

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 2011 SEP 16 5 35

OIC'S SUPPLEMENTAL HEARING  
BRIEF  
Hearings Unit, OIC  
Patricia D. Petersen  
Chief Hearing Officer

**I. FACTS ADDUCED FROM THE EVIDENCE**

At the hearing, the Company did not dispute many of the allegations set forth in OIC's Order to Cease and Desist No. 11-0088 and its Order Suspending Certificate of Authority No. 11-0089. Ability Insurance Company ("Ability" or the "Company") principal Donald Lawler testified that the Company did not take issue with or object to any of the allegations set forth in the first through sixth numbered paragraphs of these two orders, and OIC staff also presented testimony and evidence substantiating each of these allegations.<sup>1</sup> Mr. Lawler testified that the Company did dispute the allegation in the seventh numbered paragraph in each order, however. (This seventh paragraph alleged that the Company improperly refused to allow reinstatement within five (5) months of the lapse date that was required under WAC 284-54-253, in violation of the same.)

At the hearing, the testimony and other evidence also established the following:

- The Company issued its policy (OIC Exh. 1) to its insured in 1999.
- On or about September 16, 2007, the insured completed a form given to her from the Company's predecessor, "Medico Group – Medico Insurance Company / Medico Life Insurance Company." ("Medico.") (See OIC Exh. 6.) Mr. Lawler testified credibly that this form was sent to the insured to meet the Medico's obligations under WAC 284-54-253(1)(c). The insured's daughter testified credibly that the insured completed the form, not her, and that the

<sup>1</sup> Mr. Lawler also testified that he agreed that the Company is legally responsible for any violations here, even though other companies originally issued the policy (Mutual Protective Insurance Company) and took over that business (Medico Insurance Company) before the Company did. See OIC Exh. 30; Testimony Donald Lawler. Mr. Lawler suggested that Ability may not be impacted by the suspension order however (other than public opprobrium) since it is not issuing new policies in Washington at this time, even though new policies are still being sold in Washington under and by another company name.

1 insured's daughter did not know of the form's existence until after August of  
2 2009, when the insured's daughter filed a claim with the Company on her  
3 mother's behalf. The insured signed her daughter's name on this form without  
4 her daughter's knowledge, included two different area codes for her daughter's  
5 listed telephone number, and signed her daughter's name for her in a place  
6 indicating she was "elect[ing to] NOT [...] designate any person to receive  
7 such notice" – even though earlier on the form the insured also named her  
8 daughter as the designee. This form and its contradictory, nonsensical and  
9 illogical information received little scrutiny from the Company, however. The  
10 Company did not give a copy of the form to the insured's daughter, did not  
11 inform her that she had been designated (let alone explain to her what that  
12 meant), did not ask the daughter to inform the Company of any changes in her  
13 address (let alone explain why that might be needed by the Company), and did  
14 not at any time check to make sure whether the designee's address on the form  
15 was valid. (*See, e.g.,* Hearing Testimony Cheryl Silvernail and Donald  
16 Lawler.)

- 17 • Since at least 2008, and probably at the time the insured completed OIC Exh.  
18 6, the insured has suffered from both "cognitive impairment" and "loss of  
19 functional capacity." Documentary evidence as well as the credible testimony  
20 of the insured's children, caregiver (Alex Farmin), and daughter-in-law helped  
21 establish this. The insured's children, daughter-in-law, and caregiver all  
22 testified credibly, presenting compelling details and descriptions about a wide  
23 variety of observations showing that the insured had (and still has) serious  
cognitive shortcomings and loss of functional capacity. This testimony and  
other evidence (*see, e.g.,* August 24, 2011 Certification of Dr. Mihali, OIC  
Exhs. 4, 5, 8, 11, 14, 16, Ability Exhs. 1, 8, 9) shows that the insured  
experienced and suffered from both "cognitive impairment" and "loss of  
functional capacity" in most or all of her activities of daily living, every day,  
and for several years preceding 2009. (*See* Testimony Cheryl Silvernail,  
Nancy Connelly, Bill White, Marcia White, and Alex Farmin.) Even the  
Company's Mr. Lawler testified that he agreed these individuals testified  
credibly, although he also testified that none of what they said and none of the  
other evidence (aside from Dr. Mihali's August 24, 2011 certification, which  
he hadn't received at the time he testified) persuaded him that the insured met  
what he believes the requirements are for reinstatement under WAC 284-54-  
253. Mr. Lawler testified that he thinks more proof – a certificate – was  
needed to show "cognitive impairment" or "loss of functional capacity" to  
qualify for reinstatement under WAC 284-54-253, and believed Dr. Mihali's  
letter (OIC Exh. 4, Ability Exh. 9) was also insufficient to meet this  
evidentiary burden, which he believed should be placed upon the insured. OIC  
subsequently offered such evidence (*see* August 24, 2011 Certification of Dr.  
Mihali, attached to OIC's September 2, 2011 motion to supplement the  
record), and Mr. Lawler testified that while he believed the Company was  
under no obligation or duty to do so, it would consider any further evidence

1 regarding “cognitive impairment” or “loss of functional capacity” to see if the  
2 insured might yet qualify for reinstatement under WAC 284-54-253. To date,  
3 Mr. Lawler and the Company have not sought to present any further evidence  
regarding this, however. (*See, e.g.,* Hearing Testimony Cheryl Silvernail,  
Donald Lawler, Nancy Connelly, Bill White, Marcia White, and Alex Farmin.)

- 4 • The insured paid for her insurance since August 1999. (*See* Testimony Cheryl  
5 Silvernail; OIC Exhs. 1, 12.) In February of 2009, however, the insured failed  
6 to pay her six-month premium, which was due, according to her policy, by  
7 February 8, 2009. (*See* Testimony Donald Lawler; OIC Exh. 1.) The  
8 Company claims<sup>2</sup> it mailed various notices to the insured about this (*see*  
9 Ability Exh. 8 at pages bate-stamped Ability 17, 18 and 20.) It also claims it  
10 mailed the insured’s daughter a letter about this, dated March 20, 2009, in the  
11 Company’s attempt to comply with its obligations under WAC 284-54-  
12 253(1)(a) (*see* Testimony Lawler; OIC Exh. 7.) However, at the time the  
Company claims it mailed these notices and this letter, the insured had been  
shredding her mail and her daughter had moved from the address that the  
Company included in its letter. (*See, Testimony* Cheryl Silvernail, Nancy  
Connelly, Bill White, Marcia White, and Alex Farmin.) There is no evidence  
that these notices or this letter were ever actually delivered to or actually  
received by the insured, her daughter, or anyone else on or about the time the  
Company claims they mailed them. Rather, the evidence only shows, at most,  
that Mr. Lawler believes that the Company may have sent these notices and

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13 <sup>2</sup> At the hearing, the Company only offered and relied upon Donald Lawler’s testimony, and copies of  
14 documents – including certain notices and a letter dated March 20, 2009 – to prove that it mailed those  
15 documents and did so when they claim they did. Mr. Lawler testified, essentially, that the Company has a  
16 computer, and that the computer automatically mails things. From this, he assumed the computer must have sent  
17 various notices and letters at the various dates and times he suspects they may have been sent. He did not testify  
18 to having any additional detailed personal knowledge of the Company’s mailing process, but indicated there are  
19 other persons who work in the Company’s mail room who handle mail. But even some of the letters he wrote  
20 bear dates that conflict with other dates the Company claims they were sent. (*See, e.g.,* OIC Exhs. 15, 17, and  
21 compare the same with the dates included in the Company’s timeline given to Bianca Stoner in OIC Exh. 20.)  
Washington’s Uniform Business Records as Evidence Act requires that a “record of an act, condition or event,  
22 shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its  
23 identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time  
of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of  
preparation were such as to justify its admission.” RCW 5.45.020. Since the documents here do not all bear  
dates, and no one beside Mr. Lawler testified further about them, it remains unclear as to how the Company  
knows they were actually *mailed* exactly when Mr. Lawler claims they were. The Insurance Code also requires  
testimony of “the individual making or supervising such a mailing.” RCW 48.18.290(3). Here, Mr. Lawler  
spoke of people in the Company’s “mail room,” but the Company presented no postal receipts, no evidence of a  
Company employee who claims to have actually signed or handled the notices and letter, and no written office  
procedures or other documentation explaining how this mailing occurs or supposedly occurred here. According  
to the treatise Couch on Insurance 3D, where mailing of a notice is required to cancel coverage, “the burden of  
proving that the notice of cancellation was mailed, placed in the post office, properly stamped, and addressed to  
the insured, rests upon the insurer.” Russ & Segalia, §32:22 *Couch on Insurance 3d*, p. 32-35 (1996). Given all  
this, the Company has not met its burden.

1 this letter by mail to the addresses on those documents, but that the insured and  
2 her daughter never received them. (*See* Testimony Lawler; Ability Exh. 8 at  
3 pages bated-stamped Ability 17, 18 and 20; OIC Exh. 7.) Prior to 2009, the  
4 Company had dealt with Ms. Silvernail on other of the insured's past claims,  
5 and it had Ms. Silvernail's work/daytime telephone number in its records.  
6 (*See*, e.g., OIC Exhs. 2, 5, and 16.) The evidence, and the lack thereof, also  
7 shows that the Company: (a) did not give a copy of the insured's designation  
8 (*see* OIC Exh. 6) to the insured's daughter, Cheryl Silvernail (b) did not  
9 attempt (other than by its March 20, 2009 letter) to contact, inform or explain  
10 to Ms. Silvernail or to anyone else that Ms. Silvernail had apparently been  
11 designated by the insured under WAC 284-54-253 to receive notice, (c) did not  
12 contact Ms. Silvernail or anyone else to ask them to please inform the  
13 Company of any changes in Ms. Silvernail's address, nor explain why that  
14 might be needed by the Company, and (d) did not check to make sure Ms.  
15 Silvernail's address that appears on the Company's March 20, 2009 letter  
16 remained valid before supposedly mailing that letter. (*See*, e.g., Testimony  
17 Cheryl Silvernail, Donald Lawler, Nancy Connelly, Bill White, Marcia White,  
18 and Alex Farmin; OIC Exh. 16.) Ms. Silvernail testified – and credibly,  
19 according to Mr. Lawler – that she did not receive that March 20, 2009 letter,  
20 or ever see a copy, or even know of its existence, until well after August 2009,  
21 when she had first contacted the Company to make a claim for her mother.  
22 (*See*, e.g., Hearing Testimony Cheryl Silvernail, Donald Lawler.)

- In late July of 2009, Ms. White fell somewhere in her home and broke her  
13 wrist. (Testimony Cheryl Silvernail; OIC Exhs. 8, 14.) She required  
14 immediate hospitalization followed by assisted living at Lynden Grove, a  
15 facility in Puyallup that provides long-term care services. (*Id.*; *see also* Decl.  
16 Silvernail accompanying OIC opposition to Ability's stay motion; Testimony  
17 Silvernail.) She has never returned home and remains in an assisted living  
18 facility to this date. *Id.*
- On August 4, 2009, Ms. Silvernail called Ability to submit a claim for her  
19 mother, the insured, under her policy. *See* OIC Exh. 8; Decl. Silvernail;  
20 Testimony Silvernail. Ms. Silvernail spoke with Jerry in Ability's claims  
21 department. *Id.* She asked him if he would be able to get her mother's policy  
22 number because she was at work and didn't then have access to that  
23 information. *Id.* Jerry put her on hold, looked up her policy, and returned with  
her mother's policy number. *Id.* The two then went over some information  
regarding the insured's long-term care insurance, and Jerry then explained to  
the insured's daughter how to get the claim form online. *Id.* She got the form,  
completed it, and two days later, faxed it to the Company. At no time during  
this conversation with Jerry did he or anyone else with Ability inform Ms.  
Silvernail that her mother had not paid her last premium or that there was any  
issue concerning the policy still being in force, *Id.*, and the Company presented  
no evidence to the contrary at the hearing.

