THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

Opinion No. 4944, 725 S.E.2d 708 (S.C. Ct. App. filed Feb. 22, 2012)

Case Nos. 09-ALJ-09-0159-CC; 10-ALJ-09-0500-IJ

Consumer Advocate for the State of South Carolina, ... Respondent,

v.

South Carolina Department of Insurance and National Council on Compensation Insurance, Inc. of which National Council on Compensation Insurance, Inc. is the ..... Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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Certificate of Counsel

Counsel for Petitioner certifies that the Petition for Rehearing was timely filed on May 22, 2012, and finally ruled on by the Court of Appeals on May 31, 2012.

Questions Presented

1. Did the Court of Appeals err in reversing the Administrative Law Court's order in view of the fact that section 38-73-910(A) only requires the South Carolina Department of Insurance to publish notice of increases in premium rates but the workers compensation voluntary loss costs filing at issue seeks an overall decrease in loss costs?

2. Did the Court of Appeals err in interpreting section 38-73-910(A) to require the publication of notice for any workers compensation loss cost filing that contains an increase to any one of over 600 classification codes even though the lost cost filing does not directly result in an increase in rates and such an interpretation leads to an unreasonable result that could not have been intended by the legislature?

3. Did the Court of Appeals err in failing to consider that the Court does not have subject matter jurisdiction over this matter because the Consumer Advocate failed to articulate any specific, cognizable injury; that the Consumer Advocate instituted the below proceedings solely for the purposes of obtaining discovery to determine if he had a cause of action; and that the matter is not ripe for consideration?

Statement of the Case

The matter underlying this petition arose on November 25, 2008, when the Petitioner National Council on Compensation Insurance, Inc. ("NCCI"), acting in its capacity as both the statistical data-gathering agent and the rating organization for workers compensation in South Carolina, filed the Workers Compensation Voluntary Loss Cost Filing ("Filing") with the South Carolina Department of Insurance ("DOI"). NCCI requested in the Filing that the Director of DOI approve a 0.3% overall decrease to the current loss cost level used by individual insurers in calculating premium rates for workers compensation insurance policies.[1] In this regard, NCCI proposed to revise the overall effect of the advisory loss costs then in effect and to decrease the amount recovered by carriers to reimburse them for their costs incurred in providing indemnity and medical benefits to injured workers. By letter dated March 24, 2009, DOI stated that it had completed its review of the Filing, found the proposed loss costs not to be excessive, inadequate or unfairly discriminatory, and approved the Filing to become effective July 1, 2009. DOI further directed NCCI to implement the advisory loss costs on July 1, 2009. [App. pp. 40, 64.]

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[1] In March 2010, NCCI submitted a second filing requesting approval of a 9.8% overall decrease to the current loss cost level that was also approved by DOI. The Consumer Advocate petitioned the ALC for a Writ of Mandamus seeking to require DOI to publish notice which was denied. The Consumer Advocate similarly appealed this decision. The parties, acknowledging the two appeals involve substantially identical questions of law and are based upon substantially identical facts, moved to consolidate the two appeals which was granted. Although the instant Petition seeks review of the Court of Appeals' decision on both matters, for ease of reference and convenience, Petitioner NCCI herein references only the initial filing contested in Case No. 09-ALJ-09-0159-CC.

On April 6, 2009, the Consumer Advocate for the State of South Carolina ("Consumer Advocate")[2] filed its Request for Contested Case Review with the South Carolina Administrative Law Court ("ALC"). The Consumer Advocate complained that S.C. Code Ann. § 38-73-910(A) required DOI to publish notice of the overall decrease proposed in NCCI's Filing in newspapers of general statewide circulation before the loss costs could be implemented. The Consumer Advocate also claimed that failure to provide notice would deny the Consumer Advocate the opportunity to be heard on whether the loss costs submitted for approval were excessive, inadequate or unfairly discriminatory. *See* S.C. Code Ann. § 38-73-430(4) (2002). On May 12, 2009, DOI moved to dismiss the case for lack of subject matter jurisdiction. The motion to dismiss was argued before the Honorable Ralph King Anderson, III, on September 17, 2009. On February 4, 2010, the ALC issued its order granting DOI's motion to dismiss and dismissing the Contested Case. Therein, the ALC concluded that the statute only applies to overall increases in workers compensation premium rates and recognized that its application to any filing which proposes an increase to a single classification code would obviate the efficiency of having a rating organization file loss costs on behalf of insurers throughout the state. [App. pp. 6-10.]

