

No. 32377-0-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

PREMERA, a Washington non-profit miscellaneous corporation, and
PREMERA BLUE CROSS, a Washington non-profit corporation,

Petitioners,

v.

MIKE KREIDLER, Insurance Commissioner of the State of Washington,

Respondent,

WELFARE RIGHTS ORGANIZING COALITION, et al.,

Intervenors/Respondents.

**BRIEF OF *AMICUS CURIAE*
NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS**

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IDENTITY AND INTEREST OF AMICUS

The National Association of Insurance Commissioners (“NAIC”) files this amicus brief in support of Commissioner Kreidler and in support of affirmance of his order. The National Association of Insurance Commissioners (NAIC) is a non-profit corporation whose membership consists of the principal insurance regulatory officials of the fifty States, the District of Columbia, the territories and insular possessions of the United States. Formed in 1871, it is the nation’s oldest association of state government officials.

The mission of the NAIC is:

[t]o assist state insurance regulators, individually and collectively, in serving the public interest and achieving the following fundamental insurance regulatory goals in a responsive, efficient and cost-effective manner, consistent with the wishes of its members: protect the public interest; promote competitive markets; facilitate the fair and equitable treatment of insurance consumers; promote the reliability, solvency, and financial solidity of insurance institutions; and support and improve state regulation of insurance.¹

¹ See National Association of Insurance Commissioners, NAIC Mission Statement, available at <http://www.naic.org/about/mission.htm> (last visited August 1, 2005).

Any member of the NAIC may request the filing of an amicus curiae brief.² Such requests require approval by the Executive Committee of the NAIC.³

This case concerns the interpretation of and analysis of the scope of the Commissioner's authority and discretion under RCW 48.31B, Washington's Insurer Holding Company Act and Washington's Health Carrier Holding Company Act.⁴ These statutes are based on the model NAIC Insurance Holding Company System Regulatory Act.⁵ Almost every state in the country has adopted this act, with the two exceptions, New York and Wisconsin, having enacted comparable laws. State Adoption Chart, Insurance Holding Company System Regulatory Act, NAIC, *Model Laws, Regulations and Guidelines*, p. 440-29 (2005) (attached as the Appendix). The members of the NAIC are vitally interested in this Court's interpretation of Washington's Holding Company Acts because similar statutes are relied upon by the Commissioners, Directors and Superintendents of Insurance throughout the country in making decisions that greatly affect the public interest.

² See National Association of Insurance Commissioners, Amicus Curiae (Friend of the Court) Briefs, available at http://www.naic.org/legal/amicus_curiae.htm (last visited August 1, 2005).

³ *Id.*

⁴ Premera's holding company system is comprised of both traditional insurers and health carriers. Commissioner Kreidler disapproved the transaction under both the Insurer Holding Company Act and the related Health Carrier Holding Company Act found at RCW 48.31C.

⁵ NAIC, *Model Laws, Regulations and Guidelines*, p. 440 (1992).

A review of the legislative history of the NAIC model reveals that it was intended to authorize the Commissioner to do exactly what Commissioner Kreidler did in acting on the Premera application - approve or disapprove any transaction involving an acquisition or change of control of a domestic insurer after reviewing the plans of the acquiring party and considering whether the transaction, if allowed to go forward, would be hazardous or prejudicial to policyholders and the public.

STATEMENT OF THE CASE

Amicus curiae National Association of Insurance Commissioners adopts the Counter-Statement of The Case set out by Respondent.

ARGUMENTS AND AUTHORITIES

Premera and Premera Blue Cross (“Premera”) have filed this administrative appeal for discretionary review of the decision of Mike Kreidler, the Insurance Commissioner of the State of Washington, denying Premera’s application for reorganization of its insurance holding company system under a for-profit parent, including the conversion of its non-profit parent and health-care service contractors to for-profit corporations. The Commissioner’s Final Order disapproved the transaction under the Insurer and Health Carrier Holding Company Acts concluding it is unfair and unreasonable to subscribers, not in the public interest, and likely to be hazardous or prejudicial to the insurance-buying public. Resp. Br. at 5.

Specifically, the Commissioner found that the proposed transaction would likely lead to increased premiums in the individual and small group insurance markets, would likely lead to a reduced medical loss ratio⁶, and did not result in the transfer of fair market value to the proposed medical foundations. Resp. Br. at 12.