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- Unbeknownst to either Ms. Silvernail or her mother, the latter of whom was by then in assisted living and no longer living in her home, Ability mailed a letter to Ms. White dated August 31, 2009 that acknowledged her “correspondence” and stated that she had no benefits because the policy had lapsed. *See* OIC Exh. 10; Testimony Silvernail.
  - On September 8, 2009, Ms. Silvernail sent in a second claim. *See* OIC Exh. 11; Testimony Silvernail. This claim reported serious cognitive and other functional problems. *Id.* Within a few days of this, Ms. Silvernail went to her mother’s house to retrieve her mother’s mail and then discovered the Company’s August 31, 2009 letter. *See* Testimony Silvernail. Upon discovering this, she immediately wrote to the Company via facsimile on September 11, 2009, asking for help. *See* OIC Exh. 12; Testimony Silvernail. A few days later, on September 15, someone from the Company finally called Ms. Silvernail back. *See* OIC Exh. 13; Testimony Silvernail. Ms. Silvernail explained that she wanted to know what to do, how to remedy the situation, and explained that her mother had a cognitive impairment. *See* OIC Exhs. 12, 13; Testimony Silvernail. The Company representative invited Ms. Silvernail to try writing “a letter with documentation.” *See* OIC Exh. 13; Testimony Silvernail.
  - On September 30, 2009, Ms. Silvernail sent copies of the insured’s hospital records that she had been able to obtain from the July 2009 fall, and a statement from Alex Farmin, all of which detailed that (a) Ms. Silvernail hadn’t been contacted about the premiums not being paid, (b) shared proof that the insured had both cognitive impairment and a loss of functional capacity, shown by her hiding important bills and similar documents, and (c) the non-payment was unintentional and the result of her mother’s cognitive impairment (dementia) and loss of functional capacity going back to mid-2008. *See* OIC Exh. 14; Testimony Silvernail. At the hearing, the insured’s children, daughter in law, and Ms. Farmin testified, credibly, that in January 2009, the month before the premium payment wasn’t made and right at the very time when the insured supposedly had been sent the various notices the Company claims she was mailed, the insured had been shredding documents, hiding documents, and had become acutely disabled, believed to be connected to the recent tragic untimely passing of one of her children. *See* Testimony Silvernail, Connelly, Farmin, White and White; *see* also OIC Exh. 16. In response, the Company did nothing other than forward the materials to Donald Lawler for handling. *See* Testimony Lawler. The Company did not offer any assistance to the insured or Ms. Silvernail. The Company did not provide a copy of the policy to Ms. Silvernail. The Company did not make any attempt to have the insured evaluated for “cognitive impairment” or “loss of functional capacity.” *See* Testimony Lawler; Testimony Silvernail. Instead, Mr. Lawler decided the Company would deny reinstatement (after consulting with one other person,

1 and not consulting Washington law or consulting with any Washington  
2 lawyer), and by letter dated November 5, 2009,<sup>3</sup> he wrote the denial letter on  
3 behalf of the Company to Ms. Silvernail. *See* Testimony Lawler; Testimony  
4 Silvernail; OIC Exh. 15.

- 5 • On November 30, 2009, Ms. Silvernail wrote again, pleading with the  
6 Company, explaining the nonpayment was a misunderstanding; explaining her  
7 mother's destruction/hiding/shredding of documents; explaining how she had  
8 moved and never got any notice of nonpayment, nor any contact from the  
9 Company, who always had a way to reach her; explaining that her mother was  
10 truly cognitively impaired and had a loss of functional capacity; and explaining  
11 that the Company only told her how to make a claim and never told her the  
12 policy payment was missing when she called on August 4. *See* Testimony  
13 Silvernail; OIC Exh. 16. In response to this, the Company did nothing other  
14 than let Mr. Lawler respond, and Mr. Lawler did nothing other than write  
15 another letter dated December 4 again denying reinstatement.<sup>4</sup> He wrote again  
16 later to return tendered premium. *See* Testimony Silvernail; Testimony  
17 Lawler; OIC Exhs. 17, 18.
- 18 • On August 9, 2010, Ms. Silvernail's brother contacted OIC asking for help,  
19 explaining his mother's problems. *See* OIC Exh. 19. In the following months,  
20 OIC and the Company exchanged various correspondence with OIC asking  
21 questions, contending the Company violated the Insurance Code, and  
22 repeatedly requesting the Company reinstate coverage immediately. *See* OIC  
23 Exhs. 19-28. The Company denied OIC's requests and denied the Company  
did anything wrong. *Id.* And after being told OIC would take enforcement  
action, it did. *Id.*
- Since her fall in July 2009, the insured and her family have had to use the  
insured's savings and retirement annuities to pay for her care after Ability  
refused to provide coverage. *See* Testimony Silvernail; Decl. Silvernail. Since  
well before July 2009, Ms. Silvernail and her siblings had been laboring under  
the impression that the long-term care insurance which their mother purchased  
would cover some of her care, but Ability has refused to provide the  
coverage. *Id.* The insured's daughter has spent countless hours working on  
this matter, in addition to working at a full time job. *Id.* Still, Ability has  
refused to provide the coverage. *Id.* The insured's daughter and the rest of her

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<sup>3</sup> Mr. Lawler testified about the letter, and may have testified about it perhaps having been sent on the date it was dated. It is unclear whether Mr. Lawler credibly explained any apparent discrepancy between his testimony and his different date for the letter given in his timeline in his letter to Bianca Stoner. *See* OIC Exh. 20.

<sup>4</sup> Mr. Lawler testified about the letter, and may have testified about it perhaps having been sent on the date it was dated. It is unclear whether Mr. Lawler credibly explained any apparent discrepancy between his testimony and his different date for the letter given in his timeline in his letter to Bianca Stoner. *See* OIC Exh. 20.

1 family have experienced an inordinate amount of stress and frustration during  
2 this painful process of trying to get the insurance company to pay the coverage  
for which their insured contracted. *Id.*

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- 4 • Mr. Lawler's testimony was not credible in certain respects. He was evasive  
5 and refused to answer questions directly, even when asked repeatedly. He  
6 occasionally only testified about what he wanted to say, rather than squarely  
7 answering the question asked. One example of how he was not particularly  
8 credible concerned his adamant denial that Ms. Silvernail at all times failed to  
9 provide *any* proof of cognitive impairment or loss of functional capacity. Even  
10 when confronted with the contents of OIC's Exhibit 14, in which she provided  
11 the Company with records replete with references to the insured's "dementia,"  
12 confused state, and cognitive and physical problems, Mr. Lawler's refusal to  
13 acknowledge fairly what the words on the pieces of paper said cast doubt upon  
14 his credibility. Another example concerned his testimony about the  
15 Company's asserted grounds for denying reinstatement. He testified that he/  
16 the Company repeatedly and clearly pointed out in communications with both  
17 Ms. Silvernail and OIC that the Company had always given two reasons why it  
18 had denied reinstatement: (1) reinstatement wasn't requested in time, and (2)  
19 the Company hadn't been provided proof of cognitive impairment or loss of  
20 functional capacity. *See* Testimony Lawler. But his numerous letters belie  
21 this, as they do not mention the latter until after a whole year – November of  
22 2010. *See* OIC Exhs. 15, 17, 18, 20, 22, 24, and 26. His testimony to the  
23 contrary was not credible.
  - While the Company also offered testimony from Craig Bennion to support Mr.  
Lawler's interpretation of the laws, nothing Mr. Bennion said is properly a  
subject for expert or other testimony. Even if it is considered, it should not be  
considered as "evidence" and should be given no more weight or consideration  
than argument of counsel – which is not evidence.

## 17 **II. ABILITY VIOLATED THE INSURANCE CODE/CONCLUSIONS OF LAW**

18 The facts and other evidence revealed at and after the hearing show that the Company  
19 violated a number of Insurance Code provisions and laws. The first involved its wrongful  
20 refusal to allow reinstatement after it had received a timely request for reinstatement and had  
21 learned that the insured had a cognitive impairment and loss of functional capacity, all in  
violation of WAC 284-54-253.

### 22 **A. Ability wrongfully refused to allow reinstatement under WAC 284-54-253(2).**

23 Washington's Long-Term Care Insurance Act (the "Act"), RCW 48.84 *et seq*, and the  
rules/regulations duly promulgated under this Act, WAC 284-54 *et seq*, govern the insured's

1 policy. These laws and rules provide important protections for particularly vulnerable  
2 individuals who develop mental and physical deteriorations such as cognitive impairment and  
3 loss of functional capacity and fail to pay their premium.

4 The Act begins with the Legislature's declaration of intent that the "chapter shall be  
5 liberally construed to promote the public interest in protecting purchasers of long-term care  
6 insurance from unfair or deceptive sales, marketing, and advertising practices. The provisions  
7 of this chapter shall apply in addition to other requirements of Title 48 RCW." RCW  
8 48.84.010.<sup>5</sup>

9 In 1995, OIC enacted the version of WAC 284-54-253 that exists today. The Chapter  
10 that contains WAC 284-54-253 starts by indicating that the Chapter's purpose is to "establish  
11 [...] minimum standards and disclosure requirements to be met by insurers." WAC 284-54-  
12 010. WAC 284-54-253 mirrors this sentiment, indicating that the section establishes  
13 "minimum standards and do not prevent an insurer from including benefits more favorable to  
14 the insured." Various parts of the chapter were drawn from corresponding sections in the  
15 NAIC Model Long Term Care Insurance Regulation ("Model"), one of which, WAC 284-54-  
16 253, specifically followed the Model's corresponding unintentional lapse section. *See*  
17 *Testimony Kacy Scott; OIC Exhs. 35-37.*<sup>6</sup> The Model's unintentional lapse provision<sup>7</sup>  
18 requires insurers to give insureds the opportunity to designate someone to receive a notice  
19 when the insured doesn't pay her premium. If this designation has been made, the Model  
20 includes two requirements. First, it requires the insurer to send the notice "at least 30 days  
21 before the effective date of the lapse or termination." Second, it prohibits the insurer from

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22 <sup>5</sup> By its terms, the Act governs contracts issued before January 1, 2009, such as the insured's contract here.

23 <sup>6</sup> "WAC 284-54-253 was changed to follow the [Model] section on unintended lapses." *See* OIC Exh. 37  
("Concise Explanatory Statement" for R 95-5 at 1.)

<sup>7</sup> A copy of this portion of the Model was admitted as OIC Exhibit 35.

1 sending the notice until at least 35 days after the premium is due and unpaid. See OIC Exh.  
2 35.<sup>8</sup> WAC 284-54-253 includes substantially these same requirements.

