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**STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT**

DOUGLAS L. MOORE, MARY CAMP,
GAYLORD CASE, and a class of similarly
situated individuals,

Plaintiffs,

v.

HEALTH CARE AUTHORITY, STATE
OF WASHINGTON,

Defendants.

NO. 06-2-21115-4 SEA

ORDER RE MEASURE OF
DAMAGES ON PLAINTIFFS'
STATUTORY CLAIM

This matter came before the Court on October 26, 2012, on cross-motions: Plaintiffs' Motion on Measure of Damages and Defendants' Motion for Partial Summary Judgment re Fact and Measure of Damages. The Court has considered the pleadings filed in this case, including, but not limited to the following:

PLAINTIFFS' SUBMISSIONS:

1. Motion on Measure of Damages;
2. Response to State's Motion for Individual Bill Submission;
3. Reply on Measure of Damages;
4. Errata, 10/12/12;
5. Corrected Response to State's Motion for Individual Bill Submissions, 10/12/12;
6. Declaration of David Wilson, October 5, 2012;

- 1 7. Declaration of David Stobaugh, October 5, 2012;
- 2 8. Declaration of David Wilson, September 14, 2012;
- 3 9. Declaration of Stephen Festor, November 23, 2011;
- 4 10. Declaration of Stephen Festor, November 10, 2011;
- 5 11. Declaration of David Wilson, September 15, 2011;
- 6 12. Declaration of Susan Long, September 15, 2011;
- 7 13. Declaration of Stefan Boedeker, August 24, 2011;
- 8 14. Declaration of Susan Long, August 23, 2011;
- 9 15. Declaration of Stefan Boedeker, August 17, 2011;
- 10 16. Declaration of Stephen Festor, June 17, 2011.

11 **DEFENDANT'S SUBMISSIONS:**

- 12 1. Motion for Partial Summary Judgment re Fact and Measure of Damages;
- 13 2. Response to Plaintiffs' Motion on Measure of Damages;
- 14 3. Reply in Support of Motion for Partial Summary Judgment;
- 15 4. Declaration of Stephen Ross, October 21, 2012;
- 16 5. Declaration of Tim Leyh, October 5, 2012;
- 17 6. Second Declaration of Stephen Ross, October 5, 2012;
- 18 7. Declaration of Stephen Ross re Measure of Damages, September 28, 2012;
- 19 8. Declaration of Pam Davidson, September 28, 2012;
- 20 9. Errata to Declaration of Pam Davidson.
- 21 10. Declaration of Jay Jenkins, September 28, 2012;
- 22 11. Errata to Declaration of Jay Jenkins;
- 23 12. Declaration of Robert Hyde, September 28, 2012;
- 24 13. Second Declaration of Roger Feldman, September 28, 2012;
- 25 14. Declaration of Kim Grindrod, September 28, 2012;
- 26

- 1 15. Errata to Declaration of Kim Grindrod;
2 16. Declaration of Robert Hyde, September 14, 2012.

3 BASED ON the foregoing, the Court hereby enters the following:
4

5 **ORDER AND DECISION**

6 1. The current class is overly inclusive and includes state employees who were not
7 eligible for employer healthcare benefits through the Public Employee Benefits Board of the
8 Health Care Authority (hereafter, benefits) under all relevant rules, regulations and policies
9 (hereafter, eligibility rules).

10 2. The parties have deferred the resolution of issues relating to the interpretation and/or
11 application of various eligibility rules.

12 3. There is an outstanding issue as to whether the class of persons who were eligible for
13 benefits but were not notified of that eligibility would have behaved like the group of persons
14 who did receive such notice relative to decisions such as whether to enroll for such benefits (or
15 to waive them), the specific plan chosen, or the specific coverage tier chosen.

16 4. Not all employees who are offered insurance decide to accept that benefit, but some
17 instead waive coverage for themselves as well as their dependents.

18 5. An employee's decision whether to waive coverage for themselves and their
19 dependents is likely affected by their ability to pay their portion of the premium for such
20 coverage. This is particularly true where an employee has been working for a short period of
21 time. It is quite likely that a number of those class members who were working for a short
22 period of time would have opted for less expensive insurance plans and less expensive tiers of
23 coverage.

24 6. A lack of health insurance impacts an individual's healthcare choices by causing them
25 to defer necessary healthcare and to not get routine care and checkups. This conclusion is
26 supported by the public and media discussion of the Affordable Care Act and studies that are

1 public knowledge.