Following this decision, the Consumer Advocate instituted an appeal to the Court of Appeals. In its arguments to the Court of Appeals, NCCI asserted, *inter alia*, that the plain language of section 38-73-910(A) applies specifically to increases in *premium* rates which were not addressed in the proceeding or the Filing. Rather, NCCI argued that the

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[2] Appellant Consumer Advocate is appointed by the Administrator of the Department of Consumer Affairs with the functions and duties to monitor and represent the consumer interest with respect to rates or prices for consumer products or services. S.C. Code Ann. §§ 37-6-601, et seq. (2002, as amended)

Filing only affects loss costs which comprise one of several components an insurer uses to determine an individual policy holder's final premium rate. Additionally, NCCI asserted that the Consumer Advocate failed to make any claim in the proceedings below that he or the consumers which he represents are aggrieved by DOI's decision approving the filing and, hence, failed to articulate any injury that would afford standing to advance these claims. Finally, NCCI averred that affected persons may request a hearing before DOI to challenge increases to individual loss cost classifications which affords them with a constitutionally sufficient administrative procedure to protect their rights to due process.

On February 22, 2012, the Court of Appeals issued its decision in *Consumer Advocate v. South Carolina Dep't of Insurance*, __ S.C. __, 725 S.E.2d 708 (2012) ("*Consumer Advocate*" or "the Opinion"), reversing the ALC Order and holding that section 38-73-910(A) mandates publication of the notice of loss cost filings which seek an increase to any loss cost classification. [App. pp. 282-86.] Although the Court of Appeals recognized that language in a statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose, App. p. 284, the decision concluded that section 38-73-910(A), which pertains only to increases in premium rates, requires the publication of notice for filings which seek an overall decrease to loss costs but contain individual increases to certain classifications. The Court of Appeals' decision, however, did not address NCCI's assertions that the Consumer Advocate lacked standing to bring these claims. In addition, the Court of Appeals disregarded the ALC's recognition that the Consumer Advocate failed to seek information from DOI that would have enabled it to determine whether it was aggrieved by the final decision of DOI, or

that aggrieved parties have a constitutionally sufficient alternative procedure to challenge increases to individual loss costs. On March 22, 2012, NCCI and DOI filed petitions for rehearing with the Court of Appeals, both of which were denied by order of the Court of Appeals filed May 31, 2012.

Statement of the Facts

All employers in South Carolina are required to provide workers compensation insurance for their employees. S.C. Code Ann. §§ 42-1-10, *et seq.* (1976, as amended). In 1989, the South Carolina General Assembly established a rating system for the voluntary insurance programs which provides a methodology to assist carriers in developing premium rates to be charged to policy holders. The rates are calculated by the use of two categories of data: loss costs and lost cost multipliers. *Temp. Services, Inc. v. Am. Int'l Group, Inc.*, 388 S.C. 348, 350, 697 S.E.2d 527, 528, (2010). Loss costs are the portion of insurance premium rates which are comprised of incurred losses, including medical costs and lost wages arising from workplace injuries, and loss adjustment expenses directly related to the payment of claims.[3] *Id.* (*quoting* S.C. Code Ann. § 38-73-1400(1)). Loss cost multipliers are based on an insurer's specific expenses and reflect each carrier's operational expenses including items such as acquisition costs, overhead, taxes, and profit. *Id.*

[3] These advisory prospective loss costs are intended to cover the indemnity and medical benefits provided under the system, as well as the expenses associated with providing these benefits. However, loss costs do not contemplate any other costs associated with providing workers compensation insurance, such as commissions, taxes, assessments and other costs incurred by the individual carriers. *See generally Temp. Services,* 388 S.C. at 350, 697 S.E.2d at 528.

In South Carolina, Petitioner NCCI serves as the designated rating organization[4] for workers compensation insurance in South Carolina and is authorized to make loss cost filings on behalf of its members or subscribers[5] pursuant to S.C. Code Ann. §§ 38-73-1210 et seq. (2002, as amended). In this capacity, NCCI files a proposed set of loss costs with DOI for each of the approximately 600 classifications of workers in South Carolina. S.C. Code Ann. § 38-73-490. [App. p. 78, Tr. p. 13, ll. 6-10.] The loss costs for each classification are calculated by allocating the total losses among approximately 600 classes of workers based upon the comparative risks of each class. Consequently, each loss cost filing results in increases and decreases to certain individual classifications. However, what is at issue in these filings is the propriety of the overall effect of these advisory prospective loss cost—i.e., the total amount of indemnity and medical benefits and associated expenses[6] that the system will allow carriers to recover. [App. pp. 93-94, Tr. p. 28, l. 17 – p. 29 l. 13; App. p. 99, Tr. p. 34, ll. 6-12.]

In accordance with S.C. Code Ann. §§ 38-73-10, *et seq.* (2002, as amended), DOI is required to review filings made by NCCI and approve loss costs for each classification under which workers compensation insurance is written. Once approved by DOI pursuant to section 38-73-490, individual carriers may elect to adopt NCCI's proposed

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[4] As the designated rating organization, NCCI's principal functions are to collect and process statistical data, inspect and administer a detailed classification system, and develop fair, adequate and non-excessive loss costs for workers compensation insurance. S.C. Code Ann. §§ 38-73-490, -1210 (2002, as amended).

