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STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF Respondent PacifiCare of Washington, Inc. Authorized Health Care Service Contractor.	ORDER NO. 09-0010 **PACIFICARE OF WASHINGTON'S PETITION FOR REVIEW OF INITIAL ORDER**

PacifiCare of Washington ("PCW") respectfully submits the following brief in support of its petition for review of the Initial Order Denying Summary Judgment ("Initial Order"), entered herein by Judge Burdue (the "ALJ") on January 25, 2010.[1]

SUMMARY OF ARGUMENT

For purposes of summary judgment, it is uncontroverted that on August 9, 2007, the Office of the Insurance Commissioner ("OIC") knew that PCW had been making payments to an affiliate in a manner OIC considered to be in violation of the law. There is no dispute the fine OIC seeks to impose for this alleged violation is punitive and is subject to a two-year statute of limitations. Finally, it is uncontroverted that OIC requested a hearing in the matter on August 14, 2009, and no one actually provided notice of any stage in the hearing until the Office of Administrative Hearings ("OAH") notified the parties on September 8, 2009 of a scheduled prehearing conference.

Despite these clear and undisputed facts, the ALJ denied PCW's motion for summary judgment on the statute of limitations issue. The ALJ erroneously concluded that OIC actually

[1] PCW acknowledges that pursuant to RCW 34.05.461(1)(c) and .464, the Initial Order must be reviewed by the insurance commissioner or his designee before it becomes final. PCW has styled its brief as a petition to conform to the language in the "Review Rights" section of the Initial Order and WAC 10-08-211.

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commenced the action – thereby tolling the statute of limitations – on February 9, 2009, when OIC forwarded to PCW a proposed, unsigned Consent Order which OIC described in its transmittal letter to PCW as an, "*offer*," which was not accepted. The ALJ incorrectly reasoned that in order to commence an adjudicative proceeding to obtain an order to impose a fine, all OIC had to do was send "notice of the penalty to the penalized party", which she determined had been accomplished through the Consent Order and transmittal letter.

This is completely in error. First, the ALJ applied the wrong legal standard. To commence an adjudicative proceeding, OIC has to give notice of a hearing on the action – not notice of a penalty. To that end, the ALJ explicitly and properly conceded that OIC did not notify PCW of its request for an administrative hearing until August 14, 2009. Second, even under OIC's incorrect standard of "notice of the penalty" imposed, the Consent Order still does not commence the action. OIC could not have given notice of the penalty imposed in the Consent Order because there was no penalty. In the absence of a stipulation by all parties, OIC is statutorily precluded from imposing a fine or penalty without first conducting a hearing. If OIC had obtained PCW's stipulation, the fine could have been imposed and there would not have been any need for a hearing. Without PCW's stipulation, however, the proposed penalty could not be imposed by OIC absent a hearing. Therefore, there was no imposed fine of which to give notice, and it was incumbent upon OIC to commence a hearing to obtain an order imposing the fine. The Consent Order and transmittal letter, sent six months before OIC requested a hearing, could not have constituted notice of a penalty and did not constitute notice of a hearing. Therefore, it was insufficient as a matter of law for purposes of commencing the action prior to expiration of the statute of limitations.

If the law were otherwise, OIC could commence any action and toll the statute of limitations indefinitely simply by sending out an unsigned proposed consent order; it could then wait years to take any further steps and, perhaps, never even request a hearing from OAH. Not only would this would this result offend basic principles of due process, it would create a situation in which OIC could circumvent OAH.

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The ALJ also erroneously concluded that PCW's mere possession of a statutory right to a hearing on OIC's threat to impose a fine constitutes commencement because PCW could have sought a hearing on the matter in dispute. There no legal basis for this proposition. This is no different from a superior court deciding that a plaintiff successfully tolled the statute of limitations by sending a demand letter because a defendant could have filed a declaratory action to determine the parties' rights and liabilities.

The ALJ's conclusion that the OIC commenced the instant action by sending the unsigned Consent Order is the product of several clear errors of law. As such, PCW respectfully requests that conclusion be reversed and all claims against PCW be dismissed.

STATEMENT OF UNDISPUTED FACTS

I. OIC's Prior Financial Examinations.

In the last several years, OIC conducted two full scope financial examinations of PCW. The first exam covered the period from January 1, 1997 through December 31, 2002, is dated February 8, 2006, and resulted in an order dated February 13, 2006. The second exam covered the period from January 1, 2003 through December 31, 2006, is dated August 11, 2008, and resulted in an order dated August 13, 2008. On August 9, 2007, during the course of the second examination, OIC examiners participated in a conference call with members of PCW management. There is no dispute in the record - and the ALJ properly concluded for purposes of summary judgment - that this was the date OIC learned of PCW's disputed payments which underlie OIC's claims in this matter.

In its August 13, 2008 order resulting from the second exam report, OIC adopted the findings of the examiners, but did not fine PCW for the disputed payments. Rather, OIC simply instructed PCW to discontinue the payments – regardless of how they were characterized – and seek reimbursement from its affiliate, Pacific Health Plan Administrators, Inc. ("PHPA"). It is undisputed that PCW complied and effected complete recoupment as OIC has acknowledged.

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II. OIC Sends PCW A Proposed Consent Order for Imposition of Fines and Subsequently Serves a Notice of Request for Hearing.

On February 9, 2009, OIC forwarded to PCW an unsigned, proposed Consent Order Levying Fine along with a transmittal letter. The unsigned Consent Order stated in pertinent part as follows: "***By agreement of the parties***, the insurance commissioner will impose a fine of $400,000." (Emphasis added.) OIC's transmittal letter stated in pertinent part that PCW could resolve the matter ***without the need for administrative action*** by simply signing the Consent Order and paying the fine. (Emphasis added.) The letter concluded by noting: "If we have not heard back from you by March 9, 2009, this ***offer*** must be withdrawn and the OIC will be forced to explore other options." (Emphasis added.) Neither the proposed Consent Order nor OIC's transmittal included any notice of request for an administrative hearing. PCW did not stipulate to, or sign, the Consent Order, and did not pay the fine. As the ALJ properly concluded, the two-year statute of limitations applicable to this matter expired on August 9, 2009.

On August 14, 2009, OIC filed a Notice of Request for Hearing for Imposition of Fines with OAH. On September 8, 2009, OAH issued a Notice of a Pre-Hearing Conference on this matter. It was not until this date that, according to the plain language of Washington's Administrative Procedures Act ("APA") itself, OIC actually "commenced" this matter.

III. The Statute of Limitations Issue Is Presented Pursuant to the Parties' Agreement.

As reflected in the First Pre-Hearing Order, the parties and the ALJ agreed that PCW would present its dispositive motion prior to scheduling a hearing on the merits. PCW filed its statute of limitations motion on October 30, 2009. In an Amended Notice of In-Person Motion Hearing, OAH established a January 6, 2010 hearing date. The Amended Notice identified the motion hearing as an "adjudicative proceeding" with the purpose and scope of determining whether the OIC may properly impose a fine of $400,000 for the allegedly improper payments. Following the adjudicative hearing on this issue, the ALJ issued the Initial Order now before OIC for review in anticipation of entry of a final order on this issue.

