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71 MAP 2021

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 71 MAP 2021

In re: Senior Health Insurance Company of Pennsylvania (In Rehabilitation)
Appeal of: The Superintendent of Insurance of the State of Maine, The Commissioner of Insurance of the Commonwealth of Massachusetts and the Insurance Commissioner of the State of Washington

REHABILITATOR'S ANSWER AND BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEFS AS AMICI CURIAE STATE INSURANCE REGULATORS

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Filed November 29, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Jessica K. Altman, Insurance Commissioner of the Commonwealth of Pennsylvania, in her capacity as the Statutory Rehabilitator ("Rehabilitator") of Senior Health Insurance Company of Pennsylvania ("SHIP"), hereby submits this Brief in Opposition to the Motion for Leave to File Briefs as *Amicus Curiae* State Insurance Regulators ("*Amicus* Motion").

Having disdained the opportunity to appear before and assert their positions to the Commonwealth Court in the proceeding below, the insurance regulators of nineteen states (the "Non-Party Regulators") seek now to present those views to this Court as amici in opposition to the lower court's decision in the proceeding in which they chose not to participate.[1] The *Amicus* Motion seeks two forms of relief, both of which should be denied. *First*, the Non-Party Regulators ask this Court to accept an *amicus* brief prepared by the insurance departments of South Carolina and Louisiana in support of the Application for Stay Pending Appeal ("Stay Application") filed by the Intervening State Insurance Regulators ("Intervening Regulators") from Maine, Massachusetts, and Washington. The Court should refuse this request because the Stay Application has been rendered moot by the passage of

[1] The Non-Party Regulators are the chief insurance regulators of Arkansas, Connecticut, Idaho, Iowa, Louisiana, Maryland, Mississippi, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Utah, Wisconsin, and Wyoming.

the opt-out deadline, the only deadline impacting the Intervening Regulators on an issue for which they could have standing. Moreover, the *Amicus* Motion should be denied even on the merits because the Non-Party Regulators have offered no argument as to why they should be heard on an application for a stay pending appeal, and their proposed *amicus* brief does not alert the Court to any relevant matter not yet brought to its attention.

Second, an unidentified subset of regulators in the larger group of Non-Party Regulators seek permission to file an *amicus* brief on the merits in the future and at their discretion. This request should be refused as well; it is not clear which states would be filing a brief, what the interest of those states would be, or how those states might offer any meaningful analysis or information for the Court's consideration. Thus, at this time there is no evidence that such a brief will satisfy Rule 531, and the motion should be denied as to any future relief.

ARGUMENT IN OPPOSITION TO *AMICUS* MOTION

A. The proposed *amicus* brief on the Stay Application should be rejected because the Stay Application is moot, making any briefs or argument on that issue moot as well.

The Court can deny the *Amicus* Motion as moot without considering its merits or the interests of the proposed *amici* because the only deadline for which a stay might have been entered has passed. In their Stay Application, the Intervening Regulators assert that a stay is necessary because "most imminently, state insurance

regulators face the November 15, 2021 'opt-out' deadline." (Stay Application at 38.) The Non-Party Regulators raise a similar concern; the proposed *amicus* brief states that the Non-Party Regulators "support the Application seeking a stay of the Orders approving the Rehabilitator's Plan. As set forth by [Intervening Regulators], each state regulator is confronted with the Rehabilitator's impending deadline for state insurance regulators requiring each to make a decision whether on behalf of the policyholders in their states to 'opt-out' of the Plan." (Proposed *Amicus* Brief at 7.)

That deadline has come and gone as of midnight on November 15, 2021. Even if the Intervening Regulators were correct that the opt-out deadline "require[d] regulators to take steps that may be detrimental to policyholders in their states," a stay would not avoid any harm from that choice because the Intervening Regulators, the Non-Party Regulators, and others already took whatever action or inaction they deemed prudent under the circumstances.[2] Thus, the matter is moot and no stay is needed. *See Valley Forge Towers Apartments N, LP v. Upper Merion Area Sch. Dist.*, 640 Pa. 489, 504-05, 163 A.3d 962, 972 (Pa. 2017) ("For a matter to become moot, some change in the facts or applicable law must occur so that, although the plaintiff had standing at the outset . . . there is no longer a live controversy."); *Casino*

[2] The Intervening Regulators are unable to show that such "harm" would be irreparable even if it existed, because they believe that "[t]hese steps could potentially be undone by deeming the . . . regulator opt-outs nullities in the event the Court's approval is reversed." (Stay Application at 40.)