3 WAC 284-54-253's first sentence declares that a designee is "to receive notice of  
4 lapse for nonpayment of premiums at least thirty days prior to the termination of coverage."  
5 (Emphasis added.) Then WAC 284-54-253(1)(a) goes on to require that the notice "shall  
6 provide that the contract or certificate will not lapse until at least thirty days after the notice is  
7 mailed to the insured's designee." (Emphasis added.)<sup>9</sup>

8 All of WAC 284-54-253 has essentially been made a part of the policy here. The  
9 policy has a provision at Part S(13) that provides "[t]he provisions of the policy must conform  
10 with the laws of the state in which you reside on the Policy Date. If any do not, this clause  
11 amends them so that they do conform." OIC Exh. 1 at p. 13. Thus, if any parts of the policy  
12 are inconsistent with WAC 284-54-253 as it existed when the policy was originally issued,<sup>10</sup>  
13 including its provision regarding "restoration of benefits in the event of policy lapse due to  
14 cognitive impairment," the inconsistent policy terms are supplanted, and the policy should be  
15 read as embodying all of WAC 284-54-253's requirements as if the entirety of WAC 284-54-  
16 253 was part of the contract:

17 As the insurance business is affected with a public interest and subject to legislative  
18 regulation, an insurer cannot complain of valid statutes governing its contract at the  
19 time it was made. The statutory law in force and effect at the time of the issuance of a  
20 policy becomes a part of the contract as though expressly written therein, and a policy  
21 must be considered to contain those requirements. [...] The parties are chargeable  
22 with knowledge of statutes and with the fact that insurance policies cannot be issued in

19 <sup>8</sup> This portion of the Model provides that no such policy "shall lapse or be terminated for nonpayment of  
20 premium unless the insurer, at least 30 days before the effective date of the lapse or termination, has given  
21 notice" to the designee, and this "notice may not be given until thirty (30) days after a premium is due and  
22 unpaid. Notice shall be deemed to have been given as of five (5) days after the date of mailing." (Emphasis  
23 added.) OIC Exh. 35.

21 <sup>9</sup> There does appear to be one immaterial difference between these provisions and the Model. The Model adds  
22 the requirement that "Notice shall be deemed to have been given as of five (5) days after the date of mailing,"  
23 while WAC 284-54-253 does not include this.

23 <sup>10</sup> WAC 284-54-253 appears not to have materially changed between the date the policy was originally issued  
and the present.

1 conflict with them. And thus missing terms required by statute will be read into the  
2 policy and terms in conflict with statute will be amended to conform to them, and this  
3 is the result even though increased liability not reflected in original premium is the  
4 consequence.

5 4-22 Appleman on Insurance § 22.1.

6 **1. Facts relating to the Company's wrongful refusal to allow reinstatement.**

7 On August 8, 1999, the Company's policy was first issued to its insured. See OIC  
8 Exh. 1. The insured paid her premium since 1999. There is no evidence she ever missed a  
9 single payment between then and February of 2009.

10 In 2007, the insured identified a designee to receive notice of nonpayment of premium  
11 using a form the insurer had sent her. See OIC Exh. 6. While this form was not completed  
12 correctly, and it raised serious questions about whether the insured was in her proper state of  
13 mind or fully understood what she was doing when she completed it, the Company did  
14 nothing else other than store this form in its records. See Testimony Donald Lawler. In fact,  
15 as the testimony and other evidence made clear, probably at and certainly since the time the  
16 insured completed OIC Exh. 6, the insured has suffered from both cognitive impairment and  
17 loss of functional capacity. Substantial credible testimony and other evidence established that  
18 beginning some number of years before 2009, and continuing today, the insured has suffered  
19 from ever-worsening serious cognitive shortcomings and loss of functional capacity.

20 According to the insured's policy, a semi-annual premium payment was due on or  
21 before February 8, 2009. OIC Exh. 1. This premium was not paid by then. In its attempt to  
22 meet its WAC 284-54-253(1)(a) notice-giving requirements, the Company claims that, *no*  
23 *sooner* than March 20, 2009, it mailed the designee a letter bearing that date. The letter  
indicated that unless the premium was paid, the policy "will lapse." OIC Exh. 7. The  
designee had moved many months before then, however, and no longer lived at the address in  
the letter. Consequently, she never received this letter. The Company presented no evidence  
the designee received it, and presented no evidence proving that it properly mailed it. The

1 Company took no steps to verify the address before the time it claims to have mailed the  
2 letter.

3 In late July of 2009, the insured fell, broke her wrist, and immediately became  
4 hospitalized. She has since then required assisted living in a facility, and has not returned  
5 home since.

6 On August 4, 2009, the insured's designee called Ability to submit a claim for her  
7 mother, the insured, under the policy. She spoke with Jerry in Ability's claims department.  
8 She asked him if he would be able to get her mother's policy number because she was at work  
9 and didn't then have access to that information. Jerry put her on hold, looked up her policy,  
10 and returned with her mother's policy number. The two then went over some information  
11 regarding the insured's long-term care insurance, and Jerry then explained to her how to get  
12 the claim form online and submit a claim. She got the form, completed it, and two days later,  
13 faxed it to the Company, submitting the claim for coverage under the policy. At no time  
14 during her conversation with Jerry did he or anyone else with Ability inform the insured's  
15 designee that the last premium due on February 8, 2009 wasn't paid; nor did he or anyone else  
16 with Ability inform her that there was any issue concerning the policy still being in force. In  
17 fact, the designee did not become aware that the premium had not been paid until after she  
18 submitted a second claim to the Company, again by fax, on September 8, 2009.

19 On September 11, 2009, immediately after discovering that the last premium had  
20 apparently not been paid, the designee wrote to the Company via facsimile, asking for help.  
21 On September 15, someone from the Company informed her that the last premium had not  
22 been paid. The designee explained that she wanted to know what to do, how to remedy the  
23 situation, and explained that her mother had a cognitive impairment. The Company  
representative invited her to try writing "a letter with documentation."

On September 30, 2009, in response to what she had been told by the Company  
representative on September 15, the designee sent a letter with copies of various materials to

1 the Company. These included the insured's medical records from her late July 2009  
2 hospitalization, and a statement from caregiver, Alex Farmin, all of which detailed: (a) that  
3 the insured's designee had only just learned of the premium nonpayment and hadn't been  
4 contacted about the premiums not being paid, (b) proof that the insured had both cognitive  
5 impairment and a loss of functional capacity, and (c) the insured's non-payment was  
6 unintentional and the result of her mother's cognitive impairment (dementia) and loss of  
7 functional capacity going back to mid-2008. *See* OIC Exh. 14; Testimony Silvernail.<sup>11</sup>

8 By letter dated November 5, 2009,<sup>12</sup> Mr. Lawler wrote that the Company would deny  
9 reinstatement. At the hearing, he testified that he reached this decision after consulting with  
10 one other person, and not consulting Washington law or consulting with any Washington  
11 lawyer. In his denial letter, Mr. Lawler first described the notices the Company claimed it  
12 sent to the insured, and one to the designee. Then the letter gave the following explanation of  
13 the basis in the insurance contract in relation to the facts or applicable law for its denial:

14 The policy has a Restoration of Benefits provision in Part M on page 9, but the  
15 provision is limited to a five-month period in which to request reinstatement. The  
16 five-month period expired in July and we did not receive any contact from you until  
17 August.

18 Mr. Lawler's letter did not include a copy of the policy, nor did it give any other explanation  
19 for the denial. *See* Testimony Lawler; Testimony Silvernail; OIC Exh. 15.

20 On November 30, 2009, the designee wrote again, pleading with the Company. Her  
21 letter explained the nonpayment was a misunderstanding; explained her mother had been  
22 destroying/hiding/shredding important documents; explained how she had moved and had

23 <sup>11</sup> At the hearing, the insured's children, daughter in law, and Ms. Farmin testified, credibly, that in January 2009, the month before the premium payment wasn't made – the very time when the insured supposedly had been sent the various notices the Company claims she was mailed, the insured had been shredding documents, hiding documents, and had become acutely disabled, believed to be connected to the recent tragic untimely passing of one of her children. *See* Testimony Silvernail, Connelly, Farmin, White and White; *see* also OIC Exh. 16.

<sup>12</sup> Mr. Lawler testified about the letter, and may have testified about it perhaps having been sent on the date it was dated. It is unclear whether Mr. Lawler credibly explained any apparent discrepancy between his testimony and his different date for the letter given in his timeline in his letter to Bianca Stoner. *See* OIC Exh. 20.

1 never gotten the notice mentioned in Mr. Lawler's letter, nor any contact from the Company,  
2 who always had a way to reach her; explained that her mother was truly cognitively impaired  
3 and had a loss of functional capacity; and explained that the Company only told her how to  
4 make a claim and never told her the policy payment was missing when she called on August  
5 4. *See* Testimony Silvernail; OIC Exh. 16.

6 By letter dated December 4, 2009,<sup>13</sup> Mr. Lawler wrote another denial letter. First the  
7 letter implied that the designee was at fault. Then the letter gave the following explanation of  
8 the basis in the insurance contract in relation to the facts or applicable law for its denial:

9 [T]he policy has a Restoration of Benefits provision in Part M on page 9, but the  
10 provision is limited to a five-month period in which to request reinstatement. The  
11 five-month period expired in July and we did not receive any contact from you until  
12 August.

13 Mr. Lawler's letter did not include a copy of the policy and did not give any other explanation  
14 for the denial. The designee later tried tendering the past due premium, which Mr. Lawler  
15 simply returned soon thereafter. *See* Testimony Silvernail; Testimony Lawler; OIC Exhs. 17,  
16 18. The Company never told the insured or her designee any other reason or explanation of  
17 the basis in the insurance contract in relation to the facts or applicable law for its denial.

18 **2. Ability's refusal to reinstate violated WAC 284-54-253(2) regardless of  
19 whether "lapse" is determined based on WAC 284-54-253 or the terms of its  
20 policy.**

21 The only reason the Company initially gave for its decision to refuse to reinstate  
22 coverage was, essentially, that the insured's designee failed to request reinstatement within  
23 WAC 284-54-253(2)'s five-month period.<sup>14</sup> This violated WAC 284-54-253(2) because the

<sup>13</sup> Mr. Lawler testified about the letter, and may have testified about it perhaps having been sent on the date it was dated. It is unclear whether Mr. Lawler credibly explained any apparent discrepancy between his testimony and his different date for the letter given in his timeline in his letter to Bianca Stoner. *See* OIC Exh. 20.

<sup>14</sup> For over a year after the designee sought coverage, the only reason the Company gave for denying coverage was that no one requested reinstatement in time. The record contains all the various correspondence generated between the Company's Donald Lawler, the insured, the insured's designee, OIC's Bianca Stoner and OIC's Alan Singer regarding the designee's attempt to seek coverage under the policy after the designee learned the policy premium had not been paid (*see* OIC Exhs. 8-12 and 14-28), and these letters show that the Company's only claimed basis for its denial was that reinstatement hadn't been requested within the five-month period under

1 insured's designee *did* timely request reinstatement – whether “lapse” is determined based on  
2 WAC 284-54-253 or its own policy.

3 As explained earlier, WAC 284-54-253, like the Model, requires that a designee is “to  
4 receive notice of lapse for nonpayment of premiums at least thirty days prior to the  
5 termination of coverage.” (Emphasis added.) WAC 284-54-253(1)(a) next requires this  
6 notice “shall provide that the contract or certificate will not lapse until at least thirty days  
7 after the notice is mailed to the insured's designee.” (Emphasis added.) Here, the Company  
8 asserts that on or about March 20, 2009, it mailed the designee a WAC 284-54-253(1)(a)  
9 notice letter which provided that unless the premium was paid, coverage “will lapse.” So  
10 under WAC 284-54-253(1)(a), the soonest the policy could have lapsed, then, would have  
11 been “at least thirty days after” this notice was mailed – or no sooner than April 19, 2009.  
12 Five months after March 20 was September 19 – and by this date, the insured's designee had  
13 not only requested reinstatement once, she had done so at least *three times*. First, she  
14 contacted the Company to make a claim. Next, she faxed in two separate claims. Finally,  
15 after learning the last required premium payment hadn't been paid, she also expressly had  
16 contact with the Company and requested reinstatement of coverage on both September 11 and  
17 September 15.<sup>15</sup> See, e.g., OIC Exhs. 12, 13. Each of these three acts occurred no later  
18 September 15, 2009 – within WAC 284-54-253(2)'s five-month window. This means that she  
19 *did* timely request reinstatement. The Company's claim that she did not is incorrect. Since  
20 the designee clearly had requested reinstatement well within the five months she had to do so,  
21 the Company's subsequent refusal to reinstate on grounds that she had not violated WAC  
22 284-54-253(2).