Allowing the Commissioner to review and approve insurance holding company transactions, rather than limiting the Commissioner's authority only to subsequent remedial action, advances the central premise underlying insurance regulation - protection of the public interest and the interests of policyholders.

...[T]here should be effective state supervision of insurers in their relationship with holding companies. Such supervision is a proper and natural extension of the responsibility of regulatory authority to assure, in the public interest, the solvency of the insurer and the protection and fair treatment of policyholders. Insurance is a business that is dependent completely on public confidence. Its contracts underwrite contingencies that may be long deferred or promise payments to be made many years in the future. Patronage of insurers is dependent upon the confidence of the buyer that the insurer can and will discharge its obligations in the manner provided in its contract. Because of the intangible nature of the insurance promise and its enormous significance to the social and economic structure as well as to the parties of the contract, the insurance business over many decades has developed and maintained a philosophy and ethics and practices on a level far above those that are generally accepted in the marketplace. Sound regulation of the insurance business by

⁶ Medical loss ratio is the ratio of monies spent on medical care in proportion to premium collected. Resp. Br. at 53.

the states has reinforced this unique status of insurers and such regulation has been a principal bulwark of the public confidence that the business enjoys.

1969 Proceedings of the NAIC Vol. I, p. 178.

Recognition that the regulation of insurance company holding systems includes consideration of the public interest along with the interests of policyholders and shareholders is a basic premise of the NAIC Model Act on which the Washington Act is based:

When an insurer organizes or becomes affiliated with a holding company, or organizes or acquires a subsidiary, the domiciliary regulatory authority has a responsibility to exercise supervision over the insurer so as to assure that the interests of the public, policyholders and shareholders of the insurer are properly safeguarded.

1969 Proceedings of the NAIC Vol. I, p. 182.

The members of the NAIC intended that the Model Act, when adopted by a state, would give that state's Commissioner:

. . . authority under the Act to disapprove any attempted acquisition of or change in control over an insurer if the "takeover" party could not satisfy specific standards designed to protect the interest of policyholders, shareholders and the public.

1969 Proceedings of the NAIC Vol. I, p. 185.

A 1984 amendment to the Holding Company Act specifically added a provision allowing the Commissioner to disapprove a covered

transaction if it is found to be “hazardous or prejudicial to the insurance-buying public.” 1985 *Proceedings of the NAIC* Vol. I, p. 188.⁷

Washington’s Insurer and Health Carrier Holding Company Acts fully incorporate the level of Commissioner authority and discretion and the degree of importance attached to the public interest anticipated by the NAIC drafters. RCW 48.31B.015(4)(a) and 48.31C.030(5)(a) provide that the Commissioner shall approve a merger or other acquisition of control unless he finds that, inter alia, the plans of the acquiring party are unfair and unreasonable to policyholders of the insurer and not in the public interest or that the acquisition is likely to be hazardous or prejudicial to the insurance-buying public.

Both the Washington legislature and this Court have long recognized the public’s interest in the business of insurance. The Washington Insurance Code recognizes at its outset that “the business of insurance is one affected by the public interest” and establishes as a principle that the integrity of insurance be kept inviolate. RCW 48.010.030. In *Ins. Co. of North America v. Kueckelhan*, 70 Wn. 2d 822,

⁷ This amendment was adopted by the Washington legislature and codified at RCW 48.31B.015(4)(a)(vi) and is also included in RCW 48.31C.030(5)(a)(ii)(C)(IV). In addition, Washington law follows the NAIC Model law by allowing the Insurance Commissioner to disapprove a transaction that is “not in the public interest.” RCW 48.31B.015(4)(a)(iv) and RCW 48.31C.030(5)(a)(ii)(C)(II). Contrary to Petitioner’s assertion, the Insurer and Health Carrier Holding Company Acts do establish a general public interest standard. See Pet. Rep. Br. at 7.

831, 425 P.2d 669 (1967), the Supreme Court recognized that the office of Insurance Commissioner was created in furtherance of this basic principle of protecting the public's interest in the business of insurance. This Court has also held that it will give "substantial deference to a regulatory agency's judgment about how best to serve the public interest." *Washington Indep. Tel. Ass'n. v. WUTC*, 110 Wn. App. 498, 516, 41 P.3d 1212 (2002), *affirmed*, 149 Wn. 2d 17, 65 P.3d 319 (2003).

