

BEFORE THE STATE OF WASHINGTON,
OFFICE OF THE INSURANCE COMMISSIONER

FILED

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HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

In the Matter of)	Hearings Unit Case No. 16-0002
)	
Leo J. Driscoll,)	Applicant's Petition for Reconsideration
Applicant)	of Order on Cross Motions for
)	Summary Judgment
)	

Part I: Applicant Leo J. Driscoll ("Driscoll") petitions that the Presiding Officer William G. Pardee reconsider the "Order On Cross Motions For Summary Judgment" dated June 15, 2016 (herein referred to as the "6/15/2016 Order") insofar as it granted the OIC's Motion for Summary Judgment on the basis that Driscoll is not a person "aggrieved" for purposes of RCW 48.04.010(1)(b) and that he therefore lacks *standing* to demand a hearing before the OIC Hearings Unit. Such finding and ruling err and should be withdrawn for the following reasons:

1. RCW 34.05.413(2) requires the OIC to commence an adjudicative hearing "(w)hen required by law or by constitutional right and upon the timely application of any person, an agency shall commence a hearing." RCW 48.01.010 provides that: "Title 48 RCW constitutes the insurance code." RCW 48.01.070 defines the term "person" to include "any individual, company, insurer" (as well as other described entities). Ch. 48.02 RCW specifies various functions and duties of the Insurance Commissioner. RCW 48.04.010(1) provides in relevant part that "(1) The commissioner shall hold a hearing . . . * * (b) Except under RCW 48.13.475, upon written demand for a hearing made by any person aggrieved by any act, threatened act, or failure of the commissioner to act, if such failure is deemed an act under any provision of this code, or by any report, promulgation, or order of the commissioner other than an order on a hearing of which such person was given actual notice or at which such person appeared as a party, or order pursuant to the order on such hearing." (Underlining emphasis mine).

2. The 6/15/2016 Order correctly notes at pg,7 that the word "aggrieved" used in RCW 48.04.010(1)(b) and in WAC 284-02-070(1)(b) is not defined. Two (2) definitions of the word appear in *Black's Law Dictionary* as quoted in the last paragraph of pg. 7 of the 6/15/2016 Order, to-wit: "(Of a person or entity) having rights that are adversely affected; having been harmed by an infringement of legal rights."

3. Assuming arguendo that at least one of those definitions accurately reflects the meaning of the word "aggrieved" as used in the above laws, Driscoll nonetheless is a person "aggrieved" by the OIC's approval of the premium- rate increase request that

was not supported by submissions by MetLife to the OIC that affirmatively showed that such submissions complied with the requirements of Ch.48.19 RCW and of Ch. 284-60 WAC.

4. At pg. 8 the 6/15/2016 Order errs in ruling that the OIC approval of the increase did not "make Driscoll an aggrieved party" and that Driscoll's legal rights were not "determined" (i.e., were not affected by) the OIC's approval of the increase request. The laws referenced immediately below make it clear that the legal rights of policyholders like Driscoll are affected by and must be considered by the OIC in approving or disapproving an insurer's request for OIC approval of a premium-rate increase for the policyholders' policies:

(a) RCW 48.19.020 requires that "Premium rates for insurance shall not be excessive, inadequate, or unfairly discriminatory."

(b) WAC 284-60-040(1) requires that the factor of "equity between policyholders" "shall be considered" in the "(g)rouping of policy forms for purposes of rate making and requests for rate increase."

(c) Subsection (4) of WAC 284-60-040 defines as unfair and discriminatory an insurer's failure to combine policy forms to the detriment of "policyholders who cannot qualify for the new improved policies, or to whom the new benefits are not offered, are left insured and isolated as a high risk group under the prior form and soon become subject to massive rate increases. RCW 48.18.110(2) provides in relevant part: "(2) In addition to the grounds for disapproval of any such form as provided in subsection (1) of this section, the commissioner may disapprove any form of disability insurance policy if the benefits provided therein are unreasonable in relation to the premium charged."

(d) WAC 284-60-020 states in part: "The purpose of this regulation is to:

(1) Establish loss ratio standards for the purpose of implementing the authority of the commissioner to disapprove and to withdraw approval of disability policy forms which are not returning or are not expected to return a reasonable proportion of the premiums in the form of benefits, pursuant to RCW 48.18.110(2), 48.19.010(2), 48.70.030 and 48.70.040."