Free Phila. v. Pa. Gaming Control Bd., 594 Pa. 202, 204 n.2, 934 A.2d 1249, 1250 n.2 (2007) (denying request to stay gaming license decisions as moot because gaming board issued decisions while matter was pending). Whether the opt-out and opt-in decisions are effective can be decided together with the merits of the appeal.

The Stay Application does not survive the November 15 deadline simply because certain policyholders must make an election in the future. The opt-out deadline is the *only* deadline for which the Intervening Regulators might have had standing because it is the only deadline arising out of and related to their purported interests as regulators. The Intervening Regulators voluntarily waived and relinquished any right to seek a stay arising out of the policyholder election process—to the extent thatthe right existed at all—by explicitly and repeatedly stating that they speak only for themselves as regulators. (*See* Rehabilitator's Supplemental Appendix on Stay Application at 8 (Tr. 543:9-18) (Intervening Regulators do not appear in *parens patriae* capacity) and at 195 (Intervening Regulators are not acting "as some sort of agent" for policyholders).) The Intervening Regulators do not appear or speak for policyholders in their own states or elsewhere, depriving them of standing to rely on purported harms to policyholders

and putting policyholder election deadlines beyond the scope of any right to seek a stay.[3]

B. The Non-Party Regulators do not offer any legal or factual basis for granting them the extraordinary status of *amici* on an application for a stay pending appeal.

The Pennsylvania Rules of Appellate Procedure contemplate *amicus* briefs in two specific circumstances: on the merits by an interested non-party, and on petitions for allowance of appeal by an interested party in the proceedings below. *See* Pa. R.A.P. 531(b)(1)(i), (ii) ("*Amicus curiae Briefs Authorized*"). Any other *amicus* brief requires leave of court even if the proposing party may be interested in the merits. *Id.* at 531(b)(1)(iii). Even assuming *arguendo* that the Non-Party Regulators have a sufficient interest to be classified as *amici* on the merits, the Non-Party Regulators have not demonstrated that this Court should grant them leave to file an *amicus* brief as to the Stay Application.

The *Amicus* Motion makes no mention of Rule 531, the requirements for an *amicus* brief, or any standard for granting leave to file outside of the briefs on the

[3] Any claim of a "regulatory interest" in protecting policyholders or enforcing state law is similarly immaterial and reflects a mere difference of opinion amongst the various state insurance regulators. No regulator has offered any legal theory that could justify giving that regulator veto power over the informed decisions of the Rehabilitator, the Pennsylvania Insurance Department, the Commonwealth Court, or this Court. Similarly, no regulator has offered any analysis that would demonstrate that policyholders are harmed by the plan—in contrast to the Rehabilitator, who used multiple metrics, consumer analyses, and policyholder outreach to determine the best course of action.

merits or on allowance of appeal. The only statement approaching an argument in favor of granting leave is a single sentence: "Proposed Amici Curiae submit that they could be of assistance to this Honorable Court by offering information and analysis on the impact of this decision on the policyholders as well as the laws of their states that may be useful to the Court in addressing the novel issue before it." (*Amicus* Motion at 6-7.)[4] The Intervening Regulators have already raised the impact of the Approved Plan on policyholders, however, making it a central part of their Stay Application. (*See* Stay Application at 39-41 (argument alleging harm to policyholders if a stay is not entered).) The Intervening Regulators also raised arguments as to the alleged unconstitutionality and illegality of the Approved Plan. (*See id.* at 14-34 (arguing likelihood of success on the merits for challenges to approved plan).) The Intervening Regulators have presented every issue and argument the Non-Party Regulators could address, making their proposed brief unnecessary. *See* Pa. R.A.P. 531 Note (*amicus* briefs merely parroting the arguments of the parties are disfavored) (citing U.S. Supreme Ct. R. 37.1).

