

obligations that Regence breached by (1) planning, generating, accumulating and retaining excess profits and failing to use them for the benefit of its policyholders; (2) acting as a for-profit company with a primary profit motive, thereby generating excessive profits; and (3) improperly distributing those excess profits as bonuses to certain members of Regence's management.

Plaintiffs' second and third claims are for breach of contract. Plaintiffs allege in their second claim that (1) Regence's Articles of Incorporation are part of the contracts that Regence entered into with its policyholders; and (2) Regence breached those contracts by engaging in the conduct described above. Plaintiffs allege in their third claim that (1) Regence's Articles of Incorporation constitute a contract between Regence and the State of Oregon; (2) plaintiffs, as Regence policyholders, are third-party beneficiaries of that contract; and (3) Regence breached the contract by engaging in the conduct described above.

Defendants moved to dismiss on four separate grounds, contending that (1) plaintiffs lack standing under ORS 65.084 to challenge Regence's corporate actions; (2) the business judgment rule precludes plaintiffs from asserting claims challenging Regence's actions; (3) the filed rate doctrine bars plaintiffs' claims; and (4) Oregon law does not preclude Regence from accumulating a surplus of more than three times its monthly claim payments.

For the reasons stated in this opinion, the court concludes, without addressing the merits of plaintiffs' claims, that plaintiffs lack standing to bring the claims they assert in their complaint. Accordingly, Regence's motion to dismiss is GRANTED on that basis. As a result, the court does not address Regence's alternative grounds for dismissal.

DISCUSSION AND ANALYSIS

"Standing" is "a term of art that is used to describe when a party 'possesses a status or qualification necessary for the assertion, enforcement, or adjudication of legal rights or duties.'"

Morgan v. Sisters School Dist. No. 6, 353 Or 189, 194 (2013), (quoting *Kellas v. Dept. of Corrections*, 341 Or 471, 476-77 (2006)). Whether a plaintiff has standing “depends on the particular requirements of the statute under which he or she is seeking relief.” *Morgan*, 353 Or at 194, (citing *Local No. 290 v. Dept. of Environ. Quality*, 323 Or 559, 566 (1996)). Standing is “[e]ncompassed within the broad question of justiciability[.]” *Yancy v. Shatzer*, 337 Or 345, 349 (2004).

In this case, plaintiffs seek relief under the Uniform Declaratory Judgments Act, ORS 28.020. Under that statute, a plaintiff “must establish that his or her ‘rights, status, or other legal relations’ are ‘affected by’” the actions the plaintiff is challenging. *Morgan*, 353 Or at 194, (quoting ORS 28.020). In *Morgan*, the plaintiff alleged that the defendant school district lacked authority to issue credit obligations to finance the cost of improvements to district property without the approval of a majority of electors in the district. The Supreme Court held that plaintiff lacked standing as a voter and taxpayer to challenge the district’s authority to enter into the financing arrangement.

In reaching that conclusion, the court addressed the requirements for standing under the Uniform Declaratory Judgments Act. The court first explained that its prior decisions had “variously described the test for establishing that a plaintiff’s rights are affected” under ORS 28.020. *Morgan*, 353 Or at 194-95. The court then drew “three related but separate considerations” from its prior decisions. *Id.* at 195.

First, “there must be ‘some injury or other impact upon a legally recognized interest beyond an abstract interest in the correct application or the validity of a law.’” *Morgan* 353 Or at 195 (quoting *League of Oregon Cities v. State of Oregon*, 334 Or 645, 658 (2002)). The court explained that it “is not enough that a party thinks an enactment or a decision of a government

entity to be unlawful. The standing requirements of ORS 28.020 require that the challenged law must affect *that party's* rights, status, or legal relations.” *Morgan*, 353 Or at 195 (emphasis in original).

Second, “the injury must be real or probable, not hypothetical or speculative.” *Id.* To be justiciable, the court explained, ““a controversy must involve a dispute based on present facts rather than on contingent or hypothetical events.”” *Id.* at 196, (quoting *TVKO v. Howland*, 335 Or 527, 534 (2003)).

