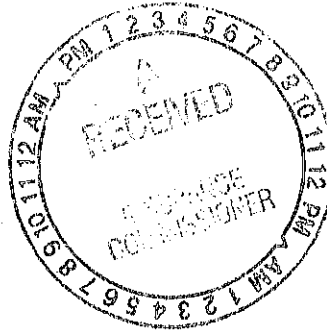


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January 13, 2015

HAND DELIVERY

Hearings Unit
Office of Insurance Commissioner
5000 Capitol Blvd.
Tumwater, Washington 98502

Re: Demand for Administrative Hearing and Automatic Stay
Association of Washington Business
AWB HealthChoice Employee Benefits Trust

Dear Sir or Madam:

The undersigned represent Association of Washington Business and AWB HealthChoice Employee Benefits Trust (collectively "AWB"). Premera Blue Cross (PBC) is expected to file AWB's HealthChoice insurance plan with the Office of Insurance Commissioner ("OIC") on or around January 14, 2015.

OIC has threatened to apply to association plan filings including AWB's, legal requirements that are erroneous and exceed the Commissioner's statutory legal authority. For example, in OIC Release No. 14-50, OIC stated in pertinent part the following:

Until recent federal regulation, association health plans were exempt from having to meet key consumer protections and from the rating and underwriting standards of the individual or small-employer market. . . All association health plans are currently under a two-part review – do they meet the new federal definition of an employer and if so, do their rates comply with large group standards, which prohibit discrimination for similarly situated employees.

In applying the referenced "two-part review", the OIC has threatened to disapprove association plans even though they meet applicable law under the facts and circumstances, which includes AWB.

In applying the referenced "two-part review", the OIC has also threatened to disapprove association plan filings that rate each of its participating employers based upon their respective aggregated experience instead of rating the entire association based on its combined experience. This issue was litigated between AWB and OIC in 2007 (the, "TAA

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Hearings Unit
Office of Insurance Commissioner
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Case”) and judgment was entered against OIC.¹ The legislature has not repealed the underlying statute exempting association health plans from community rating requirements otherwise applicable to small employer plans, and no court has held the law to have been preempted. Accordingly, the Commissioner has threatened to fail to apply the statutory exception from community rating contained in RCW 48.44.024(2) and counterparts.

OIC’s threatened disapproval of association plan filings as “discriminatory” includes filings that allow participating employers to select which benefit plan options from all such options available to all participating employers. Instead, OIC has stated that the association must allow each employee to select from all plans offered to all participating employers, regardless of his or her employer’s decision or ability to pay for the plan. In threatening to apply this requirement to AWB’s association plan filing, the Commissioner is either misapplying law or making new law which exceeds his statutory authority.

Each of the aforementioned features will be included in Premera’s filings for AWB.

In the event that OIC disapproves or otherwise prevents AWB’s plan to continue as issued or continue to be offered for sale in Washington State, AWB will be aggrieved as its members and participants will lose their current health insurance coverage and other eligible members will be prevented from obtaining it.

If denial occurs, this letter constitutes AWB’s demand for a hearing and for an automatic stay of OIC’s disapproval of AWB’s plan, including a stay of any action by OIC preventing or interfering continuation of issued coverage and marketing of the AWB association health plan, pursuant to RCW 48.04.020.

Among others, AWB’s reasons for requesting the above relief are as follows:

- (1) AWB’s plan conforms with all applicable laws and should not be disapproved;
- (2) To the extent applicable by law, AWB and/or its industry sub-trusts are true “employers” pursuant to Section 3(5) of the Employee Retirement Income Security Act and therefore AWB’s plan is exempt from any community rating requirements; and

¹ Associated Industries of the Inland Northwest and Association of Washington Business v. State of Washington Office of the Insurance Commissioner: Mike Kreidler, No. 2007-02-00592-1, Memorandum of Decision, attached as Exhibit A.

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- (3) OIC's disapproval will exceed its legal authority including but not limited to applying the ERISA employer, rating and benefits requirements at issue.
- (4) OIC's actions are arbitrary, capricious, and unsupported by law.

The above summary is non-exhaustive and we reserve all rights. Please contact the undersigned if you have any questions.

Very truly yours,

Bracewell & Giuliani LLP

Curt H. Hine / JRM

Curt Roy Hine

Very truly yours,

Gingold Law Firm PLLC

Jeffrey L. Gingold / JRM

Jeffrey L. Gingold

CRH/sjs
Attachment

cc: Michael Kreidler c/o AnnaLisa Gellermann
Debra Brown

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& GIULIANI

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bcc: John Pierce, Esq.

EXHIBIT A

1
2 SUPERIOR COURT OF WASHINGTON
FOR SPOKANE COUNTY

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

6
7 Plaintiffs,

8 vs.

9 STATE OF WASHINGTON OFFICE OF THE
10 INSURANCE COMMISSIONER, MIKE KREIDLER,
Washington State Insurance Commissioner,

11 Defendants

NO 2007-02-00592-1

MEMORANDUM DECISION

12
13
14 - This matter came before the court for oral argument on June 8, 2007, on the Plaintiffs'
15 Motion for Summary Judgment and the Defendants' Cross-Motion for Summary Judgment
16 Both sides are asking the court for a ruling regarding the validity of Technical Assistance
17 Advisory T06-07 (TAA 06-07) issued by the Office of the Insurance Commissioner (OIC) on
18 December 15, 2006.
19

20 Both sides agree that this court has jurisdiction to decide the issue either under the
21 Uniform Declaratory Judgment Act, RCW 7.24, or the Administrative Procedure Act, RCW
22
23
24

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

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

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

The Plaintiff's Motion For Summary Judgment is Granted.

Dated: August 27, 2007

KATHLEEN M. O'CONNOR
SUPERIOR COURT JUDGE