extent that it would actually conflict with federal law. State law is also  
5 preempted when it would hinder accomplishment of the full purposes and objectives of the  
6 federal regulations.” *Id.* at 431 (internal citations omitted).

7 Here, any Washington State laws or regulations are preempted by the actual conflict  
8 with federal law. In addition, if Washington State regulation permitted standards different  
9 from federal tax code for determination of benefits under a long-term care policy, it would  
10 hinder accomplishment of the purpose and objective of allowing for a tax qualified plan.  
11 *See, e.g.*, IRS Notice 97-31, explaining the purpose of PL 104-91 § 213, 26 U.S.C. § 7702B:  
12 “[C]ertain payments received on account of a chronically ill individual from a qualified long-  
13 term care insurance contract are excluded from income. In addition, certain expenditures  
14 incurred for qualified long-term care services required by a chronically ill individual are  
15 deductible as medical care expenses.”

16 Actual conflict between any Washington regulation regarding benefits under long-  
17 term care plans and HIPAA is clear. Pursuant to federal law, all benefits under the tax  
18 qualified long-term care plan must be for a chronically ill individual, as that term is defined  
19 under the federal law. 26 U.S.C. § 7702B(c)(1)(A). A chronically ill individual requires  
20 certification by a licensed health care practitioner that the individual is unable to perform at  
21 least two activities of daily living for a period of at least 90 days due to a loss of functional  
22 capacity or the individual requires substantial supervision to protect himself or herself from  
23 threats to health and safety due to severe cognitive impairment. *Id.* Any plan that fails to  
24 meet these requirements under 26 U.S.C. § 7702B is not a tax qualified plan. Washington  
25 regulations allowing or requiring a different standard for receipt of qualified long-term care  
26 services are in conflict with federal tax code.

1 The purpose and objective for allowing tax qualified plans is to provide the insured  
2 with the following benefits: (1) the ability to deduct premiums; (2) favorable tax treatment  
3 for the benefits received under the program. See IRS Notice 97-31. The consequences of  
4 any deviation from the federal standard are not trivial. If it was determined that Washington  
5 regulation is not preempted, then Ms. White, along with thousands of other Washington  
6 residents who believe they have tax-qualified long-term care policies would immediately be  
7 thrown into a highly unfavorable, and possible dire, tax position. The consequences could  
8 include:

- 9 • Any personal income tax deduction claimed by the individual for the premiums paid  
10 under the long-term care policy would be disallowed.
- 11 • Benefits received in excess of the amount disallowed as a deduction would likely be  
12 includable in the individual's taxable income.

13 In addition, if the individual received reimbursements of his or her long-term care premiums  
14 from a Health Savings Account, this amount would be included in income, and would be  
15 subject to a 20% penalty excise tax.

16 There are substantial penalties for insurers whose tax-qualified plans do not meet  
17 federal tax requirements. An insurer that fails to ensure that the policies satisfy certain  
18 qualification standards may be subject to a penalty tax pursuant to 26 U.S.C § 4980C. The  
19 amount of the tax is \$100 per insured for each day any of these requirements are not met with  
20 respect to each long-term care insurance contract. *Id.*

21 Washington State has not adopted the current NAIC Long-Term Care  
22 insurance Model Regulation. Instead, Washington has adopted only portions of a previous  
23 version of the model. See Lawler Decl., Ex. B. Contracts in states that have not adopted the  
24 model provisions or a more stringent requirement are permitted only nonsubstantive  
25 deviations from the model to be substantially similar to the requirements of the model act.  
26

1 26 C.F.R. § 1.7702B-1. Thus, the standards under the federal code preempt any  
2 Washington regulation for a tax qualified policy.

3 **D. Although it had no obligation to do so, Ability considered**  
4 **documents provided for possible reinstatement of Gladys White**  
5 **policy, but Ms. White failed to meet the requirements of**  
6 **reinstatement; thus, Ability's refusal to reinstate the policy was**  
7 **proper**

8 Reinstatement of a policy lapsed for non-payment of premium is conditioned upon  
9 receipt of evidence that the insured is eligible for benefits.

10 1. Gladys White did not qualify for reinstatement under the  
11 policy because she failed to present evidence that she met the  
12 definition of a chronically ill individual

13 Reinstatement under Ms. White's policy requires the same evidence of cognitive  
14 impairment or loss of functional capacity that is required for eligibility for benefits. Such  
15 evidence must be presented within five months after the policy ends due to nonpayment of  
16 premium. *See* Gladys White's policy, Part M; Part G. The five-month reinstatement period  
17 ended on July 9, 2009. Ms. Silvernail did not present any evidence of Ms. Whites' eligibility  
18 for benefits until October 2, 2009, long after the reinstatement period had ended. This date is  
19 also *after* OIC claims the five-month reinstatement period ended on September 19, 2009.  
20 Regardless, Ability reviewed the materials provided to it. As Don Lawler testified, this is the  
21 usual practice of Ability. Declaration of Don Lawler in Support of Ability's Supplemental  
22 Briefing, ("Lawler Decl."), ¶ 4.

23 a. The information available to Ability at the time of its  
24 decision was insufficient evidence to establish that Ms.  
25 White met the definition of a chronically ill individual

26 Ability received a phone call from Ms. Silvernail on August 4, 2009. On August 6,  
27 Ms. Silvernail faxed a Claimant's Proof of Loss Claim Form. *See* Ability Ex. 8, Gladys  
28 White's claims file (hereafter, "Claims File") at 00182. On this form, under the section  
29 "Does the insured have a diagnosis of Alzheimer's Disease or other type of Dementia," Ms.  
30 Silvernail checked both Yes and No. *Id.* Under the space allowed to describe the insured's

1 Cognitive Status, Ms. Silvernail stated “Doesn’t remember to take medications –She’s a  
2 diabetic insulin high blood pressure.” *Id.*

3 On August 31, 2009, Ability sent a letter to Ms. White explaining that her contract  
4 had lapsed and she no longer had benefits. Claims File at 00180. Absent a power of attorney  
5 on file, Ability was not allowed to send such communication to anyone other than the  
6 insured. Lawler Decl., ¶ 3. WAC 284-54-283, allowing for a third party to receive notice of  
7 non-payment of premium, in no way addresses or allows other insured information to be  
8 provided to third parties.

