Received 10/15/2021 5:36:23 PM Commonwealth Court of Pennsylvania

Filed 10/15/2021 5:36:00 PM Commonwealth Court of Pennsylvania
1 SHP 2020

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In re: Senior Health Insurance Company of Pennsylvania (In Rehabilitation)	No. 1 SHP 2020

THE HEALTH INSURERS' RESPONSE TO THE INTERVENING REGULATORS' APPLICATION FOR STAY PENDING APPEAL

The Intervenors Anthem, Inc., Health Care Service Corporation, Horizon Healthcare Services, Inc. d/b/a Horizon Blue Cross Blue Shield of New Jersey, and UnitedHealthcare Insurance Company (collectively, the "Health Insurers"), through their undersigned counsel, hereby submit this Response to the application filed by the Intervenors Superintendent of Insurance of the State of Maine, Commissioner of Insurance of the Commonwealth of Massachusetts, and Insurance Commissioner of the State of Washington (collectively, the "Intervening Regulators") for a stay pending appeal of the August 24, 2021 Order (the "Confirmation Order") granting the application of the Insurance Commissioner of the Commonwealth of Pennsylvania as Rehabilitator (the "Rehabilitator") of Senior Health Insurance Company of Pennsylvania ("SHIP") for approval of the Second Amended Plan of Rehabilitation (the "Plan"), the May 21, 2021 ruling granting the Rehabilitator's motion in the nature of a directed verdict regarding issue state rate approval and the

August 25, 2021 Order denying reconsideration (the "Application").[1] For the reasons set forth below, the Application should be denied because the Intervening Regulators have failed to meet the requirements for a stay pending appeal.

ARGUMENT

I. The Standards for the Issuance of a Stay Pending Appeal

The criteria for issuing a stay or supersedeas pending appeal are derived from the Pennsylvania Supreme Court's decision in *Penn. Public Util. Comm'n v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983). *See also* Pa.R.A.P. 1732, Official Note (citing *Process Gas* for the criteria for the issuance of a stay). Under that case, a stay or supersedeas is warranted if:

> (1) The petitioner makes a strong showing that he is likely to prevail on the merits. (2) The petitioner has shown that without the requested relief, he will suffer irreparable injury. (3) The issuance of a stay will not substantially harm other interested parties in the proceedings. (4) The issuance of a stay will not adversely affect the public interest.

Process Gas, 467 A.2d at 808–09. "[I]t is essential that the unsuccessful party, who seeks a stay of a final order pending appellate review, make a strong showing under the[se] criteria in order to justify the issuance of a stay." *Id.* at 809.

In establishing the criteria for the grant of a stay or supersedeas pending appeal, the Pennsylvania Supreme Court expressly adopted the standards set forth in *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921 (D.C.

[1] Capitalized terms used but not defined herein have the meanings ascribed to them in the Plan.

Cir. 1958), as refined in *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). The Court in *Virginia Petroleum* elaborated on the stay criteria as follows:

> (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of the appeal? **Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administrative and judicial review**.
>
> (2) Has the petitioner shown that without such relief, it will be irreparably injured? **The key word in this consideration is irreparable**. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. **The possibility that adequate compensatory or other corrective action will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm**. But injury held insufficient to justify a stay in one case may be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits.
>
> (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? **On this side of the coin, we must determine whether**, despite showings of probable success and irreparable injury on the part of the petitioner, **the issuance of a stay would have a serious adverse effect on other interested persons**. Relief saving one claimant from irreparable injury, at the expense of similar harm caused another, might not qualify as the equitable judgment that a stay represents.
>
> (4) Where lies the public interest? **In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial**. The interest of private litigants must give way to the realization of public purposes. The public interest may, of course, have many faces—favoring at once both the rapid expansion of utilities and the prevention of wasteful and repetitive proceedings at the taxpayer's or consumer's expense; both fostering competition and preserving the economic viability of existing

> public services; both expediting administrative or judicial action and preserving orderly procedure. We must determine, these many facets considered, how the court's action serves the public interest.

Virginia Petroleum, 259 F.2d at 925 (emphasis added). *Washington Metro. Area Transit Comm'n* clarified that the necessary level of "possibility of success" to warrant a stay or supersedeas "will vary according to the court's assessment of the other factors." 559 F.2d at 843. "In essence, *Process Gas* requires that a court balance the equities without necessarily giving any one element more weight than another." G. Ronald Darlington et al., 20A West's Pa. Prac., Appellate Practice § 1732:6. *See also Reading Anthracite Co. v. Rich*, 577 A.2d 881, 884 (Pa. 1990) ("As a rule, we assume that a party will establish the existence of each criterion and that a court will assess the movant's chances for success on appeal and weigh the equities as they affect the parties and the public and, thereby, exercise its discretion to grant or deny a stay so that injustice will not follow from the court's decision.").

The Intervening Regulators have not made a strong showing on any of these elements, and the issuance of a stay in this case will cause significant harm to the interests of the Rehabilitator, SHIP's estate and other interested parties. As a result, the Application should be denied. Each element is considered below as well as the need for a bond as security in the event a stay were to be issued (a requirement the Intervening Regulators failed to address at all in the Application).

