

THE STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

FILED

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

Docket Nos. 11-0088 and 11-0089 A 0:51

MOTION TO STRIKE AND
EXCLUDE TESTIMONY OF CRAIG
BENNION
Heidi M. Olsen
Chief Hearing Officer

The OIC moves to strike and exclude *as evidence or testimony* all statements of Ability Insurance Company (“Ability” or the “Company”) witness Craig Bennion. While everything Mr. Bennion said at hearing on August 5, 2011 could be considered argument for the Company, since none of it meets the requirements under Washington rules and laws that govern the admissibility of “evidence” and “testimony,” it should be excluded as such.

FACTS RELEVANT TO THIS MOTION

On June 20, 2011, Ability’s lawyers received OIC’s 1st Interrogatories and Requests for Production (herein “OIC’s discovery”; see copy attached as “Exhibit A”) which, pursuant to CR 26(b)(5)(A),¹ requested Ability disclose each “expert” and “opinion or opinions such expert is expected to express and state the grounds for each such opinion.” *See* Interrogatories No. 10 and 11 in Exhibit A.² On July 20, 2011, two weeks before the start of the hearing, Ability responded that they intended to call Craig Bennion as an “expert,” but that “Mr. Bennion has not yet completed his review of this matter. Ability will provide this

¹ Washington Superior Court Civil Rule (“CR”) 26(b)(5)(A), provides “A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules. (ii) A party may, subject to the provisions of this rule and of rules 30 and 31, depose each person whom any other party expects to call as an expert witness at trial.”

² The second page of this discovery also provided: “*Continuing in Nature:* The interrogatories and requests for production shall be deemed to be continuing. In the event that you or your attorney discover additional information that is responsive to any of them, upon receipt of the information, you are to promptly provide supplemental information or change your answers and/or responses accordingly. If additional information is discovered between the time of making these answers and responses and the time of hearing, these interrogatories and requests for production are directed to that information. **If such information is not furnished, the undersigned will move, at the time of hearing, to exclude from evidence any information requested and not furnished.**” (Emphasis added.)

1 information pursuant to the case schedule in this matter or via agreement between the parties.”

2 See copy of Ability’s answers to OIC’s discovery, attached as “Exhibit B.”

3 On August 5, 2011, two days after the commencement of the hearing, Mr. Bennion
4 testified.³ Mr. Bennion is employed as a lawyer and has practiced law for a number of years
5 in Seattle. He exclusively advocates for insurance companies in his work as a lawyer. As a
6 lawyer, he has never represented an individual insured such as Mrs. White, nor has he ever
7 advocated on any consumer’s or individual insured’s behalf in attempting to claim coverage
8 or to reinstate coverage. Mr. Bennion also testified that he has no prior experience with the
9 specific long-term care laws, rules or issues presented here. His testimony did not concern
10 any factual matters and did not concern industry standard of care. Rather, he solely provided
11 his own personal legal conclusions about what he thought certain Washington Administrative
12 Code rules said and meant, how he felt they should be interpreted, and whether he thought the
13 Company had complied with these laws and rules. The Company paid Mr. Bennion \$310 per
14 hour for his time, including walking and driving from his office to the location of each day of
15 the hearing starting on August 3. There is no evidence his opinions were ever recognized or
16 accepted by any court, nor is there any evidence he was ever before qualified by any court as
17 an expert, let alone qualified as an expert as to any of the long-term care insurance opinions
18 and interpretations.

17 The Company hired Mr. Bennion weeks before he testified, and by mid- to late-July
18 he had formed almost all his opinions and thoughts substantially as he presented them at the
19 hearing. Mr. Bennion said he communicated these opinions and thoughts to Ability’s counsel
20 prior to July 20, but Ability never supplemented its discovery responses, nor did it disclose
21 Mr. Bennion’s opinions or the grounds for those opinions until he actually testified.⁴

22 ³ Citation to a record document is not made since no transcript exists, only a recording of proceedings.

23 ⁴ CR 26(e)(1) through (4) provides:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to:

1 **ARGUMENT**

2 Washington law prohibits Mr. Bennion’s legal conclusions from being considered as
3 “testimony” or “evidence.” Although parties not infrequently try to offer such improper legal
4 conclusions and legal opinions in the hopes they will be included as evidence in the record
5 under the guise of expert testimony, Washington law consistently holds that judges must
6 reject such attempts because the role of interpreting the language and meaning of laws, and
7 deciding which laws apply, belongs solely and exclusively to the judge. *See State v.*
8 *Clausing*, 147 Wn.2d 620, 628, 56 P.3d 550 (2002) (reversible error to allow a purported
9 expert’s legal conclusion about whether a physician’s prescription complied with the law
10 because it was improper legal opinion that had relevance only as a question of law); *State v.*
11 *Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002) (citing *Stenger v. State*, 104 Wn. App.
12 393, 407, 16 P.3d 655, *rev. den.*, 144 Wn.2d 1006 (2001), “experts may not offer opinions of
13 law in the guise of expert testimony,” the Court held it was reversible error to allow expert’s
14 legal opinion that propane tanks were DOT-approved because the expert gave improper legal
15 conclusions); *Hyatt v. Sellen Constr.*, 40 Wn. App. 893, 899, 700 P.2d 1164 (1985) (citing
16 *State v. O’Connell*, “[a] determination of the applicable law is within the province of the trial
17 judge, not that of an expert witness,” the Court held that it was proper to exclude expert
18 testimony about the statutes or regulations the expert felt that apply, what the expert felt they

17 (A) the identity and location of persons having knowledge of discoverable matters; and
18 (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on
19 which he is expected to testify, and the substance of his testimony.