[5] Each insurance carrier writing workers compensation insurance in South Carolina is required to be a member of NCCI pursuant to S.C. Code Ann. § 38-73-510 (2002).

[6] The loss costs do not, however, contemplate any other costs associated with providing workers compensation insurance, such as commissions, taxes, assessments and other costs incurred by the individual carriers.

loss costs. In order to do so, each carrier must make individual filings with DOI affirmatively adopting the loss costs and proposing a loss cost multiplier, incorporating each carrier's own underwriting guidelines and expense needs.[7] *Temp. Services*, at 388 S.C. at 350, 697 S.E.2d at 528 (*quoting* S.C. Code Ann. § 38-73-1400(2)); S.C. Code Ann. § 38-73-520 (Supp. 2009). In addition, individual carriers may apply to DOI for permission to deviate from the proposed loss costs. S.C. Code Ann. §§ 38-73-520, -525 (Supp. 2009). Finally, carriers may elect to revise their rates further by offering premium discounts, applying experience rating modifications to reflect the insured's individual risk experience, and other similar adjustments. Consequently, loss cost multipliers and other various pricing plans are used to develop each carrier's final premium for their business and allow competitive pricing in the workers compensation market. *Id.* NCCI's advisory loss costs therefore serve as appropriate benchmarks from which carriers begin to determine their pricing strategies based on their own views of expenses, profit and contingencies, loss potential and individual risk characteristics.

[7] The expense portion of each carrier's loss cost multiplier reflects underwriting costs, administrative costs, and profit margin.

Summary of Arguments

The Court should issue a writ of certiorari to review the opinion issued by the Court of Appeals in *Consumer Advocate* because it incorrectly interprets section 38-73-910(A) to require DOI to publish notice of filings which seek an overall decrease to voluntary loss costs. Specifically, because the Filings at issue in this proceeding seek an overall decrease to loss costs, a plain language analysis of section 38-73-910(A) demonstrates that its notice requirements apply only to premium rates and, therefore, do not require the publication of notice for loss cost filings. Additionally, the effect of the Court of Appeals' holding requires filings which seek an overall decrease to loss costs to be stayed pending publication and litigation of the appropriateness of the filing, thereby retaining higher loss costs and penalizing insureds until any such litigation would be concluded. As a result, the Opinion erroneously applies the standard rules of statutory interpretation and renders an unreasonable interpretation of the statute that defeats the plain language of the statute. Moreover, the Opinion ignores the constitutionally sufficient administrative procedures afforded to affected parties for challenging increases to individual class codes. Finally, the Court of Appeals declined to address the Consumer Advocate's lack of standing through his failure to articulate any specific, cognizable injury with respect to the Filing. In view of the foregoing, and as further discussed below, a writ of certiorari is warranted. *See* Rule 242(b)(1) and (4).

Arguments

1. **This Court should grant a writ of certiorari because the Court of Appeals erred in holding section 38-73-910(A) requires DOI to publish notice of filings seeking an overall decrease to loss costs in view of the fact that the plain language of the statute only requires DOI to publish notice of increases in premium rates.**

This matter comes before the Court to consider the meaning of section 38-73-910(A) and whether, by its plain language, the statute requires DOI to publish notice of filings seeking an overall decrease to workers compensation voluntary loss costs. In determining whether to grant review of a final decision of the Court of Appeals, the Court may consider novel questions of law. Rule 242(B)(1), SCACR. In the proceedings below, the Court of Appeals concluded that section 38-73-910(A) mandates publication of the notice of NCCI's filings which seek an overall decrease to loss costs. However, the Opinion overlooks the fact that the plain language of Section 38-73-910(A) pertains to increases in "premium rates" which are not addressed in this proceeding. Rather, the Filing only affects loss costs which comprise one of several components an insurer uses to determine an individual policy holder's final premium rate. Given that the Opinion paradoxically concluded the plain language of the statute requires the publication of notice in the event of an "increase" but ignored unambiguous language limiting the statute only to "premium rates," this Court should consider the novel question presented to determine the appropriate application of the section for this and future filings made with DOI.

Section 38-73-910(A) provides in pertinent part that "[a]n **increase** in the **premium** rates may not be granted for workers compensation insurance . . . unless notice is given . . . at least thirty days in advance of the insurer's proposed effective date of the

increase in premium rates." S.C. Code Ann. § 38-73-910(A)(2002) (emphasis supplied). Insurance premiums consist of "payment[s] given in consideration of a contract of insurance." S.C. Code Ann. § 38-1-20(46) (Supp. 2009). By contrast, loss costs are the portion of insurance premium rates which are comprised of incurred losses, including medical costs and lost wages arising from workplace injuries, and loss adjustment expenses directly related to the payment of claims. *Temp. Services, Inc.*, 388 S.C. at 350, 697 S.E.2d at 528. Therefore, the plain language of section 38-73-910(A) unambiguously applies to proceedings where there is an increase in premium rates for workers compensation insurance.

