

**IN THE
SUPREME COURT OF PENNSYLVANIA**

IN RE: SENIOR HEALTH	:	
INSURANCE COMPANY OF	:	No. 71 MAP 2021
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**

**STATE INSURANCE REGULATORS’ APPLICATION FOR LEAVE
TO SUPPLEMENT RECORD WITH REHABILITATOR’S
APRIL 12, 2022 LETTER CONCERNING PHASE ONE RESULTS
AND EFFECT ON THE FUNDING GAP**

The Appellants-Intervenors 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 (“State Insurance Regulators”) hereby request leave to supplement the record on appeal to include a letter dated April 12, 2022 from the Appellee Insurance Commissioner of the State of Pennsylvania, as Statutory Rehabilitator (“Rehabilitator”) of Senior Health Insurance Company of Pennsylvania (“SHIP”), describing the initial results of Phase One of the Second Amended Plan of Rehabilitation (“Plan”) for SHIP. The letter containing those results was written by a party to this appeal—the Rehabilitator, was written only after the Commonwealth Court issued the approval

order that is the subject of this appeal, and contains information directly relevant to the threshold “feasibility” issue presented in this appeal. As reasons for their application, the State Insurance Regulators respectfully state:

1. This is an appeal from the August 24, 2021 order of the Commonwealth Court approving the Plan. The approval order issued after a hearing in May 2021. One of the issues on appeal is whether the Plan is required to be feasible – meaning reasonably likely to restore SHIP to solvency – and whether it is, in fact, feasible. This requires an assessment of the Plan’s impact on SHIP’s deficit. *See* Brief for Appellants at 4 (Question #1), 25-28 (filed December 27, 2021); Reply Brief for Appellants at 3-6 (filed February 22, 2022).

2. On April 12, 2022 the Rehabilitator sent a letter to state insurance regulators across the county, including the Appellant-Intervenor State Insurance Regulators. The letter is attached as Exhibit 1 hereto. The April 12, 2022 letter summarizes the initial results of the policyholder elections in Phase One of the Plan. The letter describes the effect of the Phase One results on SHIP’s deficit and is directly relevant to the threshold “feasibility” issue on appeal.

3. In these unusual circumstances, the Court should allow supplementation of the record to include the letter reflecting actual Phase One results. In appropriate cases, the Court may allow supplementation of the record with matters that occurred after entry of the order appealed from and are relevant

to the issues on appeal. *See Dincer v. Dincer*, 680 A.2d 873 (Pa. 1996) (granting petition to supplement record in child custody case to include a final custody order entered by a Belgian court); *Cohen v. Allen*, 744 A.2d 810, 812 (Pa. Cmwlth. 2000) (granting motion to supplement the record in challenge to ballot question concerning amendment to Home Rule Charter with affidavit certifying election results).

4. One of the issues presented to the Commonwealth Court by the State Insurance Regulators was whether the Plan was “feasible,” that is, whether it could reasonably be expected to eliminate the \$1.2 billion funding gap and restore SHIP to solvency. The Rehabilitator objected, contending that feasibility in this sense was not required and positing that the Plan could “reduce or eliminate” the funding gap. The Rehabilitator also contended that feasibility was a matter to be assessed over time as the Plan was implemented.

5. The Plan provided that in Phase One the Rehabilitator would mail election packages to policyholders so they could decide among five options regarding premium and benefit modifications to their policies.

6. The evidence at the hearing was that the Plan was not reasonably likely to eliminate the funding gap through the premium increases and benefit reductions provided for in the Plan. *See* Brief for Appellants at 18-19. That evidence included the concession from the Special Deputy Rehabilitator on cross-

examination that the Plan, including both Phases One and Two, was not likely to eliminate the funding gap. R.1923a.

7. In its decision, the Commonwealth Court nonetheless referred to the possibility that the Plan “will eliminate or reduce” the deficit as if elimination was a realistic possibility. Opinion at 67. *See id.* at 78. The Commonwealth Court rejected the State Insurance Regulators’ contention that feasibility focused on a return to solvency and that the Plan was not feasible.

