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Hearings Unit, OIC
Patricia D. Petersen
Chief Hearing Officer

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INSURANCE COMMISSIONER
LEGAL AFFAIRS DIVISION

STATE OF WASHINGTON
OFFICE OF
INSURANCE COMMISSIONER

In the Matter of ABILITY INSURANCE COMPANY, Respondent.	Docket No. 11-0088 MOTION FOR STAY OF ORDER TO CEASE AND DESIST

I. INTRODUCTION

This case is very simple. OIC issued a Cease and Desist and Order of Suspension against Respondent Ability Insurance Company ("Ability") because Ability did not agree with IOC's aggressive and incorrect legal interpretation of when a reinstatement period begins. The underlying dispute in this matter is whether, upon non-payment of premium by the end of the grace period, the policy termination date is the date as defined in the policy or the end of the extended grace period. Ability contends that it is clear by the policy language that the termination date is not variable and is not changed by the grace period. The OIC disagrees, and issued a Cease and Desist Order stating that Ability is violating WAC 284-54-253.

The OIC is wrong. The order is a source of immediate harm to Ability. Ability respectfully requests that Cease and Desist Order No. 11-0088 be stayed until the date of the hearing regarding this issue.

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II. EVIDENCE RELIED UPON

Ability relies upon Declaration of Virginia Nicholson and its attached exhibits and the Chief Hearing Officer's files and records herein.

III. STATEMENT OF FACTS

These orders arose from a question submitted about a specific policy. Ability issued a long-term care policy to Gladys E. White in 1999. The policy contains the following definitions:

> (3) Grace Period: Your premium must be paid on or before the date it is due or during the 31-day grace period that follows. Your policy stays in force during your grace period.
>
> (12) Term of Coverage: Your coverage starts on the Policy Date at 12:01 a.m. standard time where you live. It ends at 12:01 a.m. on the same standard time on the first renewal date. Each time you renew your policy, the new term begins when the old term ends.

The policy contains the following reinstatement provision as Part M:

> RESTORATION OF BENEFITS IN THE EVENT OF POLICY LAPSE DUE TO COGNITIVE IMPAIRMENT OR LOSS OF FUNCTIONAL CAPACITY. If coverage under this policy ends due to nonpayment of premium, you or any person acting on your behalf will have 5 months to request reinstatement of the policy on the grounds that you suffered from Cognitive Impairment or loss of functional capacity at the time of lapse. We will require the same evidence of Cognitive Impairment or loss of functional capacity that is require for eligibility for benefits under this policy. We also must receive the back premium from the date of default. If these conditions are met, we will reinstate the policy without evidence of insurability. The coverage will be at the same level that existed prior to the date of the lapse. This provision does not apply to a policy that terminated because you requested cancellation or because we paid the maximum dollar amount.

Nicholson Decl., Ex. A. Part S, Policy Provisions.

On August 27, 2007, Ms. White designated her daughter, Cheryl Silvernail, to also receive notice of lapse or termination of the insurance policy for nonpayment of premium. Nicholson Decl., Ex. B.

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Ms. White failed to pay her premium when due on February 7, 2009. Both Ms. White and Ms. Silvernail properly received notice of non-payment. Pursuant to her policy, Ms. White was granted a 31-day grace period. Ms. White received a Premium Notice, a Past Due Premium Notice, and a Final Premium Notice. Nicholson Decl., Ex. C. Pursuant to WAC 284-54-283, Ms. Silvernail was sent a third Party Advisor Notice on March 20, 2009. *Id.* As reflected in the notice to Ms. Silvernail, Ability granted a 35-day grace period, pursuant to WAC 253-54-283(1)(a).

No payment was received for Ms. White's policy by the end of the extended grace period, April 24, 2009. Ms. White's policy was cancelled for non-payment as of the Policy Date, February 7, 2009.

On August 6, 2009, Ms. Silvernail attempted to submit a claim for Gladys White. Ms. Silvernail was again informed that Ms. White's policy had been cancelled for non-payment as of February 7, 2009.

On August 9, 2010, Jack White, son of Gladys White, submitted an insurance question to Mr. Kriedler via the online "Ask Mike" form.