2 7. A measure of damage for the failure to provide healthcare benefits that consists of the
3 cost of substitute coverage or out-of-pocket payments for medical services that would have
4 been covered under the employer's insurance plan understates the actual damages suffered. It
5 is wrong as a matter of common sense, public policy and general knowledge.

6 8. There are various factual issues in this case that remain to be determined. These
7 include: a) A determination of those persons falling within the current class definition who
8 were eligible for benefits under all relevant rules and regulations; b) A determination of which
9 plan, if any, those class members eligible for benefits would have selected; and c) A
10 determination of what coverage tier those class members eligible for benefits who would not
11 have waived the same would have selected.

12 9. There are numerous federal cases holding that it is appropriate in a class action seeking
13 money damages to assess the measure of damages on a classwide aggregate basis rather than
14 individually.

15 10. The defendants' proposed measure of damages for the failure to offer insurance to
16 eligible employees and to provide that for those who do not waive such insurance – the cost
17 incurred in procuring substitute insurance or the out-of-pocket cost to the employee of medical
18 services that would have been covered under the employer's plan – and that the damages under
19 this measure must be established through an individual claim process is wrong as a matter of
20 fact and law.

21 11. Healthcare benefits are part of an employee's wages. *Cockle v Dept. of Labor and*
22 *Industries*, 16 P.3d 583 (2001). Although *Cockle* addressed whether health benefits are wages
23 in the context of workers' compensation, the *Cockle* Court looked very broadly at what wages
24 are under Washington law. Therefore, a failure to pay benefits is a failure to pay wages.

25 12. The *Cockle* court held that the best measure of the value of the healthcare benefits
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1 portion of an employee's wages is the premium paid by the employer to secure the benefits.

2 13. The defendants owe restitution to the class because the State saved lots of money by
3 not paying the premiums it should have paid to provide healthcare benefits to the class. The
4 State received a windfall here by not paying the premiums for those in the class who were
5 wrongly omitted from the health benefits. The plaintiffs have not proven that the defendants
6 caused damage to all of the persons who fall within the current class definition because of the
7 factual issues remaining.

8 13. The Court incorporates and adopts as part of this decision its oral ruling on these issues
9 announced on October 26, 2012.

10 **BASED ON the foregoing, IT IS HEREBY ORDERED, ADJUDGED AND**
11 **DECREED:**

12 1. Both parties' motions are DENIED, consistent with this order.

13 2. The parties shall note for hearings pursuant to an agreed scheduling order the following
14 three issues: a) A determination of those persons falling within the current class definition
15 who were eligible for benefits under all relevant rules and regulations; b) A determination of
16 which plan, if any, those class members eligible for benefits would have selected; and c) A
17 determination of what coverage tier those class members eligible for benefits who would not
18 have waived would have selected.

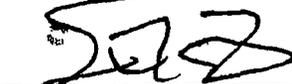
19 3. The hearing(s) regarding the determination of those persons who fall within the class
20 definition and were eligible for benefits under all relevant rules and regulations should be held
21 before the hearings on the other issues.

22 DATED this 5 day of November 2012.

23 
24 **HONORABLE CATHERINE SHAFFER**

1 Presented by:

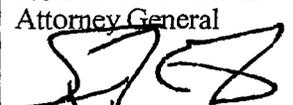
2 BENDICH, STOBAUGH & STRONG, P.C.

3 

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1 SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF KING

3 -----
4 DOUGLAS L. MOORE, MARY) VERBATIM REPORT OF
5 CAMP, GAYLORD CASE, and) THE PROCEEDINGS
6 a class of similarly)
7 situated individuals,)
8 Plaintiffs,) Cause No. 06-2-21115-4 SEA
9 vs.)
10 HEALTH CARE AUTHORITY) SUMMARY JUDGMENT
11 and STATE OF WASHINGTON)
12 Defendants.)
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10 TRANSCRIPT

11 of the proceedings had in the above-entitled cause
12 before the HONORABLE Catherine Shaffer, Superior
13 Court Judge, on the 26th day of October, 2012,
14 reported by Michelle Vitrano, Certified Court
15 Reporter, License No. 0002937.

16

17 APPEARANCES:

18 FOR THE PLAINTIFFS: STEPHEN STRONG & STEVE FESTOR
19 Attorneys at Law

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21 FOR THE DEFENDANTS: TIM LEYH, AARON WILLIAMS, and
22 TODD BOWERS
23 Attorneys at Law

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(Brief recess taken.)