9 On October 2, 2009, Ability received medical records of Gladys White and other  
10 documents from Ms. Silvernail. The benefits claim form included with this set of records  
11 was different than the one earlier submitted on August 6, 2009. Claims File at 00176. In this  
12 Claimant Proof of Loss Form, under the section “Does the insured have a diagnosis of  
13 Alzheimer’s Disease or other type of Dementia,” Ms. Silvernail checked Yes. *Id.* Under the  
14 space allowed to describe the insured’s Cognitive Status, Ms. Silvernail circled the words:  
15 memory, judgment, ability to manage medications, and safety concerns and stated “All of the  
16 above – she’s fallen several times at home.” *Id.*

17 The medical records and documents provided to Ability contained no evidence that a  
18 licensed health care practitioner certified that Ms. White met the definition of a chronically  
19 ill individual. *See* Policy, Part G, M, 26 U.S.C. § 7702B, *supra*. Ms. Silvernail was already  
20 familiar with these requirements because in 2007 Ms. White did not meet these exact same  
21 benefit requirements.<sup>7</sup> A review of Ms. White’s discharge summary from Dr. Glen C. Myers

22 <sup>7</sup> *See* Claims File at 00223- 00228. Note Claims File at 00227, a letter sent to Gladys White on  
23 November 26, 2007, which lists the requirement that a chronically ill person has been certified by a  
24 Licensed Health Care Practitioner as: (1) Being unable to perform (without Substantial Assistance  
25 from another individual) at least two Activities of Daily Living for a period of at least 90 days due to  
26 loss of functional capacity; (2) Having a level of disability similar (as determined under regulations  
prescribed by the Secretary in consultation with the Secretary of Health and Human Services) to the  
level of disability described in clause (10); or (3) Requiring substantial supervision to protect such  
individual from threat to health and safety due to severe Cognitive Impairment.

1 shows no sign of chronic illness as defined by regulation and the policy. *See* Claims File at  
2 00155- 00158, which states in part:

3       The patient's mental status has been alert and oriented. Her telemetry has  
4       been normal while here. Her abnormalities while here were that she had  
5       evidence of a urinary tract infection on admission as well as some moderate  
6       hyperglycemia from her diabetes. Likely, her syncopal episode was  
      secondary to her urinary tract infection with hyperglycemia and moderate  
      dehydration from her diabetes. No other etiology has been found.

7       The emergency room physician, Dr. Blake P. Gendron, did not note any evidence of  
8       chronic illness, either. Claims File 00160-00161. The orthopedic consult, Dr. Anthony B.  
9       Van Bergeyk, noted past history of dementia, but makes no other assessment of current  
10      condition. Claims File 00163-00164. Similarly, Dr. Umar Wahead makes only passing  
11      reference to "history of dementia." Claims File 00166-00167. None of these records  
12      establishes or equates to a certification that Ms. White met the definition of a chronically ill  
13      individual.

14      The documents included an undated letter from Alexandra Farmin. Ms. Farmin  
15      identified herself as a caregiver in the letter. At hearing, Ms. Farmin identified herself as a  
16      Certified Nursing Assistant ("CNA"), but did not identify herself as such in the letter. Mr.  
17      Lawler testified he thought a CNA might be a licensed health care practitioner, but he is not  
18      familiar with the scope of practice of health care professionals in the State of Washington.  
19      Lawler Decl., ¶ 2. A CNA is certified, not licensed. RCW 18.88A.085. A CNA is not a  
20      licensed health care professional. Furthermore, the scope of practice of a CNA is limited; a  
21      CNA does not have the training, skill or authority under statute to assess and diagnose an  
22      individual, unlike a physician or registered nurse. *See* Chapter 18.88A; RCW WAC 246-  
23      841-405; RCW 18.79.260. A certification that that one is chronically ill requires a licensed  
24      health care practitioner who is qualified to diagnose such a condition; this does not include a  
25      CNA. *Id.* Nonetheless, the letter only identified Ms. Farmin as a caregiver, not a CNA.

26      Even if Ms. Farmin were a licensed health care practitioner, the information she

1 provided in that undated letter did not establish that Ms. White met the definition of a  
2 chronically ill person as defined by the policy and federal law. Claims File at 00169.  
3 Similarly, Ms. Silvernail provided her own letter, with anecdotes regarding her mother's  
4 health issues. Claims File at 00152. But Ms. Silvernail failed to provide evidence from a  
5 licensed care professional certifying that Ms. White was chronically ill.

6 Other information contained in Ms. White's file, specifically medical records from  
7 Dr. Alexander K. Mihali and Benefit Assessments from 2007, did not provide evidence of a  
8 licensed health care practitioner certifying Ms. White as chronically ill. On August 1, 2007,  
9 a licensed health care practitioner noted that from the information in the file, Ms. White *did*  
10 *not* meet the definition of a chronically ill individual. Claims File 00274. The medical  
11 records of her long-term health care professional, Dr. Mihali, which spanned the timeframe  
12 of August 2005 – August 2007, provide no evidence that Ms. White met the definition of a  
13 chronically ill individual. Claims File at 00230-00250.

14 No other evidence was provided to Ability prior to Ability's decision not to reinstate  
15 Ms. White's policy. *See generally* Claims File. Ability did not have any information to  
16 support Ms. Silvernail's claim that her mother was eligible for benefits under the insured's  
17 policy. Ability was well within its rights, pursuant to the policy language, to not reinstate  
18 Ms. White's policy. Ability made a proper decision, supported by the record available at the  
19 time.