8. On appeal, the Rehabilitator similarly contends that the Plan “will reduce or eliminate” SHIP’s deficit. Brief of Appellee-Statutory Rehabilitator at 1 (filed February 4, 2022). *See id.* at 23 (citing Opinion at 67). The Rehabilitator also states the Plan “could even eliminate the deficit altogether.” *Id.* at 14, 29. *See id.* at 30 n.13.

9. The Commonwealth Court noted that the Plan was expected to be implemented quickly, and that “within eight months of approval the Rehabilitator anticipates receiving policyholder elections which will enable [him] to measure the precise impact of Phase One on SHIP’s Funding Gap.” Opinion at 88. Now, eight months later, the initial results of Phase One are known to the Rehabilitator as the Commonwealth Court anticipated.

10. As recently reported by the Rehabilitator, in January 2022, the Rehabilitator mailed “election packages” to approximately 21,000 of 26,200

policyholders intended to receive such packages. The Rehabilitator has received responses from over 85% of those policyholders. *See* Appellee Rehabilitator’s Application for Expedited Appellate Consideration ¶¶Exhibit B to the Annual Report of the Rehabilitator on the Status of the Rehabilitation of Senior Health Insurance Company of Pennsylvania (the “Rehabilitator’s Annual Report”) filed March 31, 2022 in *In Re: Senior Health Insurance Company of Pennsylvania in Rehabilitation*, No. 1 SHP 2020 (Pa. Cmwlth.).¹

11. Based on these election returns, the Rehabilitator is now able to credibly estimate the impact of Phase One of the Plan, specifically the effectiveness of Phase One in reducing or eliminating SHIP’s deficit.

12. The April 12, 2022 letter from the Rehabilitator to state insurance regulators nationwide reports the results of the Rehabilitator’s analysis of Phase One election results to date:

Based on current data, we expect to reduce SHIP’s deficit of approximately \$1.3 Billion, by at least half after modifying policies in Phase 1. That will still leave an obviously sizeable deficit

Exhibit 1 at 1 (emphasis added). The letter then refers to “halving the deficit.” *Id.*²

¹ The Court may properly take judicial notice of the Rehabilitator’s Annual Report pursuant to Pa.R.E. 201. Filings in the SHIP rehabilitation proceeding may be found on the SHIP rehabilitation website at <https://www.shipltc.com/court-documents?msclkid=051d7775c4a011ecb5075004e2d107ec>.

² As of December 31, 2021, SHIP’s deficit was \$1.3 billion, a deterioration of \$83 million over year-end 2020. Rehabilitator’s Annual Report at 2; April 12, 2022 letter at 1 (Exhibit 1).

13. Where Phase One is expected to “halve the deficit” of \$1.3 billion, this means that a deficit of approximately \$600 million will remain at the end of Phase One but with many fewer policyholders (only those selecting Options 1 or 4) to bear the impact of the self-sustaining premium in Phase Two.

14. The April 12, 2022 letter also advises that the Rehabilitator now intends to stay in Phase One for “several years” before Pennsylvania “must decide on Phase 2 or perhaps liquidation.” Exhibit 1 at 1. Specifically, the letter states:

While we are still working to quantify that window more specifically, we currently believe “several” to mean at least five years and maybe longer before we would have to decide any next steps.

Id.

15. The letter is relevant to this appeal in that it moves the basis for evaluating whether the Plan is feasible from the realm of prognosis to the realm of the concrete. It reveals that there will be a very substantial deficit – about \$600 million – remaining at the end of Phase One, and that the Rehabilitator now intends to wait at least five years before deciding whether to proceed to Phase Two or liquidation.

16. The Rehabilitator’s letter should be added to the record and considered on appeal. The letter provides definition to a matter that was the subject of projection at the time of the hearing as reflected in the record. It is a statement of one of the parties – the Rehabilitator – based upon the process

provided for by the Plan and anticipated by the Commonwealth Court. With the letter in the record, this Court will be more readily able to consider the question whether the Plan is feasible and whether it should be approved.