19 (2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of
20 which:

- 20 (A) he knows that the response was incorrect when made; or
21 (B) he knows that the response though correct when made is no longer true and the circumstances are
22 such that a failure to amend the response is in substance a knowing concealment.

22 (3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any
23 time prior to trial through new requests for supplementation of prior responses.

(4) Failure to seasonably supplement in accordance with this rule will subject the party to such terms and
conditions as the trial court may deem appropriate.

1 meant, and what the expert's interpretation was about whether a party complied with them);
2 *Charlton v. Day Island Marina, Inc.*, 46 Wn. App. 784, 788, 732 P.2d 1008 (1987) (citing
3 *Hiskey v. Seattle*, 44 Wn. App. 110, 113, 720 P.2d 867 (1986),⁵ the Court held that purported
4 "expert" opinions that boathouse design and construction was negligent were properly
5 excluded as improper legal conclusion); 5A K. Tegland, Wash. Prac, Evidence § 309, at 84
(2d ed. 1982).

6 It is the established and unquestioned rule that it is in the province of the court, and
7 not the jury, to interpret a statute or ordinance and to determine whether it applies to
8 the conduct of a party. *Kness v. Truck Trailer Equip. Co.*, 81 Wn.2d 251, 501 P.2d
9 285 (1972); *Wells v. Vancouver*, 77 Wn.2d 800, 467 P.2d 292 (1970). It is accordingly
10 the general rule that a witness is not permitted to give his opinion on a question of
11 domestic law or upon matters which involve questions of law. *Valley Land Office,*
12 *Inc. v. O'Grady*, 72 Wn.2d 247, 432 P.2d 850 (1967); *Seattle v. Erickson*, 99 Wash.
13 543, 169 P. 985 (1918); 31 Am. Jur. 2d *Expert and Opinion Evidence* § 69 (1967); 7 J.
14 Wigmore, *Wigmore on Evidence* § 1952 (3d ed. 1940). As was said in *State v.*
15 *Ballard*, 394 S.W.2d 336 (Mo. 1965), one of the cornerstones of our system of
16 jurisprudence is that questions of fact are to be determined by a jury, and that all
17 matters of law are to be determined and declared by the court.

18 *Everett v. Diamond*, 30 Wn. App. 787, 792, 638 P.2d 605 (1981), quoting *Ball v. Smith*, 87
19 Wn.2d 717, 722-23, 556 P.2d 936 (1976).

20 Such improper "expert" testimony is also prohibited in cases dealing with the
21 interpretation of insurance policy provisions, for essentially the same reasons.⁶ As
22 Washington legal scholar Thomas V. Harris observed in his treatise "Washington Insurance
23 Law," such "expert" testimony not only improperly intrudes upon a role which only properly
belongs to the judge, it also threatens to conflate proceedings into swearing contests:

When a court resolves a policy dispute as a question of law, it should not allow the
parties to present expert testimony. As the court recognized in *Odessa v. Insurance*
Co. of Am., such determinations are inherently legal and solely within the province of

⁵ "[...] While expert testimony is admissible even if it embraces an ultimate issue to be decided by the trier of fact if it will assist the trier of fact to understand the evidence or determine a fact in issue, ER 702 and ER 704, experts are not to state opinions of law or mixed fact and law, such as whether X was negligent." (Cites omitted.) *Charlton*, 46 Wn. App at 788, quoting *Hiskey*, 44 Wn. App. at 113.

⁶ Although Mr. Bennion's views concerned Washington insurance rules, such are "insurance regulatory statutes [that] are considered to be part of an insurance policy." *CLS Mortgage, Inc., et al. v. Bruno and State Farm Fire and Casualty*, 86 Wn. App. 390, 395, 937 P.2d 1106 (1997).

1 the trial court. An expert witness is “not free to rewrite the plain terms” of a policy.
2 Moreover, courts will not allow an expert to serve as a “stand-in for an English-
3 language dictionary for purposes of interpreting an undefined term in an insurance
4 policy.” [...] Trial judges should enforce the cardinal principle enunciated in *State v.*
5 *Clausing*, a non-insurance case, regarding the permissible scope of expert testimony
6 generally:

7 For an expert to testify to the jury on the law usurps the role of the trial
8 judge. ... Each courtroom comes equipped with a ‘legal expert’, called a
9 judge, and it is his or her province alone to instruct the jury on the
10 relevant legal standards ... A contrary rule would confuse the jury
11 because ‘each party would find an expert who would state the law in the
12 light most favorable to its position;’

13 (Cites omitted.) Thomas V. Harris, *Washington Insurance Law*, § 6.12, Third Ed. (2010).

14 Mr. Bennion’s proffered views are also inadmissible under the Washington Rules of
15 Evidence (“ER”) governing the giving of opinion testimony. Witnesses generally must only
16 offer information drawn from personal knowledge, ER 602,⁷ and aside from “experts,”
17 witnesses cannot provide opinion testimony unless (a) rationally based on the perception of
18 the witness, **AND** (b) helpful to a clear understanding of the witness’ testimony or the
19 determination of a fact in issue, **AND** (c) not based on scientific, technical, or other
20 specialized knowledge within the scope of rule 702.⁸ ER 701. Here, Mr. Bennion does not
21 speak from personal knowledge about standard of practice or personal observations of fact.
22 Thus, under ER 703 and ER 602, none of what he had to say was “rationally based on [his]
23 perception” – i.e., he is not a percipient witness. In other words, since he did not see or
witness anything or any event that he can competently attest to, he is not a competent witness.
And even if Mr. Bennion was qualified as an “expert” (something which OIC staff disputes),

⁷ ER 602 provides that “A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness’ own testimony. This rule is subject to the provision of rule 703, relating to opinion testimony by expert witnesses.”