20 b. Ability must consider the physician's records, even if  
21 they family disagrees and especially if Ability had no  
knowledge of the family's disagreement

22 Dr. Mihali's records did not support reinstatement of the policy at the time Ability  
23 viewed the documents provided by Ms. Silvernail. Ms. White's family testified at the  
24 hearing that they did not care for Dr. Mihali, and they did not think he did a good job of  
25 caring for Ms. White. Ability did not choose Dr. Mihali. Ms. White and her family did.  
26 Ability is not allowed to ignore the opinions and records of Ms. White's primary physician.

1 The family and OIC appeared to try to undermine Dr. Mihali because they did not like how  
2 he exercised his medical judgment. After the hearing, OIC attempted to submit a late  
3 certification from Dr. Mihali.

4 It is not proper to put an insurance company in the position of determining when the  
5 treating physician is correct or incorrect. The family members and Ms. White herself had the  
6 option to find a different physician. For whatever reason, they did not. Ability is required to  
7 consider the evidence provided by the insured's physician.

8 2. Testimony from Ms. White's family, that was not provided to  
9 Ability, is not relevant and is inadequate to establish chronic  
10 illness by a licensed health care professional

11 A significant portion of the hearing consisted of testimony presented by Ms. White's  
12 family members and caregiver regarding her mental status and her incontinence issues. Each  
13 and every family member, with the exception of Cheryl Silvernail, testified that they never  
14 provided that information to Ability. Even if it had been provided, anecdotal information  
15 regarding physical and mental status would not qualify as certification that Ms. White met  
16 the definition of chronically ill. None of the family members were licensed health care  
17 practitioners, qualified to certify chronic illness.

18 Their testimony and anecdotes were personal and sincere but immaterial to the  
19 decision-making process because it failed to meet the threshold of certification by a licensed  
20 health care provider and it was provided long after the fact. The information available to  
21 Ability from Ms. White's physician did not provide any evidence that Ms. White met the  
22 definition of a chronically ill individual. Ability's refusal to reinstate Ms. White's policy  
23 was legal and proper.

24 E. Ability is challenging OIC orders that incorrectly interpret  
25 Washington regulation and long-term care policy provisions

26 Ability need not prove it was harmed by OIC's orders in order to challenge them. An  
insurer has the right to challenge orders based on inaccurate interpretations of regulation

1 issued by OIC, simply because of the fact that they are incorrect.

2 Ability was harmed, however, by the unusual press releases by OIC. Harm from bad  
3 publicity may be difficult to quantify, but it is still harm.

4 Since January 2005, OIC's policy is to announce all OIC enforcement actions through  
5 routine news releases, issued every month or two, publicizing several enforcement actions  
6 simultaneously. Declaration of Virginia Nicholson Ex. A.

7 However, a cease and desist order, or a suspension of a certificate of registration,  
8 merits a separate news release under OIC's policy. *Id.* The purpose for these releases is  
9 "[t]o employ the 'sentinel effect' — opportunity to shine a light on a serious problem, to  
10 educate the public, and to put other potential bad actors on notice (ex: publicize actions  
11 against illegal health plans)." *Id.* OIC's policy is to cause bad publicity harm for "bad  
12 actors" to prevent other "bad actors" from taking the same action. But when OIC's cease  
13 and desist orders and suspension of a certificate of authority are incorrect, or based upon an  
14 inaccurate interpretation of regulation, there is no public good to outweigh, or even balance,  
15 the harm from this publicity. Ability was harmed when Ability was inaccurately cast as a  
16 "bad actor."

17 Here, Ability was surprised by the issuance of the orders. Lawler Decl., ¶¶ 5 - 8. The  
18 last communication between Ability and OIC brought out several points that the company  
19 assumed OIC would answer. Lawler Decl., ¶ 8. Instead of continuing the dialog, OIC issued  
20 a press release, then followed up with the issuance of severe orders. Lawler Decl., ¶ 8. OIC  
21 wanted to find coverage for Ms. White. OIC subsequently issued Orders 11-0088, 11-0089,  
22 and 11-0090, contested here.

#### 23 **IV. Conclusion**

24 Orders No. 11-0088, 11-0089, and 11-0090 should be rescinded.

25 OIC strained to find coverage for Gladys White. A review of statute, regulation, case  
26 law and policy all indicate that Gladys White's policy lapsed for non-payment of premium

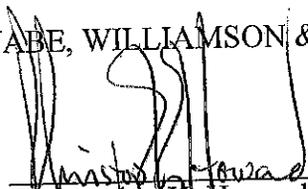
1 on February 8, 2009. A review of the facts reveals that the documentation provided by  
2 Cheryl Silvernail failed to provide evidence that a health care professional certified that  
3 Gladys White met the definition of being "chronically ill" as defined in federal tax law and  
4 Ms. White's policy.

5 The policy interpretation required by OIC's orders would be contrary to Washington  
6 and Federal law.

7 Ability's interpretation of the policy has been reasonable and correct under  
8 Washington and Federal law. OIC's severe penalties against Ability are unwarranted and  
9 capricious. Enforcement of OIC Orders No. 11-0088, 11-0089, and 11-0090 should be  
10 denied.