II. The Intervening Regulators Have Failed to Demonstrate a Strong Showing that They Are Likely to Prevail on the Merits of the Appeal

The Plan involves nothing more than the application of doctrines already well established under Pennsylvania Supreme Court authority. Its building blocks are these:

- The Pennsylvania Insurance Commissioner as rehabilitator has broad discretion to structure a plan of rehabilitation for an insurer. *Vickodil v. Commw. of Pa. Ins. Dep't*, 559 A.2d 1010, 1013 (Pa. Commw. Ct. 1989). The Rehabilitator is granted the authority under Article V to "take such action as [she] deems necessary or expedient to correct the condition or conditions which constituted the grounds for the order of the court to rehabilitate [SHIP]." 40 P.S. § 221.16(b). The Court reviews those decisions for an abuse of discretion only. *Grode v. Mutual Fire, Marine and Inland Ins. Co.,* 572 A.2d 798, 803 (Pa. Commw. 1990) ("*Mutual Fire I*"); *Foster v. Mutual Fire, Marine and Inland Ins. Co.,* 614 A.2d 1086, 1091 (Pa. 1992) ("*Mutual Fire II*"); *see also Koken v. Fidelity Mutual Life Ins. Co.*, 803 A.2d 807, 826 (Pa. Commw. Ct. 2002) ("The decision to rehabilitate the business of an insurer is within the sound discretion of a rehabilitator and should not be rejected by the reviewing court unless the rehabilitator has abused that discretion.") (citing *Mutual Fire II*, 614 A.2d at 1092).

- A rehabilitation plan can modify the rights and obligations of policyholders under policy contracts. *Mutual Fire II,* 614 A.2d at 1094; *Consendine v. Penn Treaty Network Am. Ins. Co.*, 63 A.3d 368, 452 (Pa. Commw. 2012) ("*Penn Treaty*").
- A rehabilitation plan does not have to restore the company to its exact original condition as long as it "properly conserves and equitably administers the assets of the involved corporation in the interests of investors, the public and others, with the main purpose being the public good…." *Mutual Fire* II, 614 A.2d at 1094 (internal quotations, citations omitted).
- The *Carpenter* test (set forth in *Neblett v. Carpenter,* 305 U.S. 297 (1938) ("*Carpenter*")) does not require that every single policyholder get at least what he or she would get in a liquidation, if the plan meets a compelling public purpose. *Mutual Fire II,* 614 A.2d at 1094; *Penn Treaty,* 63 A.3d at 453.

The Intervening Regulators state that they have "substantial arguments that the Court's approval of the Plan should be reversed because the Plan is based on errors of law." Application at 10. Yet, as discussed below, the Application cites virtually no factual basis or legal authority in support of the propositions it advances. What the Intervening Regulators would really like to do is substitute their judgement for the judgment of the Rehabilitator. But the fact that they would choose a different

path (liquidation) does not mean the Rehabilitator has abused her discretion in pursuing the Plan.

A. Feasibility.

The Intervening Regulators challenge the Plan on the basis that is not "feasible." Application at 10-14. They cite testimony from the Special Deputy Rehabilitator to the effect that the Plan will not restore SHIP to solvency. Fairly characterized, the testimony of the Special Deputy Rehabilitator was that Phase One of the Plan was unlikely to return SHIP to solvency, but that Phase Two of the Plan could do so, depending on the results of Phase One.

> Q. So do you see Phase Two as the phase at which a funding gap that remains at the end of Phase One is addressed and resolved?
>
> A. Yes.
>
> Q. So at the end of Phase Two, is it your view there will be no funding gap?
>
> A. That would be ideal, but as I think I also said yesterday, we can't guarantee that that will be the result.
>
> Q. Yes. Yesterday you testified that it was unlikely, I think highly unlikely that the plan could eliminate the funding gap.
> Did you mean Phase One and Phase Two?
>
> A. I meant Phase One and Phase Two. Certainly Phase One but, as I said yesterday in candor, given the magnitude of the funding, it is possible that for Phase Two to eliminate the remaining gap depending on what happens in Phase One would put such a burden on policyholders, that a different alternative might be preferable.

Tr. at 306. The Plan contemplates the restoration of SHIP to solvency through at least two phases, the second of which could restore SHIP to solvency, though such restoration is uncertain. The Intervening Regulators do not cite a single case for the proposition that a plan of rehabilitation must be "feasible" or that a plan cannot proceed in phases. Nor do they cite any authority for the proposition that rehabilitation plans must be certain to succeed in order to be undertaken.

To the contrary, in the Confirmation Order, the Court observed that neither Article V nor the case law sets "feasibility" as in independent requirement of a plan, but only requires a plan to properly conserve and administer the assets of the insurer in the interest of investors, the public and others. Confirmation Order at 66. Under this standard, proper stewardship in the service of the stakeholders is required. A definite return to solvency is not. Again, the Intervening Regulators cite no contrary authority. In addition, there is precedent for rehabilitation plans in Pennsylvania to proceed in phases. *See Mutual Fire II* at 635-36 (amending the plan of rehabilitation after implementation to achieve its rehabilitative purpose).

