UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SUSAN W. TAYLOR and CURTIS L. WELCH, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

BANKERS LIFE AND CASUALTY CO., an Illinois corporation,

Defendant.

CASE NO. C08-0447-JCC

ORDER

This matter comes before the Court on Defendant's Motion to Dismiss (Dkt. No. 22), Plaintiffs' Response in opposition (Dkt. No. 32), and Defendant's Reply (Dkt. No. 33). Having considered the parties' briefing, the complaint and documents attached thereto, and determining that oral argument is unnecessary, the Court hereby finds and rules as follows.

I. BACKGROUND

Plaintiffs Susan W. Taylor and Curtis L. Welch bring this class action on behalf of themselves and "all persons who, beginning in 1988, purchased long or short term convalescent care insurance policies ('LTC policies') from Bankers in the State of Washington . . . ." (Compl. ¶ 1 (Dkt. No. 1).) Plaintiffs

purchased their LTC policies from Defendant Bankers Life and Casualty Company ("Bankers") in 2003 and 2004. (*Id.* ¶¶ 16–17.) In 2007, Bankers secured the necessary approval from the Washington Office of the Insurance Commissioner ("OIC") to enact a premium rate increase for the type of LTC policy held by Plaintiffs. (Def.'s Mot. 1 (Dkt. No. 22).) Plaintiffs allege that they were misled at the time of purchase as to the long-term stability of the premium rates on their policies and the circumstances under which they might increase. (Compl. ¶ 1 (Dkt. No. 1).) On March 19, 2008, Plaintiffs filed the instant lawsuit, under this Court's diversity jurisdiction, alleging three causes of action: (1) Violation of the Washington Consumer Protection Act ("CPA"), WASH. REV. CODE § 19.86.01 *et seq.*; (2) Breach of Contract; and (3) Bad Faith. (Compl. ¶¶ 92–116 (Dkt. No. 1).)

Bankers now moves to dismiss the action on three independent bases. First, Bankers claims that Plaintiffs have failed to exhaust their administrative remedies under Washington law, thus surrendering a jurisdictional prerequisite to suit. (Def.'s Mot. 5–12 (Dkt. No. 22).) Second, Bankers asserts that Plaintiffs have failed to comply with contractual conditions precedent to filing suit that are set forth in Plaintiffs' policies. (*Id.* at 12–17.) Finally, Bankers argues that Plaintiffs' claims are barred by the filed rate doctrine, under which "rates approved by a regulatory agency (such as the OIC) are *per se* reasonable, lawful, and immunized from judicial challenge as long as the agency engages in 'meaningful review' of the rates." (*Id.* at 17–18 (citing *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 394 (9th Cir. 1992).) Plaintiffs dispute each of these contentions and request that the motion be denied, or in the alternative, that they be permitted to conduct "jurisdictional discovery." (Pls.' Resp. 2–3 (Dkt. No. 32).)

II. DISCUSSION

A. Standard of Review

Rule 12(b)(1) of the Federal Rules of Civil Procedure sets forth the defense of lack of subject-matter jurisdiction. While "the failure to exhaust nonjudicial remedies that are not jurisdictional . . . is subject to an unenumerated Rule 12(b) motion," *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003), under Washington law, exhaustion of the administrative remedies provided in Title 48 of the Revised

Code of Washington are "a jurisdictional prerequisite to resort to the courts." *Retail Store Employees Union v. Washington Surveying and Rating Bureau*, 558 P.2d 215, 227 (Wash. 1976). Accordingly, Rule 12(b)(1) is the appropriate procedural vehicle for resolving Defendant's motion to dismiss.

