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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

REBUTTAL PRE-HEARING MEMORANDUM OF THE HEALTH INSURERS REGARDING THE PROPOSED PLAN OF REHABILITATION FOR SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA

Pursuant to the Order entered February 25, 2021, 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 Rebuttal Pre-hearing Memorandum regarding the proposed Amended Plan of Rehabilitation (the "Plan") of Senior Health Insurance Company of Pennsylvania, in Rehabilitation ("SHIP").[1] The Health Insurers filed a Pre-hearing Memorandum regarding the Plan on April 5, 2021, a Formal Comment on the rehabilitation plan (as originally filed) on September 15, 2020, and an Amendment to their Formal Comment on November 30, 2020, each in accordance with the Court's prior Orders.

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

INTRODUCTION

The Health Insurers file this memorandum to address arguments made in the Pre-hearing Memorandum filed by the intervenor state insurance regulators from Maine, Massachusetts and Washington (the "Intervening Regulators") in opposition to the Plan.[2] The Intervening Regulators, the Rehabilitator and the Health Insurers agree that the interests of policyholders are paramount. But the Intervening Regulators maintain that an immediate liquidation of SHIP that triggers Guaranty Associations serves their interests best. The Rehabilitator and the Health Insurers maintain that the Plan is better because it provides policyholders with options, and depending on the options selected, will substantially close the Funding Gap. Moreover, even if the Plan does not close the Funding Gap, policyholders are no worse off. They have choices that would provide them benefits in a post-Phase One liquidation that are the same as the benefits they would receive in a liquidation now.

At this time, the Health Insurers do not intend to offer witness testimony or introduce exhibits at the hearing on the Plan, but intend to cross-examine witnesses and otherwise participate in the hearing.

[2] The intervenor agents filed a Pre-hearing Memorandum in which they made substantially the same arguments as in their prior Formal Comment. These arguments were addressed at length in the Health Insurers' Pre-hearing Memorandum. *See* Health Insurers' Pre-Hearing Memorandum at 34-44. For the reasons set forth therein, the Plan properly suspends the payment of commissions owed to agents until policyholders have been paid their benefits in full or funds set aside for such payment.

ARGUMENT

1. The Plan is a Better Alternative than Liquidation.

The purpose of Article V of the Insurance Department Act of 1921, *as amended*, 40 P.S. §§ 221.1–221.63 ("Article V") is the protection of the interests of insureds, creditors and the public generally through, among other things, "improved methods for rehabilitating insurers, involving the cooperation and management expertise of the insurance industry" and the "equitable apportionment of any unavoidable loss." 40 P.S. § 221.1. In rehabilitation, the Rehabilitator is charged to "take such action as [s]he deems necessary or expedient to correct the condition or conditions which constituted the grounds for the order of the court to rehabilitate the insurer." 40 P.S. § 221. This is precisely what the Plan is designed to do: the Plan provides policyholders with options as to how they want their policies treated given that not all of SHIP's policy obligations can be satisfied as originally written, either by SHIP or in a liquidation with contributions from the Guaranty Associations.

The Guaranty Association system is a safety net that protects policyholders in the event a company must be liquidated, and liquidation is itself a remedy of last resort. *See Consedine v. Penn Treaty Network Am. Ins. Co.*, 63 A.3d 368, 440 (Pa. Commw. Ct. 2012) ("*Penn Treaty*") (recognizing that liquidation is a remedy of last resort); *Koken v. Legion Ins. Co.*, 831 A.2d 1196, 1230 (Pa. Commw. Ct. 2003) (same); *Grode v. Mut. Fire, Marine & Inland Ins. Co.*, 572 A.2d 798, 803 (Pa.

Commw. Ct. 1990), *aff'd in part, remanded in part sub nom. Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 614 A.2d 1086 (Pa. 1992) ("*Mutual Fire II*") (recognizing that rehabilitation is preferable to liquidation); *see also* Rehabilitator's Pre-hearing Memorandum at 21–22 (citing cases from other jurisdictions in accord). In liquidation, SHIP's policy obligations would not be satisfied in full and policyholders would not have choices as favorable as those provided them under the Plan.