The Plan does not impair Guaranty Association coverage, and all policyholders have the option to retain their existing policies with only a requirement to pay an actuarially justified premium, as required by the terms of the policy itself. *See, e.g.*, Tr. at 102-03, 188, 331-32. Benefit modifications are entirely voluntary, and the evidence establishes many reasons why policyholders may want to modify

their benefits when presented with the opportunity. *See, e.g.*, Tr. at 85-86 (estimating that SHIP's "indemnity" policies provide $400 million in benefits in excess of what is needed for the costs of care, and that policyholders may not want to pay for such excess benefits); Tr. at 86-87 (noting that there are likely many policyholders who no longer need a lengthy or unlimited benefit period, either because of their attained age or current health circumstances.)

The evidence shows that a return to solvency is contemplated by the Special Deputy Rehabilitator at the end of the Phase Two of the Plan. The Intervening Regulators cite no authority that feasibility must be shown under Pennsylvania law, that a plan implemented in phases is *per se* not feasible, or that a plan must be certain to restore solvency. Thus, it is unlikely that the Intervening Regulators have substantial prospects for reversal of the Confirmation Order on this basis.

B. Best Interest of Policyholders

The Intervening Regulators' appear to contend that the only means by which the burden of an insolvency can be distributed is by triggering the Guaranty Associations in a liquidation and invoking the assessment mechanisms. "The legislatures in Pennsylvania and other states have chosen to protect policyholders of insolvent insurers by establishing guaranty associations to provide coverage (subject to certain limits), and they have chosen how to spread the burden of those protections through the assessment mechanism." Application at 19. The Intervening Regulators

claim that "[t]he Court improperly overrode these legislative judgments." *Id.* at 20. First, and fatally to this argument, the Intervening Regulators fail to recognize that those same legislatures chose *not* to mandatorily trigger the Guaranty Associations upon "insolvency." *See, e.g.*, 40 P.S. § 991.1706(b) (providing for mandatory trigger only if the insurer is placed under an order of liquidation with a finding of insolvency); National Association of Insurance Commissioners Life and Health Insurance Guaranty Association Model Act at § 8(b) (same). Second, if this were the only means by which insurance company insolvencies could be addressed under Pennsylvania law, then Article V and case law in Pennsylvania should bar the modification of policies in a rehabilitation proceeding. But, of course, the contrary is true. Pennsylvania precedent clearly contemplates that policies can be modified. *Mutual Fire II,* 614 A.2d at 1094; *Penn Treaty*, 63 A.3d at 452.

Moreover, the Intervening Regulators mischaracterize the operation of the Plan in making their arguments. They imply that the Plan involuntarily modifies the contractual rights of the policyholders, which it does not. The Plan imposes rate increases on policyholders under the If Knew Premium methodology in Phase One and the Self-Sustaining Premium methodology in Phase Two. Plan at 23. The policies by their terms allow for rate increases.[2] Tr. at 331-32. The undisputed

[2] The question of whether the policyholders – or the Intervening Regulators – have a contractual or other right to have rates determined by the regulator in the state that issued the policy is dealt with in Section D below.

testimony is that the actuarial methods applied to both phases are legitimate and recognized methods of setting premium rates. Tr. at 107-08; 399-400. The Plan provides policyholders options other than accepting the rate increase, but these are entirely voluntary.

The Intervening Regulators are also wrong in asserting that the Rehabilitator and the Court cannot consider the interests of other stakeholders. Indeed, *Mutual Fire II* establishes that a main purpose of a plan of rehabilitation is the public good. *Mutual Fire II*, 614 A.2d at 1094. *See also id.* at 1094 n.4 (determining that the state's interest in "regulat[ing] the fiscal affairs of its insurers for the welfare of the public" is a legitimate and significant public purpose). Under the three-part test established in *Mutual Fire II*, the Court should confirm a plan of rehabilitation so long as the Rehabilitator has acted for a legitimate and significant public purpose and the adjustment of contractual rights is reasonable and of a nature appropriate to that public purpose. *Penn Treaty*, 63 A.3d at 453 (discussing the three-part test established in *Mutual Fire II*). As part of that analysis, "the Court **must** consider the greater good, including the consequences to the larger class of policyholders **and the taxpaying public**." *Id.* (citing *Vickodil*, 559 A.2d at 1013) (emphasis added); *see also* Confirmation Order at 62-63 (discussing same). The Court expressly determined that the Plan—even assuming, *arguendo*, that it substantially impairs policies—serves a legitimate and significant public purpose, and the policy

modifications are reasonable and appropriate to that purpose. Confirmation Order at 63.

The Plan achieves its objectives by requiring all policyholders to pay an actuarially justified premium consistent with the terms of their policies, or choose another option that reduces both benefits and premiums. In all cases their Guaranty Association protections remain intact. On these facts, found by the Court (and not challenged by the Intervening Regulators), it seems highly unlikely that the Intervening Regulators would prevail on these issues on appeal.

C. The *Carpenter* test

The Intervening Regulators argue that *Carpenter* "established a floor of liquidation value that each policyholder should be able to obtain if desired." Application at 21. The Pennsylvania Supreme Court disagrees with this interpretation of *Carpenter*. *Mutual Fire II,* 614 A.2d at 1094; *Penn Treaty,* 63 A.3d at 453. As the Court stated in the Confirmation Order:

> if a particular policyholder is found to be worse off under a rehabilitation plan than in liquidation, and the impairment is 'substantial,' the Court should confirm the plan so long as the Rehabilitator has acted for a legitimate and significant public purpose and the contractual modification is reasonable and appropriate to that public purpose.

