

THE STATE OF WASHINGTON  
OFFICE OF THE INSURANCE COMMISSIONER

FILED

5-27-11

In the Matter of

ABILITY INSURANCE COMPANY,

An Authorized Insurer and Respondent

Docket Nos. 11-0088 and 11-0089

OIC'S RESPONSE AND  
OPPOSITION TO ABILITY  
INSURANCE COMPANY'S MOTION  
FOR STAY OF CEASE AND DESIST  
ORDER

Records Unit, DIC  
Patrick D. Petersen  
Director

**I. INTRODUCTION**

Ability Insurance Company ("Ability" or the "Company") seeks a stay of Order to Cease and Desist No. 11-0088 ("Order"). This Order essentially instructs the Company to comply with the law, and to stop violating the law. Without setting forth any governing stay standard, the Company argues (a) that it is entitled to a stay because its "interpretation" is correct and the "interpretation" of the Washington State Office of the Insurance Commissioner ("OIC") is supposedly "strained," (b) that OIC has no grounds to even issue such an order in the first place, and (c) that it will be irreparably harmed if it has to construe the lapse date the way the law says – give impacted Washington consumers as little as 30 more days of premium nonpayment notification before their policies lapse.

But the Company is wrong. None of its arguments for stay have evidentiary support. Ability also fails to satisfy the showing needed to warrant a stay. In fact, the Company's arguments are even contrary to the facts and contrary to the law.

OIC correctly found that Ability violated the Washington Insurance Code ("Code") during its insurance transactions with one of its 88-year-old Washington long-term care insureds who failed to timely submit her premium payment for the first time in nearly a decade. Since OIC also learned that Ability would apparently continue to violate the Code in this way, placing more Washington insureds at risk of substantial harm to Ability's other Washington insureds, OIC properly exercised its authority to issue its Order.

Ability's stay motion should be denied.



1 Nicholson Exh. B, the insured's daughter had moved. Decl. Singer Exh. A. The insured's  
2 daughter was never called via telephone to advise her that her mother's policy had not been  
3 paid, and the insured's daughter never received any March 20, 2009 notice of non-payment of  
4 premium by her mother under her mother's policy with Ability. *Id.* The first time the  
5 insured's daughter learned about the nonpayment was September 9, 2009, when she went to  
6 her mother's vacated home to collect her mother's mail. Decl. Silvernail; Decl Singer Exh. A.

7 In November 2009, among other times, the insured's daughter requested the Company  
8 reconsider its decision to refuse to cover claims for her post-July 2009 required care. Decl.  
9 Singer Exh. A. The Company refused. *See, e.g.,* Decl. Singer Exh. B.<sup>1</sup>

10 Today the insured is thankfully in an assisted living home in which she feels  
11 comfortable. Decl. Silvernail. However, since her fall in July 2009, she and her family have  
12 had to use the insured's savings and retirement annuities to pay for this care because Ability  
13 has not provided the coverage. *Id.* Prior to their mother's July 2009 injury, the insured's  
14 daughter and other siblings had been laboring under the impression that the long-term care  
15 insurance which their mother purchased would cover some of her care, but Ability has refused  
16 to provide the coverage. *Id.* The insured's daughter has spent countless hours working on  
17 this matter, in addition to working at a full time job. *Id.* Still, Ability has refused to provide  
18 the coverage. *Id.* The insured's daughter and the rest of her family have experienced an  
19 inordinate amount of stress and frustration during this painful process of trying to get the  
20 insurance company to pay the coverage for which my mother had contracted. *Id.*

21 According to the Schedule T page in Ability's 2010 Annual Statement filing, the  
22 company reported to state insurance regulators that it wrote \$3,537,225.00 in premiums in  
23 Washington in the year 2010. This is Ability's sixth largest premium volume of all the 44  
states the company does business in. Decl. Lee.

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<sup>1</sup> The Company has, however, agreed it would be liable for any Code violations. Decl. Singer Exh. C.