The Intervening Regulators imply that by liquidating the company and triggering the Guaranty Associations, policyholders would not face the increased premiums and reduced benefits contemplated by the Plan. Intervening Regulators' Pre-hearing Memorandum at 17. This is not the case. In fact, if the Guaranty Associations were triggered in liquidation, policyholders would have policy benefits capped at limits imposed by Guaranty Association statutes, rate increases based on substantially the same methodology as proposed under the Plan, and potentially changes to their policy benefits through the issuance of alternative policies. The Guaranty Associations would not be able to offer any choices that provide benefits in excess of statutory limits, nor would they be able to offer the type of generous non-forfeiture option proposed under the Plan.

Guaranty Association laws allow the Guaranty Association to meet its obligations by either reissuing the policy issued by the insolvent insurer or issuing

an alternative policy, in each case at actuarially justified rates. *See, e.g.*, 40 P.S. § 991.1707(d); Cal. Ins. Code § 1067.07(b)(2)(F). Thus, in liquidation there will likely be changes to policyholders' premium rates, and potentially their benefits as well (in addition to the imposition of Guaranty Association statutory limits and conditions). For example, in the recent liquidation of long-term care insurer Penn Treaty, Guaranty Associations sought and received substantial rate increases in 48 states and the District of Columbia. In addition, the Guaranty Association in one of the largest states satisfied its obligations through the issuance of alternative policies.

Rather than rush towards liquidation, the Rehabilitator proposes to see if the ultimate loss can be reduced by offering policyholders choices that, if accepted, would avoid liquidation. *See In re Ambac Assurance Corp.*, 841 N.W.2d 482, 508 (Wis. Ct. App. 2013) ("the goal of rehabilitation is to apportion unavoidable losses in a manner that is fair and equitable to policyholders, creditors and the public generally."). Those choices do not all have equivalent value on paper, but experience from the Penn Treaty liquidation indicates that policyholders make choices based on more than what an actuarial projection suggests is the highest financial value. They have been locked into their policies for decades with few alternatives other than to lapse their policies or take an economically unattractive reduced paid-up policy with benefits set equal to the aggregate amount of premiums paid less any benefits received. The Plan changes that. To be sure, policyholders

will need to weigh the options against each other; against what they might be called on to pay if Phase Two were implemented; and against what they would receive in a subsequent liquidation of SHIP if the Funding Gap does not close. But that is a better set of choices than they have today and a better set of choices than they would have in an immediate liquidation.

The Intervening Regulators contend that the Plan imposes $800 million of burden on policyholders above what they would bear in liquidation. Intervening Regulators' Pre-hearing Memorandum at 3. Even if this observation were true in the aggregate, it misses that point of the Plan, which is to give each policyholder options that will substantially reduce the Funding Gap. The Plan allows for the possibility that the Funding Gap will be closed or sufficiently narrowed as a result of policyholder choice in Phase One so that liquidation is not needed, though it is still available after Phase One. And as discussed in Section 4 below, policyholders will have one or more options in Phase One that will leave them no worse off if SHIP is liquidated after Phase One rather than immediately.

2. The Plan is Feasible.

The Intervening Regulators contend that the Plan is not viable because it does not offer "any actual predictions of the anticipated or likely results of Phase One but instead discusses 'hypothetical results.'" Intervening Regulators' Pre-hearing Memorandum at 21 (citing and quoting the Plan at 17–18). The results are

impossible to predict because they depend entirely on policyholder elections, which in turn will depend on a host of factors beyond pure economic projections. That does not make the Plan infeasible. Moreover, because policyholders will have an option that preserves what they would receive in an immediate liquidation, Phase One does no harm. Examined in this context, the phased structure of the Plan is a prudent approach: it ensures that only the benefit modifications and premium increases that are selected by policyholders will be implemented in Phase One and only those that are necessary to close the Funding Gap will be implemented in subsequent phases.