CONCLUSION

The State Insurance Regulators accordingly request that the Court grant leave to supplement the record on appeal with the April 12, 2022 letter from the Rehabilitator attached as Exhibit 1 hereto.

May 3, 2022

Respectfully submitted,

By: Steve Harvey Law LLC

/s/ Stephen G. Harvey

Stephen G. Harvey

steve@steveharveylaw.com

1880 John F. Kennedy Blvd.

Suite 1715

Philadelphia, PA 19103

Tel. 215-438-6600

Attorneys for the Maine Superintendent of Insurance, the Massachusetts Commissioner of Insurance, and the Washington Insurance Commissioner

Of Counsel:

J. David Leslie (*pro hac vice*)

dleslie@verrill-law.com

Eric A. Smith (*pro hac vice*)

easmith@verrill-law.com

Verrill Dana, LLP

One Federal Street, 20th Floor

Boston, MA 02110

Tel. 617-951-1131

Tel. 617-951-1127

Counsel to the Maine Superintendent of Insurance, the Massachusetts
Commissioner of Insurance, and the Washington Insurance Commissioner
and Massachusetts Special Assistant Attorneys General and Washington Special
Assistant Attorneys General

Exhibit 1



April 12, 2022

VIA E-MAIL

Re: Senior Health Insurance Plan of Pennsylvania ("SHIP")

Dear Esteemed Colleagues and Friends,

It was great to see many of you last week in Kansas City. Thank you for making my first meeting with a black badge feel as normal as possible, at least given the circumstances. This e-mail is intended to follow up on a few themes that I discussed with several of you in one-off conversations last week about the SHIP rehabilitation. Please note that my goal is to be as open and transparent as possible, while recognizing that anything I say or write, even if done so in a confidential regulator-regulator context, may nonetheless appear in any of the ongoing litigation matters surrounding SHIP.

First, attached is an updated version of the SHIP Election Package Report. This report was previously shared with you on March 11, but I wanted to share with you the most up-to-date information on the elections of policyholders in your states. For your convenience, I am also attaching the *Annual Report of the Rehabilitator* that was submitted to the Commonwealth Court on April 1. Included in that report is the updated election package figures reporting that 85 percent of policyholders had submitted elections with more than **60 percent of respondents' electing options that we do not believe, based on experience with Penn Treaty's liquidation, would have been available should we have immediately pursued liquidation for SHIP.**

Second, it became clear to me last week that providing additional perspective on Phase 1 and the possible transition to Phase 2 (or liquidation) would be helpful to the membership. **As I consider the future for SHIP's rehabilitation, please know that Phase 2 is neither imminent nor definite.** Instead, as we have previously stated, we will evaluate the results of Phase 1, engage a full vetting of the data with chief insurance regulators, and approach the Commonwealth Court before taking any definitive steps after Phase 1.

In fact, as the election packages are coming in, we now believe that we will be able to stay in Phase 1 (post policy modifications) for several years. While we are still working to quantify that window more specifically, we currently believe "several" to mean at least five years and maybe longer before we would have to decide any next steps. With policyholders at an average age of 88, these additional years in a modified policy of their choosing may represent a benefit over liquidation for many policyholders.

So how do we figure that we will be able to stay in Phase 1, without any additional rate increases, you might ask. Based on current data, we expect to reduce SHIP's deficit of approximately \$1.3 Billion, by at least half after modifying policies in Phase 1. That will still leave an obviously sizeable deficit, but it also provides us time to let the rehabilitation plan play itself out for a longer period before Pennsylvania must decide on Phase 2 or perhaps liquidation. In addition, halving the deficit also means that the plan is projected to save our states' taxpayers at least \$550 Million. The rehabilitation plan has been criticized by some commissioners in court filings as being "industry friendly" when compared to liquidation, presumably because it would require smaller assessments on life and health insurance companies if we ever pursue liquidation as the current (potential assessment base) deficit will be reduced. As we all know, however, those insurance industry assessments are ultimately borne by our

Office of the Insurance Commissioner

1326 Strawberry Square | Harrisburg, Pennsylvania 17120 | Phone: 717.783.0442 | Fax: 717.772.1969
www.insurance.pa.gov | ra-in-commissioner@pa.gov

taxpayers, as insurers can offset assessments generally through inflated rates on other policyholders or by offsetting premium tax payments due, in most cases, to a state's General Fund. Thus, one might consider the rehabilitation as "taxpayer friendly" in that it substantially reduces the amount of money ultimately born by the taxpayers if SHIP were to be liquidated in the future.