Confirmation Order at 63. The Court went on to find that 85% of policyholders would receive an option under the Plan with a value equal or greater than what they would receive in a current liquidation based on the Intervening Regulators' own

metrics. But more importantly, the Court found that the Plan serves a "legitimate and significant public purpose" by requiring policyholders to pay a fair premium for their policies on an ongoing basis (as required by their policies) instead of shifting the burden of historical rate suppression to the Guaranty Associations and the taxpayers. *Id.* at 63-64.

In reaching this conclusion, the Court's decision fell squarely within the four corners of *Mutual Fire II.* It is highly unlikely that the Pennsylvania Supreme Court would reverse the Confirmation Order given the Supreme Court's specific pronouncements on the interpretation of the *Carpenter* test.

D. State authority over the regulation of rates

As observed by the Court, Pennsylvania authority clearly interprets the rehabilitation statute to allow a rehabilitator to impair polices by reducing benefits under them pursuant to a rehabilitation plan. *Mutual Fire I,* 572 A.2d at 804, *affirmed Mutual Fire II,* 614 A. 2d at 1086; Confirmation Order at 50. The Court reasoned that increasing premiums would be authorized by the same statutes and is conceptually no different from a reduction in benefits. Confirmation Order at 51. This contention goes unanswered in the Intervening Regulators' Application. They argue that Article V does not give authority to the Rehabilitator to either modify policies or rates. Application at 25. But this is clearly not the law in Pennsylvania.

The Intervening Regulators also reject the Court's explanation of why the Full Faith and Credit clause of the U.S. Constitution does not require ceding control over rate-making to numerous state regulators, who have refused to set adequate rates in the past. But they do nothing to distinguish the cases cited by the Court or refute the contention that the statutory rate provisions in the three objecting states are substantially similar to those in Pennsylvania, and implicate the same public policies. The wide acceptance of the Plan's rate-making methodologies by insurance regulators across the country, including Maine, Massachusetts and Washington, was established during the hearing on the Plan through undisputed expert testimony. Tr. at 107-08; 399-400; 442-43; 456-57. *See also* Confirmation Order at 61 (finding that "the interests of Maine, Massachusetts, and Washington in ensuring that long-term care insurance premium rates are not excessive, unfairly discriminatory, or unreasonable to the benefits provided will be advanced, rather than impaired, by the Plan."). The Intervening Regulators could not refute that testimony then, nor can they now.[3]

Finally, the Intervening Regulators reject the "opt-out" provisions of the Plan as a measure designed to allow them to exercise rate-making authority within the

[3] The Health Insurers' Pre-hearing Memorandum discussed at length the reasons why the Plan's provisions governing the approval of premium rates are authorized by Article V and are not violative of the U.S. Constitution. Health Insurers' Pre-hearing Memorandum at 4-22. The Health Insurers incorporate that analysis by reference, and note that the Intervening Regulators' Application does not raise any arguments that were not already addressed in the Health Insurers' Pre-hearing Memorandum or by the Court in the Confirmation Order.

framework of the Plan. They contend that the Plan does not give them enough time to perform a review and creates disincentives for them to do so. Application at 28. But as the Special Deputy Rehabilitator testified, providing the states with an unlimited review period would bring the progress of the Plan to a halt. Tr. at 162-63. The disincentives are slight. Policyholders will still have option to keep their policy at the rate prescribed by the opt-out regulator, though with reduced benefits if the premium is below the If Knew Premium. They can also keep the full benefit of their policy at the If Knew Premium rate or they can elect policy modifications similar to those available to policyholders in opt-in states. Plan at 108-14 (Phase One); 114-16 (Phase Two). These provisions of the Plan strike a reasonable balance between the overall goals of the Plan, which require speed and uniformity, with the desire of the Intervening Regulators to exercise authority over rate review.

It is highly unlikely that the Pennsylvania Supreme Court will find that the Plan deprives policyholders of a meaningful contract right, that the Full Faith and Credit clause invests the Intervening Regulators with the right to set rates in the context of this rehabilitation case or that the Plan has not made reasonable accommodation for the Intervening Regulators to exercise their rate-making authority if they choose to do so.

III. The Intervening Regulators Will Not Suffer Irreparable Injury Without a Stay

Perhaps the most glaring element missing from the Application is any showing by the Intervening Regulators that the implementation of the Plan harms them in their capacity as regulators in any way. The sole allegation of harm is that if the Plan is implemented, the Rehabilitator might someday make an argument that an appeal would be equitably moot. They speculate that:

> The practical realities suggest that at some point the Rehabilitator may contend that the Plan has been "substantially consummated" so that the appeal should be dismissed under the doctrine of equitable mootness.

Application at 31. This potential, speculative "harm" falls well short of the harm a party must demonstrate to justify the drastic remedy of a stay. On the other hand, as discussed below, a stay would work concrete, quantifiable harm to the interests of the Rehabilitator, as established by evidence in the record.

