

In Re: Senior Health Insurance  
Company of Pennsylvania in Rehabilitation

No.1 SHP 2020

**FORMAL COMMENTS AND LIMITED OBJECTIONS TO THE PLAN OF  
REHABILITATION BY THE WISCONSIN OFFICE OF THE  
COMMISSIONER OF INSURANCE**

The Wisconsin Office of the Commissioner of Insurance (WIOCI) files this limited objection to the plan of rehabilitation of Senior Health Ins. Co. of Pennsylvania (SHIP) filed on April 22, 2020 (Plan). While WIOCI generally supports the Plan, it objects to the extent the Plan seeks to circumvent the laws of the states in which SHIP is licensed and continues to operate. More specifically, WIOCI objects to the terms of the Plan that allows SHIP to disregard Wisconsin rate filing requirements and caps on the size of rate increases for certain Wisconsin resident policyholders over age 75. WIOCI respectfully requests that this court modify the Plan to require the Rehabilitator to comply with state laws regulating rate filings and rate increases in the states in which SHIP does business.

**I. WIOCI has an interest in protecting Wisconsin policyholders and protecting the state-based insurer insolvency proceedings.**

WIOCI is charged with regulating the Wisconsin insurance market and protecting consumers. As part of its duties, WIOCI administers laws governing rate filings and rate increases. This includes reviewing long-term care rate increase filings. WIOCI has an interest in ensuring that insurance rates are fair to Wisconsin residents and comply with Wisconsin law.

WIOCI is in a unique position to comment on the Plan because it also conducts rehabilitations and liquidations and has a statutory insolvency scheme nearly identical to that of Pennsylvania. WIOCI appreciates the challenges that come with crafting a rehabilitation plan and is, in fact, currently crafting a rehabilitation plan for an insurer that has a large block of long-term care policies.

While a rehabilitator has broad powers to rehabilitate a troubled insurer, those powers are not unlimited. In this case, the Rehabilitator requests the extraordinary and seemingly unprecedented authority to ignore the laws of the states in which SHIP operates. WIOCI has found no legal authority for the Rehabilitator's position.

Insurance regulation in the United States is state-based. It relies heavily on cooperation among the states. Insurance rehabilitations are part of that system and to be successful they require comity from other state regulators and courts. A rehabilitation plan that disregards the laws of other states is not only unsupported by the law, it will upset this balance between states.

**A. WIOCI has a statutory right to review rate increases to ensure Wisconsin residents are treated fairly.**

Under Wis. Stat. § 625.13, "every authorized insurer ... shall file with the commissioner all rates and supplementary rate information and all changes and amendments thereof made by it for use in this state within 30 days after they become effective." The commissioner is empowered to disapprove rates that are "excessive, inadequate or unfairly discriminatory." Wis. Stat. § 625.11.

A global rehabilitation proceeding is not a substitute for the state-by-state rate review process. Under Pennsylvania law, a rehabilitator is charged with "correct[ing] the condition or conditions which constituted the grounds for the order of the court to rehabilitate the insurer." 40 Pa.C.S. § 221.16. This is not a substitute for WIOCI's duty to determine whether rates are "excessive, inadequate or unfairly discriminatory." Wis. Stat. § 625.11.

The reason rate increases are reviewed on a state-by-state basis is that each state market is unique. A fair insurance rate in each state is a product of its market and the costs of long-term care in the state. A national rate approach does not take into consideration differences in costs of care. As the insurance regulator for the state of Wisconsin, WIOCI has the expertise and specialized knowledge to be best situated to review rate increases for this state. WIOCI also has a right and duty to ensure that Wisconsin residents are treated fairly by any rate increase. The rehabilitation process is not a substitute for that review.

The need for state rate review can be seen in the loss ratio the Rehabilitator is targeting. While the Plan does not contain a great deal of data as to how rates will be calculated, it at least suggests that the Rehabilitator is setting rates based on an

assumed target loss ratio of 60 percent. (Plan at p. 16.) Put another way, the Plan is targeting claims payments to be 60 percent of total premium. No long-term care insurer in Wisconsin with a credible number of policies and data has reported a loss ratio below 74 percent. (See Attached Declaration of Rebecca Rebholz.) Further, such a low loss ratio may violate Wisconsin law which mandates a loss ratio of at least 65 percent for individual policies and at least 75 percent for most group policies issued prior to 2002. Wis. Adm. Code Ins § 3.455(5)(a).