⁸ ER 702, “testimony of experts,” says: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”

1 nothing he said assists in understanding any *other* witness's testimony or the determination of
2 any *fact* in issue. Instead, he offers only his own legal conclusions.

3 Nor is Mr. Bennion adequately qualified as an expert. Like any expert, Mr. Bennion
4 must have the requisite knowledge, skill, experience, training, or education. ER 702. But here,
5 Mr. Bennion's only proffered supposed expertise is that he happens to be one among the tens of
6 thousands of lawyers who practice law in the state of Washington. As a lawyer, he has only
7 practiced law in Seattle, and has only done coverage work for insurance companies. In his niche,
8 he has never dealt with or even seen any of the long-term care laws or rules upon which he was
9 paid to testify here. And while it should be of at least some concern that Mr. Bennion only
10 reluctantly shared just how much money the Company has paid him for his help, no evidence
11 shows that any of his opinions has ever before been recognized or accepted by any court, nor
12 is there any evidence he was ever before qualified by any court as an expert, let alone
13 qualified as an expert as to any of the long-term care insurance opinions and interpretations he
14 has offered here. Mr. Bennion is, at best, inadequately qualified to credibly assist in
15 determining any "fact in issue" let alone to assist in better understanding any of the rules and
16 laws at issue in this matter.

17 Mr. Bennion's proffered views also fail to meet Washington evidence standards for
18 relevance. What is "relevant" is guided by Washington Rules of Evidence: ER 402 provides
19 that only relevant evidence is admissible, and evidence is relevant only if it has any tendency
20 to make the existence of any fact that is of consequence to the determination of the action
21 more or less probable. ER 401. Even if evidence is relevant, a trial court may still exclude it
22 if the danger of undue prejudice substantially outweighs its probative value. ER 403. Here,
23 none of Mr. Bennion's opinions are "relevant" since none of what Mr. Bennion had to say
makes any fact that is of consequence to the determination of the action more or less probable
as ER 401 provides. And since nothing he said is probative, his status as a well-paid lawyer
would be unduly prejudicial because it outweighs probative value under ER 403.

1 Even though the Washington Rules of Evidence are advisory as opposed to mandatory
2 in these informal proceedings, *see* WAC 284-02-070(2)(c) and RCW 34.05.452(2), irrelevant
3 evidence and evidence which otherwise fails to meet their standards should still be kept from
4 coming into the record. These proceedings should only allow evidence into the record when,
5 “in the judgment of the presiding officer it is of the kind of evidence on which reasonably
6 prudent persons are accustomed to rely in the conduct of their affairs.” RCW 34.05.452(1).
7 But here, plainly improper information like Mr. Bennion’s should be kept out of the record,
8 should not be confused as “expert testimony,” and should not contaminate the rest of the
9 record’s otherwise properly admitted and considered evidence. Since Mr. Bennion’s
10 commentary, conclusions and views are plainly prohibited under Washington law and
11 Washington’s Evidence Rules, it is not the kind of evidence “on which reasonably prudent
12 persons are accustomed to rely in the conduct of their affairs,” RCW 34.05.452(1), and for
13 this reason too, it should be excluded.

14 Finally, Ability violated the rules of discovery and chose to ignore its obligations
15 rather than abide by them. It knowingly and intentionally gave non-answers and then
16 withheld from OIC Mr. Bennion’s opinions and the grounds for his opinions until the moment
17 he spoke – even though the Company was specifically asked in discovery to supplement its
18 discovery answers if any were incomplete. The Company’s knowing concealment prevented
19 OIC from being able to sooner consider and then decide whether to move *in limine* to exclude
20 or object to Mr. Bennion’s testimony, and should not be overlooked in considering whether
21 Mr. Bennion’s testimony should be considered.

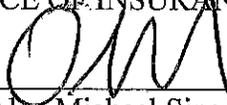
22 CONCLUSION

23 Had Ability not violated the rules of discovery and not ignored its discovery
obligations with knowing and intentional non-answers, OIC would have been able to know
Mr. Bennion’s opinions and the grounds for his opinions before he spoke. But now that his
views are known, they are all plainly improper and for the reasons above, should be excluded.

1 While Mr. Bennion's views, -- like those of any party's lawyer or other representative -- are
2 entitled to no weight and can always be considered purely for their persuasive effect, Mr.
3 Bennion should not be cloaked under the guise of an expert simply to bolster the Company's
4 own position. Nothing Mr. Bennion offered is proper to include as "evidence" or
5 "testimony," and it is important that such improper information not be elevated to that status
6 here. Accordingly, Mr. Bennion's statements should be excluded and not considered as
7 "evidence" or "testimony" in this matter.

8 DATED this 6th day of September, 2011.

9 OFFICE OF INSURANCE COMMISSIONER

10 By: 

11 Alan Michael Singer
12 Staff Attorney
13 Legal Affairs Division
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In re ABILITY INSURANCE COMPANY, Nos. 11-0088 and 11-0089

MOTION TO EXCLUDE TESTIMONY OF CRAIG BENNION

ATTACHED "EXHIBIT A"

Singer, Alan (OIC)

From: Singer, Alan (OIC)
Sent: Monday, June 20, 2011 1:48 PM
To: 'Howard, Christopher H.'; 'Nicholson, Virginia R.'
Cc: Tribe, Christine (OIC)
Subject: Ability Insurance Co., docket nos. 11-0088 and 11-0089
Attachments: 6-20-11 1st ROGs and RFPs to Ability Insurance Company.pdf

Hi Chris and Virginia,

Attached please find the First Interrogatories and Requests for Production to Ability Insurance Company. I would welcome your client's answers and responses sooner than thirty days from today, much sooner if at all possible, since, as you know, Judge Petersen indicated that she will be away and unavailable to address and resolve any discovery disputes or other questions during the week of July 25. If you have any questions about any of the interrogatories or requests for production, please call me as soon as possible to discuss them.