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[4] Despite this assertion, the proposed *amicus* brief does not include any information or analysis regarding the impact of rehabilitation generally or the Approved Plan specifically on policyholders of policies issued by the states in which the Non-Party Regulators sit. Those facts might be outside the scope of the record on appeal, of course, but the Non-Party Regulators do not even attempt to develop and offer such information in the hopes of presenting it to the Court as promised in the *Amicus* Motion. *See Banfield v. Cortes*, 631 Pa. 229, 257 n. 14, 110 A.3d 155 (2015) (court cannot consider evidence in an *amicus* brief that was not part of the official record).

To be fair, the Non-Party Regulators do identify one issue which falls outside of the Intervening Regulators' briefing—specifically, by reference to the McCarran-Ferguson Act and Gramm-Leach-Bliley Act, 15 U.S.C. § 1101 and § 6701 *et seq.* The Non-Party Regulators offer no specific argument arising out of or relating to those Acts, however, and they do not explain whether they believe the Approved Plan violates or is otherwise impacted by these federal laws. (*See* Proposed *Amicus* Brief at 9-10.) To the extent the Non-Party Regulators now seek to rely on either Act as a reason to stay implementation or reverse the plan's approval, they are barred from doing so. *See Banfield v. Cortes*, 631 Pa. 229, 257 n.14, 110 A.3d 155, 172 n.14 (2015) ("*amicus* briefs cannot raise issues not set forth by the parties").[5]

C. The Non-Party Regulators' *Amicus* Motion and proposed *amicus* brief create doubts regarding their status as interested parties, and this Court should not accept in advance their unfiled *amicus* brief.

This Court need not rule on the Non-Party Regulators' request for recognition as interested parties authorized to file *amicus* briefs on the merits. Pa. R.A.P. 531. Indeed, it is not yet clear which of the Non-Party Regulators intend to submit an *amicus* brief, if any. (*See Amicus* Motion at 4 (seeking leave to file "if one or more

[5] In any event, the Non-Party Regulators have no grounds for relief under the McCarran-Ferguson Act or the Gramm-Leach-Bliley Act, both of which merely limit the federal government's involvement in insurance regulation, and neither of which create a private right through which one or more insurance regulators can sue or challenge another state insurance regulator.

of them deem it to be helpful.").)[6] But even assuming all of the Non-Party Regulators decided to file or join in an *amicus* brief on the merits, the *Amicus* Motion highlights serious defects in the argument that they are interested parties or that a future *amicus* brief on the merits would be helpful to the Court.

1. The Non-Party Regulators have not demonstrated that they are interested parties within the meaning of Rule 531 or that any future *amicus* brief on the merits will be helpful to the Court.

The Non-Party Regulators imply without explaining that implementing the Approved Plan will violate the laws adopted in their states, and that this purported violation establishes their interest in the appeal. (*E.g.*, *Amicus* Motion at 4-5.) Argument on this issue would fall beyond the scope of *amicus* briefs, however, because this Court will not consider legal arguments raised by *amici* but not raised by the parties. *Banfield*, 631 Pa. at 257 n. 14, 110 A.3d at 172 n.14; *see also Alliance Home of Carlisle v. Bd. of Assessment Appeals*, 591 Pa. 436, 919 A.2d 206 (2007) (refusing to consider constitutional challenge to statute raised by *amicus* brief because the appellants did not raise or preserve the issue on appeal). The Non-Party Regulators cannot assert that the Approved Plan is in violation of any law not cited

[6] Similarly, the Non-Party Regulators purport to speak for policyholders "in their respective states" but fail to provide any authority for the ability to do so, let alone clarify for whom seek to speak. Is it only as to policies *issued* in their states (for which in the absence of a rehabilitation they might review premium rate applications), or for those issued elsewhere but now residing in their states (the authority to speak for which is even more dubious)?

by the Intervening Regulators nor can they claim any constitutional defect not alleged by the Intervening Regulators. As a result, an *amicus* brief filed by some or all of the Non-Party Regulators is likely to be a "'burden to the Court'" because it will be unable to bring any "'relevant matter not already brought to [the Court's] attention'" that this Court may consider on appeal. *See* Pa. R.A.P. 531 note (quoting U.S. Supreme Ct. R. 37.1).