The doctrine of equitable mootness has not been developed in the Pennsylvania case law. It is largely a creature of Federal Bankruptcy law. Under those cases, the possibility of equitable mootness is not, without more, justification for a stay. *See, e.g.*, *BDC Cap., Inc. v. Thoburn Ltd. P'ship*, 508 B.R. 633, 640 (E.D. Va. 2014) ("the fact that an appeal may become moot without a stay does not alone constitute irreparable harm"); *In re DJK Residential, LLC*, No. 08-10375, 2008 WL 650389, at *3 (S.D.N.Y. Mar. 7, 2008) ("a 'majority of courts have held that a risk of mootness, standing alone, does not constitute irreparable harm'"); *N.L.R.B. v. 710*

Long Ridge Rd. Operating Co. II, LLC, No. CIV.A. 14-832 CCC, 2014 WL 906128, at *1 (D.N.J. Mar. 6, 2014) ("Even if the Court were to accept the NLRB's proposition that the denial of a stay would render its appeal equitably moot, a risk of equitable mootness by itself is insufficient to justify a stay pending appeal."); *In re Baker*, CV05–3487, 2005 WL 2105802, at *9 (E.D.N.Y. Aug. 31, 2005) ("As other courts have noted, the possibility that an appeal will be rendered moot by a denial of stay does not, in and of itself, constitute irreparable harm."); *In re Windstream Holdings, Inc.*, No. 20 CV 4276, 2020 WL 4481933, at *3 (S.D.N.Y. Aug. 3, 2020) ("But equitable mootness is a risk present in any post-confirmation appeal of a Chapter 11 plan; merely invoking that risk in a demand for expedition is not enough to show irreparable harm.").

Even the few cases concluding that the possibility of equitable mootness could constitute irreparable injury have only done so where the appellant has made a strong showing that it is likely to prevail on the merits. *See, e.g.*, *In re Los Angeles Dodgers LLC,* 465 B.R. 18, 30-1 (D.C. Del. 2011) ("Appellant has shown a strong likelihood of success on the merits of its appeal."); *In re Cujas,* 376 B.R. 480, 491 (Bankr. E.D. Penn. 2007) ("In this sense, GJR does not have a reasonable likelihood of success. It is only a question of whether the likely outcome happens sooner or later.").

As set forth in Section II, the Intervening Regulators do not have substantial claims of error or a strong possibility of success on appeal, given the prior decisions

of the Pennsylvania Supreme Court. Their prospects for success are even further limited by the relief that they seek, which is sweeping in its scope. They want the consummation of the Plan "undone by deeming the policyholder elections and regulator opt-outs nullities in the event the Court's approval is reversed." Application at 30. Even they recognize that this would "be administratively difficult and confusing to policyholders and regulators to undo those steps." Application at 30. The prospects for obtaining this relief are remote even if their appeal succeeded. First, this relief is premised on a complete reversal of all elements of the Plan. The Intervening Regulators do not, by their own express admission, represent policyholders, and the Court has ruled that they "lack standing to assert the claim that the Plan treats 'policyholders in different States differently.' They expressly disavowed that they were appearing in a *parens patriae* or other representative capacity for policyholders in their states." Confirmation Order at 68 (citing Tr. at 541-47). This means that they only have standing to raise issues that involve their rights as regulators rather than the rights of the policyholders. Therefore, the relief that they could obtain on appeal could only relate to the opt-out provisions of the Plan, not the policy modifications.

Second, even if the Intervening Regulators were entitled to represent the interest of policyholders (contrary to their own concession), they would surely only represent the interests of policyholders of policies issued in their states, which

comprise only 1,405 of the 33,261 policyholders of SHIP – approximately 4%. Exhibit RP-30 (figures as of Jan. 21, 2021, excluding policyholders who have taken NFOs and are thus not eligible to make elections under the Plan). Thus, even in the unlikely event that the Pennsylvania Supreme Court were inclined to recognize the standing of the Intervening Regulators to represent the interests of some policyholders, it is a very small subset of SHIP's total policyholder population. Reversing the effects of the Plan for *all* policyholders and *all* regulators would vastly exceed any possible harm to the Intervening Regulators resulting from the Plan's rate-making provisions for the 1,405 policies issued in their states. *See* Tr. at 155-59 (discussing the ordinary course process in which the regulator in the state where a policy was issued will set the rate and why the application of that procedure in receivership is infeasible).

In sum, the mere possibility of equitable mootness raised by the Intervening Regulators has widely been rejected by courts as a basis for establishing irreparable injury. Even the courts that have accepted it have only done so when the moving party has made a strong showing of likelihood of success on the merits. As set forth in Section II, the Confirmation Order is supported by undisputed facts in the evidentiary record and well-established Pennsylvania Supreme Court authority. The relief sought by the Intervening Regulators is well beyond the scope of any injury that they may sustain either as regulators (which is the only capacity in which they

appear) or even as representatives of holders of policies issued in their states (if the Court were to permit them to assert such interests).

IV. SHIP and Other Interested Parties Will be Substantially Harmed By a Stay

Unlike the speculative harm asserted by the Intervening Regulators that might someday result from implementing the Plan, the issuance of the stay sought by the Intervening Regulators will result in immediate harm to the Rehabilitator's interests, and the interests of the SHIP estate and other interested parties. Currently, appeals from rulings of the Commonwealth Court have taken nearly a year to resolve. (See Exhibit A, which sets forth information about the timing of recent appeals from filing to decision.[4]) The passage of a year without implementation of the Plan will significantly diminish SHIP's assets, further delay the implementation of necessary rate increases and jeopardize the prospects for accomplishing the rehabilitative purpose set out in the Plan. The Intervening Regulators admit the harm to the estate and the fact that it will "reduce amounts that can be paid to policyholders." Application at 32.