Ability was contacted by the OIC on August12, 2010, requesting a response to the "Ask Mike" email of Jack White. On September 24, 2010, the OIC demanded that Ability reinstate Ms. White's policy, and stating that since the extended grace period did not end until April 19, 2009 (this date is based on a required grace period of 30 days; Ms. White was actually granted a 35 day grace period on March 20, 2009), that five month reinstatement period would not start until *after* April 19, 2009.

On October 4, 2010, Ability responded to the OIC, stating its position that the extended grace period does not affect the termination date, from which the reinstatement period is calculated.

Further correspondence from both sides was generated, but the crux of the dispute remained the same. Ability did not reinstate the policy. OIC issued a Cease and Desist

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Order No. 11-0088 and Order No. 11-0089 Suspending Certificate of Authority on April 27, 2011.

IV. ARGUMENT

The purpose of WAC 284-54-283 is to protect insureds from unintentional lapse by (1) establishing standards for notification of a designee to receive notice of lapse for nonpayment of premiums at least thirty days prior to the termination of coverage and (2) to provide for a limited right to reinstatement of coverage unintentionally lapsed by a person with a cognitive impairment or loss of functional capacity. *See* WAC 284-54-283. The notice requirement allows for an alternate recipient of past due notice prior to cancellation:

> Every insurer shall permit an insured to designate at least one additional person to receive notice of lapse or termination for nonpayment of premium, if the premium is not paid on or before its due date. The designation shall include the designee's full name and home address. (a) The notice shall provide that the contract or certificate will not lapse until at least thirty days after the notice is mailed to the insured's designee.

WAC 284-54-283(1). The regulation provides a five month period for reinstatement with proof of cognitive impairment:

> Every insurer shall provide a limited right to reinstate coverage in the event of lapse or termination for nonpayment of premium, if the insurer is provided proof of the insured's cognitive impairment or loss of functional capacity and reinstatement is requested <u>within the five months after the policy lapsed or terminated due to nonpayment of premium</u>.

WAC 284-54-283(2) (emphasis added).

Pursuant to the regulation, Ms. White was provided the proper notices and Ms. Silvernail was also warned of the potential cancellation of the policy for non-payment. *See* Nicholson Decl., Ex. C. Ms. Silvernail did not contact Ability until after the five-month right to reinstatement period ended on July 7, 2009.

The OIC's strained interpretation that the policy lapse date is not the policy termination date and that the policy did not lapse until after the extended grace period ran out

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is results-oriented and unsupportable by the policy language.

A. Ability's interpretation is correct; Gladys White's policy terminated on February 7, 2009 for non-payment

The plain language of Gladys White's policy is clear. The Term of Coverage definition states that coverage ends at 12:01 a.m. on the same standard time on the first renewal date. *See* Nicholson Decl., Ex. A, Part S (12). This date does not vary by grace period or unintentional lapse provisions. The date is constant and defined. When Gladys White failed to pay her premiums by the extended grace period, her policy was cancelled for non-payment on the renewal date, February 7, 2009. Ms. White's reinstatement provision has no effect on the Term of Coverage.

The grace period begins on the Term of Coverage date. It is logical and consistent to interpret the five month unintended lapse period to begin on the Term of Coverage date. There is no authority to say otherwise, and to pick another date is arbitrary. Consistency is key; it is important that the insurers, the insureds, and the OIC all have the same understanding of when the five-month reinstatement period begins.

Indeed, OIC's interpretation makes calculation of the five-month reinstatement period inconsistent and arbitrary, as illustrated by the facts of this case. The OIC contends that the five month period began on April 19, 2009. This is probably based upon the regulation requirement of a 30-day grace period in the Final Notice, sent on March 20, 2009. But Ability granted Ms. White a 35-day grace period in the Final Notice. The OIC's date of April 19, 2009 is completely arbitrary and *unrelated to any policy or notice date*. Because grace periods are defined in the policies, the OIC's interpretation of when the five-month reinstatement period begins would add inconsistency and randomness to every such calculation. Calculation from the Tem of Coverage date, however, is clear, consistent, and logical.

OIC's interpretation not only lends itself to uncertainty regarding date, but also

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rewrites the policy, granting coverage not bargained for and in excess of the policy language and the regulations. The regulation's requirement is for a limited right to reinstatement if reinstatement is requested within the five months after the policy lapsed or terminated due to nonpayment of premium. WAC 284-54-283(2). OIC's interpretation would expand the requirement beyond five months.