In addition, as we discussed some weeks ago, if there are certain facts you feel your client would be willing to stipulate to, I would welcome receiving your proposed stipulation to consider.

I will separately contact you regarding which witnesses I would like you to please make available for testimony at the upcoming hearing.

Thank you for your ongoing courtesy and prompt attention to this matter. Please do not hesitate to call me if you have any other questions.

Alan

Alan Michael Singer
Staff Attorney
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360-725-7046
360-586-0152 Fax

BEFORE THE STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of

ABILITY INSURANCE COMPANY,

An Authorized Insurer and Respondent

Docket Nos. 11-0088 and 11-0089

FIRST INTERROGATORIES AND
REQUESTS FOR PRODUCTION

TO: Donald K. Lawler
Ability Insurance Company
P.O. Box 3735
Omaha NE 68103
(via US mail and email: dlawler@abilityre.net)

AND TO: Christopher H. Howard and Virginia R. Nicholson
Schwabe, Williamson & Wyatt, P.C.
1420 5th Avenue #3400
Seattle WA 98401
(via US mail and email: VNicholson@SCHWABE.com and
CHoward@SCHWABE.com)

Definitions and Procedures

A. *Procedures:* Please complete the answers within the space provided, and, if needed, add additional pages. Within the time the Washington Civil Rules for Superior Court permit, return one copy to the office of the undersigned attorney together with copies of documents requested.

B. *Scope of Answers:* By any use of "you," "your," and "your company" in these interrogatories and request for production, it is intended that the answers and responses are to include all information known to you, to your agents and attorneys, and to your attorneys' agents and investigators, accountants, appraisers, and employees. "You," "your," and "your company" include Ability Insurance Company, Medico Insurance Company, and Mutual Protective Insurance Company.

C. *Document:* As used herein, the word "document" shall mean the original and any copy, regardless of origin or location, electronic or otherwise, of any book, pamphlet, periodical, letter, email, log, entry, memorandum, telegram, report, record, study, handwritten note, map, drawing, working paper, chart, paper, graph, index, tape, data sheet or data processing card, or any other written, recorded transcribed, punched, taped, filmed, or graphic matter, written, recorded, transcribed, punched, taped, filmed, or graphic matter, however produced or reproduced, to which you have or have had access.

D. *Continuing in Nature:* The interrogatories and requests for production shall be

deemed to be continuing. In the event that you or your attorney discover additional information that is responsive to any of them, upon receipt of the information, you are to promptly provide supplemental information or change your answers and/or responses accordingly. If additional information is discovered between the time of making these answers and responses and the time of hearing, these interrogatories and requests for production are directed to that information. If such information is not furnished, the undersigned will move, at the time of hearing, to exclude from evidence any information requested and not furnished.

E. Numbers: All answers to interrogatories and responses to requests for production shall be numbered consecutively.

F. Identify or Identity:

1. *Person:* As used herein, "identify" or "identity" used in reference to an individual person means to state his or her full name, present address, telephone number, present or last known position or business affiliation, position, and business affiliation at the time in question.

2. *Document:* "Identify" or "identity" when used in reference to a document means to state the date and author, type of document (e.g., identifying it), and its present location or custodian. If any such document was, but is no longer in your possession or subject to your control, state what disposition was made of it.

DATED this 20th day of June, 2011.



Alan Michael Singer
Staff Attorney
Legal Affairs Division
Office of Insurance Commissioner

FIRST INTERROGATORIES

INTERROGATORY NO. 1. Did you receive any proof, evidence, or other information suggesting that Gladys White had or may have had any cognitive impairment? Unless your answer is an unqualified "no," for such information received, please identify: (a) each such document or other piece or item of information that you received (including such items as medical records, verbal statements, letters, etc.), (b) when it was received, (c) the person with your company who received it, and (d) the person who provided it to you.

ANSWER:

INTERROGATORY NO. 2. Did you receive any proof, evidence, or other information suggesting that Gladys White had or may have had any loss of functional capacity? Unless your answer is an unqualified "no," for such information received, please identify: (a) each such document or other piece or item of information that you received (including such items as medical records, verbal statements, letters, etc.), (b) when it was received, (c) the person with your company who received it, and (d) the person who provided it to you.

ANSWER:

INTERROGATORY NO. 3. In your May 20, 2011 "Motion for Order to Cease and Desist" at page 3 lines 1-2 and page 4 lines 21-22, citing a series of documents attached as "Exhibit C" to the May 20, 2011 declaration of Virginia Nicholson, you asserted that "[b]oth Ms. White and Ms. Silvernail properly received notice of non-payment," and "Ms. White was provided the proper notices and Ms. Silvernail was also warned of the potential cancellation of the policy for non-payment." Please identify all documents, facts and other evidence that supports these assertions, including any that you reserve the right to offer into evidence at any hearing in this matter, specifically including (a) the identity of each person who purportedly provided each such "notice" or 'warning' or has personal knowledge of the same, and (b) an identification and listing of all documents, facts and other evidence showing the date and manner (e.g. via US mail, telephone, etc.) that each such "notice" or 'warning' was purportedly provided.

ANSWER:

INTERROGATORY NO. 4. Do you contend you were not provided with any "proof of [insured Gladys White's] cognitive impairment," as referred to in WAC 284-54-253(2)? Unless your answer is an unqualified "no," please provide the basis for your answer.