In a case similar to this one, the Supreme Court of Kansas reviewed the scope of the Kansas Insurance Commissioner's authority under a statute identical in all material respects to the Washington Insurer Holding Company Act. *Blue Cross and Blue Shield of Kansas v. Praeger, Insurance Commissioner*, 276 Kan. 232, 75 P.3d 226 (2003). The NAIC submits that the reasoning of the Kansas Supreme Court can serve as a helpful resource to this Court and urges this Court to adopt a similar view as to the extent of the Commissioner's authority and discretion when reviewing a transaction like that of the Premera conversion proposal. Similar to the findings by Commissioner Kreidler in this case, the Kansas Insurance Commissioner found that the proposed Blue Cross transaction would result in higher premiums for Kansas's insurance consumers. The Kansas Supreme Court affirmed the Commissioner's ruling and recognized her proactive role and authority to find proposed transactions

“unfair and unreasonable to policy holders of the insurer and not in the public interest” and “likely to be hazardous or prejudicial to the insurance-buying public.” 75 P.3d at 246. The Court further recognized it is the Commissioner’s role in the review process to act at the acquisition stage, “rather than attempt to repair or prevent injury to the public at a much later date, when it may be too late to fully protect the public interest and the interests of policy holders.” *Id.*

Holding company acts in every area of business, including banks, utilities, savings and loans, railroads, all provide for the governmental regulator to determine what will likely happen in the future if an acquisition is allowed to proceed (*e.g.*, *Public Service Company of New Mexico v. New Mexico Public Service Corporation*, 747 P.2d 917, 920 (N.M. 1987)) and to approve or disapprove the proposed acquisition based on the public interest. *E.g.*, *New York Central Securities Corporation v. United States*, 287 U.S. 12, 24-25, 53 S. Ct. 45, 49 (1932).

In passing on a petition for approval of acquisition of stock control of ten percent or more of a domestic insurer, the New York Supreme Court, Appellate Division, held “the Department is more than an ‘umpire blandly calling balls and strikes’ in fulfilling its statutory responsibility ... [a]nd since the very depth and breadth of the record and the comprehensiveness of the opinion-decision dispel the claim of departure

from the Superintendent's responsibility, we unanimously confirm.” *American Reinsurance Company v. Schenck*, 47 A.D.2d 517, 518, 363 N.Y.S.2d 593, 595 (N.Y. App. Div. 1975). Regulatory agencies in many areas have been given wide discretion when charged with protecting the “public interest.” “[I]n determining what constitutes the ‘public interest’ ... the Commission is entrusted with the function not merely of determining the existence or non-existence of certain facts, but also of exercising an expert judgment” *Pittsburgh and Lake Erie Railroad Company v. United States*, 294 F. Supp. 86, 97 (W.D. Pa. 1968). “In general, where the Commission is required to consider the ‘public interest,’ it must look to ‘the interest of the public, their needs and necessities and location and, in fact, all the surrounding facts and circumstances to the end that the people be adequately served.’” *Browning Freight Lines, Inc. v. Wood*, 570 P.2d 120, 126 (Idaho 1978). “[P]ublic interest may be taken to encompass a wide range of considerations, from environmental, health, and safety concerns to the financial concerns of employers, employees, and ratepayers.” *General Motors Corporation v. Indianapolis Power & Light Company*, 654 N.E.2d 752, 762 (Ind. App. 1995).

In his review of the Premera proposal, Commissioner Kreidler conducted a thorough and appropriate review of the transaction and its

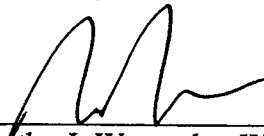
likely future effects on Premera, its policyholders, the Washington insurance-buying public, and the public in general. In doing so, Commissioner Kreidler acted with the authority and discretion granted him under the Insurer and Health Carrier Holding Company Acts. Commissioner Kreidler found that the proposed conversion would likely lead to higher premiums for some insurance markets in Washington, would likely lead to a decreased medical loss ratio, and was not in the public interest because it did not transfer the fair market value of Premera's non-profit assets to the health foundations created by the conversion. Each of these findings is within the Commissioner's discretion and statutory authority and each is supported by substantial evidence. As such, each is entitled to a high degree of deference from this Court. *ARCO Prods. Co. v. Wash. Util. & Transp. Comm'n.*, 125 Wn. 805, 812, 888 P.2d 728 (1995).

