No. 101576-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STAN SCHIFF, M.D., P.H.D.,

Respondent

v.

LIBERTY MUTUAL FIRE INSURANCE CO., LIBERTY MUTUAL INSURANCE COMPANY,

Petitioners.

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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INTEREST OF THE AMICI CURIAE[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in each industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. The Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber's members include many companies that operate in Washington and are subject to the Washington Consumer Protection Act ("CPA"). This case presents important questions affecting the Chamber's members, including the scope of the Washington CPA and the "safe harbor" and "good faith" defenses. The "safe harbor" and "good faith" defenses are crucial to ensuring that liability is not imposed on companies that reasonably relied on the approval of their policies or practices by state regulators. In the decision below, the Court of Appeals failed to properly

[1] Counsel for the Chamber certifies that no party or party's counsel authored any part of this brief. No one, apart from the Chamber, its members, or its counsel, contributed money intended to fund the brief's preparation or submission.

account for the Office of Insurance Commissioner's interpretation of the relevant statute and administrative regulations and offered an unduly narrow interpretation of the "safe harbor" and "good faith" defenses that is inconsistent with this Court's precedent. If left to stand, its decision would significantly undermine the regulatory authority of the Office of Insurance Commissioner and negatively affect the Washington business community. The Chamber thus has a significant interest in this case.

SUMMARY OF THE ARGUMENT

The Office of Insurance Commissioner ("OIC") is the Washington State agency charged by statute with overseeing the Washington insurance market and interpreting the state insurance code. Washington insurers should be able to rely on the OIC's interpretation of the Code that it administers, particularly when the OIC considers and approves specific policy terms that establish a data-driven process for evaluating the reasonableness of health care fees.

It was in recognition of the importance of protecting businesses' reasonable reliance interest that the Washington Legislature established a safe harbor, RCW 19.86.170, which precludes liability under the CPA when the challenged practice was authorized by an agency acting within its authority. The "good faith" doctrine recognized by this Court serves a similar salutary purpose of ensuring that businesses are not penalized under

the CPA if they act based on "an arguable interpretation of existing law." Leingang v. Pierce Cnty Med. Bureau, 131 Wn. 2d 133, 155 (1997). Here, Liberty had every reason to believe its policy complied with existing law; after all, the OIC specifically approved its data-driven process for evaluating a "reasonable" expense.

Businesses rightfully expect that approval from the administrative agency charged with enforcing the law is based on, at minimum, an arguable interpretation of the law. To find otherwise, in this instance, would introduce unnecessary uncertainty for insurers and their policyholders alike and would undermine the OIC's fundamental purpose and ability to effectively oversee the insurance market.

The Court should reverse the Court of Appeals' decision.

ARGUMENT

I. Clarity and Consistency Are Critical to Washington's Business Community.

The success of Washington's businesses requires clear regulations and their consistent application. In particular, businesses are often required by Washington law to obtain certain types of insurance, and they should be able to rely on the OIC's vetting and approval of specific policy language in meeting those obligations. After all, "the OIC's role is to determine consistency," Shin v.

Esurance Ins. Co., 2009 WL 688586, at *3 (W.D. Wash. Mar. 13, 2009), and one of its stated goals is to "[c]larify the regulatory environment to ensure producer and company requirements are clear and up to date," 2021-2027 Strategic Plan, Office of Insurance Commissioner (June 2020) at 19 ; see also Mattdogg, Inc. v. Philadelphia Indem. Ins. Co., 2020 WL 6111038, at *5 (D.N.J. Oct. 16, 2020) ("[B]usinesses need clarity and consistency in law. Without it, businesses and insurance companies alike would be governed by a patchwork of case law").

Similarly, insurers should have confidence that the OIC's approval—as the state insurance regulator with the explicit objective to "[e]nsure … compliance with regulatory requirements"—means that the policy is, in fact, compliant with the state's requirements. 2021-2027 Strategic Plan, Office of Insurance Commissioner (June 2020) https://www.insurance.wa.gov/sites/default/files/documents/2021-27-Strategic-Plan_1_0.pdf at p.19 (emphasis added). Inconsistent rulings by the OIC and the courts may undermine trust in the OIC, limit the OIC's ability to effectively oversee the insurance market, and discourage the types of open communication with the OIC exemplified by Liberty here. These risks are compounded if a

business might face treble damages under the CPA for failure to comply with the Washington insurance code.

Here, the record indicates that Liberty submitted the policy form, which contained a detailed description of its bill-review practices, to the OIC in 2016 at the OIC's invitation. This invitation followed an in-person meeting discussing legal challenges by Dr. Schiff's counsel to Liberty's use of a database to evaluate the reasonableness of medical expenses. CP 4889-90. The OIC approved the specific policy form, and unequivocally found that the practices described in Liberty's specific policy provision do not violate "Washington's insurance laws or regulations." Id. CP 4886; 4923. Since then, the OIC has continued to express its opinion that the policy complies with Washington law, with Toni Hood, the OIC's Deputy Insurance Commissioner, even submitting a declaration reaffirming that opinion in this litigation. See CP 4886. This is not to say that every policy approved by the OIC should be immune from judicial scrutiny. But it is inconsistent with the reasonable expectations of an insurer to be subjected to substantial civil liability, such as treble damages, for engaging in practices that the OIC has approved after extensive review.