In total, Ability granted a 76-day grace period to Ms. White (February 7, 2009 – April 24, 2009). Thus, OIC's interpretation of WAC 284-54-283 would add over two months to the limited right of reinstatement. That is far beyond what the legislature required.

As is often the case in result-oriented decisions, OIC's interpretation also would pose a serious policy problem. Since the limited right to reinstatement would be variable depending upon individual policy grace periods, there would be no consistency among long-term care policies. Under the OIC's interpretation, insurance companies would come to limit grace periods to the bare requirement rather than generously offering maximum grace periods. This is contrary to the spirit and purpose of the regulation.

The OIC's interpretation would require Ability to grant a limited right of reinstatement to Ms. White or another in her position if she requested reinstatement seven months and six days after her policy was cancelled due to non-payment. This modification was not bargained for and is not allowable under Washington case law. An insurer cannot be compelled to extend coverage beyond the insurance contract. *See, e.g., Coventry Assocs. v. Am. States Ins.*, 136 Wn.2d 269, 280, 961 P.2d 933 (1998) (stating that "[A]n insurer is [not] required to pay claims which are not covered by the contract or take other actions inconsistent with the contract"). "The underlying rationale is that an insurance company should not be required to pay for a loss for which it received no premium." *Saunders v. Lloyd's of London,* 113 Wn.2d 330, 336, 779 P.2d 249 (1989).

The OIC's interpretation is strained, would cause difficulties beyond Ms. White's policy, and is unsupported by Washington law. Ability's interpretation is clear and based on

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the plain language of the policy. The OIC is wrong.

B. The OIC did not have a proper basis to issue a Cease and Desist Order

The OIC did not find that Ability failed to give proper notice of the impending cancellation of Gladys White's policy due to non-payment. Indeed, Ability sent the proper notices with the proper language. Nicholson Decl., Ex. A. The OIC did not find that Ability failed to offer a limited right to reinstatement. To the contrary, Part M of Ms. White's policy meets the regulatory requirements of WAC 284-54-283. Nicholson Decl., Ex. A.

Instead, the OIC disagrees with a reasonable and rational interpretation of the policy cancellation date supported by the policy language.

This is not a proper basis for a Cease and Desist Order. RCW 48.02.080(3)(a) permits the commissioner to issue a cease and desist order "[i]f the commissioner has cause to believe that any person is violating or is about to violate any provision of this code or any regulation or order of the commissioner." This order was not issued because the Commissioner has cause to believe Ability will issue policies without the proper limited right of reinstatement. Nor was the order issued because the Commissioner had cause to believe that Ability will not send proper notice of non-payment. Indeed, Ability carefully complies with the language of the WAC and the policy and does so regarding Ms. White's policy.

The OIC has no cause to believe that Ability with violate WAC 284-54-283. The OIC and Ability disagree on whether the policy language defining Policy Termination Date applies. A Cease and Desist Order over this disagreement is an extreme measure that is not warranted.

C. The Cease and Desist Order causes immediate and irreparable harm to Ability

In order to be in compliance with the Insurance Commissioner's order, Ability would be required to provide more coverage than is required by either our policies or Washington Administrative Code. If, to be safe, Ability now must provide more notice and extend the

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reinstatement period beyond that provided by the policy and by statute, it would be irreparably harmed. We would not be able to undo such actions because such policies would be reinstated when they would not otherwise be entitled to reinstatement and such action could not be rescinded. In the alternative, Ability would have to incur significant expense initiating declaratory relief actions in order to reinstate policies subject to some reservation of rights. Such expense should not be necessary when Ability's current practices carefully comply with both the policy and the language of the Washington Administrative Code.

V. CONCLUSION

Stay of the Cease and Desist Order should be granted. The order was wrongly issued contrary to the plain language of the policy and the WAC. The order causes irreparable harm, and the order will likely be overturned at the hearing. A stay of this order is warranted.

Dated this 20th day of May, 2011.

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By:

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of May, 2011, I caused to be served the foregoing MOTION FOR STAY OF ORDER TO CEASE AND DESIST 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:

- [X] U.S. Postal Service, ordinary first class mail
- [ ] U.S. Postal Service, certified or registered mail, return receipt requested
- [ ] hand delivery
- [ ] facsimile
- [ ] electronic service
- [ ] other (specify) _____

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