ANSWER:

INTERROGATORY NO. 5. Do you contend you were not provided with any "proof of [insured Gladys White's] loss of functional capacity," as referred to in WAC 284-54-253(2)? Unless your answer is an unqualified "no," please provide the basis for your answer.

ANSWER:

INTERROGATORY NO. 6. As to the notice required by WAC 284-54-253(1)(a) with respect to insured Gladys White and her designee, please identify: (a) the specific date on which the notice was actually mailed to the insured's designee, (b) the person(s) who mailed it on your behalf, and (c) any records, logs, entries, or other documents in your possession, custody, or control showing proof of the specific date the notice was actually mailed and the person(s) who mailed it.

ANSWER:

INTERROGATORY NO. 7. Please identify all contact information (including telephone numbers) for Gladys White's WAC 284-54-253(1) designee that existed in any records (electronic or otherwise) within your possession, custody, or control on or before March 20, 2009.

ANSWER:

INTERROGATORY NO. 8. At any time prior to March 20, 2009, did you ever provide Gladys White's WAC 284-54-253 designee with a copy of Ms. White's designation (which you asserted was attached as "Exhibit B" to the May 20, 2011 declaration of Virginia Nicholson), or otherwise advise or inform Ms. White's designee of that designation? Unless your answer is an unqualified "no," please explain your answer fully, including an explanation of how and when you so advised or informed the designee, and an identification of the person(s) who did this on your behalf.

ANSWER:

INTERROGATORY NO. 9. In your May 20, 2011 "Motion for Order to Cease and Desist" at page 3 lines 12-13, without citing any allegedly supportive documents, you asserted that on August 6, 2009, "Ms. Silvernail was again informed that Ms. White's policy had been cancelled for non-payment as of February 7, 2009." Please identify all documents, facts and other evidence that supports this assertion, including any that you reserve the right to offer into evidence at any hearing in this matter, specifically including (a) the identity of each person who purportedly "informed" Ms. Silvernail at the date and time you indicated in the May 20, 2011 motion, (b) please provide an explanation of the manner in which Ms. Silvernail was supposedly "informed that Ms. White's policy had been cancelled for non-payment as of February 7, 2009," (c) please indicate exactly what was said or related to Ms. Silvernail when she was supposedly "informed" on the date and time you indicated, and (d) please identify all documents, facts and other evidence showing that you (including any person acting on your behalf) purportedly "informed" Ms. Silvernail at the date and time you indicated.

ANSWER:

INTERROGATORY NO. 10. Please fully identify each individual you intend to call as an expert witness in this matter, and for each such witness, please state the individual's area of expertise and expert qualifications.

ANSWER:

INTERROGATORY NO. 11. As to each expert identified in your answer to the foregoing Interrogatory, please summarize the opinion or opinions such expert is expected to express and state the grounds for each such opinion.

ANSWER:

INTERROGATORY NO. 12. Please (a) identify each person you reserve the right to call as a witness in this matter, and (b) for each such person, please briefly indicate the matters on which they are expected to testify.

ANSWER:

INTERROGATORY NO. 13. Please identify all documents and other physical evidence you reserve the right to offer into evidence in this matter.

ANSWER:

FIRST REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1. Please produce true and correct copies of all documents and other pieces or items of information responsive to interrogatory number one above.

RESPONSE:

REQUEST FOR PRODUCTION NO. 2. Please produce true and correct copies of all of your documents that discuss your view as to whether you believe Gladys White had or may have had any cognitive impairment.

RESPONSE:

REQUEST FOR PRODUCTION NO. 3. Please produce true and correct copies of all documents and other pieces or items of information responsive to interrogatory number two above.

RESPONSE:

REQUEST FOR PRODUCTION NO. 4. Please produce true and correct copies of all of your documents that discuss your view as to whether you believe Gladys White had or may have had any loss of functional capacity.

RESPONSE:

REQUEST FOR PRODUCTION NO. 5. Please produce true and correct copies of all documents and other information responsive to interrogatory number six above.

RESPONSE:

OIC FIRST INTERROGATORIES
AND REQUESTS FOR PRODUCTION TO
ABILITY INSURANCE COMPANY - 9

REQUEST FOR PRODUCTION NO. 6. If, at any time prior to March 20, 2009, you provided Gladys White's WAC 284-54-253 designee with a copy of Ms. White's designation (which you asserted was attached as "Exhibit B" to the May 20, 2011 declaration of Virginia Nicholson), or otherwise advised or informed Ms. White's designee of that designation, please produce true and correct copies of all documents showing the same or supporting the same.

RESPONSE:

REQUEST FOR PRODUCTION NO. 7. Please produce true and correct copies of all documents and other pieces or items of information responsive to interrogatory number nine above.

RESPONSE:

REQUEST FOR PRODUCTION NO. 8. Please produce true and correct copies of all documents and other pieces or items of information responsive to interrogatory number thirteen above.

RESPONSE:

REQUEST FOR PRODUCTION NO. 9. Please produce a copy of the curriculum vitae of any expert whose identity is responsive to interrogatory number ten above.

RESPONSE:

As to objections, if any:

Dated this _____ day of _____, 2011.

SCHWABE WILLIAMSON & WYATT, P.C.

By _____
Christopher H. Howard, WSBA No. 11074
Virginia R. Nicholson, WSBA No. 39601

STATE OF _____ }
COUNTY OF _____ } ss.