CONCLUSION

The Washington Insurer and Health Carrier Holding Company Acts give the Insurance Commissioner broad authority to consider the interests of policyholders and the general public when reviewing proposals such as Premera's.

The NAIC respectfully requests that this Court affirm the decision of Commissioner Kreidler disapproving the proposed Premera conversion.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that five true and correct copies of the foregoing were served by regular U.S. mail, first class postage prepaid, upon each of the following this 5th day of August, 2005:

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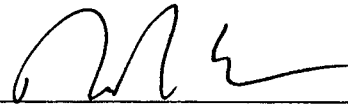
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APPENDIX

Model Regulation Service—July 2005

THE INSURANCE HOLDING COMPANY SYSTEM REGULATORY ACT

The date in parentheses is the effective date of the legislation or regulation, with latest amendments. The model includes the Merger and Acquisition Law as Section 3.1. See KEY at end of list.

NAIC MEMBER	MODEL/SIMILAR LEGIS.	RELATED LEGIS./REGS.
Alabama	ALA. CODE §§ 27-29-1 to 27-29-14 (1973/1994).	
Alaska	ALASKA STAT. §§ 21.22.010 to 21.22.200 (1976/2004) [1]	
Arizona	ARIZ. REV. STAT. ANN. §§ 20-481 to 20-481.30 (1978/2003) [1, 2]	
Arkansas	ARK. CODE ANN. §§ 23-63-501 to 23-63-530 (1971/2005) [1]	
California	CAL. INS. CODE §§ 1215 to 1215.16 (1969/2005).	<i>See also</i> BULLETIN 93-6 (1993).
Colorado	COLO. REV. STAT. §§ 10-3-801 to 10-3-814 (1963/1992) (Contains part of § 3.1)	
Connecticut	CONN. GEN. STAT. §§ 38a-129 to 38a-140 (1969/2004).	
Delaware	DEL. CODE ANN. tit. 18 §§ 5001 to 5015 (1973/1995) [1]	
District of Columbia	D.C. CODE §§ 31-701 to 31-714 (1993/2004) [1, 2]	
Florida	FLA. STAT. §§ 628.801 to 628.803 (1985/1997) (§§ 8, 9, 10 of model); §§ 628.451 to 628.461 (1959/1999); FLA. ADMIN.	

CODE §§ 690-143.045 to
690-143.050 (1970/1991) (§§ 1,
4, 5 of model).

Georgia

GA. CODE ANN. §§ 33-13-1 to
33-13-15 (1970/1993) [1]

**THE INSURANCE HOLDING COMPANY SYSTEM
REGULATORY ACT**

NAIC MEMBER	MODEL/SIMILAR LEGIS.	RELATED LEGIS./ REGS.
Guam	NO ACTION TO DATE	
Hawaii	HAWAII REV. STAT. §§ 431:11-101 to 431:11-117 (1988/2000) [1]	
Idaho	IDAHO CODE §§ 41-3801 to 41-3820 (1972/1999) [1]	
Illinois	215 ILL. COMP. STATS. 5/131.1 to 5/131.28 (1977/2003) [1]	
Indiana	IND. CODE §§ 27-1-23-1 to 27-1-23-13 (1971/1999) [1]	
Iowa	IOWA CODE §§ 521A.1 to 521A.13 (1970/1997).	
Kansas	KAN. STAT. ANN. §§ 40- 3301 to 40-3315 (1975/1997) [1]	
Kentucky	KY. REV. STAT. §§ 304.37- 010 to 34.37-150 (1972/1998); § 304.24-410 (1996) [1]	
Louisiana	LA. REV. STAT. ANN. §§ 22:1001 to 22:1015 (1991/1997).	
Maine	ME. REV. STAT. ANN. tit. 24-A § 222 (1969/1999).	
Maryland	MD. ANN. CODE INS. §§ 7- 101 to 7-807 (1969/2000) [1]	

Massachusetts	MASS. GEN. LAWS ch. 175 §§ 206 to 206D (1993).
Michigan	MICH. COMP. LAWS §§ 500.1301 to 500.1379 (1970/1995).
Minnesota	MINN. STAT. §§ 60D.09 to 60D.30 (1971/2005) [1]