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THE COURT: Thank you everyone for as

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usual a truly impressive level of briefing and

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argument on this case. Let me walk through the

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Court's thinking here. There are a number of

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factual issues remaining in this case that prevent

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the Court from ruling entirely in the plaintiffs'

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or the defendants' favor on the issues presented

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here. The first issue is the one well known to the

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parties, and that is that the class is still not

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defined, and that bears directly on the question

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that the plaintiffs have asked me to rule on.

1 We have enough problems with how the class is
2 defined that I just denied a motion by the
3 plaintiffs to reissue the notification to potential
4 class members of the class action. And I did that
5 because I can't really tell if the notice is
6 overbroad. It appears to be, but the ways in which
7 it's overbroad still seem to be under discussion
8 between the parties. As I understand where the
9 parties are right now, they have deferred some of
10 the hard decisions about who is in and out of the
11 class and have simply been overinclusive.

12 That's going to greatly affect the measure of
13 damages here for reasons that I'm going to get to.

14 A second question, which we haven't talked
15 about as much because we're only now reaching the
16 issue of damages, is deciding the behavior of
17 people who should have received health insurance as
18 a benefit and weren't given that option. I don't
19 agree with the plaintiffs that it's an appropriate
20 proxy to say that that group would have behaved
21 like the people who did receive insurance coverage.
22 And therein I think lies the best of the
23 defendants' argument about the need to prove
24 causation, that and the problem with the definition
25 of the class.

1 Let me walk you more clearly through my
2 thinking here. Let me first of all say something
3 rather strong about the appropriate measure of
4 damages here that I am now convinced of having read
5 your case law. I don't agree with the defendants
6 that there's a strong, consistent rule that when
7 healthcare benefits aren't paid that the
8 appropriate approach is an individualized one of
9 assessing whether somebody got their own
10 replacement health insurance and whether they had
11 actual healthcare costs.

12 The best I can say about the federal case law
13 that's been provided to me is there's a split in
14 authority. There's plenty of federal cases
15 indicating that it's perfectly appropriate in this
16 kind of class action to look at the plaintiffs in
17 aggregate, not individually. And there are a lot
18 of things wrong with the assumption that one should
19 look at the plaintiffs individually, which don't
20 exist and didn't exist in cases like *Sitton* and
21 *Walmart*, and for that matter some of the other
22 cases cited to me today.

23 First of all, the fact that people don't have
24 health insurance, as we all know now I think from
25 the endless public and media discussion of the

1 Affordable Healthcare Act, does not mean that they
2 didn't have impacts on their healthcare choices.
3 The studies that have come out indicate that people
4 who don't have health insurance put off necessary
5 healthcare. They don't get routine care and
6 check-ups, which results in the deferred problems
7 that the plaintiff has talked about in their
8 briefing. They don't go in for pressing medical
9 needs either, according to the studies that I think
10 are public knowledge at this point. People even
11 put off necessary care for urgent medical issues
12 like potentially fatal diseases, so to say that the
13 measure of loss for somebody who didn't get health
14 insurance coverage that they should have been
15 offered and were entitled to is nothing, unless
16 they bought replacement care or had actual medical
17 costs, is a great understatement, according to
18 everything we know about this field, of what actual
19 damage was.

20 But I will also say, because I don't think
21 this is a mystery either, that as the State handles
22 insurance, and as I think almost everybody does,
23 health insurance is a benefit that employees are
24 offered but that not every employee takes. That's
25 clearly true in the experience the parties have had

1 here, because there's lots of people who currently
2 waived their right to coverage. Also lots of times
3 people will be offered very generous benefits that
4 would cover dependents they have, and they don't
5 take those benefits because they have to pay a
6 higher amount out of their paycheck.

7 I would suggest to the plaintiffs that there's
8 a good case to be made that people who are working
9 for a short period of time may not be interested in
10 getting insurance and taking that deduction from
11 their small paycheck, and there's also a good case
12 to be made that people like that may not want the
13 highest and best level of coverage either. So I
14 think there are arguments to be made here on both
15 sides, but I think that the defendants' argument
16 that this should all get boiled down to
17 individualized claims based on whether purchased
18 substitute insurance or suffered medical damages is
19 just wrong as a matter of common sense, public
20 policy, and general knowledge.

21 And the fact that a case like Galindo
22 calculates otherwise as to an individual doesn't
23 really change my mind about that. Galindo was
24 looking specifically at somebody who had been
25 damaged in that particular case, not at how to look

1 at a class of people who hadn't received healthcare
2 benefits they were entitled to. So this problem of
3 aggregate impacts on failure to provide healthcare
4 benefits that should have been offered isn't
5 informed by the assessment of how a Court treats an
6 individual plaintiff in a labor case.