The Intervening Regulators also argue that the Plan is not viable because Phase One will not eliminate the Funding Gap. Intervening Regulators' Pre-hearing Memorandum at 21. This argument is based on the proposition that "liquidation after implementation of Phase One will result in significantly reduced recoveries for SHIP policyholders." *Id.* But this is not the case. What policyholders will receive in a hypothetical post-Phase One liquidation will depend on what choices they make. Option Four provides policyholders with an option to maintain their current benefit levels so long as they pay an actuarially appropriate premium.[3] In a hypothetical

[3] Options One and Two also preserve pre-Phase One benefits in a hypothetical liquidation following Phase One if the Court in the Penn Treaty case determines that long-term care insurance policyholders do not have claims against the estate for benefits in excess of Guaranty Association limits.

post-Phase One liquidation, they would have the same benefits as they would in a pre-Phase One liquidation. The selection by policyholders of other options (Options One, Two or Three) may result in lower benefits in a subsequent liquidation (assuming policyholders are entitled to claims against the estate for benefits in excess of Guaranty Association limits), but the Plan gives them the right to make those choices based on complete information.

3. The Premium Methodology in the Plan is Fair and Equitable.

The Intervening Regulators object to the If Knew Premium methodology on the basis that it "deliberately seeks to impose different burdens on policyholders in the different states." Intervening Regulators' Pre-hearing Memorandum at 29. As a result, the Intervening Regulators argue that the Plan is not fair and equitable. *Id.* at 29–30. The Intervening Regulators are wrong in this contention. The Plan treats all policyholders the same: it requires that every policyholder pay the If Knew Premium going forward. This is an actuarially justified calculation of premium for each policy calculated on an individual basis. The methodology does not use issue or residency state in computing the If Knew Premium. For example, a state that has historically granted very little of SHIP's requested premium rate increases may nevertheless have policyholders whose Current Premiums meet or exceed their If Knew Premiums. This would be based on the features of the particular policy. Conversely, there may be inadequately priced policies in states that have historically

granted larger rate increases.

The Intervening Regulators also contend that the If Knew Premium methodology effectively punishes policyholders who have been paying lower premiums for the same product as policyholders in other states. They observe that such policyholders paid what they were asked to pay. Intervening Regulators' Pre-hearing Memorandum at 30. But this objection confuses fairness with fault. The Plan puts all policyholders on the same footing by requiring them to pay a premium calculated pursuant to the same methodology so that any two policyholders who have the same benefits and the same underwriting characteristics will pay the same premium going forward regardless of the states in which their respective policies were issued. This is the essence of fair and equitable.

The Plan does not punish policyholders who have been paying comparatively lower premiums. The Plan could have required such policyholders to make up for that historic underpricing in payments going forward.[4] It does not. Instead, it simply puts them on the same footing as other policyholders going forward. The loss of premium from past underpricing, which was a driving force of SHIP's insolvency, is not imposed on the policyholders whose premium was inadequate.

[4] Doing so could perhaps be considered punitive, though the NAIC's Long-Term Care Insurance (EX) Task Force is currently considering a framework for rate review that may take into account a state's history of approvals. *See* Draft Long-Term Care Insurance Multi-State Rate Review Framework, April 9, 20201 (*available at* https://content.naic.org/sites/default/files/inline-files/MSA%20Framework%20Operations%20040921%20Exposure%20Draft.pdf) (last visited April 19, 2021).

The Intervening Regulators' analogy to property/casualty pricing in a state with adverse loss experience does not withstand scrutiny. Intervening Regulators' Pre-hearing Memorandum at 33. The Plan could have incorporated state of issuance into the If Knew Premium methodology. But it does not. The fact that a policy was issued in a state that has not historically granted premium rate increases (the equivalent to a state with adverse loss experience in the Intervening Regulators' analogy) is not a variable in the calculation of the If Knew Premium. If a policy in such a state has a Current Premium equal to or exceeding the If Knew Premium, the policy will be unaffected by the Plan.

Similarly, the Intervening Regulators argue that the If Knew Premium methodology impermissibly creates "subclasses." *Id.* at 33–34. But again, there are no subclasses because all policyholders are treated the same. Moreover, the prohibition on the creation of subclasses within a class of creditors is a liquidation concept that the Intervening Regulators improperly attempt to incorporate into a rehabilitation. *See* 40. P.S. § 221.44 (providing for the order of distribution of claims from the insurer's estate in liquidation and prohibiting the establishment of any subclasses within any class). Once the *Carpenter* Test (discussed in Section 4 below) is passed, the question is whether the Plan discriminates unfairly among policyholders. For the reasons set forth above and in the Health Insurers' Pre-hearing Memorandum, the Plan does not discriminate unfairly among

policyholders.[5]