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EXCEPTIONS TO PORTIONS OF INTIAL ORDER

In the Initial Order, the ALJ correctly concluded that OIC's cause of action accrued on August 9, 2007. The ALJ also correctly concluded that OIC's claims are punitive in nature, and therefore carry a two-year statute of limitations. As a result, the ALJ correctly determined that the statute of limitations on OIC's claims would run on August 9, 2009, if not tolled beforehand. The ALJ committed substantial legal error, however, in concluding that OIC commenced the action and tolled the statute of limitations upon sending PCW the February 9, 2009 Consent Order and transmittal letter.

As required by RCW 34.05.461(3), the Initial Order contains Findings of Fact and Conclusions of Law. Although findings of fact and conclusions of law on summary judgment are surplusage that may be disregarded because the standard of review is *de novo*, *Redding v. Virginia Mason Medical Center*, 25 Wn. App. 425, 878 483 (1994), PCW takes exception to certain findings and conclusions, which it specifies with particularity pursuant to WAC 10-08-211(3). Herein, PCW identifies the findings and conclusions to which it takes exception by number. The Findings and Conclusions themselves and the bases for PCW's exceptions are set forth in detail in the accompanying Declaration of Jeffery L. Gingold.

I. Findings of Fact

PCW takes exception to Finding of Fact No. 13.

II. Conclusions of Law

PCW takes exception to Conclusions of Law Nos. 4, 18, 19, 20, 21, 24, 25, 27, and 28.

ARGUMENT

Although the Initial Order contains several correct conclusions of law, the ALJ misapplied the law in finding OIC tolled the statute of limitations in this matter by mailing PCW an unsigned Consent Order and transmittal letter.

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I. The Initial Order Should be Reviewed Under a "De Novo" Standard.

Pursuant to the APA, OIC regulations, and the Commissioner's designation, OIC's Chief Hearing Officer, the Honorable Patricia Petersen, must review the Initial Order before it becomes a Final Order. RCW 34.05.464(2); WAC 284-02-080(2)(c). With one exception not present here (live witness testimony), the reviewing officer can disregard the ALJ's findings of fact and legal conclusions. RCW 34.05.464(4). In the Initial Order, the ALJ correctly found that no issues of fact precluded the granting of PCW's motion for summary judgment. Initial Order at FOF 2. Therefore, review of the denial of PCW's motion for summary judgment should be limited to the legal conclusions.[2] Legal conclusions are reviewed *de novo* "to determine if the hearing judge correctly applied the law, including whether the factual findings support the legal conclusions." *Timberlane Mobile Home Park v. Washington State Human Rights Com'n* 122 Wn. App. 896, 900, 95 P.3d 1288 (2004); *see also Bond v. Dept of Social & Health Services*, 111 Wn. App. 566, 571-72, 45 P.3d 1087 (2002) (citing *Williams-Batchelder v. Quasim*, 103 Wn. App. 8, 13, 19 P.3d 421 (2000)).

II. The Initial Order Fails To Consider and Properly Apply The Language of the APA.

The Initial Order states that pursuant to RCW 48.44.170, Chapter 48.04 RCW controls hearing rights and procedures under the insurance code. Initial Order at COL 4. RCW 48.04 *et seq.* addresses rights to a hearing (RCW 48.04.010), staying a hearing (RCW 48.04.020, 140), location of the hearing (RCW 48.04.010), show cause notices (RCW 48.04.050), adjourning hearings (RCW 48.04.070), and the consequences of not attending a hearing (RCW 48.04.070). Therefore, according to 48.44.170, OIC is subject to these rules and restrictions.

The APA expressly applies to adjudicative proceedings such as the summary judgment hearing at issue as well, however, and the Initial Order fails to concede its authority or discuss its application at all. Indeed, OIC has promulgated its own regulation entitled, "How does the OIC conduct hearings?", which states: "Hearings of the OIC are conducted according to chapter 48.04

[2] As set forth in the accompanying Gingold Declaration, PCW also seeks review of Finding of Fact. No. 13.

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RCW and the APA (chapter 34.05 RCW)." WAC 284-02-070(1)(a). And RCW 34.05.410(1) states: "Adjudicative proceedings are governed by RCW 34.05.413 through 34.05.476." An adjudicative proceeding is defined as any "proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after entry of an order by the agency". Clearly, OIC is such an agency and, therefore, these statutes govern this proceeding. Because there is no conflict between the requirements of RCW 48.04 and RCW 34.05.413 through RCW 34.05.476, there is no issue that both bodies of law apply here.

OIC even correctly acknowledges the authority of the APA in this matter by referencing it repeatedly in formal notices, including the Notice of Telephone Pre-hearing Conference, First Pre-Hearing Order, and the Amended Notice of In-Person Motion Hearing. Each of these documents concedes the authority of the APA over the procedural components of this action. The ALJ made a legal error in failing to recognize the APA's applicability and apply the provision directly on point to the key question – the date on which OIC commenced this adjudicative proceeding.

III. <u>The APA Requires Notice Of A Hearing To Commence the Action</u>.

Neither RCW 48.44 *et seq*. nor RCW 48.04 *et seq*. has a provision addressing or defining the commencement of an action. The APA does. RCW 34.05.413(5) of the APA expressly provides: "An adjudicative proceeding commences when the agency or a presiding officer notifies a party that a prehearing conference, hearing or other stage of an adjudicative proceeding will be conducted."

Nevertheless, in the Initial Order, the ALJ ignores this governing statutory law, and derives the definition of "commencement of an action" from a case decided eight years prior to the enactment of the APA, whose holding is focused predominately on an entirely different legal question. Initial Order at COL 18 (citing *U.S. Oil & Refining Co. v. Dept. of Ecology*, 96 Wn.2d 85, 633 P.2d 1329 (1981)). RCW 34.05.413(5) of the APA is statutory authority, enacted more recently than the *U.S. Oil* opinion, directly on point, and explicitly applicable to this proceeding. The ALJ made a legal error in failing to follow and apply the governing APA standard for commencement of an action. This error is especially significant because it bears directly on the key and only

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undisputed issue that was before the ALJ – when OIC commenced the action and tolled the statute of limitations.

IV. Even If It Were to Apply, *U.S. Oil* Requires More Than Notice Of A Proposed Penalty – It Requires Something That Functions Like A Complaint.

While the *U.S. Oil* Court did make the statement: "[T]he action was commenced, for tolling purposes with the notice of the penalties," it did so in a very particularized context. The ALJ takes this statement outside of that context, without consideration to the explanation that follows it, and misapplies it to this proceeding.

The *U.S. Oil* Court was considering a particular action brought by the Department of Ecology for a penalty against a polluter under a particular, self-executing statute: former RCW 90.48.144. *U.S. Oil*, 96 Wn.2d at 87. Under that statute, the Department of Ecology was authorized to unilaterally assess a fine against a business. The Department of Ecology only had to notify the business that it had assessed this fine. If the business did not respond within a set time period, the fine was automatically imposed. The *U.S. Oil* Court analogized the notice in that context to a complaint in superior court. Once a business is served with a complaint, it has a set time in which to respond. If it does not respond in time, a default judgment is entered against it.

The *U.S. Oil* Court observed, "The notice has much the same effect as a complaint or summons and hence the action should toll when the notice is served." *Id.* at 92 (emphasis added). This language of the opinion makes clear that the integral part of anything that commences an action is that it has the same effect as a complaint or a summons. A complaint provides the recipient with general knowledge of the claims against him and perhaps what the complainant thinks those claims are worth, but also it does much more than that. It actually sets in motion the judicial process, such that a failure to respond creates liability. This is what the *U.S Oil* Court required for commencement and tolling – something that is undeniably absent from the February 9, 2009 proposed Consent Order and transmittal letter.