In the proceedings below, the ALC recognized this fact and correctly determined that loss costs are but a single component of premium rates. [App. p. 105, Tr. p. 40, ll. 9-12 ("It is an underlying component of rates ... it essentially accounts for half the rate.").][8] As a result, a change in loss costs is not determinative of whether or how premium rates may be affected, and the magnitude of a change to loss costs, and even whether the change reflects an overall decrease or increase to loss costs, does not independently affect premium rates. [App. pp. 215, 298-99.]

In reversing the ALC, the Court of Appeals failed to appreciate the current workers compensation insurance system and incorrectly applied the notice requirements of section 38-73-910(A) to loss costs filings. In so doing, the Court of Appeals expanded the scope of the statute beyond the plain and unambiguous language contained therein, erroneously holding that section 38-73-910(A) requires the publication of notice for

[8] In fact, insurers use several components, which are not the subject of the Filing, to calculate the premium rate ultimately charged to policy holders. [App. pp. 5, 228-29, 296-97, 299.]

NCCI's loss cost filings which reflect increases to any loss cost classification. Although the Court of Appeals recognized that "[l]anguage in a statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose" [App. p. 284,] it failed to apply the long-recognized principle that "[w]hen the language of a statute is plain, unambiguous, and conveys a clear and definite meaning, the application of standard rules of statutory interpretation is unwarranted." *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003) *quoting State v. Benjamin,* 341 S.C. 160, 163, 533 S.E.2d 606, 607 (Ct. App. 2000). In the instant matter, NCCI's Filing did not address premium rates, but rather loss costs. Had the Court of Appeals applied the standards of statutory construction uniformly, it would have concluded that the plain language of section 38-73-910(A) does not apply to increases in loss costs and, as a result, DOI was not required to publish notice of the Filing. By failing to do so, the Court of Appeals incorrectly held that 38-73-910(A) applies to this matter, thus presenting a novel question of law for this Court to consider.

Additionally, by declining to recognize the effect of loss cost filings, the Court of Appeals disregarded the purpose underlying the requirement set forth in Section 38-73-910(A)—that notice of increases in premium rates must be published before they may become effective so that policy holders may be made aware of pending rate increases—and that these issues simply do not pertain to loss cost filings. *Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 230, 612 S.E.2d 719, 723 (Ct. App. 2005) (citation omitted) "The legislature's intent should be ascertained primarily from the plain language of the statute."). NCCI's Filing does not address premium rates, but rather loss costs which comprise one of several components an insurer uses to determine an individual policy

holder's final premium rate. Because insurers use several other components, which are not the subject of the Filing, to calculate the premium rate charged to policy holders, a change in loss costs is not determinative of whether or how premium rates may be affected. As a result, the magnitude of a change to loss costs, and even whether the change reflects an overall decrease or increase to loss costs, does not independently affect or directly result in an increase in premium rates. Rather, the Filing only affects loss costs which comprise one of several components an insurer uses to determine an individual policy holder's final premium rate. [App. pp. 215, 298-99.]

Further, the Filing is advisory, not mandatory, in nature, and insurance carriers must file separate requests with DOI to adopt the loss costs for use in developing their final premiums. Specifically, once NCCI's filings are approved by DOI, individual carriers may elect to base their final rates on NCCI's loss costs, or may apply for permission to deviate from the proposed rating system. S.C. Code Ann. §§ 38-73-520, -525 (Supp. 2009). Following adoption of the loss costs, the carriers then incorporate their own underwriting guidelines and expense needs—including underwriting costs, administrative costs, and profit margin—through the use of a "loss cost multiplier" that is separately filed with DOI for approval.[9] *Temp. Services, Inc.*, 388 S.C. at 350, 697 S.E.2d at 528 (quoting S.C. Code Ann. § 38-73-1400(2); S.C. Code Ann. § 38-73-520 (Supp. 2009)). In calculating the final premium rates charged to insureds, carriers may elect to make further adjustments by offering premium discounts, applying experience

[9] The Consumer Advocate is afforded the statutory authority to receive these filings, and therefore, to conduct his own review of the premium rates to be charged therein. *See* App. pp. 228-30.

rating modifications to reflect the insured's individual risk experience, and other similar adjustments.

The advisory loss costs, if adopted by the carriers, therefore serve as benchmarks from which carriers begin to determine their pricing strategies based on their own views of expenses, profit and contingencies, loss potential, and individual risk characteristics. A change to a single component of "premium rates" is not determinative of the ultimate premium rate charged to policy holders. Accordingly, providing notice of this change would not serve the purpose contemplated by section 38-73-910(A) and, pursuant to the plain language of the statute, is not required. *Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) ("If the legislature's intent is clearly apparent from the statutory language, a court may not embark upon a search for it outside the statute."). *See also State v. Gordon*, 356 S.C. 143, 152, 588, S.E.2d 105, 110 (2003) (The interpretation of a statute "should not consider the particular clause being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law.").

