

BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

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In the Matter of:

LEO J. DRISCOLL,

Applicant.

Docket No. 16-0002

HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

**ORDER ON CROSS MOTIONS FOR
SUMMARY JUDGMENT**

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

COPY TO: Mike Kreidler, Insurance Commissioner
James T. Odiorne, J.D., CPA, Chief Deputy Insurance Commissioner
Doug Hartz, Deputy Commissioner, Company Supervision Division
Molly Nollette, Deputy Commissioner, Rates and Forms Division
AnnaLisa Gellermann, Deputy Commissioner, Legal Affairs Division
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PO Box 40255
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This case comes before me on Leo J. Driscoll's ("Driscoll's") and the Office of Insurance Commissioner's ("OIC's") Cross Motions for Summary Judgment.

I have considered the Motions filed April 29, 2016; the OIC's Response to Driscoll's Motion, filed May 13, 2016; Driscoll's Response to the OIC's Motion, filed May 13, 2016; the OIC's Reply in Support of its Motion, filed May 20, 2016; Driscoll's Reply in Support of his Motion, filed May 20, 2016; and the declarations and other attachments to such submissions.

Issue.

In briefing in support of their Motions, among other things, the parties present the following issues:

1. Is Driscoll a person “aggrieved” for purposes of RCW 48.04.010(1)(b), such that he has standing to demand a hearing before the OIC Hearings Unit. **Short Answer: No.**
2. Is Driscoll’s demand for hearing barred by the “filed rate” doctrine? **Short Answer: Yes.**
3. Does the Consumer Protection Act, RCW Ch. 19.86, provide an avenue for Driscoll to challenge the actions of his insurer? **Short Answer: Yes.**

Given these answers, and for the reasons outlined below, I grant summary judgment in favor of the OIC.

Background.

In a previous administrative matter before the OIC, Docket No. 14-0187, involving claims by Driscoll also challenging a prior increase in premiums of long-term care insurance (“LTCP”) that TIAA-CREF Life Insurance Company (“T-C Life”) issued to Driscoll, my predecessor expressed reservations in dicta about the standing Driscoll had to demand a hearing before the OIC’s Hearings Unit, stating in part at page 4 of “Order on OIC Staff’s Motion for Summary Judgment” (“Order”), issued January 23, 2015, which granted the OIC’s motion for summary judgment, the following:

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.

(Emphasis added).

Driscoll subsequently petitioned for judicial review of the Order. On November 25, 2015, Hon. Harold D. Clarke, III, of Spokane County Superior Court, in Cause No. 15-2-00920-1,

entered an order affirming the Order (OIC Exhibit 12), stating:

1. [Driscolls'] claims are each time-barred under RCW 48.04.010(3);

2. [Driscolls'] claims are barred by the Filed Rate Doctrine in that they seek to challenge the premium rate filed with and approved by the Washington Office of the Insurance Commissioner ("OIC") and the process by which the OIC reviewed and approved the rates charged to [the Driscolls], both of which are impermissible. See *McCarthy v. Premera*, 347 P.3d 872, 182 Wn. 936 (Wn. 2015); and

Because the Court has determined that Petitioners' claims are barred by RCW 48.04.010(3) and the Filed Rate Doctrine, it did not reach the parties' remaining arguments.

The Court ORDERS that the [Order], and the order denying reconsideration, entered on February 10, 2015, are AFFIRMED in their entirety.

(Brackets added).

On January 4, 2016, Driscoll filed a demand for hearing ("Demand") in the instant matter with the OIC's Hearings Unit stating in part:

The undersigned applicant [Driscoll] hereby applies to the Insurance Commissioner for an adjudicative proceeding and demands a hearing before the Insurance Commissioner to consider and adjudicate this challenge to action [*effectively an "order" as defined by RCW 34.05.010(11)*] of the . . . OIC . . . that authorized and/or approved an unfounded request for a 22.69% rate increase in the premiums of long-term care insurance ("LTCI") series LTC.04 policy forms issued to [Driscoll] and to [Driscoll's] spouse. . . . [Driscoll] is a person aggrieved by such action (order) in particulars hereinafter set forth. RCW 48.04.010(1)(b) requires the Commissioner to hold the requested hearing.

(Brackets added).

Summary Judgment Standard.