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V. The Language Of The Consent Order And Transmittal Letter Do Not Meet The Standard Set By Either The APA Or *U.S. Oil*.

Consistent throughout the Initial Order, and essential to its decision, is the notion that the language of the Consent Order and its transmittal letter constituted sufficient notice to commence the action or otherwise toll the statute of limitations under the misapplied and misstated *U.S. Oil* standard. For example, in Finding of Fact No. 13, Conclusion of Law No. 19, and Conclusion of Law No. 21, respectively, the ALJ states:

> *"The OIC clearly notified PCW it would enforce its assessment of the fine through 'further administrative action' if PCW did not pay the fine by a certain date."*
>
> *"The Consent Order Levying Fine and the attached letter very clearly and specifically notified PCW that $400,000 in fines had been imposed and that payment would be sought administratively if not paid voluntarily."*
>
> *"The Consent Order Levying Fine made it very clear to PCW that further administrative action would be taken to enforce payment if not made voluntarily by PCW."*

Regardless of whether or not the APA or *U.S. Oil* provides the standard, however, the ALJ is in error in her reading of the language of the Consent Order and the transmittal letter. The documents did not say a fine had been imposed; they did not say a fine would be imposed; OIC did not even explicitly threaten to impose a fine if PCW did not do certain things. Initial Order at COL 25 (emphasis in original). Rather, the Consent Order – what the ALJ considered the operative document – states just the opposite. After setting forth findings of fact and conclusions of law, the Consent Order contains a section entitled "Consent to Order", which includes the following language: "By agreement of the parties, the Insurance Commissioner will impose a fine of $400,000." Moreover, despite signature blocks, the document is unsigned – not just by PCW, but by OIC as well. It is unclear how a document supposedly imposing a $400,000 fine need not even be signed.

Furthermore, while the Initial Order does accurately quote from the transmittal letter, it does so selectively and misleadingly. While the letter does say: "Attached is a Consent Order imposing

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this fine," and "[t]he OIC has determined that the appropriate penalty for these violation is a fine against PacifiCare of Washington in the amount of $400,000", it also clearly states that:

> "PacifiCare of Washington may resolve this matter now without the need for further administrative action by simply having the appropriate person sign the Consent Order, and paying the fine" (showing the requirement of PCW's participation to make the Consent Order effective)

and

> "[i]f we have not heard back from you by March 9, 2009, this offer must be withdrawn and the OIC will be forced to explore other options" (characterizing the Consent Order as an offer, not an imposed fine).

Neither of these quotations supports an interpretation that OIC has unilaterally imposed this $400,000 fine on PCW, or that the Consent Order and transmittal letter are intended to be notice of this already-imposed fine. Certainly, they do not reflect any notice of a hearing or stage in a hearing. Rather, they reflect the true nature of the Consent Order, which is an offer made by OIC to PCW to resolve the matter between them on the terms contained in it.

VI. The Consent Order And Transmittal Letter Cannot Impose A Fine Or Be Notice Of An Already-Imposed Fine Because OIC Cannot Impose A Fine Without A Hearing.

The ALJ asserts that OIC is required to act subject to a hearing when imposing a fine, but only if a hearing has been requested. This is a clear error of law. RCW 48.44.160 requires OIC to act subject to a hearing when suspending or revoking a license, but only when a hearing has been requested. By negative implication, this would suggest OIC does not need to act subject to a hearing under this statute if a hearing has not been requested. In contrast, however, RCW 48.44.166 provides: "After hearing or upon stipulation by the registrant and in addition to or in lieu of the suspension, revocation or refusal to renew any registration of a health care service contractor the commissioner may levy a fine against the party involved…" (emphasis added). In other words, OIC may be permitted to suspend a license without a hearing in some circumstances, but it is never permitted to assess a fine in lieu of that suspension, revocation or non-renewal without a hearing. Therefore, the Consent Order and transmittal letter could not have unilaterally imposed the fine and could not constitute notice of any fine since no fine had yet been imposed.

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VII. PCW's Ability to Demand A Hearing On OIC's Un-filed Claims Does Not Toll The Statute Of Limitation.

When OIC sent PCW the Consent Order and transmittal letter, it provided PCW with general notice of the claims it believed existed against PCW.[3] In addition, throughout this whole process, PCW had the ability to independently seek a hearing on this issue. Consistently throughout the Initial Order, the ALJ maintains that these two statements combine to commence OIC's action and toll the statute of limitations. Initial Order at COL 20, 21, 22, 24, 27. As sole support of this novel proposition, the ALJ once cites generally to *U.S. Oil*, without reference to any specific page or passage in the opinion.

This proposition is not supported by *U.S. Oil*, however. *U.S. Oil* says nothing about tolling the statute of limitations once the other party has the right to seek relief. In fact, *U.S. Oil* contains the contrary sentence: "A cause of action accrues when the party has a 'right to seek relief.'" *U.S. Oil*, 96 Wn.2d at 91 (emphasis added). Just as OIC did in portions of its briefing, the ALJ has confused the accrual of a cause of action with commencement of the proceeding on that cause of action.

The purpose of the statute of limitations is to restrict the period of time in which a party may bring an action. If, for some period of time, that party does not have a right or ability to seek relief, it would generally be inappropriate for the statute of limitations to run during that period. This is why the discovery rule delays the accrual of a cause of action until a party has the right and ability to seek relief. This is the role of the "right to seek relief" in a statute of limitations analysis. It has nothing to do with the other party's right to seek relief. If a cause of action accrues, a party has until the expiration of the statute of limitations to commence the appropriate proceeding. This is unaffected by anyone else's ability or inability, right or lack of right, to commence a proceeding on the same or different issues.

[3] As it turns out, the Notice of Request for Hearing OIC ultimately filed was different than the proposed Consent Order, suggesting that the Consent Order actually did not give notice of the hearing or penalty OIC would ultimately seek.

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The notion that the statute of limitations would be tolled when the opposing party has a right to seek a hearing belies common sense. If this were true, OIC would be able to sidestep the statute of limitations simply by giving notice to PCW that it had reason to believe improprieties had taken place and circumvent the role of the Chief Hearing Officer in commencing proceedings. According to the Initial Order, OIC could then wait indefinitely before actually requesting a hearing on those alleged improprieties. This is not the law, and the ALJ is in error in claiming it is.

CONCLUSION

In the Initial Order, the ALJ properly found that (i) no factual issues precluded granting PCW's motion for summary judgment, (ii) OIC's cause of action in this matter accrued no later than August 9, 2007, and (iii) a two-year statute of limitations applies to these claims. Nevertheless, the ALJ committed several errors of law in finding the February 9, 2009 unsigned Consent Order and transmittal letter commenced the action and tolled the statute of limitations. Because the Initial Order is reviewed *de novo*, OIC's reviewing officer has full authority to correct those errors of law and revise the ultimate decision regarding the merits of the motion. *See* RCW 34.05.464.

RELIEF REQUESTED

WHEREFORE, PacifiCare of Washington respectfully requests:

1. Review of the Initial Order Denying Summary Judgment entered herein on January 25, 2010;

2. Reversal of those parts of the Initial Order Denying Summary Judgment that conclude the February 9, 2009 Proposed Consent Order and transmittal letter commenced the action and tolled the statute of limitations;

3. The opportunity to present oral argument pursuant to RCW 34.05.464(6).

4. Entry of a final order granting PacifiCare of Washington's Motion for Summary Judgment re: Statute of Limitations; and dismissing all claims against it in this action

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5. Such other relief as may be deemed appropriate.