My current plan is, therefore, to run SHIP off after modifying policies in Phase 1 until we need to act in the future. We will NOT simply roll into Phase 2 after not completely closing the current SHIP deficit in Phase 1. As insurance regulators, we all believe that insurance policyholders should pay fair premiums. Phase 1 does just that; to steal a term from our past principles-based reserving efforts, Phase 1, "right-sizes" amounts policyholders pay in premium. In doing so, it provides quality options to policyholders, including options that at least match guaranty association limits and one that provides an enhanced non-forfeiture benefit that we believe has never been offered in the context of a receivership.

The rehabilitation plan has seen its share of opposition. Some object to Pennsylvania's approach to right-sizing rates, others philosophically believe that liquidation should be pursued if we do not think we will immediately and completely fill SHIP's deficit. Still other states do not believe that a domestic state regulator through its court system may control the operations of a company in receivership without being bound by the laws of every state in the country. I understand you. I hear you. I simply disagree. I believe the rehabilitation plan is best for policyholders and taxpayers and is fully consistent with our state-based system of insurance regulation. I will be glad to continue providing updates as the rehabilitation moves forward and I welcome your thoughts and questions.

Sincerely,



Mike Humphreys
Pennsylvania Insurance Commissioner

IN THE SUPREME COURT OF PENNSYLVANIA

In Re: Senior Health Insurance Company of : 71 MAP 2021
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

PROOF OF SERVICE

I hereby certify that this 3rd day of May, 2022, 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:

Service

Served: Dexter Ryan Hamilton
Service Method: eService
Email: dhamilton@cozen.com
Service Date: 5/3/2022
Address: 1900 Market Street
Philadelphia, PA 19103
Phone: 215-665-2166
Representing: Appellee Michael Humphreys, Acting Insurance Commissioner of the Commonwealth of PA
Appellee Senior Health Insurance Company of Pennsylvania

Served: Dorothy Alicia Hickok
Service Method: eService
Email: alicia.hickok@faegredrinker.com
Service Date: 5/3/2022
Address: Faegre Drinker Biddle & Reath
One Logan Square, Suite 2000
Philadelphia, PA 19103
Phone: 215-988-3364
Representing: Appellee National Organization of Life and Health Insurance Guaranty Associations

Served: Georgianna Parisi
Service Method: First Class Mail
Service Date: 5/3/2022
Address: 257 Regency Ridge Dr.
Dayton, OH 45459
Phone: 937-305-4191
Pro Se: Appellee Georgianna Parisi

IN THE SUPREME COURT OF PENNSYLVANIA

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(Continued)

Served: Haryle Kaldis
Service Method: eService
Email: hkaldis@cozen.com
Service Date: 5/3/2022
Address: 1650 Market Street
Suite 2800
Philadelphia, PA 19103
Phone: 215-665-5559
Representing: Appellee Michael Humphreys, Acting Insurance Commissioner of the Commonwealth of PA
Appellee Senior Health Insurance Company of Pennsylvania

Served: James F. Lapinski
Service Method: First Class Mail
Service Date: 5/3/2022
Address: 6121 Lundy Place
Burke, VA 220153432
Phone: 703-362-7795
Pro Se: Appellee James F. Lapinski

Served: James Steven Gkonos
Service Method: eService
Email: jgkonos@saul.com
Service Date: 5/3/2022
Address: Saul Ewing LLP
Centre Square West, 1500 Market Street, 38th Floor
Philadelphia, PA 19102
Phone: (21-5) -972-8667
Representing: Appellee Primerica Life Insurance Company