11 Dated this 19th day of September, 2011.

12 SCHWABE, WILLIAMSON & WYATT, P.C.

13  
14 By: 

15 Christopher H. Howard, WSBA #11074  
16 Virginia R. Nicholson, WSBA #39601  
17 Attorneys for Respondent  
18 Ability Insurance Company  
19  
20  
21  
22  
23  
24  
25  
26

**CERTIFICATE OF SERVICE**

I hereby certify that on the 19th day of September, 2011, I caused to be served the SUPPLEMENTAL BRIEFLY OF ABILITY INSURANCE COMPANY, DECLARATION OF DONALD K. LAWLER and DECLARATION OF VIRGINIA NICHOLSON on the following party at the following address:

Alan Michael Singer  
Staff Attorney, Legal Affairs Division  
Office of the Insurance Commissioner  
State of Washington  
5000 Capitol Boulevard SE  
Olympia WA 98504-0255

And Filed with

OIC Hearing Unit  
Office of the Insurance Commissioner  
State of Washington  
5000 Capitol Boulevard SE  
Olympia WA 98504-0255

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) Legal Messenger

Chante Tayler  
Chante Tayler

FILED

2011 SEP 20 19 KAV A 9:07

Hearings Unit, DIC  
Patricia D. Petersen  
Chief Hearing Officer

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

DECLARATION OF VIRGINIA  
NICHOLSON IN SUPPORT OF  
ABILITY'S SUPPLEMENTAL  
BRIEFING

Virginia Nicholson, being over the age of eighteen and fully competent to testify hereto, declares and states as follows:

1. I am one of the attorneys for Respondent Ability Insurance Company ("Ability") in this action and make this affidavit for and on behalf of Ability based upon my review of the file in this matter.

2. Attached as **Exhibit A** is a true and correct copy of OIC's News Release Guidelines, received by Ability's September 7, 2011 pursuant to a public records request.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing statements are true and correct.

Dated this 19th day of September, 2011, at Seattle, Washington.

  
Virginia R. Nicholson

# **EXHIBIT A**

**News Release Guidelines  
OIC enforcement actions  
November 2007**

**Why we have news release guidelines**

- To ensure fairness and consistency in announcing enforcement actions to the news media and public.
- To employ the “sentinel effect” – opportunity to shine a light on a serious problem, to educate the public, and to put other potential bad actors on notice (ex: publicize actions against illegal health plans).

These guidelines assist the agency in deciding when and how to issue news releases on OIC enforcement actions.

**Routine news releases**

In January 2005, the agency began announcing all OIC enforcement actions through routine news releases. These news releases typically are issued every month or two and publicize several enforcement actions simultaneously. But there also are enforcement actions that merit a separate, more timely, news release.

**Criteria for separate news releases**

These criteria should be considered when deciding whether to issue a stand alone news release. They are guidelines. Every situation will be reviewed on a case-by-case basis.

- ✓ “Sentinel effect” – opportunity to shine a light on a serious problem, educate the public, and put other potential bad actors on notice
- ✓ How serious or egregious the violation of state law is
- ✓ How many consumers affected or harmed
- ✓ Severity of penalty
- ✓ Existing (or likely) media interest
- ✓ How long the company was out of compliance
- ✓ C&D issued or certificate of registration suspended or revoked
- ✓ Repeat violations/history with OIC/ongoing problem area
- ✓ Any action against an illegal health plan or other illegal insurer
- ✓ Other considerations: Whether company self-reported and/or cooperated with the OIC in rectifying problem. Distinction between market conduct and individual. How this could affect a market shift.

**Important: Guidance to Legal Affairs staff**

- News releases/public announcements are a non-negotiable item with those we regulate – per Mike Watson  
(In other words, no promises are to be made that we won't issue a news release in order to achieve a consent order/settlement.)
- No draft news releases are to be shared with those we regulate or the attorneys who represent them.
- By request of Legal Affairs, a courtesy copy of the final news release can be e-mailed to the company communications office (by Public Affairs), or to their legal counsel (by Legal Affairs). Public Affairs and Legal Affairs will coordinate on strategy and timing.

**If you have questions or ideas, please contact Public Affairs.**

FILED

2011 SEP 20 A 9:07

Hearings Unit, DIC  
Patricia D. Petersen  
Chief Hearing Officer

BEFORE THE STATE OF WASHINGTON  
OFFICE OF INSURANCE COMMISSIONER

In the Matter of

No. 11-0088 and 11-0089

ABILITY INSURANCE COMPANY,

DECLARATION OF DONALD K.  
LAWLER IN SUPPORT OF ABILITY'S  
SUPPLEMENTAL BRIEFING

An Authorized Insurer and Respondent

Donald K. Lawler declares as follows:

1. I am the Senior Vice President for Ability Insurance Company (hereafter, "Ability"). I make this declaration on personal knowledge.

2. I make this declaration to clarify some issues from my hearing testimony. I was asked by Mr. Singer if a CNA was a "licensed health care professional." I believe I answered that I was not sure, but if they were licensed by the state, they probably were. I did not take into consideration the difference between certification and licensure by the state. Without further investigation, I do not know the scope of practice of a CNA in Washington or if they are officially categorized as certified as opposed to licensed.

3. Insurance companies generally communicate about an insured's policy only with the insured. An insurance company is allowed to communicate about an insured policy's with someone other than the insured only with proper permission and notification, such as when a duly authorized power of attorney form is received. At the hearing, I was asked why the August 31, 2009 letter denying benefits to Gladys White was sent to Gladys

DECLARATION OF DONALD K. LAWLER IN  
SUPPORT OF ABILITY'S SUPPLEMENTAL BRIEFING -

1

PDX/122574/181300/VNI/8108045.1

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

1 White. At that time, we had no authority or permission to send such information to anyone  
2 other than Gladys White. The third-party notification of non-payment of premium, required  
3 by Ms. White's policy and WAC 284-54-253, applies to notice for lapse or termination for  
4 nonpayment only, it does not authorize or allow us to share other information with the third  
5 party. The only valid recipient for the August 31, 2009 letter to Gladys White was Gladys  
6 White.

7 4. Under the policy, Ability has no obligation to reinstate a long-term care  
8 policy, similar to Gladys White's policy, lapsed for non-payment of premium, absent a  
9 request for reinstatement within the five-month period reinstatement period and evidence that  
10 the insured met the definition of chronically ill. Individuals who inquire about reinstatement  
11 are advised that Ability will review any written request for reinstatement, but usually will not  
12 grant reinstatement past six months. Late requests for reinstatement, such as the request for  
13 Gladys White, are routed to me for review. I examined the evidence presented by and on  
14 behalf of Gladys White and coordinated review of her claims file by others at Ability. Even  
15 though the request to reinstate the policy was too late, we considered what was submitted.  
16 There was no evidence that a licensed health care practitioner even suggested, much less  
17 certified, that Ms. White met the policy definition of a chronically ill individual.