DATED this 12th day of February, 2010.

LANE POWELL PC

By _____
Jeffrey E. Gingold, WSBA No. 18915
Andrew G. Yates, WSBA No. 34239
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CERTIFICATE OF SERVICE

I assert that true and exact copies of PacifiCare of Washington's Petition for Review of Initial Order were hand-delivered by ABC-LMI and mailed postage prepaid on February 12, 2010, to the following paries at the following addresses:

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STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE OFFICE OF INSURANCE COMMISSIONER

IN THE MATTER OF: PacifiCare of Washington, Inc., Authorized Health Care Service Contractor, Plaintiff.	Docket No. 2009-INS-0001 **DECLARATION OF JEFFERY L. GINGOLD IN SUPPORT OF PETITION FOR REVIEW OF INITIAL ORDER**

I, Jeffrey L. Gingold, make the following declaration based upon my own personal knowledge:

1. I am over the age of eighteen (18) years and am competent to testify to the facts and matters contained herein, based upon my own knowledge. I am one of the attorneys for PacifiCare of Washington, Inc. ("PCW") in the captioned matter.

2. PCW takes exception to the following portions of the Honorable Cindy L. Burdue's ("ALJ") January 25, 2010 Initial Order Denying Summary Judgment ("Initial Order"), a true and correct copy of which is attached hereto as Exhibit A: Specifically, PCW assigns error as follows:

FINDINGS OF FACT

3. As noted in its Petition for Review, PCW does not take exception to the ALJ's ultimate finding that there was no genuine issue as to any material fact that might preclude granting PCW summary judgment. Initial Order, FOF 2. Nevertheless, PCW takes exception to Finding of Fact No. 13 because it contains a statement that is unsupported by the record:

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"The OIC clearly notified PCW it would enforce its assessment of the fine through 'further administrative action' if PCW did not pay the fine by a set date."

In actuality, the transmittal letter referenced in Finding of Fact No. 13 states the following:

"PacifiCare of Washington may resolve this matter now without the need for further administrative action by simply having the appropriate person sign the Consent Order, and paying the fine...If we have not heard back from you by March 9, 2009, this offer must be withdrawn and the OIC will be forced to explore other options."

Despite this misstatement, however, the ALJ is correct to have found no genuine issue of material fact precluding summary judgment.

CONCLUSIONS OF LAW

4. PCW respectfully takes exception to Conclusions of Law Nos. 4, 18, 19, 20, 21, 24, 25, 27, and 28, for the reasons set forth below.

> 4. *The Office of Administrative Hearings and the undersigned Administrative Law Judge have jurisdiction over the parties and subject matter herein pursuant to RCW 48.04.010(5), Chapter 34.05 RCW, and Chapter 34.12 RCW. The provisions of Chapter 48 RCW, the Insurance Code, are applicable here.*

RCW 48.44.170 provides that "the insurance commissioner shall be subject to and may avail himself of the provisions of chapter 48.04 RCW, which relate to hearings and appeals". Notwithstanding that language, RCW 34.05.410 states that "[a]djudicative proceedings are governed by RCW 34.05.413-34.05.476." RCW 34.05.010 defines adjudicative proceedings as "proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after entry of an order by the agency". OIC is such an agency. Moreover, in the Notice of Prehearing Conference By Telephone, as well as the Amended Notice of In-Person Motion Hearing and in the "Review Rights" section of her Initial Order, Judge Burdue clearly references the authority and applicability of RCW 34.05 to this proceeding. Therefore, while RCW 48.04 must be considered and applied as appropriate, so must RCW 34.05.

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18. *Under U.S. Oil, Id., the pertinent action by a government agency, by which a cause of action for a penalty is "commenced," is notice of the penalty to the penalized party. Thus, I next examine the record for adequate administrative notice of the penalty prior to the expiration of the two year period ending August 9, 209.*

U.S. Oil & Refining Co. v. Dept. of Ecology, 96 Wn.2d 85, 633 P.2d 1329 (1981), does not determine when this action was commenced. Subsequent to the *U.S. Oil* opinion, the state legislature passed the Administrative Procedure Act, RCW 34.05 *et seq*. (the "APA"). RCW 34.05.410 explicitly states that this proceeding is governed by the APA. Moreover, OIC's own regulations state that the APA applies. WAC 284-02.070.

Correctly, therefore, the ALJ's circulated notices explicitly state that this proceeding is governed by the APA, which is crystal clear that "[a]n adjudicative proceeding commences when the agency or a presiding officer notifies a party that a prehearing conference, hearing, or other stage of an adjudicative proceeding will be conducted."

Alternatively, even if *U.S. Oil* did provide the applicable standard to determine when the proceeding commenced, *U.S. Oil* does not stand for the blanket proposition that "a cause of action for a penalty is commenced [by] notice of the penalty to the penalized party". (emphasis in original) *U.S. Oil* stated, with regard to the particular hearing at issue in that case in front of the Department of Ecology:

> "...[this] action was commenced, for tolling purposes with the notice of the penalties. Although the notice is not technically a complaint or a summons, it does as a practical matter commence the action and apprise the penalized party of it. Once the notice is served, the penalized party can either pay the penalty or have the claim fully adjudicated by the otherwise available administrative and judicial forums, with no liability actually arising until completion of all available judicial review. **The notice has much the same effect as a complaint or a summons, and hence the action should toll when the notice is served.**"

U.S. Oil, 96 Wn.2d at 91-92 (emphasis added).

Therefore, notice of the penalty only serves to commence the action and toll the statute of limitations when it has the same practical effect as a complaint or summons. Because an

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adjudicative hearing is expressly required by the APA and insurance code before OIC can fine PCW, OIC's mere notice of a potential penalty via its February 9, 2009 letter does not have such effect.

19. *The OIC did not specifically notify PCW of its demand for an administrative hearing on the issue of the monetary penalties until August 14, 2009, in the "Notice of Request for Hearing on Imposition of Fines." (Ex. R-1). However, the OIC did send to PCW a letter and a "Consent Order Levying Fine," on February 9, 2009, six months before the statute of limitations expired on August 9, 2009. The Consent Order Levying Fine and the attached letter very clearly and specifically notified PCW that $400,000 in fines "had been imposed" and that payment would be sought administratively if not paid voluntarily.*

The Consent Order and transmittal letter did not notify PCW that $400,000 in fines "'had been imposed'". Rather, the Consent Order provided PCW and OIC the opportunity to stipulate to and sign a document that clearly stated, "[b]y agreement of the parties, the Insurance Commissioner will impose a fine of $400,000."

Unlike the Notice of Request for Hearing for Imposition of Fines that OIC filed on August 14, 2009 after the statute of limitations expired, the February 9, 2009 Consent Order and transmittal letter failed to notify PCW that payment would be sought administratively if not paid voluntarily. Instead, the transmittal letter stated that PCW could resolve the matter without the need for further administrative action if it voluntarily paid the $400,000. If, however, PCW did not do so within the specified time, OIC stated that it would withdraw the offer and be forced to explore other unspecified options.