7 I also want to tell the parties that it is
8 very clear to me that in Washington, if not in
9 other places, that we view the right to healthcare
10 benefits as a form of wages. I agree that Cockle
11 is a workers compensation case, but I do not agree
12 that Cockle is limited to wages in the workers
13 compensation context. The Cockle Court looked very
14 broadly at what wages are under Washington law, and
15 the Court expressly rejected any method that
16 required a hypothetical calculation of market
17 value. The Court in Cockle indicated that premiums
18 actually paid by the employer to secure the benefit
19 are going to be the best measurement for wages
20 lost.

21 It's very difficult to think about the health
22 benefit that should have been offered to the class
23 in this case as anything but a wage benefit.

24 And to the extent that the State saved lots of
25 money by not paying any premiums on behalf of class

1 workers who should have been offered this benefit
2 over the period of time at issue, arguably it owes
3 some restitution.

4 Now, having said that I accept the broad idea
5 that the failure to pay wages, the failure to
6 provide healthcare benefits is a form of wages, and
7 that this is a failure to pay wages claim by the
8 class, and having said as well that I think the
9 restitution argument is well taken, I don't think
10 that ends our inquiry.

11 Because the employer's obligation to pay
12 premiums and what the employer would have paid in
13 premiums will depend a great deal on the factual
14 questions that still haven't been answered here.
15 Let me come back to this one more time with the
16 parties. Not everybody is going to opt for a
17 deduction from their paycheck for healthcare, and
18 we don't know how that would have impacted this
19 class. That's part of the damages causation
20 inquiry that I think we still have alive in this
21 case.

22 Not everybody that should have been offered
23 healthcare benefits would have opted for top level
24 care or top tier care. In fact, it's quite likely
25 that a good deal of them would have opted for cheap

1 healthcare and lower tier, but we don't know how
2 many, and that too goes to some degree damages
3 causation.

4 Not everybody that's putatively before me
5 today is really a member of this class. And that's
6 going to go to the overall calculation of damages
7 as well as to the subinquiries about how the actual
8 class would have behaved.

9 So we still have issues of fact in this case.
10 What I can tell you clearly, what's obvious to the
11 Court, is that the failure to provide healthcare
12 benefits was a denial of wages for actual class
13 members, and it's also clear to me that the
14 plaintiffs' restitution theory makes sense.

15 A third thing that I think is true but that
16 I'm not willing to rule on at this moment, it seems
17 self-evident but we will see, is that it's
18 extraordinarily unlikely that there's a lower
19 measure of what the plaintiff class should have
20 received than the premiums that the employer would
21 have had to pay had they offered these healthcare
22 benefits to the class.

23 I say that because I suspect there's no better
24 price out there for the healthcare benefits that
25 weren't offered than what the State as an employer

1 could receive in the market. It's pretty unheard
2 of for individuals to be able to get better premium
3 rates than the State, but I'll let the parties
4 fight about that.

5 So what the Court is saying again is not
6 exactly what the parties are arguing to me. I
7 agree with the plaintiffs that the failure to pay
8 benefits is a failure to pay wages, and I agree
9 with the plaintiffs that the State received a
10 windfall here as a whole, that it shouldn't have
11 received, by not paying for the folks that are in
12 the class, but I think there are huge factual
13 issues that the parties are going to have to tackle
14 and solve first about who's in the class.

15 Second, for those who were in the class, about
16 what the behavior would have been in terms of
17 actually opting for coverage and, thirdly, what
18 their behavior would have been with regard to what
19 level and quality of coverage.

20 The State would not have had to pay as much in
21 premiums I think as the plaintiffs are calculating,
22 not even close for the members of this class,
23 because my bet is that once we have some actuarial
24 evidence from the State that we're going to find
25 that the number of people who would have opted for

1 coverage or would have opted for it in as rich
2 amounts as the full-time employees who received
3 coverage is a good deal less.

4 I think this case has been in some ways a
5 moving target. Each time we look more closely at a
6 facet of this case, we discover complexity that we
7 didn't see coming, and this is not another example
8 of it. So I have done my best for you on the
9 measure of damages ruling. I do reject the
10 defendants' argument that this is an individualized
11 inquiry for the reasons I've stated, but I do agree
12 with them that there are issues of fact here on the
13 topics that I've outlined.

14 Give me an order that reflects my ruling, if
15 you would, everybody. Thank you.

16 (Whereupon, the proceedings were
17 concluded.)

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