18 5. In my experience working with insurance commissioners from almost every  
19 state, once evidence is provided to the state insurance commissioner's office that Ability  
20 followed the policy, relevant regulations and statutes, that either concludes the inquiry or  
21 more discussion ensues.

22 6. Sometimes, after the exploration of the issue with the insurance  
23 commissioner, it is not unusual for the insurance commissioner to request an exception for a  
24 particular insured even though the action taken by Ability was correct. Ability has  
25 considered and granted requests for exceptions in the past on occasion, including for the  
26 Washington Insurance Commissioner.

DECLARATION OF DONALD K. LAWLER IN  
SUPPORT OF ABILITY'S SUPPLEMENTAL BRIEFING -  
2

PDX/122574/181300/VNI/8108045.1

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

7. My experience with the Washington Insurance Commissioner's office in this matter (hereafter "OIC") was not what I expected or am accustomed to. I was still conferring with the OIC, providing documents (pursuant to their requests, which demonstrated only two reinstatement requests were denied, including Ms. White, for all policies issued in the State of Washington), as seen by the communication I sent to it on March 18, 2011.

8. On April 27, 2011, I was called by an individual regarding an article he had read in the newspaper about orders issued by the OIC against Ability. This was very surprising to me, as I thought that the OIC and Ability were still discussing the issues. Later that day, I received an email from Mr. Singer, attaching the orders issued. Attached to this declaration, as **Exhibit A**, are postings from "Seattle Post Intelligencer" and the subsequent email from Mr. Singer. To the best of my memory, the attorney who phoned me had read about the OIC's orders in the Tukwila reporter earlier in the day.

9. Attached as **Exhibit B** is a true and correct copy of the NAIC Long-Term Care Insurance Model Regulation Adoption table from 2010, listing each state and noting that Washington has only adopted portions of a previous NAIC Long-Term Care model regulation.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing statements are true and correct.

Dated this 19<sup>th</sup> day of September, 2011, at Omaha, Nebraska.

  
\_\_\_\_\_  
Donald K. Lawler

# **EXHIBIT A**

**Singer, Alan (OIC)**

---

**From:** Don Lawler [dlawler@abilityre.net]  
**Sent:** Monday, May 02, 2011 7:53 AM  
**To:** Singer, Alan (OIC)  
**Subject:** RE: Ability Insurance Company: Order (No. 11-0089) Suspending Certificate of Authority, \$10,000 fine, and Order (No. 11-0088) to Cease and Desist

Dear Mr. Singer,  
No, thank you.

 **Ability** INSURANCE COMPANY  
*Donald K. Lawler, J.D., M.B.A.*  
*Senior Vice President*  
*Ability Insurance Company*  
*FKA Medico Life Insurance Company*  
*1515 South 75th Street*  
*Omaha, NE. 68124*  
*(402) 218-4069*  
*(402) 515-4411 cell*  
*(866) 240-2352 FAX*  
*[dlawler@abilityre.net](mailto:dlawler@abilityre.net)*

---

This message contains confidential information and is intended only for the individual named. If you are not the named addressee, you should not disseminate, distribute or copy this e-mail. Please notify the sender immediately by e-mail if you have received this e-mail by mistake and delete this e-mail from your system. E-mail transmission cannot be guaranteed to be secure or error-free as information could be intercepted, corrupted, lost, destroyed, arrive late or incomplete, or contain viruses. The sender therefore does not accept liability for any errors or omissions in the contents of this message which arise as a result of e-mail transmission. If verification is required, please request a hard copy version.

Ability Insurance Company, 1515 South 75th St., Omaha, NE 68124.

---

**From:** Singer, Alan (OIC) [<mailto:AlanS@OIC.WA.GOV>]  
**Sent:** Friday, April 29, 2011 6:00 PM  
**To:** Don Lawler  
**Cc:** Sureau, Carol (OIC)  
**Subject:** RE: Ability Insurance Company: Order (No. 11-0089) Suspending Certificate of Authority, \$10,000 fine, and Order (No. 11-0088) to Cease and Desist

Don, will you please let me know if you would like me to prepare and send a draft consent order for consideration?  
Thanks,

Alan

Alan Michael Singer  
Staff Attorney  
Legal Affairs  
Office of the Insurance Commissioner  
PO Box 40255  
Olympia, WA 98504-0255  
360-725-7046  
360-586-0152 Fax

**From:** Singer, Alan (OIC)

**Sent:** Wednesday, April 27, 2011 2:43 PM

**To:** 'Don Lawler'

**Subject:** Ability Insurance Company: Order (No. 11-0089) Suspending Certificate of Authority, \$10,000 fine, and Order (No. 11-0088) to Cease and Desist

Hi Don,

As we discussed a short time ago, I attach the two orders entered today relative to Ability Insurance Company: (1) order No. 11-0089, titled "Order Suspending Certificate of Authority," and (2) order No. 11-0088, titled "Order to Cease and Desist." In addition to these two actions, this agency will also fine the company \$10,000 for the company's violation briefly outlined in the attached orders. As I mentioned, this concerns the same matter we have been discussing the past several months.

I would propose separately sending you a draft consent order to levy the fine. Our state's insurance laws allow this fine to be imposed by consent order or after hearing. Please let me know if you would like me to prepare and send a draft consent order for consideration.

Please let me know if you have any questions. Thanks,

Alan

Alan Michael Singer

Staff Attorney

Legal Affairs

Office of the Insurance Commissioner

PO Box 40255

Olympia, WA 98504-0255

360-725-7046

360-586-0152 Fax



### Comments (10)

FOLLOW US:



### WA state suspends insurer for refusing coverage to woman with dementia

02:03 p.m., Wednesday, April 27, 2011 -- Washington state officials have suspended a disability insurance company from writing new policies, after they said it illegally refused to reinstate coverage for an elderly woman with dementia.