The Intervening Regulators did not dispute the testimony and exhibits of the Rehabilitator establishing that SHIP continues to hemorrhage money year after year. The disparity between claims paid and premiums plus investment income continues

[4] This material is compiled from public records. Accordingly, this Court may take judicial notice of it. Pa. R. Evid. 201.

to average approximately $200 million per year.[5] This is quantifiable and significant harm to the SHIP receivership estate, and ultimately to policyholders if the Plan is upheld.

The fundamental problem caused by delay was stated succinctly by the Special Deputy Rehabilitator as follows:

> Unfortunately, management and the regulators all recognized that simply seeking rate increases wasn't going to help SHIP because there is such a short premium runway left that is, as I said earlier, the average age of our policyholders is 86, they don't have that many premium paying years ahead of them, unfortunately, so other measures would have to be implemented to improve the company's financial condition.

Tr. at 67-68 (emphasis added). Each year of delay in implementing the Plan decreases the runway. Not only does SHIP lose the benefit of a year of increased, actuarially justified premium (as to those who elect to keep their policies at the If Knew Premium), but SHIP also loses the benefit of decreased policy obligations from elected policy modifications. The benefits of increased premium and reduced policy obligations cannot be regained other than by imposing further burdens on the policyholders. The Special Deputy Rehabilitator made a similar observation in connection with the potential delay caused by submitting to the ordinary rate making process advocated by the Intervening Regulators:

[5] Exhibit RP-12 at 1 (calculated as follows: FY 2019 benefits paid of $369,626,000 less premiums received of $80,672,000 less net investment income of $66,717,000 equals $222,237,000; FY 2020 Benefits paid of $333,201,000 less premiums received of $66,982,000 less net investment income of $69,368,000 equals $196,851,000).

> But we concluded pretty early on that that approach [46 state regulatory approval] overlooked all of the history where the company had the checkerboard experience from rate increase across the country and it would take far too long for the plan to become effective in time to do much good. So we thought ancillary approval of the modifications just wasn't going to be an effective strategy for SHIP.

Tr. at 82-83 (emphasis added); *see also* Plan at 34 ("Moreover, the delay and expense of 'traditional' state-by-state rate or benefit approval would make the Plan unfeasible."). Even under the most conservative scenario (81% of policyholders elect to keep the policy at If Knew Premium), the Plan will close the Funding Gap by $525 million. Tr. at 113. Losing a year on a short premium runway is bound to cut into this amount. This harm is concrete and supported by the evidentiary record in this case. It clearly outweighs the Intervening Regulators' conjectured harm from the possible application of equitable mootness.

Conspicuously absent from the Application is any offer to provide security as a condition to the granting of a stay. Pa.R.A.P. 1733(a) provides that an appeal from an order that is not solely for the payment of money "shall, unless otherwise prescribed in or ordered pursuant to this chapter, operate as a supersedeas **only** upon the filing with the clerk of the court below of appropriate security as prescribed in this rule." (Emphasis added.) In any such appeal, the Court "may, upon its own motion or application of any party in interest, impose such terms and conditions as it deems just and will maintain the res or status quo pending final judgment or will facilitate the performance of the order if sustained." Pa.R.A.P. 1733(a). "The trial

court, in the first instance, and thereafter the appellate court, are afforded broad discretion to fix security in such amount as the trial court or the appellate court deems appropriate under the circumstances." G. Ronald Darlington et al., 20A West's Pa. Prac., Appellate Practice § 1733:3. In this case, if the Court is willing to entertain a stay pending appeal, it should be conditioned on a bond in an appropriate amount, and the Court should conduct a hearing to determine the amount.[6]

A recent Third Circuit decision in a bankruptcy appeal is instructive. *See In re Tribune Media Co.*, 799 F.3d 272 (3d Cir. 2015). In approving the trial court's reasoning in setting the bond amount, the Third Circuit explained that such a bond was required "to indemnify the party prevailing in the original action against loss caused by an unsuccessful attempt to reverse the holding of the bankruptcy court." *Id.* at 281-82.

It then described the lower court's process and reasoning when setting the bond amount at issue:

> The Bankruptcy Court held a hearing on the motion at which it considered whether to issue a stay and, if so, whether to condition it on a bond. Aurelius opposed posting a bond in any amount. The Court stayed its confirmation order, but it also considered **how much an unsuccessful appeal by Aurelius would cost Tribune [the debtor]**. As a result of this valuation, the Court conditioned its stay on Aurelius's posting a $1.5 billion bond to indemnify Tribune against the estimated costs associated with staying the order for the likely time to appeal.

[6] There are a variety of methodologies that could be used to calculate the bond. While it would be premature to explore them at this stage, it is very likely that the harm to the estate as a result of the stay will be approaching or greater than $100 million.

> …
> In this case, the Bankruptcy Court carefully calculated **the likely damage to the estate of a stay pending an appeal from its confirmation order**. In particular, it analyzed the following costs to Tribune and its creditors that a stay would cause: **additional professional fees, opportunity costs to creditors who would receive delayed distributions from the DCL Plan or delayed interest and principal payments from reorganized Tribune, and a loss in market value to equity investors caused by the delayed emergence**. We need not go through the opinion in detail, as Aurelius does not squarely argue that the bond requirement was an abuse of discretion, but **we note that the valuation was well-considered and as convincing as the alchemy of valuation in bankruptcy can be**.