II. The CPA's Safe Harbor Provision and Good Faith Exceptions Are Designed To Avoid Unfiare Surprise And Permit Reasonable Reliance on State Regulatory Approval.

Even if the Court found room to differ with the OIC on its view of the statute, it was certainly improper, and deeply unsettling to reasoned expectations of an insurer subject to OIC regulation, for the Court of Appeals to find that application of the OIC-approved policy violated the CPA and did not qualify for either the statutory safe harbor or the good faith exception --- provisions designed to avoid exactly such a perverse result.

A. The Court should apply the Safe Harbor Provision.

The CPA includes a safe harbor provision, RCW 19.86.170, which states "[n]othing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state … or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States … [and] nothing required or permitted to be done pursuant to Title 48 RCW shall be construed to be a violation of RCW 19.86.020." Washington courts have long interpreted RCW 19.86.170 to protect conduct affirmatively approved by a state agency.

To fit within the safe harbor, a defendant must "prove that the activity was authorized by the statute and that acting within this authority the agency took overt affirmative action specifically to permit the actions

or transactions engaged in by [defendants]." In re Real Estate Brokerage Antitrust Litigation, 95 Wn. 2d 297, 301, 622 P.2d 1185 (1980). This standard is obviously met here, where OIC staff members met with Liberty employees in person to discuss challenged insurance provisions, the OIC invited Liberty to submit the policy and provision for approval, which Liberty did while specifically calling out the challenged provision in its submission. The OIC then affirmatively approved the policy and provision.

B. The Court should apply the Good Faith Defense.

The good-faith defense similarly should apply in these circumstances. This Court has repeatedly found that good faith is a proper affirmative defense to a plaintiff's claim for violation of the CPA. See Perry v. Island Sav. & Loan Ass'n, 101 Wn. 2d 795, 810 (1984) ("We hold acts or practices performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law."); Leingang v. Pierce Cnty. Med. Bureau, Inc., 131 Wn. 2d 133, 155 (1997) ("Acts performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law."); see also Watkins v. Peterson Enterprises, Inc., 57 F. Supp. 2d 1102, 1111 (E.D. Wash. 1999) ("Peterson's good faith is a defense to a claim that its practices were per se unfair"); Gray v. Suttell

& Assocs., 2019 WL 96225, at *4 (E.D. Wash. Jan. 3, 2019) ("good faith defense is available for per se violations of the consumer protection laws").

Whereas the Court will afford deference to agency rulings and interpretations if they are based on a "plausible" construction of the statutory language, the Court will find that a party acted in good faith if the actions were based merely on an "arguable interpretation of existing law." Perry, 101 Wn. 2d at 810. It is difficult to see how Liberty's actions could not be found to be based on an "arguable interpretation of existing law" here, where the OIC, including the Deputy Insurance Commissioner responsible for determining compliance with Washington's insurance regulatory requirements, has stated that the policy provision in question does not violate Washington's insurance laws or regulations. The application of the good-faith exception is particularly important here, where the OIC is statutorily charged with overseeing Washington's insurance market and enforcing its rules and regulations.

Businesses should be able to reasonably expect that they will not be subject to CPA liability and the appurtenant treble damages for policy provisions that were specifically and expressly authorized by the OIC. This same certainty is necessary for policyholders and brokers alike, who deserve to know what to expect and bargain for in the insurance purchasing

context. Instability and uncertainty in the law imposes unwarranted costs on businesses and makes it hard for them to effectively plan for the future.

III. The Safe Harbor Provision and Good Faith Defense Serve Important Policy Interests.

The law should encourage regulated entities to comply with regulatory requirements and seek approval from regulatory agencies, as Liberty did here. Both the safe harbor provision and the good faith defense play an important role in ensuring that regulated entities understand the rules of the road—and that regulated entities will not be penalized for following those rules.

An unduly narrow interpretation of these protections would open the door for plaintiffs' lawyers to second-guess regulatory standards, processes, and approvals, allowing them to impose their preferred standards through litigation. Often, the standards advocated by plaintiffs in litigation conflict with those approved by regulators, leaving companies with little assurance that regulatory compliance will be rewarded and providing minimal benefits to the insurance market. See, e.g., James C. Cooper & Joanna Shepherd, State Unfair and Deceptive Trade Practices Laws: An Economic and Empirical Analysis, 81 Antitrust L.J. 947, 947, 969 (2017) (finding that the "explosion in consumer protection litigation" from 2000-2013 did little more than "transfer money from firms to trial attorneys, . . . providing

minimal benefits in terms of deterring harmful behavior" and that "more litigation does not necessarily mean more consumer protection"). This regulatory whiplash harms businesses, as well as consumers alike in Washington state.

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that the Court reverse the Court of Appeals' decision.

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Respectfully submitted this 11th day of August, 2023.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I electronically filed the attached document with the Clerk of the Court via the Washington State Appellate Courts' Portal which caused service on the same on all counsel of record.

Dated this 11th day of August, 2023.

s/ Paige Plassmeyer
Paige Plassmeyer, Legal Practice Specialist

DLA PIPER LLP (US)

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