Such an aggressive loss ratio suggests high administrative and creditor expenses, an improper attempt to recoup previous losses by the insurer or an attempt to coerce policyholders into selecting lower benefit amounts by charging excessive rates. Those are all reasons why WIOCI may reject a rate increase. The rates may also be completely justified. Wisconsin law tasks the commissioner with scrutinizing rate increases to determine if they are appropriate for Wisconsin residents.

For these reasons, WIOCI objects to the plan of rehabilitation to the extent it seeks to circumvent Wisconsin rate filing requirements.

**B. Any rate increases on Wisconsin residents must comport with Wisconsin law.**

Under Wisconsin law, for policies issued from August 1, 1996 to December 31, 2001, rate increases are limited to 10 percent for insureds over the age of 75 whose policy has been in force at least 10 years. Wis. Adm. Code Ins § 3.455(9)(b)2. It is the understanding of the WIOCI, based on communications with the Special Deputy Rehabilitator, that SHIP has a group of Wisconsin policies that should be subject to the 10 percent rate increase cap and that the Rehabilitator does not intend to comply with this cap.

Initially, and most importantly, the Rehabilitator has no authority to impose rate increases on Wisconsin residents that do not comport with Wisconsin law. WIOCI addresses this lack of authority in more detail in Section II. below.

In addition, WIOCI has in the past granted all rate increases requested by SHIP, based, in part, on the reliance that once Wisconsin residents reached age 75, the amount of rate increase would be limited to 10 percent. This limitation should have been known by SHIP and incorporated by SHIP into the rate increases it sought. SHIP entered rehabilitation through no fault of the consumer, and it would be unlawful and unfair to now allow SHIP to violate the 10 percent cap that supported

the higher rates previously charged. This would create the kind of unfair policyholder subsidies that the Plan seeks to avoid. For these reasons, WIOCI objects to the Plan to the extent it would violate Wisconsin's rate increase limit for policyholders over age 75.

**C. A rehabilitation plan that violates the law of other states threatens comity between the states.**

In licensing Pennsylvania-domiciled insurers to do business in Wisconsin, WIOCI must determine that Wisconsin residents will be treated fairly in the event of an insolvency. To date, WIOCI has treated the Pennsylvania insolvency scheme as equivalent to the laws of Wisconsin. If it is found that Pennsylvania insurers in rehabilitation are not bound by Wisconsin law, WIOCI will have to treat Pennsylvania insurers differently.

For example, one of the requirements to license a non-domestic insurer in Wisconsin is that the insurer and its management are found competent "to comply continuously with the laws of this state." Wis. Stat. § 618.12(1)(c). If the Rehabilitator's plan to avoid state rate filing laws is validated, WIOCI could not find that Pennsylvania insurers meet the standard of continual compliance with Wisconsin law. In that situation, the only way WIOCI could license a Pennsylvania insurer would be to require a special deposit, a performance bond, or to otherwise limit the insurer's operations in the state. Wis. Stat. § 618.12(2). With regard to SHIP, WIOCI did not require a deposit or bond or otherwise limit its operations. That likely would not have been the case if the Rehabilitator's position on the scope of its rehabilitation authority had been known. Comity between the states, and effective multi-state rehabilitations, require that each state respect the others' laws.

This example illustrates how comity between states is integral to the system of state-based insurance regulation. One of the purposes of Pennsylvania's rehabilitation and liquidation law is "lessening the problems of interstate rehabilitation and liquidation by facilitating cooperation between states." 40 Pa.C.S. § 221.1. If states no longer cooperate in the rehabilitation of insurers this could lead to increased litigation and administrative costs leading to worse outcomes for consumers. The Rehabilitator notes that SHIP has \$19.2 million in deposits with other states. The chances of recovering those deposits will be hampered by the Rehabilitator's position regarding other state rating laws. The Rehabilitator's position does not meet the purpose of facilitating cooperation among states.

**II. The Rehabilitator has no authority to ignore the state market regulation laws for the states in which SHIP operates.**

An insurer in rehabilitation must comply with the market regulation laws of the states in which it operates. However, the Rehabilitator seeks the extraordinary remedy of seeking to ignore the laws of other states when it comes to rate filing. Put another way, the Rehabilitator has asserted that this court has the authority and jurisdiction to permit it to circumvent the laws of other states.