5. As to the standing of a consumer of insurance to challenge an order of the OIC approving of an unsupported premium- rate increase of the consumer's LTCI policy form, the Washington State Law Practice Manual, quoted at pgs. 6-7 of the 6/15/2016 Order states: "It is arguable that a person whose interests may be adversely affected by an

order, as defined by RCW 34.05.010(11)(a), may have standing to obtain and participate in an adjudicative proceeding." The publication *Insurance Rate Litigation*, by Judith K. Mintel, © 1983, Kluher-Nijhoff Publishing Co., at p. 83 states: "In most instances, courts have allowed standing to any organization or person to challenge a commissioner's rate decisions when it is established that the plaintiff has purchased insurance from the company seeking the rate change." Supporting cases cited at pgs, 83-84 includes *Thaler v. Stern*, 44 Misc.2d 278, 253 N.Y.S. 2d 622 (1964).

6. The 6/15/2016 Order does not address the claims of property rights set forth in paragraphs 24-38 of Driscoll's Application and Demand for Hearing, including:

(a) That the property rights of Driscoll and Mary T. Driscoll in their LTCI policies include contract rights to the continuation of the previously scheduled premiums set forth in the Policy Schedule of the policy form except as expressly or impliedly agreed by the parties thereto,

(b) That the Washington laws that were applicable to the LTCI contract policies of Driscoll and his spouse which were in force when such policies were issued in 2002 impliedly became part of such contracts - - including RCW 48.19.030 (enacted and in force since 1989) and Ch. 284-60 WAC (adopted and in force since 1983).

(c) That LTCI policyholders like the Driscolls are *dependent* upon the OIC to comply with those laws and are *vulnerable* to diminishment and deprivation of their property rights in their policies arising from failure of OIC to comply with such laws.

(d) That the Driscolls' constitutionally-protected property rights in their LTCI policies include property interests created by the state standards and regulations cited in paragraphs 25 to 38 of Driscoll's Application which guide the discretion of the OIC and which contain mandatory language that guide the decision of the OIC as to approval of the rate increase request and that control the outcome of that request.

7. RCW 34.05.413(2) and RCW 48.04.010(1)(b) require the OIC to commence an adjudicative hearing when required by constitutional right. Due process rights of Driscoll to notice and an opportunity to be heard before the OIC under the Washington state and U.S. constitutions are invoked at pg.1, para, 3, of Driscoll's Application. The creation and existence of intangible property rights as to which Driscoll has a legitimate claim of entitlement are set forth at pg. 8, para 25 to pg.11, para 38 inclusive of Driscoll's Application and Demand for Hearing.

8. The OIC disputed those allegations to the extent only of arguing at pgs.11- 17 of the OIC Motion to Dismiss (repeated at pgs. 8-13 of OIC's Reply brief): (a) that Driscoll is not aggrieved by the action of the OIC "because his new rate has not been implemented"; (b) that Driscoll is free to choose among three options offered by the

insurer, including purchase of LTCI from another source; (c) that, in law, Driscoll has no legal property rights as to which he is entitled and as to which he has been deprived by the OIC. Each of those contentions of the OIC are disputed by Driscoll. See part III of Applicant's Response to OIC's Dispositive Motion at pgs. 7-12.

9. Para 5 of *Leo J. Driscoll's May 12, 2016 Declaration* filed in support of Applicant's Response To The OIC's Motion for Summary Judgment evidences (a) the inability of Driscoll and spouse to replace their long-term care insurance policies because of their advanced ages and personal-health conditions; and, (b) the financial detriments that they will suffer from implementation of the unfounded premium-rate increase request effective on after 8/01/2016.

10. The record before the Presiding Officer (at the very least) shows that genuine disputed issues of material fact exist as to the issue of Driscoll's standing and that the OIC is not entitled to judgment under RCW 10-08-135 on that issue.