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#### IV. ARGUMENT

**A. The Washington Insurance Code authorized OIC to issue the Order, and OIC properly issued the Order.**

Washington's "unintentional lapse" rule, which pertains to long-term care policies like the ones referenced in the Order, requires insurers like Ability to permit their insureds' WAC 284-54-253(1) designees to "receive" notice that "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." WAC 284-54-253(1)(a). Ability does not dispute that this provision applies here,<sup>2</sup> and it contends that, in the case of the insured referred to in the Order, it mailed a letter providing what it believes constituted this WAC 284-54-253(1)(a)-compliant notice. This letter was purportedly sent to this insured's WAC 284-54-253(1) designee no sooner than March 20, 2009. *See* March 20, 2009 letter included in Exh. C to Decl. Nicholson.<sup>3</sup>

Ability contends "the five month unintended lapse period [...] begin[s] on the Term of Coverage date," not the actual date when it sent its March 20, 2009 WAC 284-54-253(1)(a) notice, or on some other date thereafter. Ability believes "[c]onsistency is key,"<sup>4</sup> yet rather than having sent a notice that properly represented to the insured and her WAC 284-54-253(1) designee that the policy "will not lapse until at least thirty days after the notice is mailed to the insured's designee," the Company sent one believing that, regardless of what the notice actually said, the insured's contract had really already lapsed more than a month before March

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<sup>2</sup> Despite the fact that Ability's Motion fails to make any reference to the insured's cognitive impairment or to the insured's loss of functional capacity, since Ability does not dispute the application of these provisions, which, as WAC 284-54-253 makes clear, only apply to unintentional lapse "by a person with a cognitive impairment or loss of functional capacity," Ability also does not dispute that the insured has had a cognitive impairment and has had a loss of functional capacity under these provisions.

<sup>3</sup> However, as the insured's WAC 284-54-253(1) designee and daughter had moved, and the Company never called her, despite having her telephone number, the insured's WAC 284-54-253(1) designee and daughter never received this letter that was purportedly mailed to her old address, and did not learn of the Company's position as to the policy lapse until September of 2009. Decl. Singer Exh. A; Decl. Silvernail.

<sup>4</sup> See Ability motion at page 5 lines 13-14.

1 20, 2009 – on February 7, 2009, the initial premium due date. WAC 284-54-253(1)(a).  
2 (Emphasis added.)

3 Ability's position that WAC 284-54-253(2)'s "five-month right to reinstatement  
4 period ended on July 7, 2009"<sup>5</sup> is the same as it was before OIC issued the Order: that "the  
5 lapse date reverts back." See Decl. Singer Exh B. This position and the Company's actions  
6 demonstrate that Ability is violating and will continue to violate the law as expressed in the  
7 Insurance Code and rules duly enacted thereunder, including WAC 284-54-253. In such  
8 situations, the Code authorizes OIC to "issue a cease and desist order," since Ability "is  
9 violating or is about to violate any provision of this code or any regulation or order of the  
10 commissioner." RCW 48.02.080(3)(a).<sup>6</sup> Based on faulty assertions as to why it believes the  
11 Order was or was not issued, Ability mistakenly contends that there was "not a proper basis  
12 for a Cease and Desist Order."<sup>7</sup> But as indicated, the Order was issued because the Company  
13 is violating and would only continue to violate the law.

14 While Ability's motion for stay emphasizes its "bargained for" expectancy, argues that  
15 "Ability carefully complies with the language of the WAC,"<sup>8</sup> and points to contract terms and  
16 principles that it thinks demonstrate why its insured is undeserving of the coverage she timely  
17 paid for since 1999, Ability's motion does not mention all of the rules, laws, and principles  
18 that deserve consideration here. For example, and perhaps with RCW 48.01.030 in mind, it is  
19 noteworthy that the Legislature began the Chapter of law under which the subject  
20 unintentional lapse rules arose with this broad "public interest" intent declaration as to long-

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20 <sup>5</sup> See Ability Motion at page 4 line 23.