The Opinion appears to recognize these distinctions in its finding that rates charged to insureds "may ultimately be affected by a loss costs increase." [App. pp. 285-86.] However, the Order overlooks the point that, in these proceedings, the Consumer Advocate, insureds, and other affected parties are afforded the opportunity to protest any increases in premium rates resulting from the adoption of the loss costs before they become effective. If the Opinion had correctly applied the rules of statutory interpretation, it would have concluded that the plain language of section 38-73-910(A) does not apply to the Filing because it does not directly affect premium rates charged by carriers and does not mandate DOI publish notice of loss cost filings. *Cf. Whitner v.*

State, 328 S.C. 1, 15, 492 S.E.2d 777, 784 (1997) ("[O]ur interpretation of the statute is based primarily on the plain meaning of the word 'person' as contained *in the statute*. We need not go beyond that language.") Rather, the Opinion effectively affords the insureds two bites at the apple, with one bite coming before the loss costs even ripen into a premium increase and the second bite coming after the premium increase. Consequently, the Court of Appeals erred by failing to appreciate the current methodology by which workers compensation rates are developed and, in this context, conducted an inappropriate statutory analysis of the statute.

In further support of this point, the Opinion issued by the Court of Appeals is contradictory in that it does not uniformly apply the standards of statutory interpretation to section 38-73-910(A). As discussed further below, the Court of Appeals concluded that "[h]ad the legislature intended to make publication a requirement only for overall increases, it could have amended section 38-73-910 to specify it is concerned with 'overall' increases as it did in other paragraphs of section 38-73-910." However, the Court of Appeals declined to similarly recognize that, in light of the significant changes to the workers compensation system that followed after section 38-73-910(A) was originally enacted, the legislature could have amended the statute to specifically require DOI to publish notice for filings seeking increases to loss costs but chose not to do so. If the Court of Appeals had followed its same logic in this context, it would have concluded that the legislature declined to amend section 38-73-910(A) to address loss costs and, consequently, that the notice provisions do not apply to the Filing. This inconsistent ruling further demonstrates the novel question presented in this matter and supports the

issuance of a writ of certiorari so that the Court may provide final and accurate guidance on the application of section 38-73-910(A) to loss cost filings.

Notwithstanding NCCI's assertions that the plain language of section 38-73-910(A) does not apply to loss cost filings, the Court of Appeals further erred in disregarding the statute's plain and unambiguous application only to proceedings where there is an increase in premium rates for workers compensation insurance. In the proceedings before the ALC, the Consumer Advocate acknowledged that the only issue to be litigated in this proceeding is the reasonableness of the overall increase or decrease to loss costs. *See* App. p.99, Tr. p. 34, ll. 6-12 ("The Consumer Advocate is not suggesting that we litigate [600] class codes" and does not "believe [DOI] has to notice all [600] class codes.").[10] Consequently, any changes to a single class code out of the more than 600 classifications affected by the Filing admittedly is irrelevant in these proceedings. As discussed by the ALC, the principles of statutory interpretation demonstrate that the General Assembly did not intend to apply section 38-73-910(A) to each component of the loss cost determination, but to the overall rate determination. By failing to consider both the focus of DOI's required review and assessment and the purpose of the Filing which seeks an overall 0.3% decrease to the advisory loss costs, the Court of Appeals erred in holding that DOI was required to publish notice in this matter. In light of the clear import and application of section 38-73-910(A), the Court should grant certiorari in this matter and correct the misapplication of the statute to loss cost filings.

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[10] As discussed more fully on pp. 19-20, *infra*, the Consumer Advocate has not claimed that he is aggrieved by the Filing, either by the proposed overall decrease or by the change to any individual classification code.

2. **This Court should grant a writ of certiorari to review the Court of Appeals' erroneous decision in which it required the publication of notice for any workers compensation loss cost filing that contains an increase to any one of over 600 classification codes, even though such an interpretation leads to an unreasonable result that could not have been intended by the legislature and fails to give meaning to the plain language of the statute.**

The Court of Appeals' interpretation is even more problematic when considered in light of the application of the statute under this holding. The Opinion provides that notice under section 38-73-910(A) "serves to put insureds on inquiry notice that their rate may ultimately be affected" and affords them "the opportunity to protest rate increases before they become effective." [App. p. 285 (emphasis in original).] In reaching this determination, the Court of Appeals concludes that higher loss cost rates, which both NCCI and DOI have acknowledged would be "excessive," *see* S.C. Code Ann. § 38-73-430(4) (2002), should remain in effect throughout any protest proceedings. The import of this holding is that a filing seeking an overall decrease would be stayed pending publication and the conclusion of any protest filed by the Consumer Advocate, insureds, or other affected parties. As a result, requiring the publication of notice of filing and the opportunity for a hearing *before* overall decreases can go into effect will necessarily mean excessive loss cost filings then in effect would remain in place, thereby penalizing "the very parties the law was intended to protect." [App. p. 8.][11]