Third, “the court’s decision must have a practical effect on the rights that the plaintiff is seeking to vindicate.” *Morgan*, 353 Or at 197. That meant that “a connection must exist between the rights that a plaintiff seeks to vindicate and the relief requested. The relief that the plaintiff seeks, if granted, must redress the injury that is the subject of the declaratory judgment action.” *Id.* Otherwise, “the court’s decision will amount to no more than an advisory opinion.” *Id.*

In this case, plaintiffs contend that they have standing to assert their claims under the Uniform Declaratory Judgment Act, citing *Hinkley v. Eugene Water & Electric Board*, 189 Or App 181, 186 (2003). In that case, the Court of Appeals concluded that a ratepayer’s allegations were sufficient to satisfy the “threshold standard” for alleging an injury or impact on a legally recognized interest beyond an abstract interest in the correct application or the validity of the law. The ratepayer—Hinkley—had “alleged that he is a ratepayer and that defendant’s failure to follow the requirements of law in entering into the [janitorial services] contracts caused defendant to incur higher costs of operations contrary to its obligations to its ratepayers.” *Id.* (internal quotes omitted). The court explained that “the pleadings—and, particularly, the allegation that the utility’s incurring of higher costs would violate its obligation to its

ratepayers—bear the reasonable inference that the resultant higher costs will be passed through to ratepayers, including Hinkley.” *Id.* at 186-87. “Given the procedural posture of the case, and the standard of our review of the pleadings, that is sufficient.” *Id.* at 187 (internal citation omitted).²

Regence does not contend that plaintiffs lack standing under the Uniform Declaratory Judgments Act, as construed in *Morgan* and *Hinkley*. Instead, Regence contends that (1) ORS 65.084 applies to the plaintiffs’ claims in this case; and (2) that statute precludes plaintiffs from bringing the claims alleged in the complaint. ORS 65.084 provides that:

“(1) Except as provided in subsection (2) of this section, the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.

“(2) A corporation’s power to act may be challenged:

“(a) In a proceeding by a member or members, a director or the Attorney General against the corporation to enjoin the act;

“(b) In a proceeding by the corporation, directly, derivatively or through a receiver, a trustee or other legal representative, including the Attorney General in the case of a public benefit corporation, against an incumbent or former director, officer, employee or agent of the corporation; or

“(c) In a proceeding under ORS 65.664.”

Regence contends that ORS 65.084 determines who may bring the type of challenges asserted in this case, and plaintiffs do not fit any of the listed categories. In response, plaintiffs concede that this is not “a proceeding by the corporation” within subsection (2)(b) of the statute,

² In *DeMartino v. Marion County*, 220 Or App 44 (2008), the Court of Appeals held that the plaintiff lacked standing as a taxpayer to challenge Marion County’s use of lottery funds to guarantee payment of revenue bonds used to finance the Oregon Garden. Plaintiff’s complaint in that case “contains the bare allegation that the unlawful expenditure of public funds ‘will have actual or potential adverse fiscal consequences upon the plaintiff,’ but no more.” *Id.* at 52. The court explained that, although actual or potential adverse fiscal consequences are sufficient, “the nature of the adverse fiscal consequence must be apparent from the pleading.” *Id.* In other words, there “must be facts alleged from which the trial court can discern a link between the county’s and the Lottery Commission’s alleged unlawful conduct and the potential impact on plaintiff.” *Id.* at 53.

nor is this “a proceeding under ORS 65.664” covered by subsection (2)(c).³ Plaintiffs also concede that they bring their claims as policyholders, not as “a member or member, a director or the Attorney General” within subsection (2)(a) of the statute.

Instead, plaintiffs contend that (1) ORS 65.084 was not intended to preclude policyholders of a nonprofit corporation from bringing the claims plaintiffs allege in their complaint; and (2) the Uniform Declaratory Judgments Act, ORS 28.020, *et seq.*, not ORS 65.084, governs standing in this case.

Plaintiffs’ first argument requires the court to construe the statute. In construing legislation, courts are required to attempt to discern the intent of the legislature that enacted the legislation. ORS 174.020; *State v. McDowell*, 352 Or 27, 30 (2012) (“Our task is to discern what the legislature contemplated in enacting” the statute at issue); *MEC Racing, Inc. v. Oregon Racing Comm’n*, 233 Or App 9, 19 (2009) (“our task is to ascertain what the legislature that enacted the statutes intended”). This requires the court to examine the statutory text in context, and any legislative history supplied by the parties. *State v. Gaines*, 346 Or 160, 171-72 (2009). Context “includes other provisions of the same statute and other related statutes,” *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611 (1993), and “case law interpreting the statute at issue and related statutes, including earlier versions of those statutes.” *SAIF v. Walker*, 330 Or 102, 109 (2000). If the legislative intent remains unclear, “then the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty.” *PGE*, 317 Or at 612.