[Read Full Story](#)

### Local Photos

Displaying 1-3 of 100



Add Your Comment

Sort comments by: [Newest to Oldest](#)

Name withheld 11:26 AM on August 4, 2011

This comment was left by a user who has been blocked by our staff.



**billwald** 10:32 AM on April 28, 2011

So now insurance companies will be forced to send registered letters when payments are overdue??

Do I get a 30 day grace period on my car and house insurance?

REPLY (0) POPULARITY: 0 [Report Abuse]

Name withheld 5:58 AM on April 28, 2011

This comment was left by a user who has been blocked by our staff.



**usnr-bb** 5:18 PM on April 27, 2011

Thank you Mike! Keep those SOB's toeing the line.

REPLY (2) POPULARITY: 2 [Report Abuse]



**yaddayadda** 5:15 PM on April 27, 2011

That bill's a good candidate for autopay.

REPLY (0) POPULARITY: 0 [Report Abuse]

1 reply



**theperson** 4:24 PM on April 27, 2011

"But when an 85-year-old Puyallup woman with dementia failed to pay her bill in February of 2009, the Ability Insurance Company refused to reinstate her policy. It said she had missed her five-month window"

Maybe she just forgot to pay....

REPLY (3) POPULARITY: 1 [Report Abuse]



**Hawksyear** 3:46 PM on April 27, 2011

Good move.

Another death panel gone from Wa. Poor business practices that put money before people, need to go. I really despise insurance companies.

REPLY (9) POPULARITY: 8 [Report Abuse]

vanessaho 3:35 PM on April 27, 2011

### Most Read | Most Commented

1. Distraught teenager causes crash on purpose, police say
2. Top places for singles in Seattle
3. Idaho has slow Internet because of... Itchy bears?
4. Tarvaris Jackson gets some extra protection — from a condom company
5. 50 alien worlds found — some are 'super-Earths'
6. Suspect id'd in hit-and-run with girl, 9
7. Report: Texas prefers ACC to Pac-12

### LATEST LOCAL HEADLINES

9-year-old Bellevue girl killed in crash keeps man alive 12:42 p.m.

Northwesterners are using less gas 08:47 a.m.

Cops nab robbery suspect after car, foot chase 06:46 a.m.

Distraught teenager causes crash on purpose, police say 10:00 p.m.

Ice cream in a flash: Washington's first Sub Zero franchise opens in Federal Way 10:00 p.m.



# WA state suspends insurer for refusing coverage to woman with dementia

By VANESSA HO, SEATTLEPI.COM STAFF  
Updated 03:54 p.m., Wednesday, April 27, 2011

Comments (10) 14 tweets 0

Larger | Smaller Printable Version retweet Share

Email This Font

Washington state officials have suspended a disability insurance company from writing new policies, after they said it illegally refused to reinstate coverage for an elderly woman with dementia.

State law gives consumers with cognitive impairments a five-month window to re-start coverage if their long-term care policy lapses.

But when an 85-year-old Puyallup woman with dementia failed to pay her bill in February of 2009, the Ability Insurance Company refused to reinstate her policy. It said she had missed her five-month window, Insurance Commissioner Mike Kreidler said Wednesday.

"Situations like this are exactly why we have this law," Kreidler said in a statement. "It protects people who, through no fault of their own, have lost the ability to keep up with their financial records."

When the woman skipped a payment, the Nebraska-based company wrote her daughter on March 20, 2009, saying the mother's policy would lapse unless paid in the next 35 days. But the daughter later said she never received that notice.

In August of that year, the daughter contacted the company about a claim for her mother, but was never told the policy had lapsed. It wasn't until September, when the daughter was going through her mother's mail, that she discovered the policy had lapsed.

She tried to re-start coverage, contending the policy had stopped in late April, and that her mother was still within her five-month window.

But the company said the window had started earlier - the day her mother missed the payment. It refused to reinstate coverage.

The woman's daughter complained to Kreidler's office, which has suspended Ability Insurance from writing new policies for six months; ordered it to stop violating state law; and imposed a \$10,000 fine.

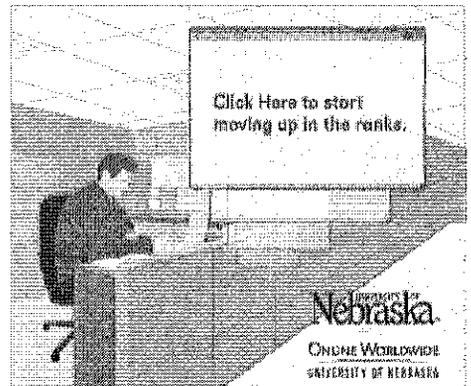
The company has the right to demand a hearing. Insurance commissioner spokesman Rich Roesler said Ability had not reinstated coverage as of Wednesday.

Read the suspension order here. It doesn't take effect for 10 days.

Visit [seattlepi.com](http://seattlepi.com)'s home page for more Seattle news. Contact Vanessa Ho at 206-448-8003 or [vanessaho@seattlepi.com](mailto:vanessaho@seattlepi.com), and follow her on Twitter as @vanessaho.



Local Photos Displaying 1-3 of 100



### Most Read | Most Commented

1. Distraught teenager causes crash on purpose, police say
2. Top places for singles in Seattle
3. Idaho has slow Internet because of... itchy bears?
4. Tarvaris Jackson gets some extra protection — from a condom company
5. Suspect id'd in hit-and-run with girl, 9
6. 50 alien worlds found — some are 'super-Earths'
7. Report: Texas prefers ACC to Pac-12

1.01% APY\* --Free Checking  
Earn 5X the National Average with  
Capital One Bank.Free  
CapitalOne.com/checking-accounts

**Penny Stock of the Day**  
Rated #1 Penny Stock Newsletter on  
the net  
<http://www.VictoryStocks.com/>

**Hot Stock Pick - OMVS**  
Newest Solar Technology.  
Investment, Stocks, Trade, News.  
[www.OMVSolar.com](http://www.OMVSolar.com)

Ads by Yahoo!