20. *Based on U.S. Oil, the OIC commenced its action when it provided notice of the penalties sought to PCW. See, U.S. Oil, Id. Such notice occurred when OIC served PCW with the Consent Order Levying Fine, on February 9, 2009, demanding payment of $400,000 as a penalty, along with a letter stating the penalty had been imposed by the OIC, and why. Either party could have taken subsequent legal action on that notice, simply by filing a hearing demand. RCW 48.04.010(1)(b). PCW now claims that this notice did not toll the statutory period, but its argument is not persuasive, nor is it supported by the law.*

For the aforementioned reasons, OIC did not commence its action by forwarding to PCW an unsigned document proposing an agreement between the parties. The only threat OIC made in the February 9, 2009 package was to "explore other options". Moreover, even if this language

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constituted a threat to commence an administrative action, threats of commencing an action are not the equivalent of commencing the action.

21. *RCW 48.04.101(1)(b) states that the Commissioner shall hold a hearing upon written demand by anyone aggrieved by an act, "threatened act," or by any report, promulgation or order of the Commissioner. Certainly, the Consent Order Levying Fine made it very clear that the OIC found statutory violations and deception by PCW, and set forth a very specific demand for payment of $400,000 by PCW. The Consent Order and letter accompanying it make very clear to PCW that further administrative action would be taken to enforce payment if not made voluntarily by PCW. At the very least, the Consent Order and letter constitute "threatened" action by the OIC, from which PCW had administrative hearing rights immediately available.*

For the aforementioned reasons, OIC did not commence its action by forwarding to PCW an unsigned document proposing an agreement between the parties. While PCW did have the opportunity to request a hearing from the Insurance Commissioner, this does not commence an action. If that were true, OIC could address every penalty action by immediately sending an unsigned proposed consent order along with a threatening letter, circumventing the role of the Chief Hearing Officer and effectively tolling the statute of limitations indefinitely, thereby rendering it nullity.

22. *When PCW failed to pay the fine, the OIC was forced to request an administrative hearing to enforce payment of its fine. The fact that it was the OIC which made the hearing demand does not diminish the fact that PCW had full rights to an administrative hearing on February 9, 2009, and had specific notice of the penalties sought by the OIC that day, in the amount of $400,000.*

The combination of PCW's knowledge of OIC's desire to fine it $400,000, and PCW's full rights to an administrative hearing, are not the equivalent to OIC commencing an action against PCW for $400,000 in fines.

23. *PCW argues that the OIC did not provide adequate notice of the imposition of the fines by the Consent Order Levying Fine. PCW claims to view the Consent Order Levying Fine as merely an offer to settle the matter. However, a "matter" to settle does not exist without the Consent Order Levying Fine. This is the document issued by the OIC (along with the attached letter), to inform PCW of its demand for and intent to collect those monies.*

OIC's February 9, 2009 proposed Consent Order <u>is</u> the equivalent of an offer to settle the matter, rather than any sort of document commencing a proceeding. Although it may provide PCW

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with notice of OIC's position and the amount of the fine it intends to seek, it cannot and does not actually impose any fine, begin any sort of action, or otherwise expose PCW to any action by OIC that would have the force of law. Without agreement by the parties, and without a request for a hearing to obtain an order imposing fines, PCW respectfully submits the Consent Order is a legally ineffectual document and it was error for the ALJ to conclude otherwise.

24. *The law does not require the OIC to request, file for, or provide notice of an adjudicative or administrative hearing or "action" before imposing a fine. RCW 48.44.166 allows OIC to impose a fine in lieu of revocation or suspension of license to conduct insurance business in Washington. RCW 48.44.160 states that the OIC can act, "subject to a hearing if one is requested, to revoke, suspend, or refuse a new license or renewal of license by an insurer. PCW's argument confuses the initiation of "adjudicative proceedings" with the agency's right to issue an order levying a fine, which triggers a subsequent right to an adjudicative proceeding by the fined party, PCW, or to OIC for enforcement of its assessed fine.*

The law does require OIC to request and conduct an adjudicative hearing before levying a fine. RCW 48.44.166 states in pertinent part as follows: "After hearing or upon stipulation by the registrant . . . the commissioner may levy a fine against the party involved." Therefore, the commissioner does not have the authority to levy a fine to which a party does not stipulate unless a hearing is conducted to authorize imposition of that fine., i.e., without a stipulation, OIC's ***sole*** mechanism for imposing a fine is a hearing, which can only be "commenced" upon notice of "a prehearing conference, hearing, or other stage of an adjudicative proceeding." RCW 34.05.413(5).

When OIC sent the Consent Order to PCW, it was seeking a stipulation on which to impose the fine. PCW did not sign the Consent Order. Therefore, OIC still had no hearing and no stipulation. Hence, it continued to have no authority to impose a fine.

25. *The undisputed facts demonstrate that the OIC sent PCW its administrative order for penalty payment on February 9, 2009, by issuing the Consent Order Levying Fine and the accompanying letter which explained the process and informed PCW that the penalty had been imposed. The documents did not say a fine "would be" imposed, nor did OIC threaten to impose a fine if PCW did not do certain things. Instead, that February 9, 2009, letter states,*

> *"The OIC has determined that the appropriate penalty for these violations is a fine against PacifiCare of Washington in the amount of $400,000. . . Attached is a Consent Order Imposing this fine."*

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The Consent Order states, "By agreement of the parties, the Insurance Commissioner will impose a fine of $400,000". Moreover, the transmittal letter clearly indicates that it requires PCW's participation to make the Consent Order effective. If OIC already "had imposed" a fine by sending out the Consent Order, there would be no need for PCW's cooperation or for subsequent negotiations, or a hearing – which OIC later requested.

More importantly, though, the precise language of the transmittal letter is simply not relevant. No matter how Ms. Philhower characterized the actions of OIC or what she threatened to do in the transmittal letter, OIC cannot impose a fine without a hearing (or stipulation), and cannot commence a hearing without following the required procedure, which includes filing a request for hearing. Without that, no matter what has been said and what threats have been made, no steps have actually been taken to commence the action.

> 27. *PCW was therefore placed on administrative notice of a specific penalty imposed by the OIC in the Consent Order Levying Fine dated February 9, 2009. That action by the OIC carried a right to hearing on the issue, and therefore is the action by the OIC which tolls the statute of limitations for imposing a fine against PCW. See, U.S. Oil, Id.*

The Consent Order did not put PCW on notice that a fine had been imposed because OIC cannot unilaterally impose a fine under RCW 48.44.166 without a hearing or stipulation. PCW was put on notice that OIC objected to its conduct, determined to require a $400,000 fine, and might, in the future, commence an action to impose that fine. This has no legal effect on the statute of limitations, however. Moreover, PCW's right to seek a hearing on this issue does not have any effect the statute of limitations for OIC's claims.

> 28. *Thus, because the OIC acted administratively, within the law, to impose a fine on PCW on February 9, 2009, 18 months after the statutory two year period began to run on August 9, 2007, with the discovery by OIC of PCW's violations, this matter may not, as a matter of law, be dismissed for lack of jurisdiction. Summary judgment on that issue must be denied to PCW.*

OIC did not impose a fine on PCW within the statute of limitations. OIC has still not imposed a fine on PCW. For OIC to impose a fine, it must obtain a stipulation or conduct a hearing.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 12th day of February, 2010 at Seattle, Washington.