_____, being first duly sworn in the manner prescribed in RCW 5.28
et seq., on oath deposes and says: That I am an authorized speaking agent for Ability Insurance
Company, that I have made the foregoing answers to interrogatories and responses to requests for
production, know the contents thereof, and believe same to be true and complete and made within
the scope of my speaking agent authority.

(Signed)

(Printed Name)

(Title)

SUBSCRIBED AND SWORN TO before me this _____ day of _____, 2008.

(Signature of Notary)

(Print or stamp name of Notary)

NOTARY PUBLIC in and for the State of _____

Residing at _____

My Appointment Expires: _____

CERTIFICATE OF MAILING

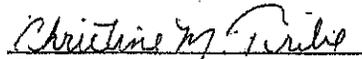
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION on the following individuals via US Mail.

Donald K. Lawler
Ability Insurance Company
P.O. Box 3735
Omaha NE 68103
(via US mail and email: dlawler@abilityre.net)

Christopher H. Howard and Virginia R. Nicholson
Schwabe, Williamson & Wyatt, P.C.
1420 5th Avenue #3400
Seattle WA 98401
(via US mail and email: VNicholson@SCWWABE.com and CHoward@SCHWABE.com)

SIGNED this 20th day of June, 2010, at Tumwater, Washington.



Christine M. Tribe, Paralegal

CERTIFICATE OF MAILING

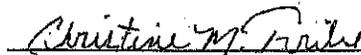
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SIGNED this 20th day of June, 2010, at Tumwater, Washington.



Christine M. Tribe, Paralegal

In re ABILITY INSURANCE COMPANY, Nos. 11-0088 and 11-0089

MOTION TO EXCLUDE TESTIMONY OF CRAIG BENNION

ATTACHED "EXHIBIT B"

RECEIVED

JUL 20 2011

INSURANCE COMMISSIONER
LEGAL AFFAIRS DIVISION

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
FIRST INTERROGATORIES AND
REQUESTS FOR PRODUCTION

Respondent Ability Insurance Company ("Ability") submits the following objections and responses to OIC's First Interrogatories and First Requests for Production of Documents.

GENERAL OBJECTIONS

1. Ability objects to these requests for production to the extent that they seek to place a higher obligation and burden on them than that which is contemplated or required under the applicable rules.
2. Ability objects to these discovery requests to the extent that they seek information that is subject to the attorney-client privilege, attorney work-product privilege, and/or any other applicable privilege.
3. Ability objects to these discovery requests to the extent that they seek Defendants or any third party's confidential or proprietary information.
4. Ability objects to these discovery requests to the extent they seek information that is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence.
5. Ability objects to these discovery requests to the extent that they are vague,

overly broad, and/or unduly burdensome.

6. Ability objects to OIC's non-cooperation regarding a discovery schedule in this matter. Notwithstanding this objection, Ability endeavors to respond to Plaintiffs' discovery without waiver of the objection.

7. Ability incorporates each and every one of these General Objections by reference into each and every specific response. A specific response to a request may repeat a General Objection for emphasis or some other reason. The failure to include any General Objection in any specific response shall not be interpreted as a waiver of any General Objection to that response.

FIRST INTERROGATORIES

INTERROGATORY NO. 1. Did you receive any proof, evidence, or other information suggesting that Gladys White had or may have had any cognitive impairment? Unless your answer is an unqualified "no," for such information received, please identify: (a) each such document or other piece or item of information that you received (including such items as medical records, verbal statements, letters, etc.), (b) when it was received, (c) the person with your company who received it, and (d) the person who provided it to you.

ANSWER:

Without waiving the objections below, Ability received the following:

- An evaluation from NationsCare Link, provided to Medico on August 1, 2007. The information was likely sent to the attention of Tie Vandyke.
- Claim for Gladys White, received on August 7, 2009 from Cheryl Silvernail
- Phone conversation between Sharon Klusaw and Cheryl Silvernail on September 15, 2009.
- October 2, 2009 medical records from Multicare received from Cheryl Silvernail Duplicates received October 28, 2009
- October 2, 2009 letter from Cheryl Silvernail. Duplicates received October 28, 2009.

Ability objects to this request as overly broad and burdensome as it is vague and unlimited as to time and scope. Ability objects to the use of the term cognitive impairment, as it is undefined. Ability further objects to this request as irrelevant; this matter regards policy and regulation interpretation and does not specifically apply to Gladys White, as stipulated by counsel.

INTERROGATORY NO. 2. Did you receive any proof, evidence, or other information suggesting that Gladys White had or may have had any loss of functional capacity? Unless your answer is an unqualified "no," for such information received, please identify: (a) each such document or other piece or item of information that you received (including such items as medical records, verbal statements, letters, etc.), (b) when it was received, (c) the person with your company who received it, and (d) the person who provided it to you.

ANSWER:

Without waiving the objections below, Ability received the following:

- An evaluation from NationsCare Link, provided to Medico on August 1, 2007. The information was likely sent to the attention of Tie Vandyke.
- Claim for Gladys White, received on August 7, 2009 from Cheryl Silvernail
- Phone conversation between Sharon Klusaw and Cheryl Silvernail on September 15, 2009.
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- October 2, 2009 letter from Cheryl Silvernail. Duplicates received October 28, 2009.

Ability objects to this request as overly broad and burdensome as it is vague and unlimited as to time and scope. Ability objects to the use of the term functional capacity, as it is undefined. Ability further objects to this request as irrelevant; this matter regards policy and regulation interpretation and does not specifically apply to Gladys White, as stipulated by counsel.