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21 WAC 284-54-253(2). Then in the Company's November 2010 correspondence, it added a second reason: it  
22 added that the insured also allegedly didn't timely prove she was cognitively impaired or had a loss of functional  
23 capacity. See OIC Exh. 26. Both reasons are meritless; this second reason is addressed later in this brief.

<sup>15</sup> Of course, there is no rational distinction that can be drawn between making a claim under a policy that is believed to be in good standing and asking for reinstatement of coverage in order to make a claim once it is learned that the policy has supposedly lapsed.

1           Alternatively, the Company’s refusal also violated WAC 284-54-253(2) based on the  
2 terms of the Company’s own policy.<sup>16</sup> At page 11, Part S(3), the Company’s policy provision  
3 titled “grace period” (which was separately required under WAC 284-54-250), the payment of  
4 the premium may occur at any time within the 31 days after the date the premium is due. But  
5 during this 31-day “grace period,” the Company promises the insured “[y]our policy stays in  
6 force during your grace period.” Part S(4) next provides that “[y]our policy will lapse if you  
7 do not pay your premium before the end of your grace period.” See OIC Exh. 1 at page 11.

8           Read together, and in the way an “average person purchasing insurance” would read  
9 them, *Woo v. Fireman’s Fund Ins. Co.*, 161 Wn.2d 43, 52, 161 P.3d 454 (2007), these two  
10 provisions – Part S(3) and (4) – mean that this “lapse” event (which is otherwise undefined in  
11 the policy) will not occur until the thirty-second day after the policy premium is due but not  
12 paid, because the policy says it “stays in force.”<sup>17</sup> Since the policy premium was due but not  
13 paid on February 8, 2009, according to Part S(3) and (4), this “lapse” could not have occurred  
14 until at least 32 days after that date, or on March 12, 2009. Even if this date is the “lapse”  
15 date, it would still be undisputed that the insured’s designee had claimed coverage – and thus,  
16 reinstatement – within five months of March 12. Here, she called the Company on August 4,  
2009 to make a claim, and submitted a written claim two days later (see, e.g., OIC Exh. 8.)  
Both of these acts were carried out before the five month period after March 12, 2009.

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17 <sup>16</sup> It should be noted that this policy is governed by both RCW 48.84 *et seq* and WAC 284-54 *et seq*, among  
18 other applicable insurance laws and rules, but not RCW 48.83 *et seq* and WAC 284-83 *et seq*. RCW 48.84 *et seq*  
19 and WAC 284-54 *et seq* only govern “long-term care insurance and long-term care benefit policies and contracts  
20 issued for delivery in this state before January 1, 2009,” while RCW 48.83 *et seq* and WAC 284-83 *et seq*  
21 govern policies issued thereafter. (Emphasis added) See WAC 284-54-010 and RCW 48.84.010; see also, e.g.,  
RCW 48.83.010(2) (“Individual and group long-term care contracts issued prior to January 1, 2009, remain  
governed by chapter 48.84 RCW and rules adopted thereunder”) and WAC 284-54-015(4) (“This chapter is  
applicable only to long-term care policies, contracts, or certificates issued prior to January 1, 2009. Long-term  
care policies, contracts, or certificates delivered under policies issued on or after January 1, 2009, are governed  
by chapters 48.83 RCW and 284-83 WAC.”)

22 <sup>17</sup> The recent decision *Bushnell v. Medico Ins. Co. et al*, 159 Wn. App. 874, 246 P.3d 856 (2011), *review denied*,  
23 172 Wn.2d 1005 (2011), affirmed this reasoning. In *Bushnell*, the Court of Appeals cited the very same 31-day  
“grace period” provision in the policy, and observed that it meant what it said: it “unambiguously states that  
during the grace period, [y]our policy stays in force.” *Bushnell* at 888.

1 Thus, whether this “lapse” event occurred no sooner than April 19 (as WAC 284-54-  
2 253 provides) or March 12 (consistent with what the policy provides), reinstatement was  
3 timely requested and the Company violated WAC 284-54-253(2) in concluding otherwise.

4 **B. By failing to mail the notice setting forth the lapse date that was required**  
5 **under WAC 284-54-253(1)(a), the Company also violated the law and**  
6 **improperly refused to allow reinstatement.**

7 The Company also violated the law by issuing a noncompliant designee notice that  
8 either misinformed the designee by not accurately providing the information required by  
9 WAC 284-54-253(1)(a), or it misled the designee, in violation of WAC 284-54-800(1).<sup>18</sup> The  
10 Company claims its March 20, 2009 letter complied with WAC 284-54-253(1)(a), but an  
11 analysis of that letter, of WAC 284-54-253’s requirements and purposes, and of WAC 284-  
12 54-253(1)(a)’s specific requirements all shows that the Company’s letter did not comply.

13 In considering whether the Company’s March 20, 2009 letter satisfied its obligations  
14 under WAC 284-54-253(1)(a), it is important to keep in mind the goals and purpose of WAC  
15 284-54-253. The introductory paragraph to WAC 284-54-253 states that the rule’s purpose is  
16 to create “minimum” consumer protection “standards” to protect a particularly vulnerable  
17 class of insureds: those with some cognitive impairment or loss of functional capacity, whose  
18 conditions will, for various reasons well within common knowledge, and well within the  
19 Company’s knowledge, result in the insured inadvertently missing premium payments.<sup>19</sup> One  
20 of the minimum standards the rule creates to further this purpose, which followed the Model,  
21 is that the insured’s designee will “receive notice of lapse for nonpayment of premiums at  
22  
23

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18 As indicated in footnote 2, *supra*, the Company *claims* it mailed this March 20, 2009 notice.

19 According to one notice the Company alleged it mailed to its insured here, the Company’s “[e]xperience shows that most policies expire inadvertently.” See Ability Exh. 8 at p. 20. See also R. Tamara Konetzka and Ye Luo, “Explaining Lapse in Long-Term Care Insurance Markets,” *Health Economics* (2010) (“Lapsers are generally less healthy than those who retain their policies. In particular, they are more functionally impaired, which typically defines a need (or future need) for [long term care, or “LTC”]. [...] We find that in addition to being poorer and less educated, individuals who let LTCI policies lapse are disproportionately less healthy and have more difficulty with ADLs. [...] [I]t is precisely the people with the highest expected need for LTC who tend to let their policies lapse in disproportionate numbers.”)

1 least thirty days prior to the termination of coverage.” (Emphasis added.) This helps  
2 prevent unintentional policy termination by requiring insurers to honor an insured’s request to  
3 send specific and important information to a designee, a third party *without* some cognitive  
4 impairment or loss of functional capacity. This information is needed so they can help make  
5 sure whether the potentially vulnerable insured intended to not pay premium, and to give them  
6 all the time WAC 284-54-253(2) grants them to help rectify the nonpayment, if needed.

7 Meeting WAC 284-54-253’s goals depends on the insurer faithfully complying with  
8 two specific requirements. The first, WAC 284-54-253(1) requires that the insurer “shall  
9 permit an insured to designate at least one additional person to receive notice of lapse or  
10 termination for nonpayment of premium, if the premium is not paid on or before its due date.”  
11 Once a designee has been identified and premium is due but not paid, the insurer’s second  
12 requirement is to ensure that the designee will “receive notice of lapse for nonpayment of  
13 premiums at least thirty days prior to the termination of coverage,” WAC 284-54-253, and to  
14 do this the insurer must mail this designee a specifically prescribed notice that “shall provide”  
15 as follows:

16 “The notice shall provide that the contract or certificate will not lapse until at least  
17 thirty days after the notice is mailed to the insured’s designee.”

18 (Emphasis added.) WAC 284-54-253(1)(a). Here, the notice that the Company *claims*<sup>20</sup> it  
19 mailed was a March 20, 2009 letter. See OIC Exh. 7. It stated in part:

20 “If the premium is not received within 35 days from the date of this letter, the policy  
21 will lapse for nonpayment of premium.”

22 (Emphasis added.) See OIC Exh. 7. This is what the Company claims it did, and the  
23 Company claims its notice was sufficient to comply with WAC 284-54-253(1)(a). The  
Company is mistaken.

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24 <sup>20</sup> As noted earlier (see footnote 2, *supra*), the Company did not present adequate evidence proving it “mailed”  
any such notice letter. It failed to present any evidence proving the addressee actually “received” it, and it failed  
to rebut Ms. Silvernail’s testimony that she moved and never actually received or even knew of the letter’s  
existence during the time period when the Company claims it was supposedly sent.

1           The Company's mistaken belief that its March 20, 2009 notice complied with WAC  
2 284-54-253(1)(a) stems from the fact that the Company also mistakenly views WAC 284-54-  
3 253's protections as just a sort of "extended grace period."<sup>21</sup> But WAC 284-54-253, unlike  
4 WAC 284-54-250's separate "grace period" requirement, is concerned with informing a third  
5 party stranger to the contract of this "lapse" or "termination" date from which they will have  
6 five months to request reinstatement under WAC 284-54-253(2). The notice that WAC 284-  
7 54-253(1)(a) requires is essentially a kind of cancellation notice. Unlike a past due notice for  
8 premiums owed, the WAC 284-54-253(1)(a) notice is to happen in advance of the "lapse" and  
9 it is intended to provide information that serves as a part of a larger regulatory scheme to  
10 provide an effective right to reinstatement. Under this scheme, the designated person is  
11 plainly intended to act or serve as a sort of ombudsman who will act on the insured's behalf.  
12 They are intended to be a person *without* cognitive or functional issues, so they can be sure to  
13 engage in the kind of thinking an unimpaired person would be expected to engage in  
14 whenever a premium is due – weighing the cost of the premium against the expected utility of  
15 retaining the coverage in light of the insured's condition and needs. This designee is intended  
16 to be there to help the insured make sure the insured's nonpayment was not inadvertent and  
17 also help the insured rectify the nonpayment if necessary. But since this person is a stranger  
18 to the contract, they need to be informed of how to help and why. In light of this, it is  
19 important for the insurer's notice to accurately and precisely provide the information that  
20 WAC 284-54-253(1)(a) contemplates that the insurer "shall provide," is not misleading, and  
21 actually gets to the insured's intended designee – particularly if that is the *only* thing sent to  
22 the designee at all. After all, if the insured is indeed one of the especially vulnerable insureds  
23 that this rule is designed to protect, that designee not only *needs* the information, the insured  
necessarily *depends* on the insurer adequately presenting it to the designee.

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<sup>21</sup> See, for example, Mr. Lawler's testimony, as well as his letters, OIC Exhs. 24 and 28, both of which referred to WAC 284-54-253(2)'s five-month reinstatement right as being no more an "extended grace period."