In re Tribune Media Co., 799 F.3d 272, 276, 281-82 (3d Cir. 2015) (emphasis added) (discussing *In re Tribune Co.*, 477 B.R. 465, 482 (Bankr. D. Del. 2012)).

The Court should deny the Application on the basis that the harm to the estate and other parties substantially outweighs any potential harm to the Intervening Regulators, particularly in light of their low likelihood of success on the merits. If the Court is willing to entertain such a stay, a bond should be required to protect the estate and the parties from the loss inherent in delay. If such a bond will be required, a hearing on the amount of that bond should be held in order to permit the type of expert testimony and determinations as were made in the *Tribune* case on a fully developed record.

V. The Issuance of a Stay Would Adversely Affect the Public Interest

The Intervening Regulators and the Rehabilitator both claim to be custodians of the public interest as state appointed officials. The Intervening Regulators argue

that a stay of Plan implementation would promote the public interest because they are seeking to invoke the Guaranty Associations and vindicate their role and the role of other regulators in setting premium rates. However, the Intervening Regulators seem to forget that they only represent themselves. They certainly do not represent all other regulators, and the Court has found that they do not even represent the interests of the policyholders in their states.

By contrast, the Rehabilitator is charged with promoting the state's "significant interest…[in] regulat[ing] the fiscal affairs of its insurers for the welfare of the public." *Mutual Fire II*, 614 A.2d at 1094, n.4. (emphasis added). The Rehabilitator has undertaken this obligation by proposing the Plan which has two goals:

> First, we reduce or eliminate the funding [gap] or the deficit.
> Second, eliminate the inequitable and discriminatory rate structure that's currently in place and eliminate the subsidies across policyholders…prospectively.

Tr. at 105.

The Court summarized the public policy arguments supporting the Rehabilitator's position as follows:

> A liquidation will place the burden of an actuarially justified premium upon the policyholders of member insurers of the applicable guaranty associations and, ultimately, upon the taxpayers in those states. No one has provided the Court with an explanation as to why, as a matter of policy, the premium burden of SHIP's policyholders should be borne by others.

Confirmation Order at 81. The stay sought by the Intervening Regulators would undermine the Plan and the advancement of the policies it embodies. For that reason, the Application should be denied.

CONCLUSION

The Application does not satisfy the four factors required for the entry of a stay pending appeal under Pennsylvania law. The Intervening Regulators are not likely to succeed on the merits of their appeal. It is undisputed that a stay would injure the interests of the Rehabilitator, SHIP's estate and other parties. The possibility of equitable mootness is not recognized in the vast majority of the case law as an injury to the appellant, and even in the minority of cases (none of which is a Pennsylvania receivership case), it is only an injury if there is a strong showing of likelihood of success on the merits. Finally, the Plan serves the public interest by reducing the Funding Gap and more equitably distributing the burden of premiums. For these reasons, the Application should be denied.

Respectfully submitted,

Dated: October 15, 2021 MORGAN, LEWIS & BOCKIUS LLP

By: */s/ Harold S. Horwich*

Harold S. Horwich (*admitted pro hac vice*)
Benjamin J. Cordiano (*admitted pro hac vice*)
MORGAN, LEWIS & BOCKIUS LLP
One State Street
Hartford, Connecticut 06103
Telephone: 860.240.2700

John P. Lavelle, Jr.
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
Telephone: 215.963.5000

Attorneys for Anthem, Inc.; Health Care Service Corporation; Horizon Healthcare Services, Inc. d/b/a Horizon Blue Cross Blue Shield of New Jersey; and UnitedHealthcare Insurance Company

EXHIBIT A

Docket No.	Days from Allocatur to Argument	Days from Argument to Decision	Days from Allocatur to Decision
59 MAP 2020	168 days	212 days	380 days
58 MAP 2020	168 days	212 days	380 days
36 EAP 2020	133 days	173 days	306 days
3 MAP 2021	118 days	127 days	245 days
74 MAP 2020	140 days	127 days	267 days
71 MAP 2020	126 days	161 days	287 days
4 EAP 2021	127 days	127 days	254 days
20 WAP 2020	N/A	N/A	371 days
22 WAP 2020	182 days	162 days	344 days
9 WAP 2020	205 days	279 days	484 days
Average	**152 days**	**176 days**	**332 days**

Received 10/15/2021 5:36:23 PM Commonwealth Court of Pennsylvania

Filed 10/15/2021 5:36:00 PM Commonwealth Court of Pennsylvania
1 SHP 2020

PROOF OF SERVICE

I, John P. Lavelle, Jr., hereby certify that on October 15, 2021, the foregoing document was served via the PACFile system as well as via e-mail upon the following counsel:

Counsel for Statutory Liquidator of Senior Health Insurance Company of Pennsylvania

Michael Broadbent, Esq.
Cozen O'Connor
1650 Market Street, Suite 2800
Philadelphia, PA 19103
Telephone: (215) 665-4732
Email: mbroadbent@cozen.com