Jeffrey L. Gingold

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CERTIFICATE OF SERVICE

I assert that true and exact copies of Declaration of Jeffrey L. Gingold in Support of Petition for Review of Initial Order were hand-delivered by ABC-LMI and mailed postage prepaid on February 12, 2010, to the following paries at the following addresses:

Hon. Cindy L. Burdue
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Olympia, WA 98507

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Legal Affairs Division
Office of the Insurance Commissioner
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Chief Hearing Officer
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Exhibit A

JGingold

RECEIVED
JAN 27 2010
LANE POWELL PC

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE OFFICE OF INSURANCE COMMISSIONER

IN THE MATTER OF: PACIFICARE OF WASHINGTON, Respondent.	Docket No. 2009-INS-0001 Order No. 09-0010 INITIAL ORDER DENYING SUMMARY JUDGMENT

Summary Judgment Hearing:

A hearing was held on January 6, 2010, before Cindy L. Burdue, Administrative Law Judge, for argument on Respondent's Summary Judgment Motion. The hearing was recorded by a court reporter, at Respondent's expense.

Appearances:

The Office of the Insurance Commissioner (OIC), represented by Andrea Philhower, Attorney at Law, Staff Attorney; and PacifiCare of Washington (Respondent), represented by Jeffery Gingold Attorney at Law, Lane Powell, PC; with Drew Steen, Attorney at Law, Lane Powell.

Material Considered:

1. Respondent's Motion for Summary Judgment Re Statute of Limitations;
2. Declaration of Jeffrey Gingold, with Exhibits R-1 through R-9;
3. Supplemental Declaration of Jeffrey Gingold, with Exhibit R-10;
4. Exhibit R-11;
5. OIC's Response to Motion for Summary Judgment Re Statute of Limitations, with Exhibits C-1 through C-7;
6. Declaration of Andrea Philhower, Attorney;
7. Declaration of Carl Baker, CPA, Financial Examiner;
8. Declaration of Dennis Edward Julnes, Chief Financial Analyst, OIC;
9. Respondent's Reply Brief to Motion for Summary Judgment;
10. Oral argument of both counsel;
11. All prior Orders and documents comprising the Office of Administrative Hearings' file.

EXHIBIT A

ISSUE PRESENTED:

Whether the OIC's action for penalties against Respondent PCW is time barred because the OIC notified PCW of a monetary penalty after the expiration of the two year statute of limitations period allowed for imposition of punitive fines by a State agency?

FINDINGS OF FACT:

1. The parties agree that the OIC has a two year statutory period in which to notify PCW of the imposition of a punitive penalty or fine pursuant to 4.16.100(2), and *U.S. Oil & Refining Co. v. Dept. of Ecology,* 96 Wn.2d 85, 633 P.2d 1329 (1981).

2. The gist of PCW's argument is that the OIC was required to file an administrative hearing request or "commence an action" against PCW for the imposition of fines and to toll the statute of limitations within the two year period.

3. The gist of the OIC position is that it may administratively impose fines, pursuant to applicable law, without the need to *first* demand an administrative adjudication or file a lawsuit or other judicial-type suit to "commence an action " for fines against PCW, and that PCW had an immediate right to demand an administrative hearing to contest the order for fines issued by OIC .

4. There is also a legal dispute between the parties over when the two year period legally commences, and whether action by the OIC during that two year period tolled the statutory period.

5. For purposes of this motion, the parties have stipulated to the essential facts and there are no disputed genuine issues of material fact, leaving only the legal issue to be determined: what action was the OIC required to take within the two year statutory period to properly impose punitive fines against PCW, and did OIC take such action timely?

6. For some years, the OIC had "suspected" that PCW was paying illegal franchise or royalty payments to its parent company. PCW "vigorously disputes that the acts in question were wrongful," but *for purposes of this motion* does not assert that there is any genuine issue of material fact on the point which would be relevant to the legal issue under consideration. (Resp's. Motion for SJ, page 7).

7. Relevant here, the OIC conducted two full financial examinations of Respondent PCW, pursuant to RCW 48.03.010: (1) For the period from 1997-2002. The OIC issued Order No. G06-4, dated February 13, 2006, as to the first financial examination; and (2) For the

period from 2003 -2006; the OIC issued Order Number 08-111, formally adopting the second financial examination on August 13, 2008. (Respondent's Motion for SJ, page 1-2; & Ex. R-5; and Decl. Jeffrey Gingold, Ex. R-3; Ex. R-4; Ex. R-6).

8. Although illegal royalty payments were suspected by the OIC during both of these financial examinations, PCW denied these payments, until finally admitted to the OIC during a conference call on August 9, 2007. (Baker Decl., OIC Response to Summary Judgment Motion). Thus, the second financial examination report, issued after that August 9, 2007, date, dealt with these admitted illegal payments at "Instruction 4" of that report. (Ex. R-4, page 4). Final Order Number 08-111, adopting the examination report of the period from 2003-2006, specifies:

> Pursuant to RCW 48.31C.050(1)(a-c) and SSAP No. 70, paragraph 8, the Company is ordered to discontinue paying royalty fees either directly or indirectly and to seek reimbursement from the PHPA for all royalty fees paid. Instruction 4, Examination Report, page 4."

9. Under RCW 48.03, PCW had a specified statutory period after each of the above-referenced final orders were issued by the Insurance Commissioner ("Commissioner") in which to contest the findings and conclusions by demanding a hearing. PCW did not demand a hearing on either order. PCW did fulfill the instructions issued by the Commissioner in each order, which included recouping of the monies paid to the parent company as illegal franchise or royalty payments. (Respondent's Motion for SJ, page 2; Ex. R-5 and R-6).

10. RCW 48.03.040(5) states, regarding the Commissioner's final order accepting a financial examination report of the OIC, as follows:

> All orders entered under subsection (4) of this section must be accompanied by findings and conclusions resulting from the commissioner's consideration and review of the examination report, . . . <u>Such an order is considered a final administrative decision and may be appealed under the Administrative Procedure Act, chapter 34.05 RCW</u>, . . .

(emphasis added).

11. The OIC argues that the date from which the two year statute of limitations should be measured is the end of the statutory appeals period after the Commissioner entered the final order. Final Order Number 08-111 was appealable by PCW until November 12, 2008. The OIC urges that it has two full years from that day, or until November 12, 2010, to pursue penalties against PCW for violations specified in that final order, under RCW 48.03.040(6)(c), specifically.

12. Neither of the final orders issued by the Commissioner, adopting the findings of the financial examinations referenced above, sought a *monetary fine* against PCW for illegal payments to its parent company in violation of RCW 48.31, the Washington Holding Company Act for Health Care Service Contractors and Health Maintenance Organizations.

13. On February 9, 2009, the OIC sent to PCW a "Consent Order Levying a Fine," imposing a fine of $400,000, along with a cover letter explaining to PCW the OIC's findings as to the illegal action which warrants the $400,000 fine; how the committee at OIC determined that amount of fine to be proper; and allowing PCW to resolve the matter on the basis of an agreed Consent Order Levying a Fine. (Ex. C-2, Consent Order Levying a Fine; and Ex. C-1, February 9, 2009, cover letter to PCW accompanying the Consent Order). The OIC clearly notified PCW it would *enforce* its assessment of the fine through "further administrative action" if PCW did not pay the fine by a set date.