**THE INSURANCE HOLDING COMPANY SYSTEM
REGULATORY ACT**

NAIC MEMBER	MODEL/SIMILAR LEGIS.	RELATED LEGIS./ REGS.
Mississippi	MISS. CODE ANN. §§ 83-6-1 to 83-6-43 (1974/2001).	
Montana	MONT. CODE ANN. §§ 33-2-1101 to 33-2-1125 (1971/1999).	
Nebraska	NEB. REV. STAT. §§ 44-2120 to 44-2153 (1991/2005).	
Nevada	NEV. REV. STAT. §§ 692C.010 to 692C.490 (1973/2003).	
New Hampshire	N.H. REV. STAT. ANN. §§ 401-B:1 to 401-B:17 (1971/2000)#	
New Jersey	N.J. REV. STAT. §§ 17:27A-1 to 17:27A-14 (1970/1996) [1]	<i>See also</i> N.J. REV. STAT. §§ 17:27B-1 to 17:27B-6 (1971).
New Mexico	N.M. STAT. ANN. §§ 59A-37-1 to 59A-37-28 (1985/1999).	
New York		N.Y. INS. LAW §§ 1501 to 1510; 1601 to 1612; 1701 to 1716 (1984/1999); 7101 to 7119 (1984/1989) (Parts of model included).
North Carolina	N.C. GEN. STAT. §§ 58-19-1 to 58-19-70 (1971/2001).	
North Dakota	N.D. CENT. CODE §§ 26.1-10-01 to 26.1-10-12 (1983/2005) [1]	
Ohio	OHIO REV. CODE ANN. §§ 3901.32 to 3901.37 (1971-1972/2002).	

Oklahoma OKLA. STAT. tit. 36 §§ 1651 to
1663 (1970/2005).

Oregon OR. REV. STAT. §§ 732.517 to
732.592 (1971/2001) [2]

**THE INSURANCE HOLDING COMPANY SYSTEM
REGULATORY ACT**

NAIC MEMBER	MODEL/SIMILAR LEGIS.	RELATED LEGIS./ REGS.
Pennsylvania	PA. UNCONS. STAT. §§ 40-10-101 to 40-10-113 (1993/2001) [1]	
Puerto Rico	NO ACTION TO DATE	
Rhode Island	R.I. GEN. LAWS §§ 27-35-1 to 27-35-14 (1971/2002).	
South Carolina	S.C. CODE ANN. §§ 38-21-10 to 38-21-390 (1988/2003) [1]	
South Dakota	S.D. CODIFIED LAWS ANN. §§ 58-5A-1 to 58-5A-77 (1972/1993).	
Tennessee	TENN. CODE ANN. §§ 56-11-201 to 56-11-215 (1986/2000) [1]	
Texas	TEX. CODE ANN. INS. Sec. 823.001 to 823.503 (2003/2005).	
Utah	UTAH CODE ANN. §§ 31A-16-101 to 31A-16-111 (1986/2004).	
Vermont	VT. STAT. ANN. tit. 8 §§ 3681 to 3694 (1971/1996).	
Virgin Islands	NO ACTION TO DATE	
Virginia	VA. CODE §§ 38.2-1322 to 38.2-1346 (1986/2001) [2]	<i>See also</i> VA. CODE §§ 38.2-4230 to 38.2-4235 (1989) (Regarding nonstock corporations)

that are members of
holding co. system).

Washington WASH. REV. CODE ANN.
§§ 48.31B.005 to 48.31B.902
(1993/2000) [1]

See also WASH. REV.
CODE ANN.
§§ 48.31C.010 to
48.31C.901 (2001)
(Holding company act for
health care service
providers and HMOs).

**THE INSURANCE HOLDING COMPANY SYSTEM
REGULATORY ACT**

NAIC MEMBER	MODEL/SIMILAR LEGIS.	RELATED LEGIS./ REGS.
West Virginia	W. VA. CODE §§ 33-27-1 to 33-27-14 (1974/2003).	
Wisconsin		WIS. STAT. §§ 617.01 to 617.25 (1969/1998).
Wyoming	WYO. STAT. §§ 26-44-101 to 26-44-117 (1991/2004).	

KEY

- [1] Includes Section 3.1 on mergers and acquisitions.
- [2] Includes confidentiality provisions adopted by NAIC in Jan. 2000 or similar provisions.