**Hunger Crisis in the Horn of Africa**  
You can save lives.  
*Beating Hunger Worldwide*

**DONATE NOW**



**Reader Services:** [My account](#) | [Mobile](#) | [RSS feeds](#) | [Follow us on Twitter](#) | [Facebook](#) | [E-mail newsletters](#) | [Corrections](#) | [Site index](#)

**Local services:** [Air conditioning contractors in Seattle](#) | [Car dealerships in Seattle](#) | [Cleaning services in Seattle](#) | [Family doctors in Seattle](#) | [Furniture stores in Seattle](#) | [Injury attorneys in Seattle](#) | [New car dealers in Seattle](#) | [Real estate agents in Seattle](#) | [Real estate attorneys in Seattle](#) | [Restaurants in Seattle](#)

**Company Info:** [Advertise online](#) | [Contact us](#) | [Send us tips](#) | [Job openings](#) | [About the P-I](#) | [Hearst Corp.](#) | [Terms of use](#) | [Privacy policy](#) | [About our ads](#)

**Advertising Services:** [SEO by LocalEdge](#) | [PPC Management by Matrix4Media](#)

Send comments to [newmedia@seattlepi.com](mailto:newmedia@seattlepi.com)

© 2011 Hearst Communications Inc.

**HEARST** newspapers



# **EXHIBIT B**

**LONG-TERM CARE INSURANCE MODEL REGULATION**

**KEY:**

**MODEL ADOPTION:** States that have citations identified in this column adopted the most recent version of the NAIC model in a **substantially similar manner**. This requires states to adopt the model in its entirety but does allow for variations in style and format. States that have adopted portions of the current NAIC model will be included in this column with an explanatory note.

**RELATED STATE ACTIVITY:** States that have citations identified in this column have **not** adopted the most recent version of the NAIC model in a substantially similar manner. Examples of Related State Activity include but are not limited to: An older version of the NAIC model, legislation or regulation derived from other sources such as Bulletins and Administrative Rulings.

**NO CURRENT ACTIVITY:** No state activity on the topic, as of the date of the most recent update. This includes states that have repealed legislation as well as states that have never adopted legislation.

NAIC MEMBER	MODEL ADOPTION	RELATED STATE ACTIVITY
Alabama		ALA. ADMIN. CODE r. 482-1-091-.32 to 482-1-091-.36 (1990/2009) (previous version of model).
Alaska	NO CURRENT ACTIVITY	
American Samoa	NO CURRENT ACTIVITY	
Arizona		ARIZ. ADMIN. CODE §§ 20-6-1001 to 20-6-1024 (1992/2005) (previous version of model); BULLETIN 2009-5 (2009).
Arkansas		ARK. CODE R. § 13 (1990/2008) (previous version of model).
California	CAL. INS. CODE §§ 10230 to 10237.6 (1988/2009).	
Colorado		3 COLO. CODE REGS. § 4-4-1 (2008/2010); § 4-4-3 (1996) (Suitability standards) (previous version of model); § 4-4-4 (2010); 3 COLO. CODE REGS. § 08-E-5 (2008); BULLETIN B-1-20 (2007).
Connecticut	CONN. AGENCIES REGS. §§ 38a-501-8 to 38a-501-24 (1994/2009) (Individual); §§ 38a-528-1 to 38a-528-17 (1994/2010) (Group).	

LONG-TERM CARE INSURANCE MODEL REGULATION

NAIC MEMBER	MODEL ADOPTION	RELATED STATE ACTIVITY
Delaware		18 DEL. CODE REGS. § 1404 (1990/2005) (previous version of model); BULLETIN 23 (2006).
District of Columbia		D.C. MUN. REGS. tit. 26, § 2600.1 (2006/2008).
Florida		FLA. ADMIN. CODE ANN. r. 690-157.001 to 690-157.023 (1989) (previous version of model); §§ 690-157.101 to 690-157.122 (2003) (previous version of model).
Georgia	GA. COMP. R. & REGS. 120-2-16-.01 to 120-2-16-.34 (1989/2009).	
Guam	NO CURRENT ACTIVITY	
Hawaii		HAW. REV. STAT. §§ 431:10H-201 to 431:10H-402 (2000/2009) (previous version of model).
Idaho		IDAHO ADMIN. CODE r. 60.18.01.60 (1990/2007) (previous version of model); BULLETIN 2007-7.
Illinois		ILL. ADMIN. CODE tit. 50, §§ 2012.10 to 2012.150 (1990/2002) (previous version of model).
Indiana		760 IND. ADMIN. CODE 2-1-1 to 2-20-42 (2007) (previous version of model).
Iowa	IOWA ADMIN. CODE r. §§ 191-39.1 to 191-39.32 (1988/2009).	BULLETIN 2008-17 (2008); BULLETIN 2009-5 (2009); BULLETIN 2009-7 (2009).
Kansas		KAN. ADMIN. REGS. §§ 40-4-37 to 40-4-37v (1988/2009) (previous version of model); BULLETIN 1996-8 (1996).