B. Exhaustion of Administrative Remedies

Bankers contends that by bringing this lawsuit as their first recourse, Plaintiffs have failed to exhaust their administrative remedies, and are therefore precluded from review by this Court. The administrative remedies in question are those set forth in Title 48 of the Revised Code of Washington. Section 48.04.010 allows "any person aggrieved" by an act or omission by the [Insurance] Commissioner to make a written demand for a hearing which the Commissioner "shall" grant if the request is made within 90 days. Section 48.19.310 falls under the specific chapter concerning rates, and reads:

> Every rating organization and every insurer which makes its own rates shall provide within this state reasonable means whereby **any person aggrieved** by the application of its rating system may be heard, in person or by his authorized representative, on his written request to review the manner in which such rating system has been applied in connection with the insurance afforded him. If the rating organization or insurer fails to grant or reject such request within thirty days after it is made, the applicant may proceed in the same manner as if his application had been rejected. **Any party affected by the action of such rating organization or such insurer on such request may, within thirty days after written notice of such action, appeal to the commissioner, who, after a hearing held upon notice to the appellant and to the rating organization or insurer, may affirm or reverse such action.**

WASH. REV. CODE § 48.19.310 (emphasis added). Furthermore, any person aggrieved by a rate filing that has already taken effect (other than the insurer or rating organization that made the filing), may make written request for a hearing in front of the Commissioner, who is empowered to subsequently disapprove of a previously approved rate. *Id.* § 48.19.120. Further enforcement authority of the OIC includes the power to issue a "cease and desist" order or bring an action in court to enjoin further violations of the Act. *Id.* § 48.02.080(3). One practice prohibited by the Act with respect to the provision of LTC insurance specifically is to "use or engage in any unfair or deceptive act or practice in the advertising, sale, or marketing of long-term care policies or contracts." *Id.* § 48.84.060.

Plaintiffs concede that they did not avail themselves of any of the administrative remedies set forth

above. Instead, they make several arguments as to why the exhaustion requirement does not apply. First, they claim that they never received notice of the relevant administrative action and are therefore excused from pursuing the remedies associated therewith. In support of this argument, Plaintiffs cite a 2002 premium rate approval by the OIC, which took place before they purchased their policies in 2003 and 2004. (Pls.' Resp. 3–6 (Dkt. No. 32).) Second, Plaintiffs assert that they were not adequately informed of their rights upon receiving notice of the 2007 premium rate increase, and are therefore excused from the exhaustion requirement with respect to that administrative action. (*Id*. at 6–7.) Third, Plaintiffs argue that even if they were properly notified, their claims are "not within the purview of the OIC," and thus they were not an "aggrieved party" required to pursue administrative remedies under the Act. (*Id*. at 7–8.) Finally, Plaintiffs maintain that their CPA and civil damages claims are not barred by a failure to exhaust because the Commissioner is powerless to grant relief on these claims. (*Id*. at 8.) None of these arguments relieves Plaintiffs of their obligation to exhaust their administrative remedies.

The notion that Plaintiffs are excused from the exhaustion requirement because they did not receive notice of a 2002 OIC premium rate approval is utterly specious. They did not receive notice of this action because they had not purchased their LTC policies at that time. The Court is well aware that Plaintiffs' claims focus upon alleged representations by Defendant at the times Plaintiffs purchased their policies in 2003 and 2004, and that the premium rates in place at those times were approved by the OIC in 2002. However, under Plaintiffs' own theory of the case, no violation of the CPA, breach of the insurance contracts, or bad faith generated any damages until the 2007 premium rate increase. That is the act that gives Plaintiffs their claims and there is no dispute that it was properly noticed.

Plaintiffs' next argument is that notice of the 2007 rate increase was insufficiently comprehensive, and therefore they are excused from first seeking recourse with the OIC. Specifically, Plaintiffs claim that because notice of the 2007 premium rate increase did not inform them that the increase was approved by the OIC, or that they had a right to lodge a challenge if filed within a certain period of time, this "means that Bankers never actually notified Plaintiffs of the OIC's action or their right or obligation to challenge

