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STATE OF WASHINGTON  
OFFICE OF  
INSURANCE COMMISSIONER

2011 JUN - 1 P 4:00

In the Matter of  
ABILITY INSURANCE COMPANY,  
Respondent.

No. 11-0088  
Hearings Unit, OIC  
Patricia D. Petersen  
ABILITY'S REPLY SUPPORTING ITS  
MOTION FOR STAY OF CEASE AND  
DESIST ORDER

OIC is seeking to implement requirements beyond current law or regulations and beyond its authority. OIC stipulated that Gladys White's policy is not the issue here; the Cease and Desist Order does not apply to Ms. White.<sup>1</sup> The only potential harm that OIC presents as the basis for the Cease and Desist Order is highly speculative and presented in a disingenuous manner.

Ability moved for a stay of the Cease and Desist Order, providing argument as to why the Cease and Desist Order was wrongly issued in the first place, how the order would cause harm to Ability, and showing that the order was likely to be overturned. Rather than addressing Ability's argument, OIC responded to Ability's motion with a new allegation of a regulation violation which is not referenced in its orders. The lack of specification or even articulation of the violation, or any argument to support it, demonstrates OIC's approach in this matter. OIC did not link the alleged violation to the language of the regulation; rather, OIC seeks "something more." This is inappropriate.

OIC further responded to Ability's motion with pages of general policy information and a case totally extraneous to the pertinent issues of Ability's motion. OIC failed to

<sup>1</sup> Ability did not address Ms. White's cognitive abilities or lack thereof because that issue is not relevant here. The Cease and Desist Order does not apply to Ms. White's policy, and was not the basis of the issuance of Order No. 11-0088 or Order No. 11-0089. Given this fact, it is immaterial whether or not Ability mentioned Ms. White's cognitive abilities and goes without saying that OIC has no standing to assert whether Ability does or does not dispute facts regarding the same. See *OIC Response*, p. 4, fn 2.

ABILITY'S REPLY SUPPORTING ITS MOTION FOR  
STAY OF CEASE AND DESIST ORDER - 1

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1 address how an interpretation dispute warrants a Cease and Desist Order. OIC appears to  
2 concede that its orders will likely be overturned. Rather than risk the irrevocable harm to  
3 Ability that the Cease and Desist Order could cause, Ability's motion for a stay of the Cease  
4 and Desist Order should be granted.

5 **I. Argument in Reply**

6 **A. Improper imposition of requirements beyond the legislation**  
7 **governing Long Term Care policies cannot be the basis of a Cease**  
8 **and Desist Order.**

9 OIC is asserting that Ability violated the notice provision of WAC 284-54-253(1)(a)  
10 in an unsuccessful attempt to justify its actions. This allegation is neither part of OIC's  
11 Cease and Desist Order No. 11-0088, nor included in OIC's order suspending Certificate of  
12 Authority, No. 11-0089. The first mention of this violation is in OIC's response. *See OIC*  
13 *Response*, p. 8 at 11-13. Ability did not violate the regulation.

14 Ability properly complied with WAC 284-54-253(1)(a). OIC has not articulated how  
15 Ability violated the regulation, nor could OIC point to a provision of the regulation violated.  
16 OIC cannot attempt to enforce requirements beyond those found in the regulations, much less  
17 make such requirements part of a Cease and Desist Order after the fact. That OIC feels the  
18 need for such an improper and impromptu justification of its order speaks volumes. Ability's  
19 motion for stay of the Cease and Desist Order should be granted.

20 **1. What the regulation requires**

21 The regulation does not require actual notice. Instead, the regulation requires that  
22 notice is sent to the home address of the person designated, and provide that the contract will  
23 continue to be in effect until at least thirty days after the notice is mailed:

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

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

ABILITY'S REPLY SUPPORTING ITS MOTION FOR  
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1 WAC 284-54-253(1)(a).

2 2. Notice sent by Ability

3 Gladys White designated Cheryl Silvernail as the person to receive additional notice  
4 of non-payment of premium. Nicholson Decl., Exhibit B. Ability properly sent notice to  
5 Ms. Silvernail of Gladys White's past-due premium on March 20, 2009. The notice  
6 explained that Ms. White had picked Ms. Silvernail as the "Advisor," that Advisors receives  
7 notice any time the policyholder's premium is 30 days past due, and that Ability's  
8 policyholder (Ms. White) trusted the Advisor (Ms. Silvernail) to contact her to discuss the  
9 importance of paying the policy premium. See Nicholson Decl., Exhibit C.