21 <sup>6</sup> Ability also does not appear to dispute the OIC's authority to simultaneously, or arising out of the same matter,  
22 issue a cease and desist order under RCW 48.02.080(3)(a) and a suspension order and a fine, under RCW  
23 48.05.140, RCW 48.05.185, and other pertinent Code provisions in the manner it did and/or sought to here.

22 <sup>7</sup> See Ability Motion at page 7.

23 <sup>8</sup> Ability's motion appears to include a typographical error. It repeatedly references the unintentional lapse rule  
as "WAC 284-54-283." (Emphasis added.) Presumably, the Company intended "WAC 284-54-253" instead.

1 term care insureds: “[t]his chapter shall be liberally construed to promote the public interest in  
2 protecting purchasers of long-term care insurance from unfair or deceptive sales, marketing,  
3 and advertising practices.” RCW 48.84.010. It is also noteworthy that the unintentional lapse  
4 rules mirror this declaration, emphasizing that its requirements are “minimum standards,” and  
5 that their enactment does not prevent insurers like Ability from “including benefits more  
6 favorable to the insured.” WAC 284-54-253. Likewise, WAC 284-54-800 establishes  
7 prohibitions against specific unfair or deceptive long term care insurance-related acts that are  
8 also “minimum standards which insurers should meet with respect to long term care.” These  
9 include fairly basic and important principles like not misrepresenting pertinent facts or  
10 insurance contract provisions to insureds, and not promptly and reasonably explaining to  
11 insureds the basis in the contract under the facts and law for coverage denials. *See* WAC 284-  
12 30-800(1) and WAC 284-30-800(9). Such laws would seem to form an important backdrop  
13 against which the subject unintentional lapse rule provisions should eventually be reviewed  
14 when this matter is ultimately decided after hearing.

15 Ability’s motion cites inapplicable cases like *Coventry Assoc. v. Am. States. Ins. Co.*,  
16 136 Wn.2d 269, 961 P.2d 933 (1998) and *Saunders v. Lloyd’s of London*, 113 Wn.2d 330,  
17 779 P.2d 249 (1989), but these do not help in evaluating Ability’s conduct here. In *Saunders*,  
18 not only was property damage from a tree fall under an entirely different kind of policy at  
19 issue, the issue before the Court was whether estoppel, waiver, and Consumer Protection Act  
20 (“CPA”) tort claims were well-founded. *Saunders* dealt with none of the long-term care  
21 policy and practice requirements at issue here. *Coventry* is no different. In *Coventry*, the  
22 Court struggled with whether an insured may bring a bad faith or CPA claim against its  
23 insurer when the insurer conducted a bad faith investigation of the insured’s claim but the  
denial of coverage was ultimately determined to be correct. No long-term care contract rules  
or practices were at stake. While those cases did involve insurance contracts and insurance  
companies, that’s the only similarity – they are otherwise inapposite.

1 Ability's motion cites *Saunders* and *Coventry* for the principle that a contract and  
2 premium receipt will generally guide when there will and will not be coverage, but much  
3 more pertinent principles were discussed in the recent published Division I Court of Appeals  
4 decision, *Bushnell v. Medico Ins. Co. et al*, 159 Wn. App. 874, 246 P.3d 856 (2011).  
5 *Bushnell*, coincidentally, dealt with the very same company whose conduct is at issue here —  
6 Medico Insurance Company ("Medico").<sup>9</sup> (See pages 14-16 of Exh. A to Decl. Nicholson,  
7 showing the name change to Medico.) Additionally, Medico's President, Timothy Hall,  
8 appears to have signed (if not by autopen) the same previously mentioned March 20, 2009  
9 Ability notice in this matter, as well as other notices. See Exh. C to Decl. Nicholson.