11. As shown by the foregoing, genuine issues of fact and law exist as to the issue and finding at pg. 8 of the *6/15/2016 Order* that "*Driscoll was not aggrieved by the order (i.e., OIC's approval of the premium increase), and therefore his Demand does not trigger the right to a hearing before the OIC under RCW 48.04.010(1)(b) -2 (sic).*"

12. Issues as to which findings and rulings have not been made in the *6/15/2016 Order* include

- (a) whether the OIC's allegedly-erroneous approval of MetLife's premium- rate increase request that was not supported by submissions by MetLife to the OIC that affirmatively showed that such submissions complied with the requirements of Ch.48.19 RCW and of Ch. 284-60 WAC;
- (b) whether such constitutes (a) *state* action within the meaning of the due process provisions of the Washington and U.S. Constitutions;
- (c) whether an unconstitutional deprivation of intangible property rights that are created by contract and as to which the Driscolls have legitimate claims of entitlement is likely to occur on 8-01-2016 ; ¹
- (d) whether the Driscoll LTCI contracts impliedly include the terms and provisions of WA laws existing when the LTCI contracts were made and issued and that governed WA regulatory approval of the subject premium increase. ²

¹ See Driscoll's Application at pg. 8,, para 25

² See Driscoll's Application, at pgs.8-9, paras '25—32 inclusive

13. The *6/15/2016 Order* does not include findings and rulings as to the issues in this matter pertaining to the due process rights of Driscoll and Mary T. Driscoll under the Washington State and U.S. constitutions not to be deprived by state action of their intangible property rights which they allegedly have and are entitled as alleged in Driscoll's Application and Demand for Hearing.

14. RCW 34.05.461(3) requires that final orders such as the *6/15/2016 Order* shall include a statement of findings and conclusions, and the reasons and basis therefor, on all the material issues of fact and law presented on the record. Driscoll respectfully requests that the Presiding Officer amend the *6/15/2016 Order* as needed to comply with those requirements in respect to the issues referenced in paragraphs 4 to 14 above.

15. The *6/15/2016 Order* errs in including findings or conclusions that Driscoll has a conditional right to pursue a Consumer Protection Act (CPA) claim against the insurer under Ch. 19.86 RCW. Whether or not such a claim could be alleged and pursued by Driscoll is not a defense to Driscoll's claim made in this proceeding that Driscoll is "aggrieved" by the OIC's approval of the premium-rate increase request that was not supported by submissions by MetLife to the OIC that affirmatively showed that such submissions complied with the requirements of Ch. 48.19 RCW and of Ch. 284-60 WAC.

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Part II. For the following stated reasons, Driscoll petitions the Presiding Officer to reconsider the ruling of the *6/15/2016 Order* insofar as it granted the OIC's Motion for Summary Judgment on the grounds that "*the "filed rate doctrine" trumps Driscoll's Demand for hearing"*", and that Driscoll's Demand "*violates the "filed rate doctrine" because it seeks to challenge the LTCI premium rates that MetLife filed with the OIC, and the process by which OIC reviewed and approved the rates charged to the Driscolls, both of which are impermissible.*" (see pg. 12 of the *6/15/2016 Order*).

1. The *6/15/2016 Order*, at pg. 12, rules that: Driscoll's "Demand, and this administrative matter, involve claims related to agency-approved rates, which are *not* incidental to agency-approved rates, and therefore would necessarily require courts to reevaluate agency-approved rates. Such claims may not be considered by the courts or by myself under *Premera.*"

2. First, as to claims the "courts" may consider if this matter was before a court on review (which claims may be informative as claims that the Presiding Officer may consider), RCW 34.05.570 authorizes court review of agency action and error in agency action but RCW 34.05.574 limits a court's functions in conducting that review. RCW 34.05.574 cannot reasonably be construed to authorize a court conducting such review

to either evaluate or "reevaluate agency approved rates". Subdivision (1) of RCW 34.05.574 provides that:

"(1) In a review under RCW 34.05.570, the court may (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, **set aside agency action**, enjoin or stay the agency action, **remand the matter for further proceedings**, or enter a declaratory judgment order. The court shall set out in its findings and conclusions, as appropriate, **each violation or error by the agency** under the standards for review set out in this chapter on which the court bases its decision and order. **In reviewing matters within agency discretion, the court shall limit its function** to assuring that the agency has exercised its discretion in accordance with law, and **shall not itself undertake to exercise the discretion** that the legislature has placed in the agency. **The court shall remand to the agency for modification of agency action**, unless remand is impracticable or would cause unnecessary delay." (bold emphasis mine) XXX

3. Second, as to the issues that the Presiding Officer may consider in this proceeding, Driscoll's Application and Demand for hearing does not seek relief that would require or permit the Presiding Officer to "reevaluate agency-approved rates", i.e., reevaluate the amount or reasonableness of the rates.