that action." (Pls.' Resp. 6 (Dkt. No. 32).) From the cases cited by Plaintiffs in support of this proposition, it appears that they mistake a lack notice about a particular administrative action itself, or notice that is patently misleading, with mere ignorance of the law. In *Gardner*, Plaintiff did not receive notice of the administrative action itself until the day it became effective, *Gardner v. Pierce County Bd. of Com'rs*, 617 P.2d 743, 745 (Wash. App. 1980), and *Gonzalez* simply stands for the proposition that in the social security benefits context, notice of an administrative right to appeal must be "accurately" stated and not "misleading." *Gonzalez v. Sullivan*, 914 F.2d 1197, 1203 (9th Cir. 1990). The question presented in the instant case is whether having received notice that the rates for their LTC policies were going to increase, Plaintiffs may be expected to independently avail themselves of the public laws governing this highly-regulated industry. Introducing no support to the contrary, Plaintiffs would have their duty to exhaust administrative remedies hinge on whether Defendant adequately explained the relevant provisions of the Revised Code of Washington in a timely manner. While the Court is under no illusion that the average citizen is fully apprised of the law, it is a presumption on which our system depends that those with a grievance will take the initiative to pursue publicly available remedies. Indeed, "the [Insurance] Code anticipates consumer involvement, and provides a mechanism for their input on rate-setting." *Blaylock v. First Am. Title Ins. Co.*, 504 F. Supp. 2d 1091, 1095 (W.D. Wash. 2007).

Plaintiffs' third argument as to why their failure to exhaust may be excused is that their claims are "not within the purview of the OIC," and therefore they are not "aggrieved" parties under the Code. (Pls.' Resp. 7–8 (Dkt. No. 32).) This claim has some appeal, as it is clear that Plaintiffs' grievance concerns their relationship with Bankers and the representations exchanged therein rather than the functioning of the regulatory process itself. However, the type of conduct alleged in the Complaint is quite clearly within the OIC's regulatory purview under Washington law. As mentioned above, "us[ing] or engag[ing] in any unfair or deceptive act or practice in the advertising, sale, or marketing of long-term care policies or contracts" is a prohibited practice with respect to LTC policies. WASH. REV. CODE § 48.84.060. Furthermore, the Code intervenes with respect to the drafting of private, long-term care

insurance contracts, prohibiting certain types of provisions, *id*. § 48.84.040, and requiring others. *Id*. § 48.84.050. These sections of the Code refute Plaintiffs' efforts to characterize their dispute with Defendant as private, and demonstrate an overarching regulatory scheme governing the insurance industry in Washington.

By failing to acknowledge the full breadth of the OIC's authority over insurance contracts and long-term care policies in particular, Plaintiffs ignore one of the many justifications for the exhaustion requirement, as stated by the United States Supreme Court: "Certain very practical notions of judicial efficiency come into play as well. A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene." *McKart v. United States*, 395 U.S. 185, 195 (1969). On this rationale, whether a particular grievance is subject to the exhaustion requirement depends on whether the administrative agency offers a remedy that might resolve or narrow the dispute, or at least eliminate the harm suffered. In this case, the harm was the rate increase, and it is clear that the OIC is empowered revisit prior rate approvals, as well as enforce other provisions of the Code. *See* WASH. REV. CODE §§ 48.02.080(3), 48.19.120. To be sure, the Court is not entirely aware of how the OIC would treat Plaintiffs' particular set of grievances in an administrative proceeding. However, this fact only demonstrates another reason for the exhaustion requirement, which is to allow the agency vested with authority over a certain subject matter "to exercise its discretion or apply its expertise." *McKart*, 395 U.S. at 194. Plaintiffs' CPA, breach of contract and bad faith claims, though byproducts of the rate-setting process, still fall within the regulatory ambit of the OIC, and there is no reason to assume that administrative action would not have substantially addressed them.

This leads to Plaintiffs' final argument, which is that their CPA and civil damages claims are not subject to exhaustion because the Commissioner is powerless to grant relief on these claims. (Pls.' Resp. 8 (Dkt. No. 32).) While there can be no doubt that the OIC is not empowered to simply stand in the place of a state or federal district court, this fact alone does not obviate the exhaustion requirement. Indeed, if

this were the standard, few if any administrative actions would be subject to exhaustion, since no administrative agency has the authority of an Article III court. In Washington, the question Plaintiffs raise is whether the administrative relief is "patently inadequate." *Dioxin/Organochlorine Ctr. v. Dep't of Ecology*, 837 P.2d 1007, 1016 (Wash. 1992). For example, in *Credit General Ins. Co. v. Zewdu*, the plaintiff made a similar argument to that raised here:

> Credit General contends that the relief that it seeks-a declaratory judgment binding on the taxicab driver and the deceased pedestrian's estate-is not within the commissioner's authority. And further, that even if Credit General sought and received a favorable determination from the commissioner, the commissioner could not bind this court. From these two points, Credit General reasons that the administrative remedy was inadequate and that pursuit of administrative review was futile.