10 Ability's notice specifically stated: "If the premium is not received within 35 days  
11 from the date of this letter, the policy will lapse for nonpayment of premium." *Id.* Ability  
12 fully complied with the requirements of WAC 284-54-253(1)(a).

13 3. OIC's accusation of violation is based on requirements beyond  
14 the regulation

15 Although OIC did not clearly articulate the alleged violation of WAC 284-54-  
16 253(1)(a), it appears to be based upon Ms. Silvernail's claim that she did not receive the  
17 notice. But the regulation does not hold Ability to the standard of actual notice, nor would  
18 that be practical. And OIC does not present any evidence that Ability had any reason to  
19 believe that Ms. Silvernail did not receive her notice. Indeed, the regulation requires that the  
20 notice be sent to the address specified. That is exactly what occurred.

21 OIC states merely (referencing WAC 284-54-253(1)(a)): "This language simply  
22 requires something other than what the Company says and did." *OIC Response*, p. 11 at 2-3.  
23 OIC makes no further elaboration regarding what that "something" may be. Insurance  
24 companies should not be put in the position of guessing what the "something more"  
25 requirement is; the requirements should be clearly stated in the regulation. OIC has gone too  
26 far.

ABILITY'S REPLY SUPPORTING ITS MOTION FOR  
STAY OF CEASE AND DESIST ORDER - 3

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1 OIC appears to demand strict liability for actual notice. OIC alleges that Ability did  
2 not make an additional telephone call. *See OIC Response*, p. 4 at fn 3. That is not required  
3 by any regulation. *See WAC 284-54-253*. A requirement of actual notice, not found in the  
4 regulation, is an improper basis for (a) a cease and desist order and (b) an argument opposing  
5 the stay of a cease and desist order. OIC is not allowed to make up the rules ad hoc. This  
6 allegation of violation is a desperate attempt to justify OIC's orders. It lacks any basis in law  
7 or policy, and will not be upheld. Ability's motion for stay of the cease and desist order  
8 should be granted.

9 **B. OIC failed to present evidence of any proper basis for a Cease and**  
10 **Desist Order**

11 OIC's response lacks any evidence or support for a cease and desist order, which  
12 requires the commissioner to have "cause to believe that any person is violating or is about to  
13 violate any provision of this code or any regulation or order of the commissioner." RCW  
14 48.02.080(3)(a).

15 OIC presented a new allegation of a notice violation, which is also not supported by  
16 the regulations, as explained *supra*. OIC's other justification for issuing the Cease and  
17 Desist Order at issue does not make sense: "Since OIC also learned that Ability would  
18 apparently continue to violate the code in this way, placing more Washington insureds at risk  
19 of substantial harm to Ability's other Washington insureds, OIC properly exercised its  
20 authority to issue its Order." *See OIC's Response*, p. 1 at 20-23.

21 Ability's interpretation of when the five-month period required by the regulation  
22 begins is based upon the plain language of the policy and the regulation. *See Nicholson*  
23 *Decl., Ex. A, Part S (12)*. The Term of Coverage date does not vary by grace period or  
24 unintentional lapse provisions. The Term of Coverage date is constant and defined. The  
25 grace period begins on the Term of Coverage date. Pursuant to WAC 284-54-283, the  
26 extended notice period begins upon receipt of the notice.

ABILITY'S REPLY SUPPORTING ITS MOTION FOR  
STAY OF CEASE AND DESIST ORDER - 4

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1 Ms. White's reinstatement provision has no effect on the Term of Coverage. If the  
2 contract is terminated for non-payment, that occurs on the Term of Coverage Date. This is  
3 clear from the policy.

4 WAC 284-54-283 allows for a limited right to reinstatement if reinstatement is  
5 requested "within the five months after the policy lapsed or terminated due to nonpayment of  
6 premium." WAC 284-54-283 (c)(2) (emphasis added). Thus, the five-month unintended  
7 lapse period required by the regulation begins with the Term of Coverage Date; the date  
8 when the policy is terminated due to nonpayment of the premium.