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.

In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable inferences therefrom most favorably for the nonmoving party and, when so considered, if reasonable people might reach different conclusions, the motion should be denied. *Jacobsen v. State*, 89 Wn.2d 104, 108-109, 569 P.2d 1152 (1977). See also *Fleming v. Stoddard Wendle Motor Co.*, 70 Wn.2d 465, 467, 423 P.2d 926 (1967).

Since both the OIC and Driscoll are each the nonmoving party when considering the other's Cross Motion for Summary Judgment, I will consider material evidence in the record in the manner most favorable to the nonmoving party in each instance. If reasonable persons might reach different conclusions given the evidence, then I should deny the Cross Motions of either or both the OIC and Driscoll.

A. **Whether Driscoll has standing to file the Demand.**

RCW 48.04.010 mandates that the Commissioner hold hearings under certain circumstances, and specifies the contents an aggrieved party must include in their demand for hearing:

(1) . . . The commissioner shall hold a hearing:

(a) If required by any provision of this code; or

(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.

(2) 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.

(Emphasis added).

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WAC 284-02-070(1)(b) states: "Under RCW 48.04.010 the commissioner is required to hold a hearing upon demand by any person aggrieved by any act, threatened act, or failure of the commissioner to act, if the failure is deemed an act under the insurance code or the Administrative Procedure Act." (Emphasis added). WAC 284-02-070(1)(b)(i) states that a hearing can also be demanded "by an aggrieved person based on any report, promulgation, or order of the commissioner." (Emphasis added).

WAC 284-02-070(1)(a) states that hearings of the OIC are conducted according to RCW Ch. 48.04 and RCW Ch. 34.05. WAC 284.02.070(2)(a) adds that provisions applicable to adjudicative proceedings before the OIC are contained in RCW Ch. 48.04, RCW Ch. 34.05, and WAC Ch. 10-08.

In their respective briefs filed in support of their Cross Motions for Summary Judgment, both Driscoll and the OIC cite to the standard governing standing for purposes of judicial review, RCW 34.05.530, and the case law thereunder, as the basis in determining whether Driscoll has standing for purposes of an adjudicative proceeding before the OIC. However, this is not the correct standard for purposes of the instant adjudicative proceeding before the OIC. As the Presiding Officer for the OIC stated in Order on Intervenors' Joint Motion for Summary Judgment, in OIC Docket No. 13-0293:

Intervenors cite RCW 34.05.530, and acknowledge that this statute sets forth the criteria for judicial review of an agency's decision by the Superior Court, i.e., this statute sets forth the criteria which must be met in order to appeal a final order of this agency's (or any agency's) quasi-judicial executive tribunal to the Superior Court. It does not set forth the criteria which must be met for a party aggrieved by an act of the Commissioner to contest the act before this agency's (or any agency's) quasi-judicial executive tribunal such as this one. While, as Intervenors suggest, RCW 34.05.530 might be somewhat informative because it uses the same word "aggrieved" as RCW 48.04.010, it would be in error to grant summary judgment in this case based on a statute which applies to an entirely different type of review, and based on case law interpreting that inapplicable statute.

(Emphasis added). Case law and scholarly commentary agrees with the OIC Presiding Officer's conclusion in Docket No. 13-0293.

In *Patterson v. Segale*, 171 Wn. App. 251, 257, 289 P.3d 657 (2012), the court stated: "A party's standing to participate in an administrative proceeding, however, is not necessarily coextensive with standing to challenge an administrative decision in a court." The issue of standing at the agency level, and that it must be distinguished from standing for purposes of judicial review, is also addressed in *Washington Administrative Law Practice Manual* (2015), § 9.03[B], which states in part:

Standing. There are two different areas in the adjudicative hearing process where standing is an issue. The first is at the agency level in the adjudicative hearing itself. The second is standing to obtain judicial review. The latter is not within the scope of this chapter and is addressed elsewhere. See Chapter 10 Judicial Review of Administrative Procedure Act Decisions, § 10.02(C), and its discussion of RCW 34.05.530.