[11] To further illustrate this point, the Opinion's conclusion indicates that the overall decreases to loss costs implemented as a result of the 2009, 2010, and 2011 filings—each seeking an overall decrease to loss cost—should not have become effective because notice was never published. Consequently, the loss costs approved by the ALC in 2008 are the last rates implemented in accordance with the procedure contemplated by the Opinion. Had DOI not directed NCCI to implement the loss costs in the 2009, 2010, and 2011 filings upon their proposed effective date, carriers would have been unable to adopt these Filings. Therefore, over the past three years, carriers would have been charging premiums to insureds using loss costs approved in 2008—rates that NCCI and

The Opinion therefore overlooks the finding of the ALC that:

> staying the entire loss cost adjustment while its legality is litigated would penalize insureds who benefit from the decrease. If the new overall loss cost decrease is stayed while the Consumer Advocate litigates the amount of the decrease, then employers will pay a higher premium—the current rates—while the issue is pending.

[*Id.*] This conclusion suggests an illogical and unreasonable interpretation of the statute that the legislature simply could not have intended. *See New York Times Co. v. Spartanburg County Sch. Dist. No. 7*, 374 S.C. 307, 312, 649 S.E.2d 28, 30 (2007) (the court "will reject a statutory interpretation that leads to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention."); *State v. Gillam*, 208 S.C. 126, 132, 37 S.E.2d 299, 301 (1946) ("[I]f possible [the court] will construe the statute so as to escape the absurdity and carry the intention into effect.").

In reviewing sections 38-73-910, *et seq.* as a whole, it is apparent the General Assembly did not intend for the notice provision to address decreases in individual premium rates for casualty insurance coverage. [App. pp. 215-17.] If the General Assembly had so intended, it could have simply required the publication of notice for all filings which result in a change to any premium rate. Instead, the General Assembly provided a constitutionally sufficient administrative mechanism by which individual loss costs may be challenged in a much more manageable and efficient manner. Pursuant to section 38-73-1030, interested parties who are aggrieved with respect to any filing, such as the Filing at issue, are permitted to contest the filing in a hearing before DOI. To the extent that a policyholder desires to challenge an increase to an individual classification

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DOI agree are approximately 13.8% higher than the market required at the time the filings were made.

code, section 38-73-1030 therefore provides such an opportunity outside of the context of challenging the proposed overall changes to loss costs.

In addition, the Court of Appeals held that, notwithstanding the fact that individual class codes will not be litigated, section 38-73-910(A) mandates the publication of notice anytime one of over 600 class codes is increased. The import of this decision fails to appreciate the absurd result that necessarily will follow from this interpretation. Each of NCCI's filings contains increases and decreases to individual classification codes, [App. p. 116, Tr. p. 51, ll. 19-21,]. Consequently, the effect of the Court of Appeals' holding is that every filing will necessitate the publication of notice which contradicts the clear statutory language requiring notice only in cases of increases. Based upon the conclusion of the Opinion, in order for the word "increase" in Section 38-73-910(A) to have any effect and allow any decrease to go into effect without the publication of notice, NCCI would be required to make 600 separate filings for each class code, allowing decreases to become effective while increases were noticed and potentially litigated. *See* App. pp. 217-19. This interpretation not only would burden administrative and judicial economy, but also would adversely affect the stability of the workers compensation market.[12]

The Court of Appeals expressed its understanding that "the overarching purpose of the statute is to give any 'insured or affected party' the opportunity to protest rate increases *before* they become effective." *Consumer Advocate*, 725 S.E.2d at 710 (emphasis in original). However, it ignored that DOI's approval of the Filing does not

[12] Loss costs for each classification codes are established by allocating total losses among approximately 600 classes of workers based upon the comparative risks of each class. Therefore, a challenge to a single class code would disrupt the proper allocation of risks to the remaining classification codes.

forestall or preclude the due process rights of the Consumer Advocate or policyholders from challenging individual rates in an administrative forum subject to judicial review once it is known who is aggrieved—and to what extent—by an actual and direct injury such as an increase in premium rates actually paid. *See* App. pp. 221-30. Therefore, to the extent the Consumer Advocate or another affected party is afforded the right of due process, such rights would be properly asserted by contesting these filings. *See Bi-Metallic Inv. Co. v. State Bd. of Equalization*, *supra* (finding no due process requirement for notice or opportunity to be heard for an increase in property values where an individual owner has an opportunity to protest and appeal in the usual system). The effect of the Opinion, therefore, not only would result in an unduly burdensome and ineffective rate making system, but would also "obviate the efficiency of having a rating organization file loss costs on behalf of insurers." [App. p. 8.] The Court should, therefore, grant the writ of certiorari to review the Opinion and the effect of the Court of Appeals' interpretation of section 38-73-910(A) on the workers compensation insurance system.