10 In *Bushnell*, not unlike the instant case, the Company issued a policy of coverage to a  
11 Washington long-term care insured. Like the case of the insured described in the Order, the  
12 insured in *Bushnell* had timely paid renewal premiums for many, many years, only to find that  
13 when the policy was actually needed, the Company refused coverage. *Bushnell*, 159 Wn.  
14 App. at 878-79. Also relevant to the instant matter, the policy in *Bushnell* included the same  
15 "Conformity With State Statutes" provision that says: "[t]he provisions of the policy must  
16 conform with the laws of the state in which you reside on the Policy Date. If any do not, this  
17 clause amends them so that they do conform." See *Bushnell*, 159 Wn. App at 884-85, and  
18 Decl. Nicholson Exh. A at page 12. Other pertinent principles from *Bushnell* include:

- 19 • "Insurance policies are liberally construed to provide coverage wherever  
20 possible." *Bushnell* at 882, citing *Bordeaux, Inc. v. Am. Safety Ins. Co.*, 145  
21 Wn. App. 687, 694, 186 P.3d 1188 (2008).
- 22 • "If any ambiguity exists, the language of the policy must be construed in favor  
23 of the insured." *Bushnell* at 882, citing *Bordeaux*, 145 Wn. App. at 694.
- Citing RCW 48.18.130(2), the *Bushnell* Court noted that the Insurance Code  
provides that "[n]o insurance contract shall contain any provision inconsistent

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<sup>9</sup> The insured's policy was apparently originally issued in 1999 by Mutual Protective Insurance Company ("MPIC"). Later MPIC's name changed to Medico, and subsequently Ability assumed this policy. Ability has agreed that it would be responsible for any insurance code violations at issue here. See Decl. Singer Exh. C.

1 with or contradictory to any such standard provision used or required to be  
2 used.” *Bushnell* at 882-83.

3 Additionally, while the Company’s motion for stay argues that the insured’s coverage lapsed  
4 before what the Company calls a “76-day grace period,”<sup>10</sup> in *Bushnell* the Company appear to  
5 raise the same argument – that the coverage supposedly “lapsed” on the last date of the term  
6 for which the last premium payment was made. *Bushnell* at 888. The *Bushnell* Court  
7 specifically rejected this, and went on to hold that “coverage did not lapse until after the grace  
8 period.” *Id.* (Emphasis added.)

9 As all of this reveals, OIC properly concluded that Ability violated the Code. It points  
10 to contract provisions in its policy that it claims trump the language of WAC 284-54-253, yet  
11 its policy has a provision to make the WA supercede those provisions. The Company  
12 attempts to argue that its “interpretation” is good, but that’s irrelevant to whether OIC’s  
13 “interpretation” made sense. But as a matter of fact, Ability’s claim that it has complied with  
14 the law is incorrect. Its notice sent failed to comply with the requirements of WAC 284-54-  
15 253(1)(a). Nor did the insured’s WAC 284-54-253(1) designee ever get it – she had moved.  
16 And despite the fact that the Company’s records had the insured’s WAC 284-54-253(1)  
17 designee’s phone number, knew of the importance of the matter, and the Company has even  
18 called other insureds in similar situations, the Company never chose to call the insured’s  
19 WAC 284-54-253(1) designee of the nonpayment. Nor did its representative tell her when she  
20 called to make a claim in August 2009. Instead of conceding that the insured’s WAC 284-54-  
21 253(1) designee had contacted the Company well within the time period under WAC 284-54-  
22 253, the Company resorted to an untenable date-counting position which has resulted in the  
23 insured and her family suffering stress and the need to cash in the insured’s remaining assets.  
Given the large premium volume Ability does in Washington when combined with Ability’s  
violation of the law and insistence that doing its business that way is acceptable, it is clear

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<sup>10</sup> See Ability motion at page 6 line 6.

1 why OIC issued its Order – well within its authority – to instruct the Company to herewith  
2 comply with the law, stop violating the law, and cease and desist from doing so again with  
3 other Washington insureds. Ability’s claim that OIC had no basis to act is itself baseless.