Served: Jodi A. Frantz
Service Method: eService
Email: jodfrantz@pa.gov
Service Date: 5/3/2022
Address: 1341 Strawberry Square
Harrisburg, PA 17120
Phone: 717-787-2567
Representing: Appellee Michael Humphreys, Acting Insurance Commissioner of the Commonwealth of PA
Appellee Senior Health Insurance Company of Pennsylvania

IN THE SUPREME COURT OF PENNSYLVANIA

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(Continued)

Served: John P. Lavelle Jr.
Service Method: eService
Email: john.lavelle@morganlewis.com
Service Date: 5/3/2022
Address: Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103
Phone: 215-963-4824
Representing: Appellee Anthem, Inc., et al.

Served: Joseph M. Donley
Service Method: eService
Email: jdonley@clarkhill.com
Service Date: 5/3/2022
Address: 2001 Market Street
Suite 2620
Philadelphia, PA 19103
Phone: 215--64-0-8525
Representing: Appellee ACSIA Long Term Care, Inc., et al.

Served: Kathryn McDermott Speaks
Service Method: eService
Email: kspeaks@pa.gov
Service Date: 5/3/2022
Address: 1341 Strawberry Square
Harrisburg, PA 17120
Phone: (71-7) -787-2567
Representing: Appellee Michael Humphreys, Acting Insurance Commissioner of the Commonwealth of PA
Appellee Senior Health Insurance Company of Pennsylvania

Served: Leslie Miller Greenspan
Service Method: eService
Email: lgreenspan@tlgattorneys.com
Service Date: 5/3/2022
Address: Tucker Law Group
1801 Market Street, Suite 2500
Philadelphia, PA 19103
Phone: 215-875-0609
Representing: Appellee Michael Humphreys, Acting Insurance Commissioner of the Commonwealth of PA
Appellee Senior Health Insurance Company of Pennsylvania

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served: Michael John Broadbent
Service Method: eService
Email: mbroadbent@cozen.com
Service Date: 5/3/2022
Address: Cozen O'Connor
1900 Market Street
Philadelphia, PA 19103
Phone: 215--66-5-4732
Representing: Appellee Michael Humphreys, Acting Insurance Commissioner of the Commonwealth of PA
Appellee Senior Health Insurance Company of Pennsylvania

Served: Patrick Herrera Cantilo
Service Method: eService
Email: phcantilo@cb-firm.com
Service Date: 5/3/2022
Address: 11401 Century Oaks Terrace
Suite 300
Austin, TX 78758
Phone: 512-478-6000
Representing: Appellee Michael Humphreys, Acting Insurance Commissioner of the Commonwealth of PA
Appellee Senior Health Insurance Company of Pennsylvania

Served: Preston M. Buckman
Service Method: eService
Email: pbuckman@pa.gov
Service Date: 5/3/2022
Address: 901 North 7th Street, Suite 201
Harrisburg, PA 17102
Phone: (71-7) -787-6009
Representing: Appellee Michael Humphreys, Acting Insurance Commissioner of the Commonwealth of PA
Appellee Senior Health Insurance Company of Pennsylvania

Served: Scott Brandon Galla
Service Method: eService
Email: SCOTTGALLA@GMAIL.COM
Service Date: 5/3/2022
Address: 2001 Market Street
Suite 2620
PHILADELPHIA, PA 19103
Phone: 608--34-7-6758
Representing: Appellee ACSIA Long Term Care, Inc., et al.

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

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Courtesy Copy

Served: James Joseph Lawless Jr.
Service Method: Email
Email: jim.lawless@butlersnow.com
Service Date: 5/3/2022
Address:
Phone: 610-420-6304
Representing: Amicus Curiae State Insurance Regulators

/s/ Stephen G. Harvey

(Signature of Person Serving)

Person Serving: Harvey, Stephen G.
Attorney Registration No: 058233
Law Firm: Steve Harvey Law LLC
Address: 1880 JFK Blvd Ste 1715
Philadelphia, PA 19103
Representing: Appellant Maine Superintendent of Ins., Massachusetts Commissioner of Ins. and Washington Ins. Co