919 P.2d 93, 97 (Wash. App. 1996). The court responded by first noting that "Washington law rejects the simplistic, mechanistic approach to adequacy that Credit General proposes. For even when an administrative remedy is not the precise relief sought, or will not give a litigant "complete relief," the remedy may be adequate for purposes of requiring exhaustion." *Id*. (citations omitted). The court emphasized that "[t]he adequacy of an administrative remedy is measured in relation to the claim." *Id*. Thus, "an administrative agency lacking authority to make or enforce a decision relevant to the claim cannot provide an adequate remedy." *Id*. (citing *State v. Tacoma-Pierce County Multiple Listing Service*, 622 P.2d 1190, 1192 (Wash. 1980)). However, "an administrative agency empowered to entertain the type of claim and enforce its decision can supply an adequate remedy." *Zewdu*, 919 P.2d at 97 (citing *Retail Store Employees Union v. Washington Surveying and Rating Bureau*, 558 P.2d 215 (1976)).

Applied to the instant matter, it is clear that the OIC has "authority to make or enforce a decision relevant" to Plaintiffs' claims. The Insurance Code both prohibits the precise behavior Plaintiffs allege and extensively regulates the particular contractual relationship at issue between the parties. These are matters over which the Commissioner's enforcement authority plainly extends. Furthermore, the ultimate harm Plaintiffs complain of is the result of the 2007 premium rate increase, the propriety of which is solely within the discretion of the OIC, which even has the authority to revisit prior rate-setting decisions. *See* WASH. REV. CODE § 48.19.120. Under these circumstances, the Court cannot say that the extensive

administrative remedies afforded under the Title 48 of the RCW are "patently inadequate." And as Defendant observes, Plaintiffs "damages" came to fruition precisely because they did not engage the administrative process before the new rates took effect. (Def.'s Reply 5 (Dkt. No. 33).) To the extent it is uncertain what that process might have yielded, it was Plaintiffs' obligation to find out. In sum, Plaintiffs are not excused from exhausting their administrative remedies for lack of an adequate remedy. Having reached this conclusion, it is unnecessary to address the other bases of dismissal set forth in Defendant's motion.

Finally, Defendant maintains that this matter should be dismissed with prejudice, presumably because the time for Plaintiffs to pursue their administrative remedies has expired. (*See* Def.'s Mot. 11–12 (Dkt. No. 22).) Defendant apparently bases this conclusion on certain provisions in the Insurance Code setting time limits for administrative challenges. *See*, *e.g.*, WASH. REV. CODE § 48.04.010(3) (request for a hearing must occur "within ninety days after receiving notice of such order"); *Id.* § 48.19.310 (thirty days after written notice to file an appeal). However, it is not clear that these are the only mechanisms for administrative review under Title 48. For example, those aggrieved by a filing currently in effect "may make written application to the commissioner for a hearing thereon." *Id.* § 48.19.120(3). This administrative avenue does not appear to be subject to a time limitation. The Court offers this limited observation only to demonstrate that it is unclear whether Plaintiffs' administrative avenues are entirely foreclosed. For that reason, this matter shall be dismissed without prejudice. As for Plaintiffs' request for "jurisdictional discovery," the Court concludes that it would be unwarranted with respect to the exhaustion issue. As demonstrated by the briefing, there is simply no dispute of fact between the parties that would alter the conclusion reached here today.

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III. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss (Dkt. No. 22) is hereby GRANTED, and this matter is dismissed without prejudice.

SO ORDERED this 29th day of August, 2008.

John C. Coughenour
United States District Judge