14. PCW did not pay the monetary fines, and on August 14, 2009, the OIC sent to PCW a "Notice of Request for Hearing for Imposition of Fines." (Ex. R-1) PCW argues that the date by which the OIC had to bring its "action" against Respondent for a monetary penalty or fine was August 9, 2009, two years from the August 9, 2007, "discovery" of the violations by PCW's admissions of such violations. PCW further argues that the action for the monetary penalty was not filed or commenced by the OIC until August 14, 2009, when the OIC filed its "Notice of Request for Hearing for Imposition of Fines," which is five days after the expiration of the statutory period ending August 9, 2009 (Ex. R-1).

15. The OIC argues that the date from which its right to assess monetary fines accrued is November 13, 2008, when the Order issued by the Commissioner in the 2003-2006 examination became "final" due to lack of an appeal by PCW. (Citing RCW 48.03.040(6)(c). Alternatively, the OIC argues that it is entitled to assess penalties based on an "equitable estoppel" theory, since PCW was not truthful or forthcoming for so long about the payment of royalties to its parent company.

CONCLUSIONS OF LAW:

Jurisdiction:

1. The Office of Administrative Hearings and the undersigned Administrative Law Judge have jurisdiction over the parties and subject matter herein pursuant to RCW 48.04.010(5), Chapter 34.05 RCW, and Chapter 34.12 RCW. The provisions of Chapter 48 RCW, the Insurance Code, are applicable here.

Summary Judgment Standard and OIC hearing & procedures statute:

2. Summary judgment may be granted if the written record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as matter of law. WAC 10-08-135. The evidence presented, and all reasonable inferences from the facts, must be viewed in the light most favorable to the nonmoving party. *Herron v. King Broadcasting,* 112 Wn.2d 762, 776 P.2d 98 (1989). Where reasonable minds could reach but one conclusion from the admissible facts and evidence, summary judgment should be granted. *White v. State,* 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

3. The initial burden of showing the absence of material fact rests with the moving party. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Only if the moving party meets this initial showing will the inquiry shift to the non-moving party. *Herron v. King Broadcasting*, 112 Wn.2d 762, 776 P.2d 98 (1989). In that case, the non-moving party must " counter with specific factual allegations revealing a genuine issue of fact. ..." *Int'l. Union of Bricklayers v. Jaska*, 752 F.2d 1401, 1405 (9th Cir. 1985).

4. Pursuant to RCW 48.44.170, Chapter 48.04 RCW controls hearing rights and procedures under the Insurance Code. RCW 48.04 therefore must be considered and applied, as appropriate, in this case.

What is the commencement date of the OIC's "cause of action" for monetary fines?

Punitive vs. Remedial actions by State:

5. There is no dispute that the OIC can fine PCW for statutory violations. See, RCW 48.44.166. The parties agree that a two year statute of limitations applies to the imposition of penalties in this case, pursuant to RCW 4.16.100(2) and under *U.S. Oil and Refinery v. The Dept. of Ecology,* 192 Wn. 2d 85, 633 P.2d 1329 (1981) (holding that the two year statute of limitations applies to the State when it seeks to impose punitive penalties rather than remedial measures).

6. The OIC does not dispute that the imposition of $400,000 in fines is punitive rather than remedial, and in fact, specifies that the penalty is imposed particularly in consideration of deceit by PCW over a lengthy period, including lying to the examiner during two consecutive examinations, until it confessed it had been paying improper royalties on August 9, 2007.

Discovery date vs. date of violations:

7. The statutory limitations period runs either from the date of the illegal actions at issue, or the date these could or should have been discovered with reasonable diligence by the "plaintiff" (here, the OIC). See, *U.S. Oil, Id.* The OIC did not *know* until August 9, 2007, that PCW was paying royalties, despite the OIC's questions and suspicions since 2003. August 9, 2007, is the *earliest* date the OIC could have known of the illegal royalty payments. Thus, August 9, 2007, is the "discovery" date of the statutory violations at issue.

8. As is required in a summary judgment motion, viewing facts in the light most favorable to the non-moving party (the OIC), the violations could not have reasonably been discovered by the OIC prior to August 9, 2007. PCW failed to disclose the information needed for the OIC to determine impermissible royalty payments were being made by PCW, and actively hid the information from OIC. Therefore, since the OIC had no way to learn of the illegal payments without the cooperation of PCW, the "discovery" date of the violations is the applicable date here, not the dates on which the illegal payments were actually made by PCW to its parent company. Accord: See, *U.S. Oil v. Dept. of Ecology,* 98 Wn. 2nd 85, 633 P.2d 1329 (1981), wherein the court held that the government agency did not have the information or control necessary to learn of the violations as they occurred, but necessarily learned of the illegalities later.

9. The OIC had *at least* until August 9, 2009, to "commence its action" or administratively impose fines against PCW within the two year period starting August 9, 2007. The cited law supports an application of the "discovery" rule in this matter, which means that the "cause of action" for assessment of fines began on that date: August 9, 2007, and continued during a two year limitations period, to August 9, 2009.

The cause of action does not commence on November 13, 2008, when the Final Order Number 08-111 was no longer appealable by PCW:

10. The OIC argues that the action for fines commenced on November 13, 2008, when the Commissioner's Final Order Number 08-111 was no longer appealable by PCW. The OIC argues that it has until November 13, 2010, two years from the end of the appeal period for that final order, to commence the action for fines. The OIC cites RCW 48.03.040 as authority for its argument that the cause of action for penalties against PCW accrued on November 13, 2008, in connection with the Final Order Number 08-111, which was final that date.

11. RCW 48.03 *et seq.*, does not support a conclusion that a final administrative order, which makes no reference to a monetary penalty for the violations specified therein, could be the starting point in time for the OIC to assess monetary penalties, allowing the OIC a

further two year period in which to do so. RCW 48.03.040(6)c), specifically cited by the OIC as authority that the Commissioner has two years after the entry of that final order on a financial examination to impose fines or take other legal or regulatory action, states,

"If the commissioner determines that regulatory action is appropriate as a result of any examination, he or she may initiate any proceedings or actions as provided by law."

12. The parties did not cite, and I could not locate any regulation or statute which defines "regulatory" as to the Insurance Commissioner or insurance laws of Washington. Nonetheless, there is nothing in the statute which indicates that the cited provision was meant to, or does, extend the time during which the OIC may impose punitive fines on an insurer beyond the two years from when the illegal actions of the insurer were discovered or should have been discovered. Moreover, having no definition of "regulatory," I am not confident that punitive fines are considered "regulatory."

13. In regard to financial examinations by the OIC, RCW 48.03.040(3) and (4) describe the process, and mandate the time periods for OIC to issue and serve its reports and final orders on the examined company. Within the statutory period mandated in the law after the examination and report, the Commissioner must::

(a) enter an order adopting the report, as filed or with modifications; or,
(b) enter an order rejecting the report, with directions to reopen the examination for more information; or,
(c) call for an investigatory hearing for purposes of obtaining further information.

14. "If the examination report reveals that the company is operating in violation of any law, rule, or order of the commissioner, the commissioner may order the company to take any action the commissioner considers necessary and appropriate to cure that violation." RCW 48.03.040(4)(a). As noted in the Findings, the Commissioner's final order on the examination report is considered to be a final administrative order and "may be appealed under the Administrative Procedures Act, chapter 34.05 RCW . . . " RCW 48.03.040(5).