4. The Plan Satisfies the *Carpenter* Test.

The Plan meets the requirement that policyholders fare at least as well under the Plan as they would in liquidation. *Mutual Fire II*, 614 A. 2d at 1093-94 (the "*Carpenter Test*"); *see also* Health Insurers' Pre-hearing Memorandum at 22–26. The Intervening Regulators first argue that every single policyholder must fare at least as well under the Plan as in liquidation. This position directly contradicts prior decisions of this Court. *Penn Treaty*, 63 A.2d at 453; *Mutual Fire II*, 614 A.2d at 1102. To support their position, the Intervening Regulators do not attempt to distinguish those decisions, but argue that the Court's decisions are simply incorrect. Intervening Regulators' Pre-hearing Memorandum at 27 (stating that the *Penn Treaty* Court "conflated" two separate constitutional issues in reaching its (incorrect) decision). This explanation is not persuasive, and the Court should not deviate from its prior decisions.

The Plan offers policyholders at least one option satisfying the *Carpenter* Test. Which option will depend on whether, in liquidation, policyholders would

[5] The Intervening Regulators also take issue with the Plan's provisions related to Waiver of Premium benefits. Intervening Regulators' Pre-hearing Memorandum at 30–31. If the Intervening Regulators object to the proposed Differential Premium, they may opt-out. Policyholders from Opt-out States are not required to pay Differential Premium. Revised Issue State Rate Approval Section at 6, 10. Instead, they may have their MBP reduced to the level that would support their Current Premium on an If Knew Basis (with the Guaranty Association limit as a floor). *Id.* This is clearly within the Rehabilitator's authority. *See* Health Insurers' Pre-hearing Memorandum at 4–6.

have viable class (b) claims for benefits in excess of Guaranty Associations limits, which would necessarily arise more than thirty days following an order of liquidation. As noted in the Health Insurers' Pre-hearing Memorandum, that issue is currently before the Commonwealth Court in the Penn Treaty liquidation. Health Insurers' Pre-hearing Memorandum at 23, n.6. If, as the Health Insurers maintain, Pennsylvania law does not allow policyholders to assert claims against the assets of the estate based on claims for covered benefits occurring more than thirty days after the date of liquidation, then Options One, Two and Four satisfy the *Carpenter* Test. None of these options reduces policy benefits below Guaranty Association limits if the current benefits exceed the limit.

The Intervening Regulators argue that Option Two does not provide at least the benefit value that the Guaranty Association would provide in liquidation for policies with current benefits in excess of Guaranty Association limits. Intervening Regulators' Pre-hearing Memorandum at 11, n.3. In making this argument, the Intervening Regulators use a flawed measurement, comparing the present value of future benefits less the present value of future premiums in rehabilitation versus liquidation. But the Guaranty Association statutes do not use this type of "actuarial value" to measure benefits. Instead, statutory limits are based on total benefits. Thus, the Plan uses the Maximum Policy Value when comparing benefits to Guaranty Association limits. Maximum Policy Value is the product of a policy's

Maximum Benefit Period and its Maximum Daily Benefit. The Plan is calibrated so that policies with MPV at or above the applicable Guaranty Association limit will have their MPV adjusted so that it is at least equal to that limit. Plan at 45. As a result, if the Court in *Penn Treaty* determines that policyholders do not have claims for covered benefits in excess of Guaranty Association limits, then Option Two satisfies the requirement that policyholders receive under the Plan at least what they would receive in liquidation.

If the Court in *Penn Treaty* determines that policyholders are entitled to assert claims for benefits under policies in excess of Guaranty Association limits, then the *Carpenter* Test is satisfied by Option Four. Under this option, policyholders preserve their liquidation position because they maintain their entire policy liability. Any increase in premium due to the election of Option Four would not impact their claim for Uncovered Benefits against the estate in liquidation.

Under a rehabilitation plan, policyholders are not entitled to a liquidation option. They are only entitled to receive an option that has an equivalent value to liquidation. The *Ambac* court squarely considered this issue and rejected the Intervening Regulators' position. *Ambac Assurance Corp.*, 841 N.W.2d at 503–05 ("we reject the interested parties' argument that the rehabilitation plan is unlawful because it does not provide policyholders with the liquidation value of their claims or, in the alternative, the right to opt out of the plan and receive the liquidation value

of their claims.").