4 **B. The Company fails to present grounds for a stay of the Order, and a balancing of  
the interests involved should be found to strongly weigh against any stay.**

5 While the Company’s motion for a stay fails to set forth any legal standards it believes  
6 would govern its stay request, our United States Supreme Court long ago observed that a stay  
7 “is not a matter of right, even if irreparable injury might otherwise result to the appellant.”

8 *Virginian R. Co. v. United States*, 272 U.S. 658, 672, 47 S. Ct. 222, 71 L. Ed. 463 (1926).

9 One United States Supreme Court case suggests four factors should be considered by a court  
in deciding whether a stay should be issued:

10 (1) whether the stay applicant has made a strong showing that he is likely to succeed  
11 on the merits;

12 (2) whether the applicant will be irreparably injured absent a stay;

13 (3) whether issuance of the stay will substantially injure the other parties interested in  
14 the proceeding; and

15 (4) where the public interest lies.

16 *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987). A request  
17 for a stay also seems akin to a request in a court action for a preliminary injunction, the  
18 requirements for which are summarized in the Washington Supreme Court case *Kucera v.*  
*Department of Transportation*, 140 Wn.2d 200, 209-210, 995 P.2d 63 (2000):

19 An injunction is distinctly an equitable remedy and is “frequently termed ‘the strong  
20 arm of equity,’ or a ‘transcendent or extraordinary remedy,’ and is a remedy which  
21 should not be lightly indulged in, but should be used sparingly and only in a clear and  
22 plain case.” 42 Am. Jur. 2d Injunctions sec. 2, at 728 (1969) (footnotes omitted).  
Accordingly, injunctive relief will not be granted where there is a plain, complete,  
speedy and adequate remedy at law. *State v. Ralph Williams’ N.W. Chrysler*  
*Plymouth, Inc.*, 87 Wn. 2d 298, 312, 553 P.2d 423 (1976).

23 The applicable requirements for issuance of a preliminary injunction are well settled:  
“One who seeks relief by temporary or permanent injunction must show (1) that he

1 has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate  
2 invasion of that right, and (3) that the acts complained of are either resulting in or will  
3 result in actual and substantial injury to him.” Since injunctions are addressed to the  
4 equitable powers of the court, the listed criteria must be examined in light of equity  
5 including balancing the relative interests of the parties and, if appropriate, the interests  
6 of the public. *Tyler Pipe Indus., Inc. v. Department of Revenue*, 96 Wn.2d 785, 792,  
638 P.2d 1213 (1982) (quoting *Port of Seattle v. International Longshoremen’s &  
Warehousemen’s Union*, 52 Wn.2d 317, 319, 324 P.2d 1099 (1958); see also RCW  
7.40.020 (grounds for issuance of preliminary injunction). (footnote omitted.) If a  
party seeking a preliminary injunction fails to establish any one of these requirements,  
the requested relief must be denied. *Washington Fed’n*, 99 Wn.2d at 888.

7 Applying these principles yields several compelling reasons for denying the Company’s stay  
8 request.

9 Under the first of the *Hilton* elements, Ability has not made “a strong showing” that  
10 they are “likely to succeed on the merits.” Here, the merits are, primarily, whether Ability’s  
11 practices and acts violate the Code. But Ability’s motion concedes to there being at least two  
12 different “interpretations”: the Company’s and OIC’s. Consistent with its mission to protect  
13 Washington consumers first, OIC ‘interpreted’ the statutes and rules in favor of the insured.  
14 Ability’s ‘interpretation’ favors itself alone, arguing that doing other than what its  
15 “interpretation” says just isn’t what it “bargained for.” See Ability motion at page 6 line 1.  
16 But the fact that there are, according to Ability, at least, two interpretations, here means that  
17 there is clearly not a strong showing of a likelihood of Ability prevailing on the merits. As  
18 noted earlier, the Code and rules are expressly incorporated into Ability’s policy via its  
19 “Conformity With State Statutes” provision. In addition, Washington law makes clear that  
20 OIC’s ‘interpretation’ is entitled to greater weight than the Company’s. This means that if  
21 there is any ambiguity in the language of the policy – i.e., two different ‘interpretations’ –  
22 then Washington courts are required to choose the ‘interpretation’ that is “in favor of the  
23 insured.” *Bushnell* at 882, citing *Bordeaux*, 145 Wn. App. at 694. Yet, even if this weren’t  
the law, Ability’s ‘interpretation’ also doesn’t make sense here. First, it flies in the face of the  
various, aforementioned public interest proclamations contained in the Code and rules. But it  
also flies in the face of the plain language of WAC 284-54-253(1)(a), which requires that the