1 In light of WAC 284-54-253's scheme, WAC 284-54-253(1)(a)'s requirement to give  
2 a designee advance notice of the date when lapse will occur, relative to the date of mailing, is  
3 more akin to a cancellation requirement, not merely a sort of collection letter-like "extended  
4 grace period" notice. Consistent with this, it has been observed that "[a]lthough lapse and  
5 cancellation are normally distinguished, it has been held that lapse is a de facto cancellation  
6 requiring compliance with all the requirements for a valid cancellation." Couch on Insurance  
7 3d §30:2 at page 30-5. This is also logical, since both WAC 284-54-253's prescribed  
8 processes for providing the right of reinstatement and cancellation procedures both share the  
9 same goal: to provide reasonable steps that will protect insureds from unintended or unwanted  
10 termination of coverage. "The purpose of statutory restrictions on the power to cancel is to  
11 protect both the insured and the public from unnoticed or unwarranted termination of  
12 insurance coverage." *Id.* at §30:6, pages 30-11 and 30-12. In general, to accomplish this  
13 goal, failure to comply with such provisions generally results in coverage not terminating.  
14 "[A]ny information required by statute to be given in the notice [of cancellation] must be  
15 given or the notice will be ineffective." 3-16 Appleman on Insurance § 16.9.

16 Another, perhaps more important reason why the March 20, 2009 letter did not  
17 comply with WAC 284-54-253(1)(a) is that the Company intended – and believes – its letter  
18 meant something significantly different than what it plainly says. The Company's position is  
19 that this letter didn't mean that the coverage "will lapse," despite the letter's use of those  
20 words. Rather, the Company takes the position that this letter meant that the coverage *had*  
21 *already terminated*. The Company's position is that this termination was *not* some future  
22 event that supposedly "will" happen. Instead, it was actually something that had already  
23 happened – *on February 7, 2009*. According to the Company's position, its letter's use of the  
word "lapse" referred to a date which "reverted back" and terminated the policy more than a  
month before this notice letter was ever even supposedly mailed to the designee.

1 While the Company has offered no legal authority to support its position that this  
2 “lapse” event supposedly “reverts back,”<sup>22</sup> OIC staff believes the Company’s “lapse reverts  
3 back” position has no legal basis, is contrary to the language of WAC 284-54-253, and is even  
4 contrary to the language in Part S(3) and (4) in the Company’s policy, as indicated.<sup>23</sup>

5 Washington’s Court of Appeals recently rejected the Company’s “lapse reverts back”  
6 argument. In *Bushnell v. Medico Ins. Co. et al*, 159 Wn. App. 874, 246 P.3d 856 (2011),  
7 *review denied*, 172 Wn.2d 1005 (2011), the Company appeared to raise the same argument –  
8 that “lapse” of the contract related backward in time so that the coverage had supposedly  
9 “lapsed” on the last date of the term for which the last premium payment was made, leaving  
10 the insured without coverage. *Bushnell* at 888. The *Bushnell* Court specifically rejected this,  
11 by emphasizing that the policy “unambiguously states that during the grace period, ‘[y]our  
12 policy stays in force.’” *Id.* While the Court did not address the WAC 284-54-253  
13 unintentional lapse rule, it did agree with one of OIC staff’s arguments here, that even under  
14 the terms of the Company’s own policy, lapse cannot be retroactive to the date premium was  
15 due but not paid. As the *Bushnell* Court correctly concluded, under the Company’s policy  
16 “coverage d[oes] not lapse until after the grace period.” *Id.* (Emphasis added.)

17 Also contrary to the Company’s position, at least one respected authority observed that  
18 a cancellation “takes effect only from the time of cancellation and does not operate  
19

20 <sup>22</sup> While OIC staff is unaware of any legal authority that supports the Company’s position that “lapse”  
21 supposedly “reverts back,” Mr. Lawler did once try to support this position by citing a single *unpublished*  
22 Washington Court of Appeals case. See OIC Exhs. 28 and 29. Of course, GR 14.1 provides that “A party may  
23 not cite as an authority an unpublished opinion of the Court of Appeals.” But even this unpublished case fails to  
support the Company’s position. The case, offered into evidence at OIC Exhibit 29, simply has nothing to do  
with the Company’s “lapse date reverts back” argument. See OIC Exhs. 28 and 29 (highlighted portion.) To the  
contrary, in any event, since at least one respected authority observed that a cancellation “takes effect only from  
the time of cancellation and does not operate retroactively,” (emphasis added), Couch on Insurance 2d (Rev  
Ed) §67:22 at page 477, it seems implausible that the Company’s March 20, 2009 letter would operate  
differently to achieve the opposite result.

<sup>23</sup> The Company’s March 20, 2009 letter did not letter allude to its “lapse reverts back” view, nor did any denial  
letter to the insured. For example, no letter indicated whether “lapse” or “lapse date” meant something technical,  
different, or special to the Company, nor did any letter say whether the Company considered any particular  
definition of “lapse” relative to its use of the word “lapse” in its March 20, 2009 letter. See OIC Exh. 7.

1 retroactively.” (Emphasis added.) Couch on Insurance 2d (Rev Ed) §67:22 at page 477.

2 Because it seems implausible that the Company’s March 20, 2009 letter would operate  
3 differently to achieve the opposite result.

4 Moreover, the Company’s “lapse reverts back” argument is also inconsistent with  
5 rules of statutory construction, which also apply to administrative rules and regulations like  
6 WAC 284-54-253.<sup>24</sup> These include:

7 If a rule’s meaning is plain on its face, then the court must give effect to that plain  
8 meaning. *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). Under the ‘plain  
9 meaning’ rule, examination of the statute in which the provision at issue is found, as  
10 well as related statutes or other provisions of the same act in which the provision is  
11 found, is appropriate as part of the determination whether a plain meaning can be  
12 ascertained. *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10, 43 P.3d  
13 4 (2002); *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 708-09,  
14 985 P.2d 262 (1999). A term in a regulation should not be read in isolation but rather  
15 within the context of the regulatory and statutory scheme as a whole. *ITT Rayonier,  
16 Inc. v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993). The court should not  
17 construe a regulation in a manner that is strained or leads to absurd results. [*State v.  
18 Burke*, 92 Wn.2d 474, 478, 598 P.2d 395 (1979)].

19 *City of Seattle v. Allison*, 148 Wn.2d 75, 81, 59 P.3d 85 (2002). Here, the Company would  
20 have the Court ignore the plain language of the rule, requiring written notice setting forth the  
21 “lapse” date no sooner than 30 days from the date the letter is mailed. The Company  
22 contends that its interpretation of “lapse” correctly means the day the premium was due but  
23 not paid, but to reach that conclusion, one would need to ignore that the rule used the word  
“lapse” and “termination” in some places, while making reference to the “due date”  
elsewhere, like in WAC 284-54-253(1), and even in WAC 284-54-250. And the Company’s  
interpretation would yield a number of absurd results – including (a) that “shall” is for not  
mandatory, (b) that “will lapse” really means “previously cancelled effective more than a  
month ago,” and (c) that a five month reinstatement period can be unilaterally shortened to  
only *three* months, unilaterally, by an insurer, for a reason only the Company believes, for a  
reason based on no legal authority, and with no reasons given to the insured or anyone else.

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24 “Rules of statutory construction apply to administrative rules and regulations.” *City of Seattle v. Allison*, 148 Wn.2d 75, 81, 59 P.3d 85 (2002), citing *State v. Burke*, 92 Wn.2d 474, 478, 598 P.2d 395 (1979).

1           Moreover, a notice such as the WAC 284-54-253(1)(a) must not be loaded with  
2 misleading or ambiguous terms. “Any notice of cancellation for nonpayment of premiums  
3 must be unambiguous in its intent to cancel as opposed to being a past due notice for  
4 premiums owed.” Couch on Insurance 2d (Rev ed) §67:73 at page 527. While it is true that,  
5 “[i]n the absence of contract, statute, or established course of dealing, the insurer has no  
6 obligation to give notice of the actual lapse of a policy for nonpayment of premiums,” 6-39  
7 Appleman on Insurance § 39.9, when one is given, as WAC 284-54-253 requires, it must meet  
8 *precisely* what the regulation requires. Here, the Company’s March 20, 2009 letter failed to  
9 do that.

10           Nor are WAC 284-54-253(1)(a)’s precise requirements subject to an insurer’s  
11 substantial changes in content. The words in the rule set forth a mandatory, not discretionary,  
12 duty, *see, e.g., Crown Cascade, Inc. v. O’Neal*, 100 Wn.2d 256, 261, 668 P.2d 585 (1983),<sup>25</sup>  
13 and this rule’s words must be given meaning and not rendered superfluous.<sup>26</sup> For example, it  
14 would be improper to treat as mere surplusage the rule’s words that specified how the notice’s  
15 future “lapse” date would be calculated relative to the date of the notice’s mailing, as shown  
16 by its use of the words “will not lapse until at least thirty days after the notice is mailed to the  
17 insured’s designee.” (Emphasis added.) WAC 284-54-253(1)(a).

18           In addition, the fact that the word “lapse” is undefined calls upon a few rules of  
19 construction to determine its meaning. First, since the word “lapse” is undefined in the  
20 Company’s March 2009 letter, in its policy with its insured, and in the Insurance Code, the  
21 word “should be given [its] ordinary and common meaning, not [its] technical, legal

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22 <sup>25</sup> Absent persuasive evidence of a contrary intent, the word “shall,” when used in a law or rule, “is imperative  
23 and operates to create a duty rather than to confer discretion.” *Crown Cascade, citing Clark Cy. Sheriff v.*  
*Department of Social & Health Servs.*, 95 Wn.2d 445, 448, 626 P.2d 6 (1981).

<sup>26</sup> A reviewing court should construe agency rules in “a rational, sensible” manner, giving meaning to the  
underlying policy and intent. *Mader v. Health Care Auth.*, 149 Wn.2d 458, 70 P.3d 931 (2003) (citing *Cannon*  
*v. Dep’t. of Licensing*, 147 Wn.2d 41, 57, 50 P.3d 627 (2002)). “In construing a statute, we give effect to all its  
language so that ‘no portion is rendered meaningless or superfluous.’” *Friends of Columbia Gorge, Inc. v.*  
*Wash. State Forest Practices*, 129 Wn. App. 35, 47, 118 P.3d 354 (2005), *citing Muckleshoot Indian Tribe v.*  
*Dep’t of Ecology*, 112 Wn. App. 712, 720, 50 P.3d 668 (2002), *review denied*, 150 Wn.2d 1016 (2003).