Dexter Hamilton
Cozen O'Connor
1650 Market Street, Suite 2800
Philadelphia, PA 19103
Telephone: (215) 665-2166
Email: dhamilton@cozen.com

Haryle Kaldis
Cozen O'Connor
1650 Market Street, Suite 2800
Philadelphia, PA 19103
Telephone: (215) 665-2000
Email: hkaldis@cozen.com

Amy Daubert
Pennsylvania Department of Insurance
1341 Strawberry Square
Harrisburg, PA 17120
Telephone: (717) 787-2567
Email: adaubert@state.pa.us

Jodi Frantz
Pennsylvania Department of Insurance
1341 Strawberry Square
Harrisburg, PA 17120
Telephone: (717) 787-2567
Email: jodfrantz@state.pa.us

Kathryn McDermott Speaks
Pennsylvania Department of Insurance
1341 Strawberry Square
Harrisburg, PA 17120
Telephone: (717) 787-2567
Email: kspeaks@pa.gov

Preston M. Buckman
Pennsylvania Insurance Department
901 N. 7th Street, Suite 200
Harrisburg, PA 17102
Telephone: (717) 886-2080
Email: pbuckman@pa.gov

Leslie Greenspan
Tucker Law Group, LLC
Ten Penn Center
1801 Market Street, Suite 2500
Philadelphia, PA 1910
Telephone: (215) 875-0609
Email: lgreenspan@tlgattorneys.com

Non-Parties

Counsel for the Senior Health Care Oversight Trust

Thomas Jenkins, Attorny-at-Law
6498 N. Lazulite Place
Tucson, AZ 85750
Telephone: (312) 480-8153
Email: tjenkins5714@gmail.com

Matthew D. Coble, Counsel
Mette Evans & Woodside
3401 North Front Street
Harrisburg, PA 17110
Telephone: (717) 232-5000
Facsimile: (717) 236-1816
Email: mdcoble@mette.com

Intervenors

Counsel for Intervenor National Organization of Life and Health Insurance Guaranty Associations (NOLGHA)

Caryn M. Glawe
Faegre Drinker Biddle & Reath LLP
300 North Meridian Street, Suite 2500
Telephone: (317) 237-0300
Facsimile: (317) 237-1000
Email: caryn.glawe@faegredrinker.com

D. Alicia Hickok
Faegre Drinker Biddle & Reath LLP
One Logan Square, Suite 2000
Telephone: (215) 988-3364
Facsimile: (215) 988-2857
Email: alicia.hickok@faegredrinker.com

Jane Dall Wilson
Faegre Drinker Biddle & Reath LLP
300 North Meridian Street, Suite 2500
Telephone: (317) 237-0300
Facsimile: (317) 237-1000
Email: jane.wilson@faegredrinker.com

Counsel for Intervenor Primerica Life Insurance Company

Kevin Eldridge, Assistant General Counsel
Primerica Life Insurance Company
Office of the General Counsel
1 Primerica Parkway
Duluth, GA 30099-0001
Telephone: (470) 564-6898
Facsimile: (470) 564-7028
Email: Kevin.Eldridge@primerica.com

J. David Leslie
Rackerman, Sawyer & Brewster P.C.
160 Federal Street
Boston, MA 02110-1700
Telephone: (617) 951-1131
Email: dleslie@rackermann.com

Eric A. Smith
Rackerman, Sawyer & Brewster P.C.
160 Federal Street
Boston, MA 02110-1700
Telephone: (617) 951-1127
Email: esmith@rackermann.com

Counsel for Intervenor Primerica Life Insurance Company

Jim Gkonos, Counsel
Saul Ewing Arnstein & Lehr LLP
Centre Square West
1500 Market Street, 38th Floor
Philadelphia, PA 19102-2186
Telephone: (215) 972-8667
Facsimile: (215) 972-1833
Email: jim.gkonos@saul.com

Counsel for Intervenors Maine Superintendent of Insurance, Massachusetts Commissioner of Insurance and Washington Insurance Commissioner

Stephen G. Harvey
Steve Harvey Law LLC
1880 John F. Kennedy Blvd., Suite 1715
Philadelphia, PA 19103
Telephone: (215) 438-6600
Email: steve@steveharveylaw.com

Counsel for Intervenors ACSIA Long Term Care, Inc.; Global Commission Funding LLC, LifeCare Health Insurance Plans, Inc., Senior Commission Funding LLC, Senior Health Care Insurance Services, Ltd., LLP, and United Group Agency, Inc.

Joseph M. Donley, Member
Clark Hill PLC
Two Commerce Square
2001 Market Street, Suite 2620
Philadelphia, PA 19103
Telephone: (215) 640-8525
Email: jdonley@clarkhill.com

Scott B. Galla, Senior Attorney
Clark Hill PLC
Two Commerce Square
2001 Market Street, Suite 2620
Philadelphia, PA 19103
Telephone: (215) 640-8512
Email: sgalla@clarkhill.com

Pro Se Intervenor James F. Lapinski

James F. Lapinksi, Plaintiff and Commenter
P.O. Box 29135
Port Orange, FL 32129

Pro Se Intervenor Georgianna I. Parisi
Georgianna I. Parisi
257 Regency Ridge Dr.
Dayton, OH 45459

Dated: October 15, 2021

/s/ John P. Lavelle, Jr.
John P. Lavelle, Jr.