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BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

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In the Matter of

BUSINESS HEALTH TRUST

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Docket No. 14-0246

**ORDER ON COMMISSIONER'S
REQUEST FOR A DETERMINATION
OF NO THREATENED AGENCY
ACTION**

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COPY TO: Mike Kreidler, Insurance Commissioner
James T. Odiorne, J.D., CPA, Chief Deputy Insurance Commissioner
AnnaLisa Gellermann, Deputy Commissioner, Legal Affairs Division
Charles Brown, Senior Insurance Enforcement Specialist, Legal Affairs Division
Office of the Insurance Commissioner
PO Box 40255
Olympia, WA 98504-0255

1. On December 17, 2014, Business Health Trust (“BHT”), a third party administrator of 13 industry-specific Health Benefit Trusts (“Trusts”), filed a Demand for Hearing and Stay of Hearing Pending Federal Action (“Demand”).

2. The Demand seeks a hearing before an administrative law judge pursuant to RCW 48.04.010 et seq., 1) to challenge a “threatened action by the OIC,” as further discussed below; and 2) to stay such hearing, as well as any further OIC action, pending the determination, in a case filed by BHT in the Western District of Washington (“the federal lawsuit”), of an exclusively federal question under ERISA Section 502(e)(1) – whether each of the Trusts is sponsored by an ERISA Section 3(5) Employer. (The Demand states that the federal lawsuit also seeks an order enjoining all OIC actions and state proceedings.)

3. On January 15, 2015, I held a telephonic prehearing conference in which the Commissioner was represented by Marta DeLeon, AnnaLisa Gellerman, and Charles Brown, Attorneys at Law, and Richard J. Birmingham, Attorney at Law, represented BHT. During the conference, the Commissioner raised the threshold issue now before me, and I set a briefing schedule, with which the parties complied.

4. The Aggrieved Party’s Motion to Strike Commissioner’s Reply in Support of a Determination of No Threatened Agency Action, dated February 6, 2015, is granted as to the issue of standing. (BHT has withdrawn its Motion to Strike all material submitted after the first three pages.)

5. I have considered the Commissioner’s Brief Requesting a Determination of No Threatened Agency Action, dated January 22, 2015; the Aggrieved Party’s Opposition to Commissioner’s Request for a Determination of No Threatened Agency Action, dated February

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2, 2015; the Commissioner's Reply in Support of a Determination of No Threatened Agency Action, dated February 5, 2015; and the attachments to such filings.

6. RCW 48.19.100 provides that if the Commissioner finds that a filing does not meet the requirements of Chapter 48.19 RCW, he shall disapprove such filing and give notice of such disapproval, specifying the respect in which he finds the filing fails to meet such requirements. RCW 48.19.110 provides similar requirements as to special filings subject to RCW 48.19.070.

7. RCW 48.44.020(2) provides that the Commissioner may on examination, "subject to the right of the health care service contractor to demand and receive a hearing under chapters 48.04 and 34.05 RCW, disapprove any individual or group contract form" on stated grounds.

8. RCW 48.04.010(1)(b) provides in pertinent part that the Commissioner shall hold a hearing "upon written demand for a hearing made by any person aggrieved by any act, threatened act, or failure of the commissioner to act...." RCW 48.04.010(2) provides: "Any such demand for a hearing shall specify in what respects such person is so aggrieved and the grounds to be relied upon as basis for the relief to be demanded at the hearing."

8. The threshold issue, as framed by the Commissioner, is: "Under RCW 48.04.010, is the mere fact that the Commissioner will fulfill his regulatory duty to complete his review of a large group health plan filing, a 'threatened act' that serves as the basis for a third party to demand a hearing?" The Commissioner asserts that he has done no more than stand ready to fulfill his regulatory duty, which does not constitute a threatened act, and that an automatic stay is not in effect.

9. BHT responds (expanding on the Demand) that the evidence demonstrates that it is a person aggrieved by threatened retroactive and future actions of the Commissioner regarding

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both a finding that the Association Health Plans are not sponsored by an employer as defined by 29 U.S.C. Sec. 1002(5), Section 3(5) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) and that Premera Blue Cross’ (“Premera’s”) rate filing methodology is not in compliance with Washington State law.

10. BHT asserts that the OIC’s threatened action is automatically stayed under RCW 48.04.020(1), which provides that a demand for a hearing received by the Commissioner prior to the effective date of action taken or proposed to be taken by him stays such action pending a hearing on the demand (with inapplicable exceptions). The Demand requests that, if an automatic stay is not deemed to apply, a stay be granted pursuant to RCW 48.04.020(2), which provides that in cases where an automatic stay is not applicable, if the Commissioner after written request therefor fails to grant a stay, the person aggrieved by such failure may apply to the Thurston County Superior Court for a stay.