INTERROGATORY NO. 3. In your May 20, 2011 "Motion for Order to Cease and Desist" at page 3 lines 1-2 and page 4 lines 21-22, citing a series of documents attached as "Exhibit C" to the May 20, 2011 declaration of Virginia Nicholson, you asserted that "[b]oth Ms. White and Ms. Silvernail properly received notice of non-payment," and "Ms. White was provided the proper notices and Ms. Silvernail was also warned of the potential cancellation of the policy for non-payment." Please identify all documents, facts and other evidence that supports these assertions, including any that you reserve the right to offer into evidence at any hearing in this matter, specifically including (a) the identity of each person who purportedly provided each such "notice" or "warning" or has personal knowledge of the same, and (b) an identification and listing of all documents, facts and other evidence showing the date and manner (e.g., via US mail, telephone, etc.) that each such "notice" or "warning" was purportedly provided.

ANSWER:

Note that this request is duplicative to information already obtained by the OIC and

OIC FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION TO
ABILITY INSURANCE COMPANY - 3

already provided in this matter. The following notices were sent:

- Premium Notice to Gladys White sent via U.S. Mail on January 90, 2009
- Past Due Notice to Gladys White sent via U.S. Mail on February 19, 2009
- Reinstatement Notice to Gladys White sent via U.S. Mail on March 20, 2009
- Third Party Notice to Cheryl Silvernail sent via U.S. Mail on March 20, 2009

These notices are automatically generated.

INTERROGATORY NO. 4. Do you contend you were not provided with any "proof of [insured Gladys White's] cognitive impairment," as referred to in WAC 284-54-253(2)? Unless your answer is an unqualified "no," please provide the basis for your answer.

ANSWER:

Without waiving the objections below, see attached claims file.

Ability objects to this request as argumentative and calling for a legal conclusion; thus, it is not a proper subject matter for discovery. Ability objects to this request as burdensome as it is duplicative of Interrogatory No. 1. Ability further objects to this request as irrelevant; this matter regards policy and regulation interpretation and does not specifically apply to Gladys White, as stipulated by counsel.

INTERROGATORY NO. 5. Do you contend you were not provided with any "proof of [insured Gladys White's] loss of functional capacity," as referred to in WAC 284-54-253(2)? Unless your answer is an unqualified "no," please provide the basis for your answer.

ANSWER:

Without waiving the objections below, see attached claims file.

Ability objects to this request as argumentative and calling for a legal conclusion; thus, it is not a proper subject matter for discovery. Ability objects to this request as burdensome as it is duplicative of Interrogatory No. 2. Ability further objects to this request as irrelevant; this matter regards policy and regulation interpretation and does not specifically apply to Gladys White, as stipulated by counsel.

INTERROGATORY NO. 6. As to the notice required by WAC 284-54-253(1)(a) with respect to insured Gladys White and her designee, please identify: (a) the specific date on which the notice was actually mailed to the insured's designee, (b) the person(s) who mailed it on your behalf, and (c) any records, logs, entries, or other documents in your possession, custody, or control showing proof of the specific date the notice was actually

mailed and the person(s) who mailed it.

ANSWER:

Ability objects to this request as duplicative to information already obtained by the OIC and already provided in this matter. Notwithstanding this objection, see answer to Interrogatory No. 3. In addition, see letter to the OIC from Don Lawler with attached billing history.

INTERROGATORY NO. 7. Please identify all contact information (including telephone numbers) for Gladys White's WAC 284-54-253(1) designee that existed in any records (electronic or otherwise) within your possession, custody, or control on or before March 20, 2009.

ANSWER:

Without waiving the objections below, see Answer to Interrogatory No. 6. Ability objects to this request as burdensome because it is duplicative. Gladys White's designee information has been previously provided.

INTERROGATORY NO. 8. At any time prior to March 20, 2009, did you ever provide Gladys White's WAC 284-54-253 designee with a copy of Ms. White's designation (which you asserted was attached as "Exhibit B" to the May 20, 2011 declaration of Virginia Nicholson), or otherwise advise or inform Ms. White's designee of that designation? Unless your answer is an unqualified "no," please explain your answer fully, including an explanation of how and when you so advised or informed the designee, and an identification of the person(s) who did this on your behalf.

ANSWER:

Without waiving the objections below, no.

Ability objects to this request as argumentative as implying there is such a requirement that does not appear in the WAC. Thus, it is not a proper subject matter for discovery.

INTERROGATORY NO. 9. In your May 20, 2011 "Motion for Order to Cease and Desist" at page 3 lines 12-13, without citing any allegedly supportive documents, you asserted that on August 6, 2009, "Ms. Silvernail was again informed that Ms. White's policy had been cancelled for non-payment as of February 7, 2009." Please identify all documents, facts and other evidence that supports this assertion, including any that you reserve the right to offer into evidence at any hearing in this matter, specifically including (a) the identity of each person who purportedly "informed" Ms. Silvernail at the date and

time you indicated in the May 20, 2011 motion, (b) please provide an explanation of the manner in which Ms. Silvernail was supposedly "informed that Ms. White's policy had been cancelled for non-payment as of February 7, 2009," (c) please indicate exactly what was said or related to Ms. Silvernail when she was supposedly "informed" on the date and time you indicated, and (d) please identify all documents, facts and other evidence showing that you (including any person acting on your behalf) purportedly "informed" Ms. Silvernail at the date and time you indicated.

ANSWER:

Without waiving the objections, below, see Answer to Interrogatory No. 3 and the attached claims file.

Ms. Silvernail was informed on March 20, 2009 via the Third Party Notice.

Ms. White was informed on August 31, 2009 via letter.

Ms. Silvernail was called and informed on September 15, 2009.