9 Instead of addressing Ability's argument, OIC attempts to mischaracterize it, falsely  
10 purporting that the Ability "believed" that Ms. White's contract had already lapsed at the  
11 time that they sent the March 20 Notice to Ms. Silvernail. *See OIC Response*, p. 4 at 11-17.  
12 This argument is specious. Ability gave proper notice as required by WAC 283-54-253 and  
13 properly calculated the unintended lapse five-month period. Ms. Silvernail's request fell  
14 outside of that window, which ended on July 7, 2009. While that result may not be ideal for  
15 Ms. White, *that result does not violate any law, regulation, or policy.*

16 OIC did not attempt to address the arbitrary nature of its own calculation of the lapse  
17 period, which is not based on any aspect of Ms. White's policy, the 35-day period granted by  
18 Ability, or the regulation. It is inconsistent and result-oriented.

19 OIC did not bring forth facts or argument to refute Ability's logical interpretation of  
20 the policy which is based upon policy provisions. OIC's issuance of the Cease and Desist  
21 Order is not justified, nor was any adequate explanation of what the Commissioner believes  
22 is a violation given, as required by statute. OIC failed to bring any evidence of a proper basis  
23 for the Cease and Desist Order. Ability's request for a stay regarding that order should be  
24 granted.

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ABILITY'S REPLY SUPPORTING ITS MOTION FOR  
STAY OF CEASE AND DESIST ORDER - 5

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1           **C. The Bushnell case is neither relevant nor analogous; reference to**  
2           **an out-of-context quotation is contrary to the rules of evidence**  
3           **and an improper basis for consideration**

4           OIC mischaracterized Ability's argument and attempts to argue against a position not  
5 taken by Ability with improper and irrelevant evidence. The *Bushnell v. Medico Ins. Co.*  
6 case,<sup>2</sup> discussed extensively by OIC, is not relevant to the issues here. *Bushnell* regarded  
7 whether or not a policy was continuous and whether or not retroactive application of a statute  
8 regarding hospital stays should be applied. 159 Wn. App. at 881. The facts of *Bushnell* are  
9 not analogous to this case, nor do they offer any support for OIC's arguments. *See Id.* at  
10 876-80.

11           OIC's mischaracterization of Ability's argument notwithstanding, Medico never took  
12 the position that any coverage lapses prior to a grace period in the *Bushnell* case or in any  
13 other case. OIC's quotation of the case is out of context and neither party's argument is  
14 clearly articulated by the Court in the written opinion.

15           Basic rules of evidence apply to this and all administrative matters. OIC is  
16 attempting to use its out-of-context quote to suggest prior bad acts on the part of Ability.  
17 This not allowed under Rules of Evidence 401, 402, 403 and 404. *Bushnell* has no  
18 application to this mater.

19           **D. The Motion for Stay should be granted; all factors weigh heavily**  
20           **in Support of the Stay**

21           There is no Washington case law on point discussing the standard for a stay in an  
22 administrative action. OIC also did not cite a case on point. However, if it is true that a  
23 request for a stay is similar to that of a request for a preliminary injunction, the factors  
24 usually analyzed for a determination on an injunction all weigh heavily in Ability's favor as  
25 discussed in Ability's motion.

26           A party seeking relief through a temporary injunction must show (a) a clear legal or

<sup>2</sup> 159 Wn. App. 874, 246 P.3d 856 (2011).

1 equitable right; (b) that there is a well-grounded fear of immediate invasion of that right, and  
2 (c) that the acts complain of have or will result in actual and substantial injury. *Rabon v.*  
3 *Seattle*, 135 Wn.2d 278, 284, 957 P.2d 6231 (1998).

4 The first factor, of a clear legal or equitable right, is in Ability's favor. "In deciding  
5 whether a party has a clear legal or equitable right, the court examines the likelihood that the  
6 moving party will prevail on the merits." Ability is highly likely to succeed on the merits, as  
7 argued *supra*. Ability's interpretation is clear and consistent, and is based on the insured's  
8 policy and the regulations. OIC's interpretation is arbitrary, results-oriented, and unrelated  
9 to the regulation or the insured's policy. Ability is likely to prevail on the merits.