In Part IV of the APA, there is no statute that directly addresses standing. RCW 34.05.410 states that "[a]djudicative proceedings are governed by RCW 34.05.413 through 34.05.476, except as otherwise provided." There are three subsections that constitute exceptions to the statement of applicability in this statute. RCW 34.05.530 is a statute in Part V of the APA dealing specifically with judicial review and civil enforcement. By the terms of RCW 34.05.410, RCW 34.05.530 is not a statute that pertains to the question of standing of a party in an adjudicative proceeding. Two cases appear to support the proposition that RCW 34.05.530 only addresses standing to obtain judicial review. *City of Burlington v. Wash. State Liquor Control Bd.*, 187 Wn. App. 853, 876, 351 P.3d 875 (2015), held "[w]e conclude the City has standing to seek judicial review of the Board's decision to allow transfer of a liquor license from the location of a former state-run liquor store. Accordingly, we reverse and remand to the superior court for further proceedings consistent with this opinion." See also *Id.* at n.21. In an earlier case, *Seattle Bldg. & Constr. Trades Council v. Washington State Apprenticeship & Training Council*, 129 Wn.2d 787, 804, 920 P.2d 581 (1996), the Supreme Court held:

We hold that Appellants have standing to seek review of the Apprenticeship Council's approval and registration of CITC's apprenticeship program. We further hold that the APA requires a formal adjudicatory hearing on an application for Apprenticeship Council approval and registration of an apprenticeship program under RCW 49.04. We reverse the superior court, set aside the Apprenticeship Council's approval of CITC's program, and remand this matter for a formal adjudicatory hearing under the APA.

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The question of how to obtain standing in an adjudicative proceeding at the agency level is not directly addressed. It is arguable that a person whose interests may be adversely affected by an order, as defined in RCW 34.05.010(11)(a), may have standing to obtain or to participate in an adjudicative proceeding.

(Emphasis added).

As Driscoll does in his Demand, I assume that the OIC's approval of the 22.69% rate increase in the premiums of LTCI at issue in this matter equates to the OIC's issuance of an order. RCW 34.05.010(11)(a) defines "order" as: ". . . without further qualification, means a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons." (Emphasis added). RCW 34.05.010(14) defines "person" as "any individual, partnership, corporation, association, governmental subdivision or unit thereof, or public or private organization or entity of any character, and includes another agency."

The word "aggrieved" in both RCW 48.04.010(1)(b)-(2), and WAC 284-02-070(1)(b)(i), is not defined. To determine the ordinary meaning of an undefined term, we may look to the dictionary. *Garrison v. Washington State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976). "When a statute fails to define a term, we look to the regular dictionary definition when a term has a well-accepted, ordinary meaning. *City of Spokane v. Dep't of Revenue*, 145 Wash.2d 445, 454, 38 P.3d 1010 (2002). However, when "an otherwise common word is given a distinct meaning in a technical dictionary or other technical reference and has a well-accepted meaning within the industry," we turn to the technical, rather than general purpose, dictionary to resolve the word's definition. *Spokane*, 145 Wash.2d at 454. Black's Law Dictionary (8th ed. 2004), a technical reference, defines "aggrieved" as: "(Of a person or entity) having legal rights that are adversely affected; having been harmed by an infringement of legal rights."

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Driscoll was not aggrieved by the order (i.e., OIC's approval of the premium rate increase), and therefore his Demand does not trigger the right to a hearing before the OIC under RCW 48.04.010(1)(b)-(2). Assume for the sake of argument the OIC denied Metropolitan Life Insurance Company's ("MetLife's") request, as administrator of the T-C Life LTCI policies at issue, and indemnitor-reinsurer of such policies, for premium rate increases, and issued an order to that effect. In such an instance MetLife and T-C Life would clearly be aggrieved. If they demanded a hearing to contest the OIC's denial, the OIC would be required to hold a hearing. However, the OIC's approval of the rate increase as to LTCI policies at issue in the instant case does not make Driscoll an aggrieved party. The OIC's approval of the 22.69% rate increase in the premiums of LTCI at issue in this matter determined the legal rights or interests of T-C Life and MetLife, not Driscoll. Controlling case law from the courts supports this position.