1 notice “shall provide that the contract or certificate will not lapse until at least thirty days after  
2 the notice is mailed to the insured’s designee.” WAC 284-54-253(1)(a). This language  
3 simply requires something other than what the Company says and did. Moreover, the  
4 *Bushnell* Court has already – and quite recently – apparently rejected Ability’s  
5 ‘interpretation,’ concluding that “coverage did not lapse until after the grace period.”  
6 (Emphasis added.) *Bushnell* at 888. Clearly, this all shows that Ability has not made “a  
7 strong showing” that the Company is “likely to succeed on the merits.”

8 Another reason to deny the stay lies in an application of the first part of the  
9 Washington test for granting injunctive relief. Under *Kucera* a court should deny a stay if the  
10 Company has “a plain, complete, speedy and adequate remedy at law.” Here, Ability does. It  
11 will receive its hearing. *Kucera* thus instructs that, on this ground alone, the Company’s stay  
12 request “will not be granted.” *Kucera*, 140 Wn.2d at 209, citing *State v. Ralph Williams’*  
13 *N.W. Chrysler Plymouth, Inc.*, 87 Wn. 2d 298, 312, 553 P.2d 423 (1976).

14 As to the *Tyler Pipe* elements in *Kucera*, these too ditate against a stay. Even  
15 assuming the Company meets the first one (“a clear legal or equitable right”), the Company  
16 also has given no evidence to prove the second element – a “well-grounded fear of immediate  
17 invasion of that right,” nor has it given any evidence to prove the third element – that not  
18 staying the Order “will result in actual and substantial injury.”<sup>11</sup> While the Company’s  
19 motion speculates (*see* pages 7 and 8) that a number of calamitous events will most certainly  
20 transpire if the Order is not stayed – things like “provid[ing] more coverage than is required,”  
21 the sheer oppression of having to provide “more notice,” reinstatement of an untold volume of  
22 policies, and vast litigation, so vast that the Company will most certainly be forced to “incur  
23 significant expense initiating declaratory relief actions.” But where is the evidence to support  
any of these complaints? The answer is, there is none – the Company supplied no evidence to  
support any of these dire predictions. Moreover, it begs the question of whether the incurring

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<sup>11</sup> This test for “injury” resembles the second and third elements of the *Hilton* test as well.

1 of expenses alone could be either “substantial” or “irreparable” injury? No, is the answer, at  
2 least according to the lack of evidence to show any. Ability’s motion is unaccompanied by  
3 any of the evidence that is necessary to even attempt to persuade what amounts of actuarially-  
4 demonstrable losses would supposedly result from compliance with the law under the Order.<sup>12</sup>  
5 Ability gives no proof – only argument of counsel – why any such alleged declaratory action  
6 or litigation would maybe happen, perhaps, nor does it give any evidence to prove what  
7 related expenses would follow and how such expenses would cause “substantial” and  
8 “irreparable” injury. And as the *Kucera* Court concluded, when a moving party “fails to  
9 establish any one of these requirements, the requested relief must be denied.” *Kucera*, 140  
10 Wn. 2d at 210, citing *Washington Fed’n of State Employees v. State*, 99 Wn.2d 878, 888, 665  
P.2d 1337 (1983). (Emphasis added.)