The Intervening Regulators also appear to misconceive what policyholders might be entitled to in liquidation, or, for that matter, under a rehabilitation plan. In liquidation, policyholders are not necessarily entitled to their current policies with the only modification being the imposition of the Guaranty Association limit. Instead, as noted above at Section 1, the vast majority of Guaranty Association statutes allow the Guaranty Association to issue alternative policies on different terms. And while those policies may need to have the same policy limits, they may have different terms. For example, the Pennsylvania Life and Health Insurance Guaranty Association Act allows the Guaranty Association to issue alternative policies providing "coverage of a type similar to that of the policy issued by the impaired or insolvent insurer, as determined by the association" and approved by the commissioner. 40 P.S. § 991.1706(b)(2)(iv)(B)(III). The alternative policies are required to have the minimum statutory provisions in the state and premiums that "reflect the amounts of insurance to be provided and the age and class of risk of each insured," but there is nothing in the statute requiring that the benefits under the alternative policy be equivalent to the benefits in the policy issued by the insolvent insurer. 40 P.S. § 991.1706(b)(2)(iv)(B)(II). In addition, the alternative policies are required to be issued at "actuarially justified rates." 40 P.S. § 991.1706(b)(2)(iv)(A)(I).

The *Carpenter* Test is satisfied because the vast majority of policyholders will receive at least one option that will equal or exceed what would be provided in liquidation. This is all that is required. The Intervening Regulators' comparison of the aggregate net present value of benefits less premiums in rehabilitation versus liquidation is not the relevant test. Intervening Regulators' Pre-hearing Memorandum at 3. That view would strip the policyholders of the ability to choose alternatives and instead compel them into an involuntary liquidation. The Plan allows policyholders to have a voice in how to equitably apportion unavoidable loss.

Indeed, if the Intervening Regulators' view governs, rehabilitation could *never* pass the test if policyholders are entitled to assert claims in liquidation for benefits in excess of Guaranty Association limits. Section 221.16 would be written out of Article V. In order to successfully rehabilitate under this view, the net present value of benefits less premiums must be equal to the insolvent insurer's assets. In liquidation, the net present value of benefits less premiums would be equal to the insolvent insurer's assets *plus* the contribution from the Guaranty Associations. Therefore, the net present value of benefits less premiums in liquidation would always be greater than rehabilitation. If policyholders are not entitled to assert claims for benefits in excess of Guaranty Association limits, the net present value of benefits less premiums could potentially be equal in rehabilitation and liquidation, but they would never be greater in rehabilitation.

5. The Plan's Provisions Governing Premium Rate Determinations are Permissible Under Pennsylvania Law and the US Constitution.

The Intervening Regulators again argue that the Plan impermissibly "overrides" the insurance laws of other States, which vest authority over premium rates in the insurance regulator in the policyholder's state of residence. Intervening Regulators' Pre-hearing Memorandum at 37–48. The Intervening Regulators make substantially the same arguments as in their Formal Comment. These were addressed at length in the Health Insurers' Pre-hearing Memorandum. Health Insurers' Pre-hearing Memorandum at 4–21. For the reasons set forth therein, to the extent there is a substantive conflict between the Plan's provisions governing rate determinations and the rate statutes of other states, the Court can and should resolve that conflict in favor of Pennsylvania receivership law under well-established conflict-of-law principles. Neither the Full Faith and Credit Clause of the US Constitution nor principles of comity demands a different result.

CONCLUSION

The Intervening Regulators seek liquidation of SHIP now. In doing so, they would deprive policyholders of the valuable right to choose what benefits they want from their policies in the future. This is an important right for policyholders, many of whom have been trapped in these policies for decades without meaningful choices. The premiums to be charged under the Plan fall evenly across all policyholders and do not discriminate based on state of issue or seek to recover for

past underpricing. Phase One of the Plan includes options that would leave policyholders with the same rights in a subsequent liquidation as they have now. As a result, it is fair and equitable to policyholders and passes the *Carpenter* Test. Accordingly, the Rehabilitator has met her burden to show that the Plan is not an abuse of discretion and should be confirmed.

Respectfully submitted,

Dated: April 19, 2021 MORGAN, LEWIS & BOCKIUS LLP

By: */s/ Harold S. Horwich*

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