Appellants in *Newman v. Veterinary Bd. of Governors*, 156 Wn. App. 132, 231 P.3d 840 (2010) had their dog put to sleep following unsuccessful treatment for a disc condition over a six month period. The appellants later filed a report with the Veterinary Board of Governors ("Board") alleging that the veterinarians involved acted unprofessionally while treating their dog. After a nine month review, the Board sent a letter to the appellants informing them their complaint had been fully investigated, and that "there was no cause for disciplinary action against either of the veterinarians because the care provided was within the standards of practice." While the Board was sympathetic to the appellant's experience, it stated it did "not have sufficient evidence to discipline the practitioners." Therefore, in the letter the Board informed the appellants that the cases against the two veterinarians was being closed.

The appellants in *Newman* then requested an adjudicative hearing on the merits before the Board. The Board responded that "administrative rules do not provide an appeal process once the

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[Board] makes a decision to close a case without action.” (Brackets added). In particular, the Board noted that RCW Ch. 34.05 did not provide for an adjudicative hearing on a Board decision not to issue a statement of charges. The appellants then sought judicial review of the Board’s decision by filing a petition for a constitutional writ of certiorari and statutory writ of review in Thurston County Superior Court. The trial court found that the appellants did not comply with the filing requirements of RCW Ch. 34.05, which it concluded were jurisdictional, required strict compliance, and could not be extended. On appeal, the Court in *Newman* agreed with the trial court, and stated in part:

The Newmans assert that the November 10, 2008 letter was a final order and cite *Devore v. Department of Social & Health Services* for the proposition that service of the November 10, 2008 letter on their attorney was not sufficient to start running the 30 day period for review. 80 Wn. App. 177, 906 P.2d 1016 (1995), review denied, 129 Wn.2d 1015 (1996). The Newmans' position rests on the erroneous assertion that they are parties to the Board's decision not to file a statement of charges. The Newmans do not cite any authority for the proposition that they had become a party to the agency proceeding by filing a report. Nor does the definition of a “party” under the Administrative Procedure Act support their position. According to RCW 34.05.010(12), a “[p]arty to agency proceedings,’ or ‘party’ in a context so indicating, means: (a) A person to whom the agency action is specifically directed; or (b) A person named as a party to the agency proceeding or allowed to intervene or participate as a party in the agency proceeding.”

¶23 While the Newmans assert that they would have been allowed to intervene, the record does not show that they were in fact allowed to intervene or whether they even asked to intervene. In addition, the agency's decision not to prepare a statement of charges, if specifically directed at anyone, was directed at the licensees. For example, if the Board had prepared a statement of charges, the Uniform Disciplinary Act specifically directs that action toward only the licensee or applicant. See RCW 18.130.090(1). Because the Newmans were not parties to the agency proceeding, they were not entitled to service of the November 10, 2008 letter under *Devore*.

[22] ¶24 Even if the Newmans were parties, the November 10, 2008 letter was not a “final order” determining their rights. RCW 34.05.010(11)(a) defines an “order” to mean “a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons.” RCW 34.05.010(3) defines an “agency action” to mean licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits. “Licensing” includes

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that agency process respecting the issuance, denial, revocation, suspension, or modification of a license.” RCW 34.05.010(9)(b). An agency action regarding licensing could also be an order when it finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons. See Devore, 80 Wn. App. at 181 (The parties did not contest that the letter denying license renewal was a final order.). Here, the Board's decision against reconsideration in the November 10, 2008 letter did not finally determine the legal rights or interests of the Newmans. Simply put, the Newmans do not identify their legal interest in having the Board prepare a statement of charges.

156 Wn. App. at 147-148 (emphasis added).

As with the appellants in *Newman*, the OIC’s approval or disapproval of rate increase(s) in the premiums of LTCI, does not provide Driscoll, or others similarly situated, with a right to a hearing or appeal rights under RCW Ch. 34.05 or RCW 48.04.010(1)(b). The policies behind the so-called “filed rate” doctrine buttress this conclusion.