Ability objects to this request as argumentatively phrased. Ability objects to the extent this request is asking Ability to state evidence upon which he intends to rely to prove any fact or facts. *Weber v. Biddle*, 72 Wn.2d 22, 29 (1967) ("However, the opposing party cannot be required to put on a dress rehearsal of the trial. While it is proper to elicit information as to evidentiary facts as contrasted with ultimate facts, nevertheless it is improper to ask a party to state evidence upon which he intends to rely to prove any fact or facts."). Ability objects to the extent that this request calls for information protected by attorney work product.

INTERROGATORY NO. 10. Please fully identify each individual you intend to call as an expert witness in this matter, and for each such witness, please state the individual's area of expertise and expert qualifications.

ANSWER:

Mr. Craig Bennion. Mr. Bennion is an attorney whose practice focuses on insurance coverage. He concentrates his practice on insurance coverage and declaratory judgment litigation, appellate work, and alternative dispute resolution. His insurance coverage background spans 28 years experience in analyzing insurance policies and claims, in both first-party property and third-party liability areas. He represents leading national and regional insurers and self-insured risk pools.

INTERROGATORY NO. 11. As to each expert identified in your answer to the foregoing Interrogatory, please summarize the opinion or opinions such expert is expected to express and state the grounds for each such opinion.

ANSWER:

Mr. Bennion has not yet completed his review of this matter. Ability will provide this information pursuant to the case schedule in this matter or via agreement between the

parties.

INTERROGATORY NO. 12. Please (a) identify each person you reserve the right to call as a witness in this matter, and (b) for each such person, please briefly indicate the matters on which they are expected to testify.

ANSWER:

Ability will provide a witness list pursuant to the case schedule in this matter or via agreement between the parties.

INTERROGATORY NO. 13. Please identify all documents and other physical evidence you reserve the right to offer into evidence in this matter.

ANSWER:

Ability will provide an exhibit list pursuant to the case schedule in this matter or via agreement between the parties.

FIRST REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1. Please produce true and correct copies of all documents and other pieces or items of information responsive to interrogatory number one above.

RESPONSE:

See attached claims file.

REQUEST FOR PRODUCTION NO. 2. Please produce true and correct copies of all of your documents that discuss your view as to whether you believe Gladys White had or may have had any cognitive impairment.

RESPONSE:

Without waiving the following objection, see attached claims file. Ability objects to this request to the extent it calls for attorney work product or any attorney-client privileged information.

OIC FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION TO
ABILITY INSURANCE COMPANY - 7

REQUEST FOR PRODUCTION NO. 3. Please produce true and correct copies of all documents and other pieces or items of information responsive to interrogatory number two above.

RESPONSE:

See attached claims file.

REQUEST FOR PRODUCTION NO. 4. Please produce true and correct copies of all of your documents that discuss your view as to whether you believe Gladys White had or may have had any loss of functional capacity.

RESPONSE:

See attached claims file.

REQUEST FOR PRODUCTION NO. 5. Please produce true and correct copies of all documents and other information responsive to interrogatory number six above.

RESPONSE:

See attached claims file.

REQUEST FOR PRODUCTION NO. 6. If, at any time prior to March 20, 2009, you provided Gladys White's WAC 284-54-253 designee with a copy of Ms. White's designation (which you asserted was attached as "Exhibit B" to the May 20, 2011 declaration of Virginia Nicholson), or otherwise advised or informed Ms. White's designee of that designation, please produce true and correct copies of all documents showing the same or supporting the same.

RESPONSE:

N/A; see Response to Interrogatory No. 8.

REQUEST FOR PRODUCTION NO. 7. Please produce true and correct copies of all documents and other pieces or items of information responsive to interrogatory number nine above.

RESPONSE:

See attached claims file.

REQUEST FOR PRODUCTION NO. 8. Please produce true and correct copies of all documents and other pieces or items of information responsive to interrogatory number thirteen above.

RESPONSE:

N/A; see Response to Interrogatory No. 13.

REQUEST FOR PRODUCTION NO. 9. Please produce a copy of the curriculum vitae of any expert whose identity is responsive to interrogatory number ten above.

RESPONSE:

See attached.

As to objections, if any.

Dated this 19th day of July, 2011.

SCHWABE WILLIAMSON & WYATT, P.C.

By Virginia R. Nicholson
Christopher H. Howard, WSBA No. 11074
Virginia R. Nicholson, WSBA No. 39601

STATE OF _____ }
COUNTY OF _____ } ss.

_____, being first duly sworn in the manner prescribed in RCW 5.28 *et seq.*, on oath deposes and says: That I am an authorized speaking agent for Ability Insurance Company, that I have made the foregoing answers to interrogatories and responses to requests for production, know the contents thereof, and believe same to be true and complete and made within the scope of my speaking agent authority.

_____ (Signed)

_____ (Printed Name)

_____ (Title)

SUBSCRIBED AND SWORN TO before me this ____ day of _____, 2008.

(Signature of Notary)

(Print or stamp name of Notary)

NOTARY PUBLIC in and for the State of _____

Residing at _____

My Appointment Expires: _____

CERTIFICATE OF MAILING

I hereby certify that on the 19 day of July, 2011, I caused to be served the foregoing FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION on the following party at the following address:

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

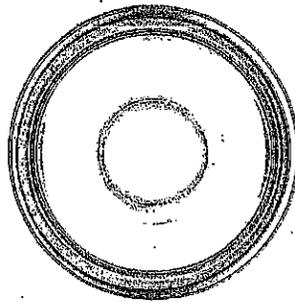
by:

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<input type="checkbox"/>

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) _____

Tanya Garbell
Tanya Garbell

**In the Matter of Ability
Insurance Company**



**Ability's Response to OIC 1st
Discovery Requests**