The Non-Party Regulators appear to claim, without evidence, that the Approved Plan is bad for policyholders and that liquidation is inevitable. (*Amicus* Motion at 6.) As with their arguments that the Approved Plan is unlawful, the Non-Party Regulators seem to be unable to offer facts that may be of "'considerable help'" to this Court in reaching a decision on the appeal. *See* Pa. R.A.P. 531 note (quoting U.S. Supreme Ct. R. 37.1). Any analysis of the alleged impact on policyholders of policies issued in the states governed by the Non-Party Regulators would impermissibly raise new evidence not in the record as a reason for reversing the Commonwealth Court's order. *See Banfield*, 631 Pa. at 257 n. 14, 110 A.3d at 172 n.14.[7] The Non-Party Regulators should not be permitted to supplement or correct any perceived deficiencies in the record through their *amicus* brief.

[7] Moreover, as the Rehabilitator has demonstrated at every stage, the Approved Plan is better for policyholders because, *inter alia*, it offers an element of choice not available in liquidation and it offers policyholders the opportunity to keep their existing coverage even if it exceeds the guaranty association limits.

2. The Non-Party Regulators cannot seek to defeat the plan as *amici* while still maintaining the fiction that Pennsylvania courts cannot bind the regulators or out-of-state policyholders who do not actively participate in the rehabilitation proceedings.

The *Amicus* Motion appears to be part of a deliberate strategy by the Non-Party Regulators to present merits arguments to this Court while refusing to acknowledge that Pennsylvania courts can bind policyholders and other interested parties who do not avail themselves of the opportunity to be heard on the plan when invited to do so. This Court should reject this improper use of *amicus* briefs and require the Non-Party Regulators to establish clearly their alleged interest when filing any proposed future submissions.

The Non-Party Regulators had an opportunity to participate in the proceedings in the Commonwealth Court, as did the holders of policies issued in those states. Notice was provided to regulators, policyholders, and other interested parties pursuant to the Commonwealth Court's scheduling order, and the Commonwealth Court allowed formal comments, informal comments, and intervention by state regulators and others asserting an interest in addressing the merits of the plan. (Intervening Regulators' Appendix supporting their Stay Application at 454 (Order Approving Plan at 6).) Of the Non-Party Regulators, only Maryland and Wisconsin submitted formal comments. None elected to intervene or ask the Commonwealth Court to hear their arguments against the proposed plan.

The named authors of the *Amicus* Motion and proposed brief went further; the insurance regulators of Louisiana and South Carolina filed collateral attacks challenging the Commonwealth Court's jurisdiction and authority to approve a plan they did not like. (*See* South Carolina Department of Insurance, SHIP Policyholder Information page, *available at* https://doi.sc.gov/994/SHIP-Policyholder-Information (last visited Nov. 29, 2021) (describing lawsuits).) The insurance regulators of those states (and others among the Non-Party Regulators) also refused to make an election by the opt-out deadline, claiming they had no obligation to acknowledge the authority of Pennsylvania courts or respond to the opt-out process. (*See, e.g.*, Letter from South Carolina Department of Insurance and Director Raymond Farmer dated November 15, 2021, attached hereto as Exhibit A (declaring that "this Department is not subject to or bound by the order of the Pennsylvania Commonwealth Court").)

Now, having refused to participate and timely raise their arguments in the Commonwealth Court, the Non-Party Regulators want *this* Court to entertain their arguments opposing the Approved Plan—but only as *amici*, not as parties, so that those states may continue to claim that the plan is not effective in any state that did not choose to intervene in the proceedings.[8] This Court cannot condone such tactics,

[8] This assumption is plainly incorrect; the orders of this Court and the Commonwealth Court are entitled to Full Faith and Credit throughout the United States. *See, e.g.*, *Wilkes ex rel. Mason v. Phoenix Home Life Mut. Ins. Co.*, 587 Pa.

and it must deny the *Amicus* Motion as submitted given the Non-Party Regulators' inability to demonstrate an actual and proper interest in the proceedings or an ability to offer information of use to the Court.