Here, the parties did not supply any legislative history. Both parties rely on the text and context of the statute. The text of subsection (1) of the statute unambiguously precludes *any*

³ ORS 65.664 describes the procedure for judicial dissolution of a nonprofit corporation.

challenge to the validity of corporate action on the ground that the corporation lacked the power to act, unless the challenge fits within one of the exceptions listed in subsection (2). Because plaintiffs do not contend that their challenge falls within one of the exceptions listed in subsection (2), the only question is whether plaintiffs' claims challenge "the validity of corporate action...on the ground that the corporation lacks or lacked power to act" within the meaning of subsection (1).

On that issue, plaintiffs acknowledged at the hearing on Regence's motion to dismiss that all of their claims are premised on the theory that Regence violated its Articles of Incorporation by accumulating excess profits and distributing them to its corporate executives. Under Oregon law, the Articles of Incorporation of a nonprofit corporation define the corporation's powers. *See* ORS 65.047 (describing Articles of Incorporation); ORS 65.077 (describing powers of a nonprofit corporation "unless its article of incorporation provide otherwise"); *Loveland & Co. v. Doernbecher Co.*, 149 Or 58, 70 (1934) ("It is settled law that the charter of a corporation is the measure of its powers and that a corporation can exercise only such powers as are conferred upon it, either in express terms or by necessary implication").

Thus, any claim that Regence violated its Articles of Incorporation necessarily challenges the validity of Regence's actions on the ground that it lacked the power to take those actions. Under ORS 65.084, only a member, director, or the Attorney General can bring such a claim. The statute thus precludes policyholders from bringing the claims in the complaint, but it would not preclude a member, director or the Attorney General from bringing the same claims. In other words, under ORS 65.084, only members, directors, and the Attorney General have standing to bring these claims.⁴

⁴The court determines standing in this context on the basis of ORS 65.084, ORS 28.020, and the allegations of the complaint, without deciding the merits of plaintiffs' claims, as required in deciding a motion to dismiss a declaratory

The only remaining question is whether the Uniform Declaratory Judgments Act confers standing even if plaintiffs do not have standing under ORS 65.084. Again, that is a question of determining the legislature’s intent. Under ORS 28.020, “any person...whose rights, status or other legal relations are affected” may have standing to seek declaratory relief. That statute applies in a wide variety of circumstances. *See Morgan*, 353 Or at 195-97 (describing cases brought under the Uniform Declaratory Judgments Act).

ORS 65.084 applies only when a plaintiff is challenging the validity of corporate action on the ground that the corporation lacked the power to act. To the extent ORS 28.020 and ORS 65.084 are in conflict, under Oregon law, the narrower, more specific statute prevails over the broader, more general statute. ORS 174.020; *Smith v. Multnomah County Board of Commissioners*, 318 Or 302, 309 (1994) (applying “the well-established rule of statutory construction that a specific statute takes precedence over an inconsistent general statute related to the same subject”).

Applying that principle here, ORS 65.084, not ORS 28.020, determines who may bring this type of action. Plaintiffs lack standing under ORS 65.084 to assert claims based on alleged violations of Regence’s Articles of Incorporation. Plaintiffs acknowledge that the declaratory judgment and breach of contract claims in their complaint are all based on alleged violations of Regence’s Articles of Incorporation. It follows that plaintiffs lack standing to bring those claims.

judgment claim. *See Chernaik v. Kitzhaber*, 263 Or App 463, 475 (2014) (trial court erred in granting defendants’ motion to dismiss a claim for declaratory relief based on its ruling on the merits of plaintiffs’ legal theory).

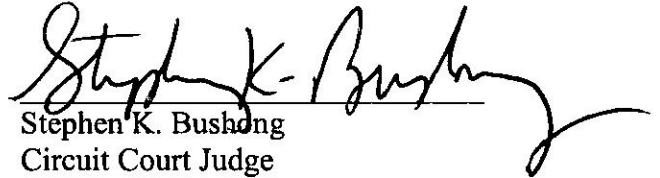
CONCLUSION

For the reasons stated in this opinion, Regence's motion to dismiss is GRANTED.⁵

Plaintiffs did not request leave to re-plead. Absent such a request, dismissal is with prejudice.

Regence's counsel may submit an appropriate form of judgment of dismissal consistent with this opinion.

Dated this 16 day of September, 2014.


Stephen K. Bushong
Circuit Court Judge

⁵ Dismissal here is consistent with the results reached in similar cases brought in other states. *See, e.g., Petty v. Hospital Service Ass'n of NE Penn*, 23 A3d 1004 (Pa 2011); *Blue Cross and Blue Shield of Missouri v. Nixon*, 81 SW3d 546 (Mo App 2002).