1 meaning.<sup>27</sup> (Cite omitted.) *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244  
2 (1997). Since courts “look at the language according to the way it would be read by the  
3 average insurance purchaser,” *id.*, Washington courts do what they presume a consumer would  
4 do: resort to a standard dictionary like Webster’s Third New International Dictionary to find the  
5 definition. *Id.* at 426. Webster’s provides two definitions with multiple sub-definitions for  
6 “lapse,” as follows:

7 <sup>1</sup>*lapse* \ ‘laps \ n -s [L *lapsus* fault, error, fall, slide, fr. *lapsus*, past part. Of *labi* to glide, slide -- more  
8 at SLEEP] **1 a** : an accidental mistake in fact or departure from an accepted norm : trivial fault : SLIP,  
9 ERROR <~ of memory> <~ of taste> <the performances show this great pianist at the height of his  
10 powers, whatever rhythmical or technical ~s they may contain -- Edward Sackville-West> **b** : a  
11 temporary deviation <~ from consciousness> <~ from respectability> < writes well, despite occasional  
12 ~s into polysyllabic humor -- *Geog. Jour.* > **2 a** : FALL; *specif* : a decrease of temperature, pressure, or  
13 value of other meteorological element as the height increases -- see LAPSE RATE **b** : LOSS,  
14 LOWERING, DECLINE, DROP <a sudden ~ of confidence -- Josephine Johnson> <~ in the supply of  
15 college graduates during the war years -- M.L.Kastens> <~ from grace> **3 a** (1) : the termination or  
16 failure of a right or privilege through neglect to exercise it within some limit of time or through  
17 failure of some contingency -- compare EXPIRY (2) : *Eng eccl law* : the transfer of the right to  
18 present or collate a rector to a vacant benefice from one having the first right and neglecting to exercise  
19 it to one having a secondary right (3) : termination of coverage (as by life insurance) for nonpayment  
20 of premiums **b** : an interruption or discontinuance <~ of a custom> <resumed dividends after a ~ during  
21 the depression -- P.J.O’Brien> <masters narrative ~s with great skill -- C.C.Rister> **4 a** : a yielding to  
22 temptation or inclination : transitory disregard of moral principles : FOLLY <his laxity of conduct, his  
moral ~s -- S.H.Adams> **b** : an abandonment of religious faith or principles : APOSTASY,  
BACKSLIDE <prior to Adam’s -- R.W.Murray> **5 a** *archaic* : a continuous flow or gentle downward  
glide (as of water) <down comes the stream, a ~ of living amethyst -- Thomas Aird> **b** : a continuous  
passage or an elapse period of time : COURSE, INTERVAL <a transaction involving a considerable ~  
of time because the shares could not be sold until the state debt was paid -- W.P. Webb> <except for a ~  
of two years when he studied abroad, he has taught continuously since graduation> **syn** SEE ERROR

16 <sup>2</sup>*lapse* \ “ \ vb -ED/-ING/ -S v/ **1 a** : to fall into error or folly : depart from an accepted standard <~s into  
17 addiction again at the first temptation -- *Time*> <purchases . . . where his discrimination *lapsed* -- Basil  
18 Taylor>; *specif* : BACKSLIDE <in their view Constantinople had *lapsed* into heresy -- R.M. French> **b**  
19 : to sink or slip involuntarily : SUBSIDE, RELAPSE <murmurs good morning . . . and ~s into silence --  
20 Gertrude Samuels> <some *lapsed* into reading and others into sleep -- Earle Birney> <why does starry-  
21 eyed youth ~ into flabby middle-aged vacuity -- Douglas Bush> <the moment his attention is relaxed . . .  
22 he will ~ into bad Shakespearean verse -- T.S. Eliot> **2** : to go out of existence : fall into decay or  
disuse : DISAPPEAR, TERMINATE <the nest-building impulse . . . ~s when the eggs are laid --  
E.A.Armstrong> <could think of no rejoinder . . . and our conversation *lapsed* -- Maurice Cranston> <a  
relationship may be allowed to ~, but it can never be dissolved -- G.M.Foster> <this series of  
experiments seems to have *lapsed* around 1910 -- Frank Denman> **3** : to fall or pass from one proprietor  
to another or from the original destination by the omission, negligence, or failure of some one (as a  
patron or legatee) <a legacy ~s when it fails to vest> <an insurance policy ~s with forfeiture of value  
from non-payment of a premium when due> **4 a** *of time* : to run its course : PASS <the whole fund

23 <sup>27</sup> This applies whether a word is undefined in a contract or in a statute. See *Am. Legion Post No. 149 v. Dep’t of Health*, 164 Wn.2d 570, 592 fn. 17, 192 P.3d 306 (2008).

1 might be lost . . . by the *lapsing* of the time allowed --A.D.White> **b** : to glide past <saw the washed  
2 pavement *lapsing* beneath my feet --L.P.Smith> **c** : to glide gently along <lolled with their lovers by  
3 *lapsing* brooks --W.H.Auden> <barges *lapsing* on its tranquil tide --C.C.Clark> ~ vt 1 obs : LOSE,  
FORFEIT <a vestry cannot ~ their right of presentation --William Bryd> **2** : **to make ineffective by**  
4 **failing to meet the requirements of : let slip : NULLIFY** <lapsed his policy> <the high percentage of  
5 patients *lapsing* therapy --*Jour. Amer. Med. Assoc.*>

6 (Emphasis added.) WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1272

7 (2002). The emboldened and underlined definitions above appear consistent with the way the  
8 word is used throughout WAC 284-54-253 – as a prescribed date when the policy’s coverage  
9 will come to an end. Regardless which of these definitions fits best, the Company’s strained,  
10 technical, legal interpretation does not.

11 Second, while the Company claims “lapse” means one thing, and OIC staff claim it  
12 means another, the term may be seen as ambiguous. “When an ambiguity in the policy exists,  
13 a meaning and construction most favorable to the insured must be applied, even though the  
14 insurer may have intended another meaning.” *Kaplan v. Northwest Mutual Life Ins. Co.*, 115  
15 Wn. App. 791, 804-05, 65 P.3d 16 (2003) (cites omitted.) This seems particularly apt here,  
16 since the Company has made clear that it specifically did intend a different meaning than what  
17 the rule’s requirements provided.

18 The evidence shows that the Company considered its March 20, 2009 letter (if indeed  
19 it was ever actually mailed) to be an attempt to collect unpaid premium, not a letter to advise  
20 when the lapse “will” occur. The letter’s language that the policy “will lapse” was misleading  
21 and deceptive, because the Company didn’t really mean that the policy will lapse, but rather,  
22 it incorrectly believed lapse “reverted back” to February 7, 2009, yet, that was not said  
23 anywhere in the letter. Its language failed to fulfill the Company’s notice obligation under  
WAC 284-54-253(1)(a) by only ambiguously suggesting that perhaps the “lapse” date was 35  
days from the date on the letter. In fact, the Company made clear at the hearing (and in Mr.  
Lawler’s letters) that it meant something different. This rendered the letter both noncompliant  
with WAC 284-54-253(1)(a) and also misleading and deceptive in violation of WAC 284-54-  
800(1). Accordingly, the Company’s denial of reinstatement based on this letter was in error.

1  
2 **C. The Company wrongfully denied reinstatement on the spurious ground that**  
3 **the insured had not presented adequate proof of cognitive impairment or loss**  
4 **of functional capacity.**

5 A year after denying coverage to the insured, the Company first asserted that it had  
6 another reason for its denial: that the insured did not timely present enough proof to satisfy  
7 the Company that she was cognitively impaired enough, or had enough loss of functional  
8 capacity, so as to qualify for coverage. *See* OIC Exh. 26. At the hearing, the Company  
9 claimed that the proof not only needed to be presented to it, to its satisfaction, within the 5-  
10 month period, it also made vague allusions to various federal law, such as “HIPPA” and tax  
11 laws, which prevented the Company from applying any more stringent consumer protection  
12 definitions than the ones included in the Company’s policy, which were put there to meet tax-  
13 qualification requirements. But the 5-month period applies to the presentation of proof, nor  
14 does any federal law preempt the Company from imposing more stringent consumer  
15 protection standards, such as looking to the WAC 284-54-040(3)(a) and (5)(a) to guide  
16 whether the consumer has a “loss of functional capacity” under WASC 284-54-253(2). The  
17 Company’s delay in bringing out these asserted reasons for its conduct not only constitutes a  
18 failure to “promptly provide a reasonable explanation of the basis in the insurance contract in  
19 relation to the facts or applicable law for denial of a claims” not only violated WAC 284-54-  
20 800(9), but on all counts, the Company is wrong.

21 **1. WAC 284-54-253 does not require proof of cognitive impairment be**  
22 **presented within 5 months, only a request for reinstatement.**

23 The Company incorrectly claims the insured needed to have presented proof of  
cognitive impairment or loss of functional capacity within 5 months. WAC 284-54-253(2)  
only requires that the insurer be provided (1) “proof of the insured’s cognitive impairment or  
loss of functional” and (2) a request for reinstatement “within the five months after the policy  
lapsed or terminated due to nonpayment of premium.” Under this, the only thing that needs to  
be given to the insurer within 5 months of the WAC 284-54-253(1)(a)’s lapse date is a request

1 for reinstatement of coverage or a claim for coverage. That occurred here. Indeed, even the  
2 Company's policy (*see* OIC Exh. 1 at page 9) says someone "will have 5 months to request  
3 reinstatement of the policy." While OIC staff believe this language isn't ambiguous, the  
4 Company believes WAC 284-54-253(2) has a different meaning, that the five months should  
5 apply to both the request and the proof of infirmity. But in the case of any ambiguity, such  
6 language must be construed in favor of coverage. *Kaplan v. Northwest Mutual Life Ins.*  
7 *Co.*, 115 Wn. App. 791, 804-05, 65 P.3d 16 (2003).

8 The reason why the 5 months do not apply to the presentation of proof makes sense,  
9 too. A designee is a stranger to the contract, and may likely not be an expert in insurance,  
10 law, or medicine. They may need time to consult with family members, doctors, insurance  
11 expert, and lawyers to evaluate the facts, weigh the insured's needs and resources, and find  
12 ways to acquire premium funds, all simply determine whether the request should be made.  
13 The designee may require time to gather proof. But it also makes sense because it would be  
14 absurd to suggest that a designee will fail to secure reinstatement even if they timely request  
15 reinstatement in month four, but then fail to gather enough "proof" until two days after the  
16 fifth month. "The court should not construe a regulation in a manner that is strained or leads  
17 to absurd results." *City of Seattle v. Allison*, 148 Wn.2d 75, 81, 59 P.3d 85 (2002), *citing*  
18 *State v. Burke*, 92 Wn.2d 474, 478, 598 P.2d 395 (1979).

19 **2. The insured had a cognitive impairment and loss of functional capacity,  
20 and the Company's claims to the contrary are meritless.**

21 The evidence presented included testimony and documents showing that clearly, the  
22 insured had a cognitive impairment and a loss of functional capacity. This was obvious from  
23 the testimony of the witnesses, the letter and certification of Dr. Mihali, and the records  
admitted.

The Company erroneously claims that the standards for reinstatement are, as they  
supposedly must be, more strict and more difficult to meet than what WAC 284-54 *et seq*  
otherwise provides, because the Company feels that certain federal laws simply require it.

1 For example, at the hearing Mr. Lawler testified that a “certificate” was needed to satisfy the  
2 Company under these more strict standards, and that the testimony and other evidence  
3 presented to that point was simply not enough to meet this exceedingly high standard of  
4 proof. At the time, no such certificate was in evidence. , but since then, one has been offered.  
5 This certificate, from Dr. Mihali, obviates any concern over whether the insured meets even  
6 the more strict standards that the Company claims apply.

7 But while the Company seems to claim that some yet unrevealed federal laws preempt  
8 and/or mandate that the Company must require insureds to satisfy stricter and more difficult  
9 to meet standards for reinstatement, the opposite is true here. According to the legislative  
10 materials underlying two such federal laws Mr. Lawler alluded to in his testimony, states like  
11 Washington are specifically allowed to require more stringent consumer protection standards  
12 without the policies losing their tax-qualified status or otherwise running afoul of any law.  
13 For example, the HIPPA conference report states that “a Federal standard” was “not  
14 intended,” and that “applicable or appropriate state standards” which may be more stringent  
15 than the federal law, are expressly permissible. This was contemplated when the laws were  
16 being written:

17 [...] an otherwise qualified long-term care insurance contract will not fail to be a  
18 qualified long-term care insurance contract, and will not be treated as failing to meet  
19 the analogous requirement under the conference agreement, solely because it satisfies  
20 a consumer protection standard imposed under applicable State law that is more  
21 stringent than the analogous standard provided in the bill. The conference agreement  
22 does not preclude States from enacting more stringent consumer protection provisions  
23 than the analogous standards under the bill.

See attached excerpts of the HIPPA Conference Report.<sup>28</sup> Likewise, this remained the case  
after the enactment of HIPPA:

HIPPA provides that an otherwise qualified long-term care insurance contract will not  
fail to be a qualified long-term care insurance contract, and will not be treated as  
failing to meet the analogous requirement under HIPPA, solely because it satisfies a  
consumer protection standard imposed under applicable State law that is more

<sup>28</sup> Attached to this brief are copies of excerpts from the Conference Report and Joint Committee on Taxation  
explanation of HIPPA and a copy of IRS Notice 97-31.