CONCLUSION

For the reasons set forth herein, the Rehabilitator respectfully asks that the *Amicus* Motion be denied.

Dated: November 29, 2021

Respectfully submitted,

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590, 607, 902 A.2d 366, 376 (2006) ("The Full Faith and Credit Clause thus precludes a party from attacking collaterally a judgment of one state by attempting to re-litigate the underlying dispute resolved by that judgment in another state. Thus, full faith and credit typically requires that a state give a judgment the same res judicata effect the judgment would have been afforded in the state in which it was rendered."); *Underwriters Nat'l Assur. Co. v. N. Carolina Life & Acc. & Health Ins. Guar. Ass'n*, 455 U.S. 691 (1982) (full faith and credit given to decisions of rehabilitation court).

CERTIFICATE OF CONFIDENTIALITY COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: November 29, 2021

/s/ Michael J. Broadbent
Michael J. Broadbent

Counsel for Jessica K. Altman, Insurance Commissioner of the Commonwealth of Pennsylvania, as Statutory Rehabilitator of Senior Health Insurance Company Of Pennsylvania

EXHIBIT A

South Carolina Department of Insurance

HENRY McMASTER
Governor

RAYMOND G. FARMER
Director

November 15, 2021

EMAIL TRANSMISSION TO:
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Mr. Patrick H. Cantilo, Special Deputy Rehabilitator
c/o Administrator of SIDP Opt-Out Elections
550 Congressional Blvd., Suite 200
Carmel, IN 46032

Re: Senior Health Insurance Company of Pennsylvania (in Rehabilitation)

Dear Commissioner Altman and Mr. Cantilo:

This letter responds to your September 30, 2021 correspondence regarding an "Opt-Out Election Notice" (Notice) for Senior Health Insurance Company of Pennsylvania (SHIP).

I have expressed to you my numerous concerns about the Rehabilitation Plan and opposition to its attempt to avoid state law and to force elderly policyholders to shoulder the burden of the insolvency of this long-term care insurer. As you are also aware, this matter is the subject of ongoing litigation in the Court of Common Pleas for Richland County, South Carolina. I am disappointed that you have decided to go forward with this Plan while that litigation and an appeal in the Pennsylvania rehabilitation proceedings is pending before that state's highest court.

The Department objects to the Plan for the reasons set forth in our court filings and the filings by other state insurance regulators, including those who have intervened in the Pennsylvania proceedings. As an insurer holding a Certificate of Authority in South Carolina, SHIP remains subject to the laws of this State, including the laws governing the filing and review of rates and forms. Accordingly, please take notice that: (1) the Department will not respond to the Notice, (2) the Department does not agree that the Rehabilitator has any authority to unilaterally impose changes to rates or policies, (3) this Department is not subject to or bound by the order of the Pennsylvania Commonwealth Court, and (4) I cannot and will not abrogate or assign the powers and duties with which I have been charged by the General Assembly

of South Carolina, and will continue to administer and enforce the Insurance Law of this State for the protection of policyholders. *See* S.C. Code Ann. §§ 38-1-10 *et seq.*

By taking this position, we are not opting into the Plan and are not opting out of a Plan we have opposed from inception. The Department reserves all its rights in connection with this matter.

Sincerely yours,

Raymond G. Farmer
Director of Insurance

Cc: Superintendent Eric Cioppa
Commissioner Gary D. Anderson
Commissioner Mike Kreidler
The Honorable James J. Donelon

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IN THE SUPREME COURT OF PENNSYLVANIA

In Re: Senior Health Insurance Company of Pennsylvania (In Rehabilitation) Appeal of: The Superintendent of Insurance of the State of Maine, The Commissioner of Insurance of the Commonwealth of Massachusetts and the Insurance Commissioner of the State of Washington	:	71 MAP 2021

PROOF OF SERVICE

I hereby certify that this 29th day of November, 2021, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

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IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

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IN THE SUPREME COURT OF PENNSYLVANIA

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/s/ Michael John Broadbent

(Signature of Person Serving)

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