

SPOKANE COUNTY COURT HOUSE

Superior Court of the State of Washington
for the County of Spokane

Department No. 4

Kathleen M. O'Connor

Judge

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August 27, 2007

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AUG 30 2007

GOVERNMENT COMPLIANCE
& ENFORCEMENT

ASSOC INDUSTRIES VS STATE OF WA OFC OF INS COMMISSIONER ETAL
No. 2007-02-00592-1

Dear Counsel:

Please find the enclosed Memorandum Decision on Plaintiffs' Motion for Summary Judgment and the Defendants' Cross-Motion for Summary Judgment. I have emailed a courtesy copy to each of you and the decision will be filed for record today.

Please don't hesitate to contact me if I can be of any further assistance.

Sincerely,

Ashley Koedding, Judicial Assistant to
Kathleen M. O'Connor
Superior Court Judge

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Enclosure
Cc: legal file

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AUG 27 2007

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ATTORNEY GENERAL
OF WASHINGTON

AUG 30 2007

GOVERNMENT COMPLIANCE
& ENFORCEMENT

**SUPERIOR COURT OF WASHINGTON
FOR SPOKANE COUNTY**

ASSOCIATED INDUSTRIES OF THE INLAND
NORTHWEST, a Washington Non-Profit Corporation;
THE ASSOCIATION OF WASHINGTON
BUSINESSES, a Washington Corporation,

NO. 2007-02-00592-1

MEMORANDUM DECISION

Plaintiffs,

vs.

STATE OF WASHINGTON OFFICE OF THE
INSURANCE COMMISSIONER; MIKE KREIDLER,
Washington State Insurance Commissioner,
Defendants.

This matter came before the court for oral argument on June 8, 2007, on the Plaintiffs' Motion for Summary Judgment and the Defendants' Cross-Motion for Summary Judgment.

Both sides are asking the court for a ruling regarding the validity of Technical Assistance Advisory T06-07 (TAA 06-07) issued by the Office of the Insurance Commissioner (OIC) on December 15, 2006.

Both sides agree that this court has jurisdiction to decide the issue either under the Uniform Declaratory Judgment Act, RCW 7.24, or the Administrative Procedure Act, RCW

1 34.05. Both sides also agree that summary judgment is the proper procedure to determine the
2 validity of TAA 06-07.
3

4 Prior to oral argument the Plaintiffs' Motion to Strike a Thurston County Superior Court
5 decision was granted as it constituted an "unpublished" decision.
6

7 **FACTS**

8 The facts are not in dispute. Plaintiffs are independent business associations
9 which serve employer members. They make health insurance plans available to their small
10 employer members. They are not insurance companies but the health plans they offer to their
11 members are subject to OIC approval.
12

13 In 1995 the legislature enacted RCW 48.44.023(3) and RCW 48.44.024(2). RCW
14 48.44.024(2) is a statutory exception to RCW 48.44.023(3). Since that time Plaintiffs have
15 offered insurance plans to their small employer members where the premium for individual
16 employer members has been calculated using "experience rating". That is, the premium takes
17 into consideration each employer's claims experience and aggregated health history. This
18 method is an exception to the community rating pooling requirements of RCW 48.44.023(3).
19

20 On December 15, 2006, the Office of the Insurance Commissioner issued TAA 06-07.
21 This advisory indicated it was the OIC position that "(A)ny rating based on the health
22 information of an individual member employee was prohibited."
23

24 **STATUTES/TAA 06-07**

25 **RCW 48.44.023(3):**

26 (3) Premium rates for health benefit plans for small employers a defined in this section shall be
27 subject to the following provisions:

28 (a) The contractor shall develop its rates based on an adjusted community rate and may
29 only vary the adjusted community rated for:

- (i) Geographic area;
- (ii) Family size;
- (iii) Age; and
- (iv) Wellness activities.

(i) Adjusted community rates established under this section shall pool the medical experience of all groups purchasing coverage.

RCW 48.44.024(2):

(2) Employers purchasing health plans provided through associations . . . are not small employers and the plans are not subject to RCW 48.44.023(3).