**LONG-TERM CARE INSURANCE MODEL REGULATION**

NAIC MEMBER	MODEL ADOPTION	RELATED STATE ACTIVITY
Kentucky		806 KY. ADMIN. REGS. 17:081 (1993/2009) (previous version of model); 806 KY. ADMIN. REGS. 17:083 (2009).
Louisiana		LA. ADMIN. CODE tit. 37, §§ XIII.1901 to XIII.1961 (Regulation 46) (1993/2005) (previous version of model); BULLETIN 9-5-2006; BULLETIN 06-03 (2006); BULLETIN 12-28-2009 (2009).
Maine		425 ME. CODE R. (2004/2007) (previous version of model); BULLETIN 347 (2007); BULLETIN 363 (2009); BULLETIN 362 (2009); BULLETIN 361 (2009); BULLETIN 369 (2010).
Maryland		MD. CODE ANN., INS. §§ 18-101 to 18-120 (1989/2009) (portions of model); MD. CODE REGS. 31.14.01.01 to 31.14.01.32 (1994/2008); 31.14.02.01 to 31.14.02.14 (1993/2002) (previous version of model); BULLETIN 13-2009 (2009).
Massachusetts		211 MASS. CODE REGS. 65.01 to 65:16 (1989/2005) (Portions of previous version of model act and regulation included).
Michigan		MICH. COMP. LAWS §§ 500.3901 to 500.3955 (1992/2001) (previous version of model).
Minnesota		MINN. STAT. §§ 62S.01 to 62S.33 (1997/2010) (previous version of model); MINN. STAT. §§ 62A.46 to 62A.56 (1986/2002); MINN. R. §§ 2745.0010 to 2745.0050 (1992) (Non-qualified plans); BULLETIN 2007-5.

**LONG-TERM CARE INSURANCE MODEL REGULATION**

NAIC MEMBER	MODEL ADOPTION	RELATED STATE ACTIVITY
Mississippi		90-102 MISS. CODE R. (1990) (previous version of model).
Missouri		MO. CODE REGS. ANN. tit. 20, § 400-4.100 (1991/2003) (previous version of model).
Montana		MONT. ADMIN. R.6.6.3101 to 6.6.3120 (1991/2008) (previous version of model); BULLETIN 2007-4; Memorandum 223-2010 (2010).
Nebraska		210 NEB. ADMIN. CODE ch. 46 (1989/2001) (previous version of model); BULLETIN CB-114; BULLETIN CB-113.
Nevada		NEV. ADMIN. CODE §§ 687B.005 to 687B.140 (1988/2009) (previous version of model); 3602 (2010); BULLETIN 2006-10; BULLETIN 2010-020-AB (2010).
New Hampshire		N.H. CODE R. INS. 3601.01 to 3601.30 (2004) (previous version of model).
New Jersey		N.J. ADMIN. CODE §§ 11.4-34.1 to 11.4-34.32 (1989/2010) (previous version of model).
New Mexico		N.M. CODE R. §§ 13.10.15.1 to 13.10.15.53 (1997/2004) (previous version of model).
New York		N.Y. COMP. CODES R. & REGS. tit. 11, §§ 52.12 to 52.65 (Regulation 62) (1992/2002) (Portions of previous version of model).
North Carolina		N.C. GEN. STAT. § 108A-70.4 (2010); 11 N.C. ADMIN. CODE 12.1002 to 12.1029 (1990/2002); § 12.0555 (1989/1992) (previous version of model).

LONG-TERM CARE INSURANCE MODEL REGULATION

NAIC MEMBER	MODEL ADOPTION	RELATED STATE ACTIVITY
North Dakota		N.D. ADMIN. CODE 45-06-05-01 to 45-06-05-09 (1988/2004) (previous version of model).
Northern Marianas	NO CURRENT ACTIVITY	
Ohio		OHIO ADMIN. CODE § 3901-4-01 (1994/2008) (previous version of model); OHIO ADMIN. CODE § 3901-4-02 (2007/2009); § 3901-4-03 (2009).
Oklahoma		OKLA. ADMIN. CODE §§ 365:10-5-40 to 365:10-5-52 (1989/2009) (previous version of model); §§ 365:10-5-53 to 365:10-5-54 (2008/2009); BULLETIN 6-23-2008.
Oregon		OR. ADMIN. R. §§ 836-052-0500 to 836-052-0786 (1991/2006) (previous version of model).
Pennsylvania		31 PA. CODE §§ 89a.101 to 89a.129 (2002) (previous version of model).
Puerto Rico	NO CURRENT ACTIVITY	
Rhode Island		27-44 R.I. CODE R. §§-001 to 016 (1989/1998); REG. 44 (2008) (previous version of model); BULLETIN 2007-10 (2007).
South Carolina		S.C. CODE ANN. REGS. 69-44 (1989) (previous version of model); BULLETIN 4-2009 (2009).
South Dakota	S.D. ADMIN. R. 20:06:21:01 to 20:06:21:75 (1990/2010).	BULLETIN 2007-4 (2007); BULLETIN 2007-7 (2007).

LONG-TERM CARE INSURANCE MODEL REGULATION

NAIC MEMBER	MODEL ADOPTION	RELATED STATE ACTIVITY
Tennessee		TENN. COMP. R. & REGS. 0780-1-61 (1991) (previous version of model).
Texas		28 TEX. ADMIN. CODE §§ 3.3801 to 3.3850; (portions of previous version of model) (1990/2002).
Utah		UTAH ADMIN. CODE r. 590-148 (1992/2005) (previous version of model).
Vermont	21-020 VT. CODE R. § 024 to 040 (2009/2010).	BULLETIN HCA-130 (2010).
Virgin Islands	NO CURRENT ACTIVITY	
Virginia		14 VA. ADMIN. CODE §§ 5-200-10 to 5-200-210 (1992/2008) (previous version of model); Admin. Letter 1990-23 (1990) (Requires NAIC Shopper's Guide); Admin. Letter 2007-3 (2007)
Washington		WASH. ADMIN. CODE 284-54-010 to 284-54-900 (1989/2008) (portions of previous version of model).
West Virginia	W. VA. CODE R. §§ 114-32-1 to 114-32-24 (1993/2009).	
Wisconsin		WIS. ADMIN. CODE INS. § 3.46 (1991/2008) (previous version of model); WIS. ADMIN. CODE INS. § 3.455 (1991/2002).
Wyoming		WYO. CODE R. § 37 (1990/2003) (previous version of model).