B. Whether the “filed rate” doctrine trumps Driscoll’s Demand.

In *McCarthy Finance Inc. v. Premera*, 182 Wn.2d 936, 941-943, 347 P.3d 872 (2015), the Court applied the “filed rate” doctrine to the OIC’s review and approval of health insurance premiums in the context of a Consumer Protection Act (“CPA”), RCW Ch. 19.86, claim brought by policyholders, and stated:

Health insurance premiums in Washington must be approved by the OIC. RCW 48.44.017(2), .020-.024, .040, .070, .110, .120, .180; WAC 284-43-901, -910 through -930, -945, -950. Among its powers, the OIC may disapprove (1) ambiguous or misleading contracts and deceptive solicitations and (2) contracts the benefits of which are “unreasonable in relation to the amount charged for the contract.” RCW 48.44.020(3), (2), .110. The OIC considers numerous factors when determining whether a health insurance premium is reasonable, including “[h]ow much profit the company expects to make[,] ... generally called ‘contribution to surplus’ or ‘projected profit[,]’ ... [which] depends on the company's current level of surplus as well as the type of business.” CP at 323. The Policyholders do not challenge that the OIC approved the health insurance premiums that the Policyholders paid.

[1-4] ¶10 HN4 Consumers' power to challenge agency-approved rates is limited by the common law filed rate doctrine. See *Wegoland, Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1113-16 (S.D.N.Y. 1992) (providing a history of the doctrine). As this court observed:

The “filed rate” doctrine, also known as the “filed tariff” doctrine, is a court-created rule to bar suits against regulated utilities involving allegations concerning the reasonableness of the filed rates. This doctrine provides, in essence, that any “filed rate”—a rate filed with and approved by the governing regulatory agency—is per se reasonable and cannot be the subject of legal action against the private entity that filed it. 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. These principles serve to provide safeguards against price discrimination and are essential in stabilizing prices. But this doctrine, which operates under the assumption that the public is conclusively presumed to have knowledge of the filed rates, has often been invoked rigidly, even to bar claims arising from fraud or misrepresentation.

Tenore v. AT&T Wireless Servs., 136 Wn.2d 322, 331-32, 962 P.2d 104 (1998) (footnotes omitted). In cases such as this that involve claims and damages related to agency-approved rates, courts must determine whether the claims and damages are merely incidental to agency-approved rates and therefore may be considered by courts or would necessarily require courts to reevaluate agency-approved rates and therefore may not be considered by courts. See *id.* at 344.

[5] ¶11 But while a court must be cautious not to substitute its judgment on proper rate setting for that of the relevant agency, the legislature has directed that the CPA be liberally construed. See, e.g., RCW 19.86.920; *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009); *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 73, 170 P.3d 10 (2007); *Short v. Demopolis*, 103 Wn.2d 52, 60, 691 P.2d 163 (1984). The mere fact that a claim is related to an agency-approved rate is no bar. The CPA itself addresses the limited times when agency action exempts application of the CPA. See RCW 19.86.170; *Vogt v. Seattle-First Nat’l Bank*, 117 Wn.2d 541, 550-52, 817 P.2d 1364 (1991); *In re Real Estate Brokerage Antitrust Litig.*, 95 Wn.2d 297, 300-01, 622 P.2d 1185 (1980)). In most cases, courts must consider CPA claims even when the requested damages are related to agency-approved rates because, to the extent that claimants can prove damages without attacking agency-approved rates, the benefits gained from courts’ considering CPA claims outweigh any benefit that would be derived from applying the filed rate doctrine to bar the claims.

[6] ¶12 In this case, however, rather than requesting general damages or seeking any damages that do not directly attack agency-approved rates, the Policyholders specifically request (1) a “refund[] of the gross and excessive overcharges in premium payments” and (2) a refund of “the amount of the excess surplus.” CP at 28. The Policyholders’ requested damages cause their CPA claims to run squarely against the filed rate doctrine. Even assuming that the Policyholders can successfully prove all the elements of their CPA claims, a court’s awarding either of the two specific damages requested by the Policyholders would run contrary to the purposes of the filed rate doctrine because the court would need to determine what health insurance premiums would have been reasonable for the Policyholders to pay as a baseline for calculating the amount of damages

and the OIC has already determined that the health insurance premiums paid by the Policyholders were reasonable. Accordingly, the Policyholders' claims are barred by the filed rate doctrine because to award either of the specific damages requested by the Policyholders a court would need to reevaluate rates approved by the OIC and thereby inappropriately usurp the role of the OIC.

(Emphasis added).

