

BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

FILED

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In the Matter of)
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LEO J. DRISCOLL and)
MARY T. DRISCOLL)
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Application for Hearing)
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Docket No. 14-0187
ORDER ON OIC STAFF'S
MOTION FOR
SUMMARY JUDGMENT

TO: Leo J. Driscoll
4511 E. North Glenngrae Ln.
Spokane, WA 99223

COPY TO: Mike Kreidler, Insurance Commissioner
James T. Odiorne, J.D., CPA, Chief Deputy Insurance Commissioner
Molly Nollette, Deputy Commissioner, Rates and Forms Division
Mandy Weeks, Insurance Enforcement Specialist, Legal Affairs Division
AnnaLisa Gellermann, Deputy Commissioner, Legal Affairs Division
Office of the Insurance Commissioner
PO Box 40255
Olympia, WA 98504-0255

This case comes before me on the OIC Staff's Motion for Summary Judgment, brought pursuant to the Order on Prehearing Conference, filed October 8, 2014. I have considered the Motion, filed November 7, 2014, the Applicants' Response, filed December 16, 2014, the Supplement to Applicants' Response, filed December 31, 2014, and the OIC Staff's Reply, filed January 20, 2015, as well as the attachments to such submissions.

Discussion.

1. On September 19, 2014, the Driscolls filed a 36-page Application (hereinafter, "Demand") directed to Washington State Insurance Commissioner Mike Kreidler, "seeking a consolidated Adjudicative Proceeding under RCW 34.05.413 as to four (4) related counts." In brief:

2. *Count 1-A.* Seeks adjudication that a 2011 41% premium increase request for individual long-term care insurance ("LTCI") policies issued by TIAA-CREF Life Insurance Company ("T-C Life"), through Metropolitan Life Insurance Company ("MetLife") as indemnitor-reinsurer and administrative agent, was insufficiently supported by information demonstrating compliance with applicable laws and regulations; that the OIC's failure to timely disapprove such request resulted in statutorily-deemed approval, filing and legal effectiveness; that the premium increase resulted in unconstitutional deprivation of the Driscolls' property rights in violation of the Due Process clauses of the Washington State and U.S. Constitutions; that the Driscolls were denied Procedural Due Process due to inadequate notice of the pendency of the request, the lack of necessary information, and the absence of a meaningful opportunity to be heard and present objections; and that the OIC failed to consider and balance competing interests. *B.* Alleges unconstitutional delegation, abdication, and surrender of legislative power to the private proponent of the premium increase and failure to provide essential procedural safeguards and to balance competing interests. *C.* Seeks adjudication that the LTCI at issue is subject to most provisions of Ch. 48.19 RCW.

3. *Count 2.* Seeks an administrative order directing T-C Life to provide documentary information to the Driscolls pertaining to their LTCI affected by the 41% premium increase.

4. *Count 3.* Seeks a remedy under Ch. 48.18 RCW, alleging that OIC's approval of the premium increase and the related Policy Schedule forms was erroneous because such approval was,

and is, ungrounded, and that the Commissioner has authority, grounds, cause, and duty to hold a hearing and to issue an order pursuant to RCW 48.18.100(3) and (4) and RCW 48.18.110(1) directing the insurer to cease use of and withdraw the changed Policy Schedule forms and granting other prospective relief.

5. *Count 4.* Seeks prospective relief under RCW 48.19.120 from the 41% premium increase on the grounds that the premium increase request was, and is, unsupported by information showing that it complied with applicable laws and regulations and/or adjudication as to the futility of pursuing that remedy (because of the provisions of RCW 49.19.120(2) and applicability thereof to an order under RCW 48.19.120(1) in relation to the policy forms). The Driscolls seek to access and exhaust available administrative remedies, if any, and to invoke the primary jurisdiction of the OIC, if any, in respect to such matters.

6. By Order on Motion to Amend and Supplement Grounds for Demand for Hearing, filed October 29, 2014, I allowed amendment of the Application to include proposed paragraphs 5-D and 5-E, set forth in the Driscolls' Motion to Amend filed October 23, 2014, which related to the persons aggrieved by the OIC's alleged failures to act and the grounds to be relied upon as a basis for relief to be demanded at the hearing.

7. WAC 10-08-135, which governs motions for summary judgment in administrative proceedings, provides:

A motion for summary judgment may be granted and an order issued if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

8. The facts set forth in this Order are either undisputed or are taken in the light most favorable to the Driscolls. (The declarations submitted by the Driscolls regarding OIC's decision-making are argumentative, speculative, and/or not based on personal knowledge or reasonable

inferences, as required by CR 56(e) and ER 602, nor do they constitute insurance or other expert testimony under ER 702, so are disregarded.)

9. RCW 48.04.010(1) provides that the insurance commissioner (who has properly delegated this function to me) shall hold a hearing upon written demand made by any person aggrieved by any act, threatened act, or failure of the commissioner to act, specifying in what respects such person is aggrieved and the grounds relied upon for the relief demanded. I assume for purposes of this Order, without deciding, that the Driscolls were aggrieved by an act or failure to act of the commissioner (though a serious standing issue exists) and further assume that the Demand appropriately specifies how they were aggrieved and the basis for relief.