11. BHT notes that in a letter from the Commissioner to Maud Daudon, President and CEO of the Seattle Metropolitan Chamber of Commerce, dated October 28, 2014, he writes that in 2011 he began working to provide clear direction to insurance carriers and their clients as to upcoming changes in federal law related to federal health care reform, including providing guidance to organizations, like the Chamber, that wished to pursue the ERISA exemption. The Commissioner writes that he noted in an email to Ms. Daudon dated July 31, 2012, “the U.S. Department of Labor’s Susan Rees shared that she did not believe the Seattle Chamber was capable of satisfying ERISA’s definition of ‘employer’ even with the proposed structural changes.” (Such structural changes included reorganization of the Chamber into several separate industry groups with dedicated trusts.) The Commissioner’s letter concludes: “I hope our recent

meeting on October 1 was useful to you in clarifying the information we need to complete our review of your association status. My staff continues to review the documentation you provided, and decisions will be communicated regarding the plans in the next few weeks.”

12. BHT asserts as further evidence of threatened acts that in a conference call on December 15, 2014, the Commissioner indicated that proposed structural changes would not be sufficient to satisfy the definition of “employer” set forth by ERISA.

13. BHT notes that representatives of the Commissioner attested in the federal lawsuit that he intends to disapprove Premera’s applications on the grounds of 1) the sponsors’ status as ERISA Section 3(5) employers; and 2) Premera’s rating methodology.

14. However, I do not find that BHT is a person aggrieved by an act, threatened act, or failure to act of the Commissioner under RCW 48.04.010(1)(b). The Commissioner’s intent to act on the filing, even assuming he will determine that the plans are not sponsored by ERISA Section 3(5) employers and that Premera’s rate filing methodology is not in compliance with Washington State law, does not constitute a threatened specific adverse action, but instead the Commissioner’s stated intent to exercise his statutory duties.

15. The automatic stay provided under RCW 48.04.020(1) is therefore inapplicable. I do not believe that a discretionary stay under RCW 48.04.020(2) is appropriate.

16. Even assuming that BHT is aggrieved by threatened acts of the Commissioner, RCW 48.44.020(2) provides that the Commissioner may on examination, “*subject to the right of the health care service contractor to demand and receive a hearing under chapters 48.04 and 34.05* RCW, *disapprove* any individual or group contract form.” (Emphasis added.) RCW 48.44.020(2) is a specific statute setting forth an aggrieved party’s right to a hearing *following*

the Commissioner's disapproval, not in anticipation of such disapproval. The specific statute that is applicable under the present plan review circumstances controls aggrieved parties' hearing rights, rather than the general hearing provisions of RCW 48.04.020(1).

17. Further, a statutory interpretation that imposed a stay would block the Commissioner from exercising his statutory duty to review group plan filings and interfere with the Commissioner's efficient and effective regulation of the insurance industry. Such interpretation would result in unlikely, absurd, or strained consequences, which must be avoided. *Glaubach v. Regence Blueshield*, 149 Wn.2d 827, 833 (2003). An interpretation consistent with the spirit or purpose of the statutory scheme -- for the commissioner to engage in the review of group plan filings and to efficiently and effectively regulate the insurance industry -- rather than a literal reading that would render this statutory scheme ineffective, is favored. *See, Regence Blueshield v. Insurance Commissioner*, 131 Wn.App. 639, 648 (2006) (citing *Glaubach*).

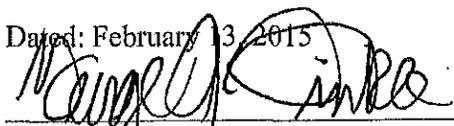
ORDER

BHT is not entitled to a hearing or to an automatic stay under RCW 48.04.020(1). I do not grant a discretionary stay under RCW 48.04.020(2).

This Order is without prejudice to BHT's renewed Demand and presentation of all pertinent arguments, following action by the Commissioner.

I do not rule on BHT's standing.

Dated: February 13, 2015



JUDGE GEORGE FINKLE (Ret.)
Presiding Officer

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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: Richard J. Birmingham, Marta U. DeLeon, Mike Kreidler, James T. Odiorne, J.D., CPA, Charles Brown and AnnaLisa Gellermann.

DATED this 13th day of February, 2015.


KELLY A. CARNNS