10 Furthermore, OIC failed to address Ability's arguments regarding its policy  
11 interpretation, presenting no facts or arguments in dispute. OIC mentions general policies  
12 underlying long-term care insurance, but it failed to respond to Ability's policy arguments  
13 against arbitrary and inconsistent dates and failed to answer Ability's argument that the  
14 policy created by OIC decision would be detrimental to those very policies cited by it. To  
15 further the policies cited by OIC, insurance companies should be encouraged to offer  
16 generous grace periods. Instead, OIC's interpretation would encourage insurance companies  
17 to offer only the minimum grace periods. OIC's new allegations are no more persuasive.  
18 OIC order No. 11-0088 is likely to be overturned at the hearing.<sup>3</sup> The first factor weighs  
19 heavily in support of granting this motion for a stay.

20 The second factor, a well-grounded fear of immediate invasion of that right, is also  
21 clearly met here. OIC has issued a Cease and Desist Order; which is the immediate invasion  
22 of Ability's rights.

23 The third factor, that OIC's acts will result in actual and substantial injury, is also in

24  
25 <sup>3</sup> It is interesting to note that OIC apparently assumes that the administrative process has no  
26 impact on OIC orders, stating that certain policies should serve as the backdrop against which  
the unintentional lapse rule provisions should reviewed "when this matter is ultimately  
decided after hearing."

ABILITY'S REPLY SUPPORTING ITS MOTION FOR  
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1 Ability's favor. Contrary to OIC's position, the harm to Ability can be future, not just  
2 present harm as the factor language makes clear: "either resulting in or will result in actual  
3 and substantial injury." *Rabon*, 135 Wn.2d at 284. There is a substantial risk that Ability  
4 will be irreparably harmed if it is required to reinstate a single policy based upon OIC's  
5 current interpretation. This harm is actual and substantial. There is no way to "undo" being  
6 forced to provide more coverage than the policy and the regulations require. Either Ability  
7 will be forced to provide more coverage than the policy and the regulations require, or Ability  
8 will be forced into costly litigation.

9 In response, OIC objects to Ability's lack of proof of impending harm, claiming  
10 requirement of "actuarially-demonstrable losses." See *OIC Response*, p. 12 at 3-4. But the  
11 case cited does not support their argument. Instead, it clarifies the required standard:  
12 "Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the  
13 truth or correctness of the matter." *Superior Asphalt v. Labor & Indus.*, 112 Wn. App. 291,  
14 296, 49 P.3d 135 (2002).

15 A single application of OIC's interpretation would harm Ability. But the OIC has  
16 provided only misleading evidence of harm supporting its Cease and Desist Order in the first  
17 place. OIC justifies its Cease and Desist Order by representing that Ability generates \$3.5  
18 million in premiums, and states "That's a lot of Washington insureds that could be impacted  
19 by the Company's 'interpretation.'" *OIC Response*, p. 12 at 15-17. As OIC is aware, this is  
20 misleading. Declaration of Donald K. Lawler ("Lawler Decl."), ¶ 3. A total of all premiums  
21 for the entire state, including policies other than Long-Term Care policies, cannot be an  
22 indicator of the number of insureds similarly situated to Ms. White. OIC's indication  
23 otherwise is disingenuous.

24 OIC is well aware that no other policyholder in the State of Washington is similarly  
25 situated to Ms. White. Lawler Decl., ¶ 2. OIC requested of and received from Ability a  
26 review of all reinstatement requests since January 1, 2009. *Id.* The review revealed only two

ABILITY'S REPLY SUPPORTING ITS MOTION FOR  
STAY OF CEASE AND DESIST ORDER - 8

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1 other policies similar to Ms. White for which reinstatement was denied. *Id.* In both denials,  
2 the reinstatement requests were well outside the five month reinstatement period. *Id.*

3 Washington case law suggests that the motion for stay should be granted. *See, e.g.,*  
4 *Rabon*. In *Rabon*, the court determined that a dog owner, convicted of owning a vicious dog,  
5 still had the right to a hearing contesting a determination that the dogs should be destroyed.  
6 135 Wn.2d at 295. The dog owner was entitled to provided evidence and argument as to  
7 why the animal should not be destroyed despite its being a vicious animal. *Id.* at 296. The  
8 trial court erred by denying the preliminary injunction. *Id.* Similarly here, Ability has the  
9 right to contest OIC's interpretation, which invades its legal rights. Similarly, Ability is  
10 entitled to provide evidence and argument as to why OIC's interpretation is incorrect. And  
11 similarly, here the stay should be granted until the hearing.