1 stringent than the analogous standard provided in HIPA. HIPA does not preclude  
2 States from enacting more stringent consumer protection provisions than the  
analogous standards under HIPA.

3 *Id.* And it also remained the case after the Internal Revenue Code enactments were made:

4 In a case of a State that has adopted all or any portion of the [NAIC] Model Act or  
5 Model Regulation, compliance with the applicable requirement of State law is  
6 considered compliance with the parallel Model Act or Model Regulation requirement  
7 specified in §7702B(g) or §4980C, and failure to comply with that requirement of  
8 State law is considered failure to comply with the parallel Model Act or Model  
9 Regulation requirement specified in §7702B(g) or §4980C. [...] In accordance with  
10 §4980C(f), in the case of a State that imposes a requirement that is more stringent than  
11 the analogous requirement imposed by §7702B(g) or §4980C, compliance with the  
12 applicable requirement of State law is considered compliance with the parallel Model  
13 Act or Model Regulation requirement in §7702B(g) or §4980C.

14 *See* IRS Notice 97-31, Long Term Care Services and Insurance. In any event, Dr. Mihali's  
15 certification renders moot any issue about the applicability of any federal law, because under  
16 even the incorrectly asserted "federally imposed" tests for cognitive impairment and loss of  
17 functional capacity, the insured meets all tests.

18 **3. The term "loss of functional capacity" is undefined in the policy and  
19 elsewhere, so its common meaning should govern and should be informed  
20 by WAC 284-54-040(3)(a)-(b) and (5)(a).**

21 It is also important to note that the term "loss of functional capacity is undefined in the  
22 policy, in WAC 284-54-253, or in any part of the Insurance Code. An undefined term like  
23 this must be given its common meaning. Being undefined, and not being a qualifying  
condition for coverage under the policy, it means what it would mean to an ordinary  
purchaser of insurance. Briefly, while the evidence shows that the insured met this standard,  
the Court may look to WAC 284-54-040(3)(a)-(b) and (5)(a) to guide it in its interpretation of  
what "loss of functional capacity" means.

WAC 284-54-040(3)(a)-(b) and (5)(a) provide definitions for activities of daily living  
and "cognitive impairment," which is referred to in WAC 284-54-040(3)(b). These standards  
should be seen as helping guide whether the insured had a "loss of functional capacity," since  
WAC 284-54-040(3)(a) specifies that they help measure "functional incapacity," similar to  
"loss of functional capacity."

1           Interestingly, while WAC 284-54-040(3)(a) includes this “functional incapacity”  
2 language,” the policy’s definition for “activities of daily living” does not define “loss of  
3 functional capacity.” The policy uses the term “loss of functional capacity” in page 3,  
4 (definition for “Assisted Living Care Facility”) page 6 (Part G), and in the provision Part M  
5 on page 9. The policy’s use of this undefined term is, however, somewhat circular. Part G  
6 provides that one way to qualify for benefits is to meet at least two activities of daily living  
7 for a period of 90 days, but this must be “due to loss of functional capacity.” Again, the term  
8 is undefined, and in such circumstances, the terms ordinary meaning prevails.

9           Under any meaning of “loss of functional capacity, OIC staff respectfully submits that  
10 the evidence shows that the insured met this standard, and was wrongfully denied  
11 reinstatement on the basis that she supposedly did not meet it.

12           **D. In its denial, the Company engaged in a variety of other wrongful acts that**  
13           **violated the law.**

14           Another aspect of the Company’s conduct was its complete failure to do anything to  
15 assist its insured or give its insured’s interests equal consideration to its own. This was  
16 evident in numerous ways.

17           First, as to the manner in which the Company handled the claim for reinstatement, the  
18 Company failed to meet its quasi fiduciary obligations to its insured. Aside from forwarding  
19 the designee’s September 30, 2009 and subsequent reinstatement materials to Donald Lawler  
20 for handling, the Company did nothing to assist the insured or her designee. *See* Testimony  
21 Lawler. The Company did not offer any kind of assistance to the insured or her designee  
22 from this date forward. The Company did not provide a copy of the policy to the designee.  
23 The Company did not explain WAC 284-54-253’s right to reinstatement, what it meant, what  
burden of proof the Company felt needed to be met, or how it could be met. Nor did the  
Company make any attempt to have the insured evaluated for “cognitive impairment” or “loss  
of functional capacity” under its policy, even though the Company had its own contractual  
right to do so under its policy with the insured, and had previously utilized this provision to

1 examine the insured in a situation that cut off benefits under a prior claim. *See, e.g.,*  
2 Testimony Lawler; Testimony Silvernail; and OIC Exh. 1 at p. 7 (“Part G,” subsection  
3 entitled “Independent Evaluation.”) And more than a year after denying reinstatement  
4 supposedly because it hadn’t been requested in time, the Company added a new reason, which  
5 it never told the insured or her designee: there was supposedly no proof of cognitive  
6 impairment or loss of functional capacity.

7 But even before the reinstatement issue arose, the Company took no steps to fulfill the  
8 purpose of WAC 284-54-253, let alone in a way that gave equal consideration to the insured’s  
9 interests as to its own interests. For example, the Company merely collected designee forms  
10 without scrutinizing them to make sure they were properly completed. The Company’s  
11 normal practice was to leave to chance whether the information on them was ever accurate.  
12 The Company took no steps to verify addresses, call insureds, or call designees. This meant,  
13 for example, that if an insured completed a designee form by naming a California Senator as  
14 their designee, that’s who the Company would send a WAC 284-54-253(1)(a) notice to – no  
15 questions asked. The Company never notified designees about having been apparently named  
16 as designees, never told designees about the importance of advising the Company of any  
17 changes in address, and never explained any aspect of WAC 284-54-253 to the designees.

18 In this case in particular, the Company’s failure to act in response to the insured’s  
19 designee form (*see* OIC Exh. 6) was concerning. The way this particular form was completed  
20 should have raised questions and concerns on the Company’s part, but did not. For example,  
21 any reasonable person looking at this form with any degree of care readily apprehends several  
22 significant problems with it: (1) it includes two area codes for the designee’s telephone  
23 number, (2) it includes the supposed signature of the insured’s *designee*, on a line intended for  
the *insured*, purportedly indicating that *the designee* wanted to waive “protection against  
unintended lapse,” and (3) the signatures of both the insured and the designee were obviously  
made by the same person. If the Company is interested in “preserving inviolate the integrity

1 of insurance” (RCW 48.01.030) and effectively meeting at least the bare “minimum”  
2 consumer protection standards and requirements under WAC 284-54-253, it should be found  
3 to be both concerning and surprising that the Company’s Donald Lawler testified that he saw  
4 no issues whatsoever with the way this form was completed.

5 This all flies in the face of the Company’s quasi-fiduciary duties under Washington  
6 law. This law provides that the Company, in all aspects of its work for its insureds, owes a  
7 particular kind of fiduciary duty to each and every insured. In *Van Noys v. State Farm*, 142  
8 Wn.2d 784, 16 P.3d 574 (2000), the Washington Supreme Court affirmed that this “quasi-  
9 fiduciary” duty is one of “good faith [that] rises to an even higher level than that of honesty  
10 and lawful lawfulness of purpose toward its policyholders: an insurer must deal fairly with an  
11 insured, giving equal consideration *in all matters* to the insured’s interests” – which matters,  
12 of course, would necessarily include the reinstatement right under WAC 284-54-253. *Van*  
13 *Noys*, 142 Wn.2d at 794. (Emphasis in original; cites omitted.) The *Van Noys* Court  
14 indicated that several discrete sub-duties comprise this quasi-fiduciary duty, and they include  
15 “(1) the duty to disclose all facts that would aid its insureds in protecting their interests; (2)  
16 the duty of equal consideration; and (3) the duty not to mislead its insureds,” *Id.* at 791. The  
17 Court also noted that this quasi-fiduciary duty exists

18 not only as a result of the contract between insurer and insured, but because of the  
19 high stakes involved for both parties to an insurance contract and the elevated level of  
20 trust underlying insureds’ dependence on their insurers.” [...] **This dependence and  
21 heightened level of trust exists not only where the insurer’s and the insured’s  
22 interests are aligned, as in the third-party context, but also, and perhaps even  
23 more so, in the first-party context, where the insurer’s interests might be opposed  
to the insured’s and the insured is particularly vulnerable and dependent on the  
insurer’s honesty and good faith.**

(Cites omitted; emphasis added.) *Id.* at 793, fn. 2. Here, the insured was singularly  
vulnerable and dependent on Ability’s honesty and good faith. At every turn described above,  
the Company abused and violated its quasi-fiduciary duties: (a) it failed to offer reasonable  
assistance when reinstatement was requested, (b) it misled its insured about the lapse date, (c)

1 it did nothing to help the designee understand what exactly was needed, (d) it failed to  
2 promptly provide a reasonable explanation of the basis in the insurance contract in relation to  
3 the facts or applicable law for denial of a claim (see WAC 284-54-800(9), and more.

4 **E. Other briefing from the Court's 8/24/11 Order re: post hearing briefs.**

5 The Court's order requested issues to be included in the parties' briefs, as follows:

6 **Rules of construction: policies, when/when not ambiguous**

7 The following summary provides some pertinent principles. OIC staff may provide  
8 others in subsequent briefing, consistent with the Court's order. The following are quoted  
9 from *Bushnell*, *supra* at 881-882:

- 10 • "Interpretation of an insurance contract is a question of law that we review de  
11 novo. *Woo*, 161 Wn.2d at 52."
- 12 • "We construe an insurance policy as a whole and give a fair, reasonable, and  
13 sensible construction as would be given by the average person purchasing insurance.  
14 *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 575, 964 P.2d 1173 (1998)."
- 15 • "Courts determine coverage under the plain meaning of the policy. *Capelouto*  
16 *v. Valley Forge Ins. Co.*, 98 Wn. App. 7, 13-14, 990 P.2d 414 (1999)."
- 17 • "We interpret the agreement to give effect to each provision. *Smith v. Cont'l*  
18 *Cas. Co.*, 128 Wn.2d 73, 78-79, 904 P.2d 749 (1995)."
- 19 • "Undefined terms are given their plain, ordinary, and popular meaning. *Kitsap*  
20 *County*, 136 Wn.2d at 576.
- 21 • Insurance policies are liberally construed to provide coverage wherever  
22 possible. *Bordeaux, Inc. v. Am. Safety Ins. Co.*, 145 Wn. App. 687, 694, 186 P.3d 1188  
23 (2008)."
- "If a policy is clear and unambiguous, the court must enforce it as written and  
not create ambiguity where none exists. *Quadrant Corp. v. Am. States Ins. Co.*, 154  
Wn.2d 165, 171, 110 P.3d 733 (2005)."
- "An ambiguity exists only if the policy language is susceptible to two different  
reasonable interpretations. *Daley v. Allstate Ins. Co.*, 135 Wn.2d 777, 784, 958 P.2d  
990 (1998).
- If any ambiguity exists, the language of the policy must be construed in favor  
of the insured. *Bordeaux*, 145 Wn. App. at 694."