15. There is nothing apparent in the applicable law which prevents the Commissioner from assessing monetary fines in the final order.[1] PCW did not appeal the final order. However, since there was no indication in the Commissioner's Final Order that monetary fines were being or would later be assessed, there was no opportunity for PCW to appeal the imposition of fines, nor any reason for PCW to appeal the final order on the basis that it did not agree with the OIC's imposition of fines.

---

[1] As noted in the Findings, the OIC also issued to PCW a Commissioner's Final Order which approved the first examination for the 1996 to 2003 period. Likewise, no penalty was assessed by the OIC for the various statutory infractions cited in that Order.

16. Under chapter 48 RCW, neither entry of the Commissioner's final order which can be appealed, nor expiration of the examined company's appeal period for that order, logically appear to be a starting point for a two year statute of limitations period during which the OIC can assess monetary penalties not previously addressed in the final order by the OIC. The statutory period applicable here, during which the OIC can assess monetary fines, therefore cannot run from November 13, 2008, to November 13, 2010.

17. As stated above, the "discovery" of the illegal actions, on August 9, 2007, is the date from which the two year statute of limitations for imposition of punitive penalties must be measured.

18. Under *U.S. Oil, Id.,* the pertinent action by a government agency, by which a cause of action for a penalty is "commenced," is notice of the penalty to the penalized party. Thus, I next examine the record for adequate administrative notice of the penalty prior to the expiration of the two year period ending August 9, 2009.

February 9, 2009, "Consent Order Levying Fine" & Letter from OIC as commencement of action or administrative imposition of penalty:

19. The OIC did not specifically notify PCW of its demand for *an administrative hearing* on the issue of the monetary penalties until August 14, 2009, in the "Notice of Request for Hearing on Imposition of Fines." (Ex. R-1). However, the OIC *did* send to PCW a letter and a "Consent Order Levying Fine," on February 9, 2009, six months before the statute of limitations expired on August 9, 2009. The Consent Order Levying Fine and the attached letter very clearly and specifically notified PCW that $400,000 in fines "had been imposed" and that payment would be sought administratively if not paid voluntarily.

20. Based on *U.S. Oil*, the OIC commenced its action when it *provided notice* of the penalties sought to PCW. See, *U.S. Oil, Id.* Such notice occurred when OIC served PCW with the Consent Order Levying Fine, on February 9, 2009, demanding payment of $400,000 as a penalty, along with a letter stating the penalty *had been* imposed by the OIC, and why. *Either party* could have taken subsequent legal action on that notice, simply by filing a hearing demand. RCW 48.04.010(1)(b). PCW now claims that this notice did not toll the statutory period, but its argument is not persuasive, nor is it supported by the law.

21. RCW 48.04.010(1)(b) states that the Commissioner *shall* hold a hearing upon written demand by anyone aggrieved by an act, "threatened act," or by any report, promulgation or order of the Commissioner. Certainly, the Consent Order Levying Fine made it very clear that the OIC found statutory violations and deception by PCW, and set forth a very specific demand for payment of $400,000 by PCW. The Consent Order and

letter accompanying it make very clear to PCW that further administrative action would be taken to enforce payment if not made voluntarily by PCW. At the very least, the Consent Order and letter constitute "threatened" action by the OIC, from which PCW had administrative hearing rights immediately available.

22. When PCW failed to pay the fine, the OIC was forced to request an administrative hearing to enforce payment of its fine. The fact that it was the OIC which made the hearing demand does not diminish the fact that PCW had full rights to an administrative hearing on February 9, 2009, and had specific notice of the penalties sought by the OIC that day, in the amount of $400,000.

23. PCW argues that the OIC did not provide adequate notice of the imposition of the fines by the Consent Order Levying Fine. PCW claims to view the Consent Order Levying Fine as merely an offer to settle the matter. However, a "matter" to settle does not exist without the Consent Order Levying Fine. This *is* the document issued by the OIC (along with the attached letter), to inform PCW of its demand for and intent to collect those monies.

24. The law does not require the OIC to request, file for, or provide notice of an adjudicative or administrative hearing or "action" before imposing a fine. RCW 48.44.166 allows OIC to impose a fine in lieu of revocation or suspension of license to conduct insurance business in Washington. RCW 48.44.160 states that the OIC can act, "subject to a hearing *if one is requested*," to revoke, suspend, or refuse a new license or renewal of license by an insurer. PCW's argument confuses the initiation of "adjudicative proceedings" with the agency's right to issue an order levying a fine, which triggers a *subsequent right* to an adjudicative proceeding by the fined party, PCW, or to OIC for enforcement of its assessed fine.

25. The undisputed facts demonstrate that the OIC sent PCW its administrative order for penalty payment on February 9, 2009, by issuing the Consent Order Levying Fine and the accompanying letter which explained the process and informed PCW that the penalty *had been imposed*. The documents did not say a fine "would be" imposed, nor did OIC threaten to impose a fine if PCW did not do certain things. Instead, that February 9, 2009, letter states,

> "The OIC has determined that **the appropriate penalty for these violations is a fine** against PacifiCare of Washington **in the amount of $400,000. . . .Attached is a Consent Order <u>imposing this fine</u>**."

(Emphasis added).

26. The OIC also explains that PCW ". . . may resolve this matter now without the need for further administrative action by . . . [signing the Consent Order] and paying the fine."

27. PCW was therefore placed on administrative notice of a specific penalty imposed by the OIC in the Consent Order Levying Fine dated February 9, 2009. That action by the OIC carried a right to hearing on the issue, and therefore is the action by the OIC which tolls the statute of limitations for imposing a fine against PCW. See, *U.S. Oil, Id.*

28. Thus, because the the OIC acted administratively, within the law, to impose a fine on PCW on February 9, 2009, 18 months after the statutory two year period began to run on August 9, 2007, with the discovery by OIC of PCW's violations, this matter may not, as a matter of law, be dismissed for lack of jurisdiction. Summary judgment on that issue must be denied to PCW.

ORDER:

IT IS HEREBY ORDERED Respondent PCW's Motion for Summary judgment is **DENIED** on the issue whether the statute of limitations bars the imposition of penalties by the OIC against PCW.

Dated and Mailed this 25th day of January, 2010, at Olympia, Washington

Cindy L. Burdue
Administrative Law Judge
P.O. Box 9046
Olympia, WA 98507
1-800-843-7712; (360) 753-7328

REVIEW RIGHTS

Pursuant to RCW 34.05.464 and WAC 10-08-211, any party to an adjudicative proceeding may file a Petition for Review of an Initial Order. The Petition for Review shall be filed with the agency head within **twenty (20) days** of the date of service of the Initial Order. Copies of the Petition must be served upon all other parties or their representatives at the time the Petition for Review is filed. The Petition for Review must specify the portions of the Initial Order to which exception is taken and must refer to the evidence of record which is relied upon to support the petition.

Any party may file a Reply to a Petition for Review. The Reply shall be filed with the office where the Petition for Review was filed within ten days of the date of service of the Petition for Review and copies of the Reply shall be served upon all other parties or their representatives at the time the Reply is filed.

A Petition for Review or Reply filed at the address of the Office of Administrative Hearings shall be deemed service upon the agency head. The Petition and Reply shall be forwarded to the Insurance Commissioner to be consolidated with the hearing file.

Certificate of Service

I certify that I mailed a copy of this order to the below-identified parties at their respective addresses postage prepaid on the date stated herein. 1/25/2010

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Margaret Simmons, Legal Secretary

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