11 Both the *Hilton* and *Kucera* tests also suggest that a weighing of the interests involved  
12 should occur – including “where the public interest lies.” Here too lie yet further reasons to  
13 deny a stay of the Order. First, the public interest lies squarely with OIC’s ‘interpretation.’  
14 While RCW 48.01.030 and RCW 48.84.010 clearly and unequivocally make the “public  
interest” the OIC’s prime consideration, the Company appears not to share this.

15 A weighing of the relative harms also dictates against a stay. Here, Ability does more  
16 than \$3 and a half million annually in premium. Decl. Lee. That’s a lot of Washington  
17 insureds that could be impacted by the Company’s “interpretation.” On the other hand, the  
18 already-harmed insured and her family have demonstrably suffered tremendously.  
19 Frustration, anxiety, stress, cashing in of assets – all based in the Company’s determination to  
20 deny coverage. See Decl. Silvernail. While granting a stay and allowing the Company to  
21 continue its ‘interpretation’ could cause devastating harm to Ability’s Washington insureds

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23 <sup>12</sup> Like any order in any adjudicative proceeding, an order granting a stay must be based on substantial supporting evidence in the record. See RCW 34.05.570(3)(e); *Superior Asphalt & Concrete Co. v. Dep’t of Labor & Indus.*, 112 Wn. App. 291, 296, 49 P.3d 135 (2002).

1 (see, e.g., Decl. Silvernail; Decl. Lee), Ability's claimed "immediate harm"<sup>13</sup> and claim that  
2 Ability "would be irreparably harmed"<sup>14</sup> is, by comparison, entirely unproven.<sup>15</sup> As  
3 indicated, no evidence submitted supports these claims.

4 *Kucera* also instructs that equity requires a "balancing [of] the relative interests of the  
5 parties and, if appropriate, the interests of the public." *Kucera*, 140 Wn. 2d at 209-10. (Cites  
6 omitted.) Applying *Kucera*'s balancing of interests here, too, as just explained, strongly  
7 dictates against any stay. Ability's interests are weakened by the Company's failure to  
8 present any evidence to support its asserted "immediate" and "irreparable" harms. On the  
9 other hand, the above-cited laws and other evidence presented supports a finding that a  
10 potentially large number of Ability's Washington insureds have very clear and tangible  
11 interests.<sup>16</sup> Without question, these are the same "public" interests that the OIC is charged  
12 with protecting under laws like RCW 48.01.030 and RCW 48.84.010 – interests that, given  
13 the facts and the law presented, should be found to outweigh the Company's interests for  
14 purposes of this stay request. The potential harm to Washington consumers would be just like  
15 the devastating harm that one Washington insured has already suffered. *See* Decl. Silvernail.  
16 Any harm to the Company, on the other hand, is entirely unknown, unquantified, and  
17 unsupported by any evidence. Taken together, all of this weighs very much against a stay.

## 18 V. CONCLUSION

19 <sup>13</sup> See Ability's motion at page 1 line 23.

20 <sup>14</sup> See Ability's motion at page 8, line 2.

21 <sup>15</sup> This principle, that the moving party or party seeking a stay bears the burden of presenting evidence to show  
22 and prove that the circumstances justify an exercise of that discretion, is one that appears to have also been long  
23 recognized by the United States Supreme Court. *See, e.g., Clinton v. Jones*, 520 U.S. 681, 708, 117 S. Ct. 1636,  
137 L. Ed. 2d 945 (1997); *Landis v. North American Co.*, 299 U.S. 248, 255, 57 S. Ct. 163, 81 L. Ed. 153  
(1936).

<sup>16</sup> According to Annual Statement filings made by Ability for the year 2010, there would appear to be many,  
many other Washington insureds that could be impacted. The company writes more premium in Washington  
than in nearly all of the other 43 states in which it also writes long-term care insurance; Washington's reported  
premium volume ranks sixth overall. *See* Decl. Lee.