4. *Tenore v. AT & T Wireless Services*, 136 Wn. 2d 322, 331-332 (1989) ruled that the purposes of the filed rate doctrine are twofold: (1) to preserve the agency's primary jurisdiction to determine the reasonableness of rates, and (2) to insure that regulated entities, charge only those rates approved by the agency.

5. The purpose of the *filed rate doctrine* (as specified in *Tenore*) recognizes the constitutionally-required separation of powers between the three branches of our state and federal governments and particularly the need that the judicial branch not usurp the powers/functions of the executive branch. The presiding officer's role as a quasi-judicial officer in an administrative adjudicative proceeding such as this does not include evaluating, approving, or disapproving the amount or reasonableness of the proposed rate increase; those are the exclusive prerogatives of the OIC's executive-function personnel and not those of the Presiding Officer.

6. The Presiding Officer's role and functions are those of a neutral quasi-judicial official and are principally specified in WAC 10-08-200, WAC 10-08-210, and WAC 284-04-070. None of those provisions permit or require the Presiding Officer to exercise executive functions or to make executive decisions - - including functions and decision-making in evaluating, approving, or disapproving the reasonableness of a proposed premium- rate or a modification thereof.

7. As to the second purpose of the filed rate doctrine set forth in *Tenore*, i.e., "to insure that regulated entities, charge only those rates approved by the agency", the record before the Presiding Officer shows that the premium-rate increase request approved by the agency was not supported by submission of information that affirmatively showed that such submissions complied with the requirements of Ch.48.19 RCW and of Ch. 284-60 WAC.

8. RCW 34.05.413, RCW 49.04.010(1)(b), WAC 284-02-070(2), require the administrative adjudicative hearing that Driscoll demands to correct OIC's erroneous approval of the rate-increase request that was not supported by submissions by MetLife to the OIC that affirmatively showed that such submissions complied with the requirements of Ch.48.19 RCW and of Ch. 284-60 WAC. Neither the courts nor the Presiding Officer have the authority to suspend or negate those statutory and regulatory provisions by force of the judicially-created filed rate doctrine.

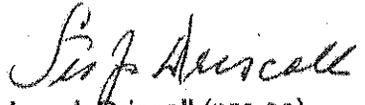
9. The due process provisions of the WA state and U.S. constitutions prohibit deprivation by state action of the Driscolls' intangible property rights in their subject LTCI policies. The 6/15/2016 Order's ruling that the *filed rate doctrine* applies to and "trumps" Driscoll's Demand for hearing errs in effectively ruling that the *filed rate doctrine* applies to and/or negates

(a) Driscoll's statutory rights to a hearing under RCW 48.04.010(1)(b) to correct OIC error in approving the rate increase request that was not supported by submissions by MetLife to the OIC showing that the request complied with the requirements of Ch. 48.19 RCW and Ch. 48.60 WAC; and

(b) Driscoll's constitutional rights to be meaningfully heard at the agency level to seek correction of the OIC's allegedly erroneous approval of the rate increase request that allegedly was not supported by MetLife's submissions showing that it complied with specified requirements of Ch. 48.19 RCW and Ch. 48.60 WAC.

Part III. Driscoll petitions the Presiding Officer to reconsider, amend, and supplement the 6/15/2016 Order to address the material issues set forth in Driscoll's First Motion for Partial Summary Judgment as provided in RCW 34.05.461(3) including the issues of whether the information provided by MetLife to the OIC in support of MetLife's request for the 22.69% premium rate increase was sufficient to permit the Commissioner to determine that it meets the requirements of Ch. 48.19 RCW, as required by RCW 48.19.040(1) and (2), and whether due consideration was given by MetLife and by the OIC to the requirements of RCW 48.19.030 that are specified at pgs.1 to 9 of Applicant's Motions for Partial Summary Judgment.

Respectfully submitted June 27, 2016.

A handwritten signature in cursive script that reads "Leo J. Driscoll". The signature is written in black ink and is positioned above the typed name.

Leo J. Driscoll (pro se)
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