3. **This Court should grant a writ of certiorari to review the Court of Appeals' erroneous decision in which it failed to consider that the court did not have subject matter jurisdiction over this matter because the Consumer Advocate failed to articulate any specific, cognizable injury the Consumer Advocate instituted the proceedings below solely for the purpose of obtaining discovery to determine if he had a cause of action; and the matter is not ripe for consideration.**

In the proceedings below, the ALC recognized that "the Consumer Advocate in this case [did] not claim that the approved loss costs are excessive, inadequate, or unfairly discriminatory, and [did] not seek an order implementing loss costs different than those approved by the Department." [App. p. 7.] Although addressed by the Petitioner on

Appeal, the Court of Appeals failed to consider that the Consumer Advocate has not made even a *prima facie* assertion that the loss costs proposed by NCCI and approved by DOI are inappropriate, unreasonable, or otherwise affect a private right or the interests of policy holders of South Carolina. *Cf.* Rule 12(b)(6), SCRCP; S.C. Const. art I, § 22. Because the Consumer Advocate did not identify any injury, he lacked standing to advance these issues and, as a result, the Court of Appeals should have declined to rule on these matters in their entirety.

In order for the Consumer Advocate—or any party—to seek relief, he is required to identify a real, material, or substantial interest, and not a merely nominal or technical one, in order to advance the litigation. *See Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). Notwithstanding this requirement, the Consumer Advocate has never asserted—either before the ALC or the Court of Appeals—that he or the consumers which he represents are in any way aggrieved by DOI's decision approving NCCI's filing. *See* [App. pp. 221-25.] To the contrary, instead of articulating a specific injury, the Consumer Advocate admittedly instituted this proceeding for the sole purpose of seeking "expanded discovery. . . to permit an independent review of NCCI's filings." [App. p. 59, ¶¶ 4-5.]

As recognized by the ALC, the Consumer Advocate instituted the action below seeking the court's intervention only to allow him to engage in discovery to evaluate the proposed loss costs. [App. pp. 9-10.] However, the ALC correctly held that the Consumer Advocate had the statutory right to obtain information related to the filing outside of a contested case proceeding. Pursuant to S.C. Code Ann. § 37-6-605, the Consumer Advocate is statutorily afforded the authority to access the records of DOI,

including records compiled in connection with DOI's analysis of the Filing. The Consumer Advocate failed to avail himself of this right and, instead, asserted his only recourse to evaluate NCCI's Filing and determine whether he was aggrieved by DOI's approval of it was through the contested case process. As a result, the ALC correctly concluded that because the Consumer Advocate failed to take advantage of this constitutionally sufficient procedure, he cannot now assert that he must institute administrative proceedings to gain access to this information. [App. p. 10, *citing Zaman v. S.C. State Bd. of Medical Examiners*, 305 S.C. 281, 408 S.E. 2d 213 (1991); pp. 225-26.]

In short, the Consumer Advocate has never identified any substantial injury arising out of DOI's approval of the filing, but sought judicial review of DOI's decision based upon a hypothetical contention that South Carolina policy holders may be affected somehow, sometime, somewhere. However erroneous and prejudicial the ALC's decision may be to other person's rights and interests, the Court of Appeals should have recognized that the Consumer Advocate cannot appeal from a decision which does not affect his interest. *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589-590 (Ct. App. 2001). Consequently, he does not have standing to bring this proceeding and the Court, concomitantly, lacks subject matter jurisdiction over this matter. *See Bardoon Props., NV v. Eidolon Corp.*, 326 S.C. 166, 169, 485 S.E.2d 371, 373 (1997) ("We have previously indicated that a party's lack of standing as a real party in interest deprives a court of subject matter jurisdiction.") (*citing Richland County Recreation District v. City of Columbia,* 290 S.C. 93, 348 S.E.2d 363 (1986); *Anders v. S.C. Parole and Comm. Corrections Board,* 279 S.C. 206, 305 S.E.2d 229 (1983). By

failing to recognize that the Consumer Advocate does not have standing in this matter, the Court of Appeals therefore erred in considering the Consumer Advocate's appeal. Accordingly, the Court should reverse the decision of the Court of Appeals and determine that subject matter jurisdiction to decide this matter does not exist.