Technical Assistance Advisory T 06-07:

The Office of Insurance Commissioner (OIC) is issuing **Technical Assistance Advisory (TAA) T – 06-07** to offer guidance on the nondiscrimination requirements that health insurance carriers must follow when rating member employers of association health plans (AHPs). The TAA applies to all AHP contracts issued or renewed on or after January 1, 2008.

Association health plans provide an important alternative for obtaining employer sponsored health insurance. Some plans, however, unlawfully discriminate against their members based on their health. Approximately 7 percent of association plans are in violation of the law by using health information to set rates for individual member employers. Rates must be based on the health of the *entire association group*. Any rating based on the health information of an individual member employer is prohibited. (emphasis in original)

ISSUES

1. Did the issuance of TA 06-07 violate APA rulemaking requirements?
2. Did the OIC violate the Washington State Constitution when it issued TA 06-06?

1. Did the issuance of TA 06-07 violate APA Rulemaking Requirements?

TA 06-07 is not a rule. In oral argument defense counsel conceded that it could not be enforced as a rule. TA 06-07 was issued under RCW 34.05.230(1). The statute permits a state agency to “advise the public of current opinions, approaches and likely courses of action” the agency may take in the future. It is advisory only. It is not subject to the rulemaking requirements of the APA.

1
2 **2. Did the OIC violate the Washington State Constitution when it issued TA 06-06?**

3 The basis for this claim by the Plaintiffs is their view that the OIC has violated the
4 separation of powers doctrine by promulgating TA 06-07. In substance TA 06-07 treats the
5 entire association as the group. Interestingly, both sides believe the language of RCW
6 48.44.023(3) and 48.44.024(2) is unambiguous and supports their diametrically opposing views.
7

8 The Plaintiffs approach the issue by emphasizing the fact that the legislature passed a
9 specific exemption to RCW 48.44.023(3). From the Plaintiffs' perspective, TA 06-07, in effect,
10 eviscerates the exception and now makes their plans subject to RCW 48.44.023(3). In their view
11 this violates the separation of powers because the OIC, as an executive agency, does not have the
12 power to enact legislation. Also, this particular legislation does not have a grant of authority
13 from the legislature to the agency to make changes.
14

15 The Defendants argue that their approach is supported by Federal law which defines
16 employer as "group or association of employers". CFR §144.103. How "group" is defined is
17 key to Defendants argument. Use of individual employer's rating as the "group" is
18 discriminatory and, arguably, a violation of Federal law. In addition, RCW 48.44.024, while
19 providing an exemption, does not address how the association plan should be rated.
20

21 Defendants suggest that if there was no exemption the small employers would be in the
22 small group rating pool, which is subject to community rating, instead of being pooled with their
23 association(s). Thus under the exemption the rate calculation would be based upon the
24 association's experience.
25

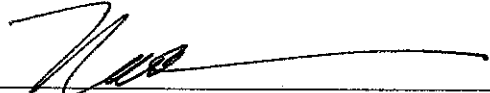
26 Both sides have asked the court to decide which interpretation of the statutes is correct.
27 What information I have on legislative intent as well as the statutes themselves indicates that the
28 legislature intended to exempt plaintiffs from RCW 48.44.023(3). The plaintiffs have been
29

1
2 operating under that understanding for over 12 years and have "experience rated" employer
3 members. The OIC did not officially disagree with plaintiff's interpretation until the
4 promulgation of TA 06-07 in December 2006.

5 This court's view is that the plaintiffs had a right to proceed on the statutory exemption.
6 Their interpretation of that exemption remained unchallenged for over a decade. While OIC can
7 issue technical advisories, they are not rules and are not enforceable. TA 06-07 amounts to a
8 major policy shift from the plaintiff's perspective. Policy is made by the legislature. The
9 legislature should make the decision. More than a decade has past since the legislation was
10 enacted, if the legislature believes it is time for a change they will act.

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12 The Plaintiff's Motion For Summary Judgment is Granted.

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15 Dated: August 27, 2007

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18 KATHLEEN M. O'CONNOR
19 SUPERIOR COURT JUDGE
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