Driscoll argues at page 18 of his Response that his Demand does not violate the “filed rate” doctrine because he has not initiated a legal action against MetLife, the entity which filed the LTCI premium rate increase request, but rather has simply filed a Demand “to correct [the] OIC’s erroneous approval of the rate increase request.” (Brackets added). Driscoll’s argument misses the mark. His Demand, as the Spokane County Superior Court found in Cause No. 15-2-00920-1, 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 the OIC reviewed and approved the rates charged to the Driscolls, both of which are impermissible. 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 myself under *Premera*. That said, under *Premera* and other case law, the CPA, RCW Ch. 19.86, is available to Driscoll, provided he does not violate the “filed rate” doctrine.

C. Whether a CPA cause of action against MetLife and T-C Life is available to Driscoll.

RCW 48.83.150 states that a “person engaged in the issuance or solicitation of long-term care coverage shall not engage in unfair methods of competition or unfair or deceptive acts or practices, as such methods, acts, or practices are defined in chapter 48.30 RCW, or as defined by

the commissioner.”¹ RCW 48.84.060 notes prohibited practices involving LTCI and states in part: “No insurance producer or other representative of an insurer, contractor, or other organization selling or offering long-term care insurance policies or benefits may: . . . (3) use or engage in any unfair or deceptive act or practice in the advertising, sale, or marketing of long-term care policies or contracts.”

RCW 19.86.020 states: “Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” RCW 19.86.170 provides that actions and transaction prohibited or regulated under laws which the OIC administers shall be the subject to the provisions of RCW 19.86.020, and the remainder of RCW Ch. 19.86 which provide for the implementation and enforcement of RCW 19.86.020, and states in part:

Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States: PROVIDED, HOWEVER, That actions and transactions prohibited or regulated under the laws administered by the insurance commissioner shall be subject to the provisions of RCW 19.86.020 and all sections of chapter 216, Laws of 1961 and chapter 19.86 RCW which provide for the implementation and enforcement of RCW 19.86.020 except that nothing required or permitted to be done pursuant to Title 48 RCW shall be construed to be a violation of RCW 19.86.020:

(Emphasis added).

In *Pain Diagnostics v. Brockman*, 97 Wn. App. 691, 697-698, 988 P.2d 972 (1999), the Court emphasized that the insurance regulatory scheme was not designed to protect or provide remedies for individuals, but rather to regulate the insurance industry, whereas the CPA was the proper venue for private causes of action, stating in part:

¹ As RCW 48.83.010 notes, RCW Ch. 48.83 only applies to LTCI policies delivered or issued for delivery in the state of Washington on or after January 1, 2009.

In creating the insurance regulatory scheme, the Legislature and the insurance commissioner did not intend to provide protection or remedies for individual interests; they intended only to create a mechanism for regulating the insurance industry. Escalante v. Sentry Ins., 49 Wn. App. 375, 389, 743 P.2d 832, review denied, 109 Wn.2d 1025 (1988). Instead, private causes of action for violations of the insurance statutes and regulations must be brought under the CPA. Escalante, 49 Wn. App. at 390; see also Industrial Indem. Co. of the N.W., Inc. v. Kallevig, 114 Wn.2d 907, 924, 792 P.2d 520, 7 A.L.R. 5th 1014 (1990).

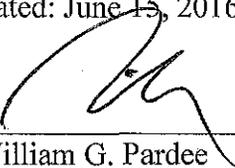
(Emphasis added). See also *Graham-Bingham Irrevocable Trust v. John Hancock Life Insurance Co.*, 827 F. Supp.2d 1275, 1281-1282 (W.D. Wash. 2011)(“RCW Title 48, however, does not create a private cause of action)(citing Court’s decision in *Brockman*).

The appropriate forum for Driscoll to challenge MetLife or T-C Life business practices, or allege unfair or deceptive acts or practices on their part, is via a CPA cause of action, provided it does not infringe upon the “filed rate” doctrine as outlined in *Premera*, and explained in **B.** above.

Ruling.

Driscoll’s Cross Motion for Summary Judgment is denied. The OIC’s Cross Motion for Summary Judgment is granted.

Dated: June 15, 2016



William G. Pardee
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.

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the state of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be filed and served the foregoing Order on Cross Motions for Summary Judgment on the following people at their addresses listed below:

Leo J. Driscoll
4511 E. North Glenngrae Lane
Spokane, WA 99223

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

Dated this 15th day of June, 2016, in Tumwater, Washington.


Dorothy Seabourne-Taylor
Paralegal
Hearings Unit