Similarly, the Court of Appeals erred by failing to conclude that the Consumer Advocate had not presented a matter ripe for its review. "A private person may not invoke judicial power to determine the validity of executive or legislative action unless he has sustained, or is in danger of sustaining prejudice therefrom." *Florence Morning News, Inc. v. Building Comm'n of City*, 265 S.C. 389, 398, 218 S.E.2d 881, 884-885 (1975). Because the Consumer Advocate has failed to suggest, much less demonstrate, that DOI's approval of the Filing will result in rates that are excessive, inadequate, or unfairly discriminatory, *see* S.C. Code Ann. § 38-73-430(4) (2002), no justiciable controversy exists in this matter. A "justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." *Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983). Although not addressed by the ALC, the inability to determine whether DOI's approval of the filing will affect unknown policyholders leads to the conclusion that the Court of Appeals should not have considered these matters inasmuch as they are not ripe. *See* App. pp. 222-24, 307-08; *see also Eagle Container Co., LLC v. County of Newberry*, 366 S.C. 611, 634, 622 S.E.2d 733, 745 (Ct. App. 2005) *rev'd on other grounds*, 379 S.C. 564, 666 S.E.2d 892 (2008) ("[B]efore addressing merits of any appeal, [the court] must be convinced that the claim in question is ripe for review, even if neither party has raised the

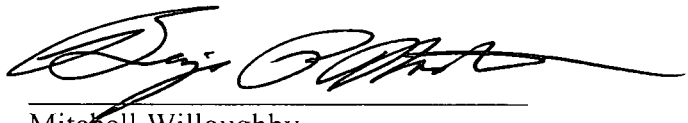
issue") (*quoting Bigelow v. Michigan Dep't of Natural Res.*, 970 F.2d 154, 157 (6th Cir. 1992)). By ruling on an issue that was not ripe for consideration, the Court of Appeals' analysis of section 38-73-910(A) was erroneous, and this Court should grant a writ of certiorari to review that decision.

Conclusion

In light of the foregoing, NCCI respectfully requests that this Court issue a writ of certiorari to review the Court of Appeals' Opinion. Because the Filing only addresses an overall decrease to the loss cost level, the plain language of S.C. Code Ann. § 38-73-910(A) does not require DOI to publish notice prior to the effectiveness of the loss costs proposed therein. Additionally, due process does not require the publication of notice as asserted by the Consumer Advocate. Finally, the Consumer Advocate has failed to articulate a sufficient injury to afford subject matter jurisdiction and the hypothetical nature of the claims demonstrate the Court of Appeals should have declined to consider these issues as unripe. Accordingly, NCCI respectfully asserts that a petition for writ of certiorari is warranted in this case.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,



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Columbia, South Carolina
July 17, 2012

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
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S.C. Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

Opinion No. 4944, 725 S.E.2d 708 (S.C. Ct. App. filed Feb.22, 2012)

Case Nos. 09-ALJ-09-0159-CC; 10-ALJ-09-0500-IJ

Consumer Advocate for the State of South Carolina, ... Respondent,

v.

South Carolina Department of Insurance and National Council on Compensation Insurance, Inc. of which National Council on Compensation Insurance, Inc. is the ..... Petitioner.

CERTIFICATE OF SERVICE

This is to certify that I have caused to be served this day one (1) copy of the Petitioner's **Petition for a Writ of Certiorari** via the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

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Hana Pokorná Williamson, Esquire
SC Department of Consumer Affairs
P.O. Box 5757
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Cindy C. Mills

Cindy C. Mills

Columbia, South Carolina
This 17th day of July, 2012.

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW

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July 17, 2012

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk of Court
The South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

RE: National Council on Compensation Insurance, Inc., Petitioner v. Consumer Advocate for the State of South Carolina, and South Carolina Department of Insurance; Opinion No. 4944, 725 S.E.2d 708 (S.C. Ct. App. Filed Feb. 22, 2012; Case Nos. 09-ALJ-09-0159-CC, 10-ALJ-09-0500-IJ

Dear Mr. Shearouse:

On behalf of the Petitioner National Council on Compensation Insurance, Inc., enclosed for filing in the above referenced matter please find an original and seven (7) copies of the **Petition for a Writ of Certiorari**. I am also enclosing for filing three (3) copies of an **Appendix,** one (1) copy being unbound. Please acknowledge receipt of these documents by file-stamping the extra copies and returning same via our courier. Also enclosed is our firm's check in the amount of One Hundred Dollars ($100.00) for the filing fee associated with this request.

By copy of this letter, I am serving counsel of record and enclose a Proof of Service to that effect. If you have any questions or need additional information, please contact me at your convenience. With best regards, I am

Sincerely,

WILLOUGHBY & HOEFER, P.A.

Benjamin P. Mustian

BPM/srw
Enclosures

Check # 20374
$100.00

cc: The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
(Via Hand-Delivery)

Elliott F. Elam, Jr., Esquire
Hana Pokorná Williamson, Esquire
Gwendolyn Fuller McGriff, Esquire
John B. O'Neal, III, Esquire
(all via first-class U.S. Mail)

The Supreme Court of South Carolina

Benjamin Parker Mustian
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07/17/2012

RECEIPT #64891

Case No:	2012-212375
Case Short Title:	Consumer Adv. v. SCDI
Event:	
Fee Type:	Case Initiation Fee
Amount:	$100.00
Payment Type:	Check
Reference No:	20374
Check/Money Order Date:	07/17/2012
Comments:	