12 All three of the preliminary injunction factors are in Ability's favor. The stay should  
13 be granted.

#### 14 **II. Conclusion**

15 Ability's motion for a stay of the Cease and Desist Order should be granted. The  
16 issue here regards the interpretation of when an unintended lapse period begins. OIC  
17 arbitrarily picked a date. Ability provided policy language and argument supporting the  
18 policy's Term of Coverage Date. OIC's Response failed to address both (1) the lack of any  
19 relationship from the date it insists is correct to the policy or the regulation and (2) the policy  
20 issues this arbitrary date would cause.

21 Instead, OIC launched a new allegation of regulation violation, but completely failed  
22 to identify any part of the regulation that was violated; instead insisted that "something  
23 more" was required. OIC cannot make up the requirements on the fly. Instead, they must  
24 enforce the regulations that have been enacted.

25 OIC cannot prove that any policy or regulation has been violated in this matter.

26 OIC's result-oriented determinations cannot support its Cease and Desist Order,

ABILITY'S REPLY SUPPORTING ITS MOTION FOR  
STAY OF CEASE AND DESIST ORDER - 9

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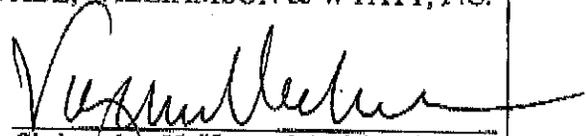
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1 which will likely be overturned at the hearing. Since Ability could be greatly harmed by the  
2 Order, its motion for a stay of the Cease and Desist Order should be granted.

3 Dated this 1st day of June, 2011.

4 SCHWABE, WILLIAMSON & WYATT, P.C.

5  
6 By:



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

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**ABILITY'S REPLY SUPPORTING ITS MOTION FOR  
STAY OF CEASE AND DESIST ORDER - 10**

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 1st day of June, 2011, I caused to be served the foregoing  
ABILITY'S REPLY SUPPORTING ITS MOTION FOR STAY OF CEASE AND DESIST  
ORDER on the following party at the following address:

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

by:

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

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STATE OF WASHINGTON  
OFFICE OF  
INSURANCE COMMISSIONER

In the Matter of  
ABILITY INSURANCE COMPANY,  
Respondent,

No. 11-0088  
DECLARATION OF DONALD K.  
LAWLER SUPPORTING ABILITY'S  
MOTION FOR STAY OF CEASE AND  
DESIST ORDER

Donald K. Lawler declares as follows:

1. I am the Senior Vice President for Ability Insurance Company. I make this declaration on personal knowledge.
2. The OIC is well aware that no other policyholder in the State of Washington is similarly situated to Ms. White. I was involved in discussions with the Washington Office of Insurance Commissioner regarding the denial of reinstatement of Gladys White's policy. During these discussions, the Office of Insurance Commissioner requested and received a review of all reinstatement requests since January 1, 2009. The review revealed only two other policies similar to Ms. White for which reinstatement was denied. In both denials, the reinstatement requests were well outside the five month reinstatement period.
3. The Schedule T information, submitted as Exhibit A to the Declaration of

DECLARATION OF DONALD K. LAWLER - 1

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Hyung M. Lee, reflects all premiums for the state of Washington. This total premium amount has no relationship to amount of insureds similarly situated to Ms. White, as explained above.

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

Dated this 1st day of June, 2011, at Omaha, Nebraska.



Donald K. Lawler

DECLARATION OF DONALD K. LAWLER - 2

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 1<sup>st</sup> day of June, 2011, I caused to be served the foregoing Declaration on the following party at the following address:

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

by:

<input checked="" type="checkbox"/>
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U.S. Postal Service, ordinary first class mail  
U.S. Postal Service, certified or registered mail,  
return receipt requested  
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electronic service  
other (specify) \_\_\_\_\_

Chante Taylor  
Chante Tayler

CERTIFICATE OF SERVICE - 1

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