10. RCW 48.04.010(3) provides in pertinent part that unless persons aggrieved by a written order of the commissioner demand a hearing thereon within ninety days after receiving notice of such order, "the right to such hearing shall conclusively be deemed to have been waived." This statute controls the present matter.

11. Compliance with such a statutory filing deadline is a jurisdictional requirement. *Snohomish Co. Fire Protection District No. 1 v. Washington State Boundary Review Board for Snohomish Co.*, 121 Wn.App.73, 81-82 (2004); *Graham Thrift Group v. Pierce Co.*, 75 Wn.App.263, 267-69 (1994).

12. The Driscolls purchased long-term care insurance policies in 2002. Metropolitan Life Insurance Company ("MetLife") assumed the Driscolls' and other policies from a prior insurer in 2004 and was entitled to seek the rate increases at issue.

13. On June 10, 2011, MetLife submitted a rate increase filing as to such policies to the OIC, supported by actuarial and other required information. MetLife represented that it would

implement the proposed rate increase only after OIC approval and that it would provide 60 days' notice to policyholders before the effective date of the increase.

14. On August 17, 2011, the OIC gave final approval of the rate increase filing and associated forms, and such Disposition was entered and posted. (OIC's actuarial approval of the rate increase had occurred on June 22, 2011.)

15. On December 9, 2011, the Driscolls received notice from MetLife that its rate increase filing had been approved by OIC.

16. MetLife did not deem its rate increase filing approved – it did not implement or seek to implement the proposed rate increase until after OIC approval and provision of 60 days' notice to policyholders.

17. I assume for purposes of this Order that the Driscolls first received notice of the commissioner's approval of the rate increase filing on December 9, 2011 (not on August 17, 2011, when the approval was posted, or on another date before December 9). Under RCW 48.04.010(3), they were therefore required to file their demand for a hearing within ninety days – that is, not later than March 10, 2012 – or their right to a hearing was conclusively deemed to have been waived.

18. The Driscolls filed their Demand on September 19, 2014, more than 2¾ years after receiving notice that the OIC had approved MetLife's rate increase filing. Such Demand did not comply with the filing deadline provided under RCW 48.04.010(3), which is jurisdictional.

19. Even assuming arguendo that RCW 48.04.010(3) were not applicable, the Driscolls' Demand would be time-barred under the catch-all statute of limitations, RCW 4.16.130, which provides: "An action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued." The Driscolls' Demand was filed on September 19,

2014, more than two years after December 9, 2011, the latest date on which their cause of action accrued.

20. Assuming for purposes of this Order that the Driscolls enjoyed due process protections allowing them to seek relief from the OIC's approval of the rate increase filing (despite the availability of alternatives to paying the rate increase that did not exist in *Pennsylvania Coal Mining Association v. Insurance Dept. of Pennsylvania*, 370 A.2d 685 (Supreme Court, Penn. 1977)), they had prior notice of such increase and a reasonable opportunity under RCW 48.04.010 to be heard (or under RCW 48.19.310, which provides for a hearing at the request of a party aggrieved by application of an insurer's rating system, but provides a shorter 30-day filing deadline).

21. The Driscolls' Demand should be dismissed as a matter of law.

Ruling.

The OIC Staff's Motion for Summary Judgment is granted. The Driscolls' September 19, 2014, Demand is dismissed as a matter of law.

Dated: January 23, 2015,



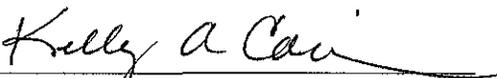
JUDGE GEORGE FINKLE (Ret.)
Presiding Officer

Pursuant to RCW 34.05.461(3), the parties are advised that they may seek reconsideration of this order by filing a request for reconsideration under RCW 34.05.470 with the undersigned within 10 days of the date of service (date of mailing) of this order. Further, the parties are advised that, pursuant to RCW 34.05.514 and 34.05.542, this order may be appealed to Superior Court by, within 30 days after date of service (date of mailing) of this order, 1) filing a petition in the Superior Court, at the petitioner's option, for (a) Thurston County or (b) the county of the petitioner's residence or principal place of business; and 2) delivery of a copy of the petition to the Office of the Insurance Commissioner; and 3) depositing copies of the petition upon all other parties of record and the Office of the Attorney General.

Declaration of Mailing

I declare under penalty of perjury under the laws of the State of Washington that on the date listed below, I mailed or caused delivery through normal office mailing custom, a true copy of this document to the following people at their addresses listed above: Leo J. Driscoll, Mike Kreidler, James T. Odiome, J.D., CPA, Molly Nollette, Mandy Weeks, and AnnaLisa Gellermann.

DATED this 23rd day of January, 2015.


KELLY A. CAIRNS