Other principles, not from *Bushnell*, have been previously cited herein. Some others include:

1           • Where a contract contains different words, those terms should be construed to  
2 have different meanings. *See, e.g. Bellevue Sch. Dist. No. 405 v. Bentley*, 38 Wn. App.  
3 152, 159, 684 P.2d 793 (1984). In *Bellevue School District*, supra, the Court evaluated  
4 an employment contract to determine whether a former teacher was required to pay  
5 back her salary and benefits she received during a sabbatical. *Id.* at 154. The  
6 agreement specifically required that teachers who failed to return to work after a paid  
7 sabbatical were required to reimburse the district for the "salary" they received while  
8 away. *Id.* The agreement also contained the term "benefits," but the provision  
9 regarding reimbursement only stated that teachers must pay back their salary. *Id.* The  
10 court held that the terms should be construed to have different meanings because they  
11 were used separately in the agreement, and shall be construed to have different  
12 meanings. *Id.* at 159.

13           • "When interpreting a document, the preferred interpretation gives meaning to  
14 all provisions and does not render some superfluous or meaningless." *Bogomolov v.*  
15 *Lake Villas Condominium Ass'n of Apartment Owners*, 131 Wn. App. 353, 361-62,  
16 127 P.3d 762 (2006).

17           • "A clause in a policy is ambiguous when, on its face, it is fairly susceptible to two  
18 different interpretations, both of which are reasonable." *Greer v. Northwestern Nat'l*  
19 *Ins. Co.*, 109 Wn.2d 191, 198, 743 P.2d 1244 (1987).

20           • "In construing the language of an insurance contract, the contract as a whole is  
21 examined, and if, on the face of the contract, two reasonable and fair interpretations  
22 are possible, an ambiguity exists." *Nichols v. CNA Ins. Co.*, 57 Wn. App. 397, 400,  
23 788 P.2d 594 (1990). "When an ambiguity in the policy exists, a meaning and  
construction most favorable to the insured must be applied, even though the insurer  
may have intended another meaning." *Id.* (citing *Riley v. Viking Ins. Co.*, 46 Wn. App.  
828, 830, 733 P.2d 556 (1987).)"

OIC staff would note also that, as indicated above, all of WAC 284-54-253 has essentially  
been made a part of the policy here. The policy has a provision at Part S(13) that provides  
"[t]he provisions of the policy must conform with the laws of the state in which you reside on  
the Policy Date. If any do not, this clause amends them so that they do conform." OIC Exh.  
1 at p. 13. Thus, if any parts of the policy are inconsistent with WAC 284-54-253, including  
its provision regarding "restoration of benefits in the event of policy lapse due to cognitive  
impairment," the inconsistent policy terms are supplanted, and the policy should be read as  
embodying all of WAC 284-54-253's requirements as if the entirety of WAC 284-54-253 was  
part of the contract:

1 As the insurance business is affected with a public interest and subject to legislative  
2 regulation, an insurer cannot complain of valid statutes governing its contract at the  
3 time it was made. The statutory law in force and effect at the time of the issuance of a  
4 policy becomes a part of the contract as though expressly written therein, and a policy  
5 must be considered to contain those requirements. [...] The parties are chargeable  
6 with knowledge of statutes and with the fact that insurance policies cannot be issued in  
7 conflict with them. And thus missing terms required by statute will be read into the  
8 policy and terms in conflict with statute will be amended to conform to them, and this  
9 is the result even though increased liability not reflected in original premium is the  
10 consequence.

11 4-22 Appleman on Insurance § 22.1. Consequently, OIC staff believes that, in this matter, the  
12 rules of construction applicable to policies apply to such terms, specifically including the  
13 rules to the effect that terms should be liberally construed in favor of finding coverage and in  
14 favor of the insured.

15 **Rules of construction: statutes/regulations, when ambiguous**

16 The following summary provides some pertinent principles. OIC staff may provide  
17 others in subsequent briefing, consistent with the Court's order. The following are quoted  
18 from *Bushnell, supra* at 881-882:

- 19 • "The meaning of a statute is also a question of law that we review de novo. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)."
- 20 • "The primary objective in interpreting a statute is to ascertain and give effect to the  
21 intent of the legislature. *King County v. Taxpayers of King Cnty.*, 104 Wn.2d 1, 5,  
22 700 P.2d 1143 (1985)."
- 23 • "If the statute is unambiguous, we give effect to that plain meaning as an  
expression of legislative intent. *Campbell & Gwinn*, 146 Wn.2d at 9-10."
- ""[T]he court should assume that the legislature means exactly what it says. Plain  
words do not require construction." *City of Kent v. Jenkins*, 99 Wn. App. 287, 290,  
992 P.2d 1045 (2000) (internal quotation marks omitted) (quoting *State v. McCraw*,  
127 Wn.2d 281, 288, 898 P.2d 838 (1995))."

The following are not from *Bushnell*, but derive from the source cited:

- "Rules of statutory construction apply to administrative rules and regulations." *City of Seattle v. Allison*, 148 Wn.2d 75, 81, 59 P.3d 85 (2002), citing *State v. Burke*, 92 Wn.2d 474, 478, 598 P.2d 395 (1979).
- "If a rule's meaning is plain on its face, then the court must give effect to that plain meaning." *Id.*, citing *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001).
- "Under the 'plain meaning' rule, examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in

1 which the provision is found, is appropriate as part of the determination whether a  
2 plain meaning can be ascertained.” *Id.*, citing *Dep’t of Ecology v. Campbell &*  
*Gwinn, L.L.C.*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002); *C.J.C. v. Corp. of the Catholic*  
*Bishop of Yakima*, 138 Wn.2d 699, 708-09, 985 P.2d 262 (1999).

- 3
- 4 • “A term in a regulation should not be read in isolation but rather within the context  
5 of the regulatory and statutory scheme as a whole.” *Id.*, citing *ITT Rayonier, Inc.*  
6 *v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993).
  - 7 • A reviewing court should construe agency rules in “a rational, sensible” manner,  
8 giving meaning to the underlying policy and intent. *Mader v. Health Care Auth.*,  
9 149 Wn.2d 458, 70 P.3d 931 (2003) (citing *Cannon v. Dep’t. of Licensing*, 147  
10 Wn.2d 41, 57, 50 P.3d 627 (2002)).
  - 11 • In construing an agency’s rule or regulation, “the spirit or purpose of an enactment  
12 should prevail.” *Glaubach v. Regence Blueshield*, 149 Wn.2d 827, 833, 74 P.3d  
13 115 (2003) (quoting *State v. Day*, 96 Wn.2d 646, 648, 638 P.2d 546 (1981)).
  - 14 • To ascertain its meaning, “a term in a regulation should not be read in isolation but  
15 rather within the context of the regulatory and statutory scheme as a whole.” *City*  
16 *of Seattle v. Allison*, 148 Wn.2d 75, 81-82, 59 P.3d 85 (2002) (interpreting a  
17 section in an administrative rule listing the rationales for breath-testing rules)  
18 (citing *ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801 807, 863 P.2d 64 (1993)).  
“The court should not construe a regulation in a manner that is strained or leads to  
absurd results.” *Id.*, citing *Burke*, 92 Wn.2d at 478.
  - It is a well-established rule of statutory construction in Washington that  
*considerable judicial deference* should be given to the construction of legislation  
by those officials charged with its enforcement. *Keller v. Bellingham*, 92 Wn.2d  
726, 731, 600 P.2d 1276 (1979); *Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d  
569 (1956). “Similarly, the United States Supreme Court has shown ‘great  
deference’ to the interpretation given a statute by the agency charged with its  
administration and stated ‘[w]hen the construction of an administrative regulation  
rather than a statute is in issue, deference is even more clearly in order.’” *Hayes v.*  
*Yount*, 87 Wn.2d 280, 289, 552 P.2d 1038 (1976), citing *Udall v. Tallman*, 280  
U.S. 1, 16, 13 L. Ed. 2d 616, 85 S. Ct. 792 (1965); and *Zuber v. Allen*, 396 U.S.  
168, 192-93, 24 L. Ed. 2d 345, 90 S. Ct. 314 (1969).

19 **When a statute or regulation is either enacted or changed after the date an**  
20 **insurance policy was originally issued, how must the new/changed law/regulation**  
21 **be reflected in the insurance policy?**

22 This will depend on the circumstances. But generally, policies must be consistent with  
23 the law on the date the policy is originally issued. As cited earlier:

As the insurance business is affected with a public interest and subject to legislative  
regulation, an insurer cannot complain of valid statutes governing its contract at the  
time it was made. The statutory law in force and effect at the time of the issuance of a

1 policy becomes a part of the contract as though expressly written therein, and a policy  
2 must be considered to contain those requirements. [...] The parties are chargeable  
3 with knowledge of statutes and with the fact that insurance policies cannot be issued in  
4 conflict with them. And thus missing terms required by statute will be read into the  
policy and terms in conflict with statute will be amended to conform to them, and this  
is the result even though increased liability not reflected in original premium is the  
consequence.

4-22 Appleman on Insurance § 22.1.

5 **Must an insurance policy comply only at renewal, and how is renewal defined?**

6 The answer depends. As was touched upon in the *Bushnell* case, whose opinion was  
7 published and is now final, when renewal occurs depends on the language in the policy and  
8 the language in any pertinent statute or regulation. OIC staff believes that, occasionally, the  
9 Legislature or OIC may have intended requirements to take place upon renewal, or only upon  
10 original issuance only, or some combination, and will endeavor to provide further explanation  
in its subsequent briefing.

11 **In a guaranteed renewable policy such as Ability's policy with Ms. White herein**  
12 **(Ability's policy), is there a renewal date upon which the policy must comply? [For**  
13 **example, in this case the Health Insurance Portability and Accountability Act of 1996**  
14 **(HIPPA), P.L. 104-191, was enacted after WAC 284-54-253 (eff. 10/12/95).**

15 No, the policy does not appear to set forth a "renewal date." The analysis in the  
16 *Bushnell* case would appear helpful in the resolution of this question. Both the policy in the  
17 *Bushnell* case and OIC Exh. 1 here appear to contain certain identical provisions, but the  
18 absence of the reservation of the right to not renew in OIC Exh. 1 would appear relevant to  
19 this analysis. As to HIPPA, as indicated, it and other federal laws expressly allow any more  
20 stringent consumer protection provisions contained in such provisions as WAC 284-54-253,  
21 so HIOPPA's enactment is, in OIC staff's view, irrelevant to this matter.

22 **How is WAC 284-54-253 (eff. 10/12/95) to be properly interpreted in light of**  
23 **WAC 284-83-025 ((eff. 12/25/08) and HIPAA?**

OIC staff respectfully submits that WAC 284-54-253 is not binding on how WAC  
284-54-253 should be interpreted. WAC 284-83-025 is functionally identical in all or nearly  
all material respects when compared with WAC 284-54-253. The only difference, as alluded  
to above, is that WAC 284-83-025 appears to have adopted the Model's 5-day notice deeming

1 language as set forth in WAC 284-83-025(1)(c). As indicated, OIC staff believes HIPPA is  
2 irrelevant to the question of how WAC 284-54-253 should be interpreted.

3 **Part S(13) at OIC Exh. 1 p. 12.**

4 OIC staff submits that this provision must be construed pursuant to the rules of  
5 construction governing insurance policies. These rules include the requirement that if a  
6 provision is found to be ambiguous, coverage and interpretation must be in favor of finding  
7 coverage and in favor of the insured.

8 **Definition of "lapse"**

9 The meaning of "lapse" was discussed above, and seems to mean an event that, when  
10 it arrives, marks the time when the policy will come to an end. WAC 284-54-253's  
11 requirements should be interpreted based on the words' plain meaning, and because the  
12 Company's interpretation would require a construction that leads to strained or absurd results,  
13 it should be rejected.

14 DATED this 19<sup>th</sup> day of September, 2011.

15 OFFICE OF INSURANCE COMMISSIONER

16 By:   
17 Alan Michael Singer