The Rehabilitator has identified no legal authority supporting its position, and WIOCI has discovered none. The Plan simply cites general authority to “modify or terminate insurance policies.” (Plan at p. 22.) The court should reject the Rehabilitator’s assertion that it has the authority to ignore the laws of the states in which SHIP operates because it is without legal support and contrary to this Court’s previous holdings.

**A. There is no legal authority supporting the Rehabilitator’s position on the application of other states’ law.**

The Rehabilitator’s sole claim of authority in support of the request to disregard the law of other states is its power to develop a plan of rehabilitation which includes the power to modify insurance contracts. (Plan at p. 22.) The Rehabilitator cites no authority in support of its claim that premium rate increases are the same as the insurance contract modification that rehabilitation courts have approved in the past.

This Court has *in rem* jurisdiction over SHIP and its assets<sup>1</sup> but that jurisdiction is not exclusive as to SHIP’s policyholders. (Plan at p. 80.) Such jurisdiction includes the authority to determine how the limited assets of SHIP should be allocated between policyholders and other claimants. It is from this jurisdiction and authority that the Rehabilitator’s power to modify contracts derives.

The Rehabilitator appears to conflate the authority to modify the *insurer’s* obligations under the policy with the authority to modify the *policyholder’s* obligations under the

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<sup>1</sup> WIOCI does not assent to the Rehabilitator or the Rehabilitation court having the authority or jurisdiction to determine the application of Wisconsin law. Nor does WIOCI concede that any decision that allows the Rehabilitator to impose rate increases in violation of Wisconsin law is valid and enforceable in Wisconsin. WIOCI makes these objections so the Rehabilitation court has the benefit of the WIOCI’s position in determining whether to approve the Plan as presented. WIOCI’s respect for the rehabilitation process should not be viewed as a concession of rights of the agency or the courts of the State of Wisconsin to determine the application of Wisconsin law and the rights of Wisconsin residents.

policy. Premium rate increases are not modifications or termination of the *insurer's* obligation under an insurance policy. A premium rate increase does not present a question as to how to allocate an insolvent insurer's limited assets. Premium rate increases are the policyholder's consideration for the insurance contract and *in rem* jurisdiction does not extend to the assets of the policyholders.

The proposal in the Plan here looks more like an assessment than a rate increase, which is a fundamental problem for approval of the Plan. There is a type of policy that, by its terms, allows a receiver to unilaterally change the obligations of the policyholders in the event of an insolvency. Such policies are called assessable policies; but this case does not involve assessable policies.

An assessable policy is a type of insurance policy that, by contract, may require the policyholder to pay additional funds to cover an insurer's losses and expenses. The right to levy an assessment is provided for in the contract and may be exercised by the management or board of the insurer and, if it comports with the law, typically may be done without the approval of state insurance departments.<sup>2</sup> The rehabilitator, standing in the shoes of the insurer's management, may exercise the right to levy an assessment on policyholders. "The levy of an assessment by a receiver ... is nothing more or less than the exercise, by the receiver, of contractual rights vested in him or her by the liquidation decree and amounts to no more than a demand for payment of the contingent liability which they assumed." Couch on Insurance 3<sup>rd</sup> § 70.12, citing People ex rel. Palmer v. Central Mut. Ins. Co. of Chicago, 313 Ill. App. 84, 39 N.E.2d 400 (1st Dist. 1942).

Here there are no assessable policies, but the Rehabilitator has claimed the unilateral right to levy rate increases including Phase 2 rate increases to make the policy self-sustaining and "eliminate a policy's Shortfall Amount."<sup>3</sup> Further, the Rehabilitator has indicated that the rate increases will not "be limited by, or adhere to, filed rate cards" and that SHIP's filed rates are "inapplicable to the plan." (Plan at p. 22.) The Rehabilitator argues that the rate increases are a matter of contract and not subject to state rate review laws. The modification of the policyholder's obligations beyond that allowed by state rate laws or even SHIP's filed rates in order to eliminate any policy shortfalls is more akin to an assessment than a rate increase.

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<sup>2</sup> Couch on Insurance Third Edition § 70.11.

<sup>3</sup> "Self-sustaining Premium is the premium calculated by determining the amount of premium required to eliminate a policy's Shortfall Amount." (Plan at p. 16.)

As the policies issued by SHIP were not assessible, the contract modification of the Plan effectively changes these policies from non-assessible to assessible policies. Modifying an insurance policy in rehabilitation to make the policyholders responsible for an insurer's solvency is improper. The premium increases sought in the Plan must be treated as rate increases and, as such, must be submitted for state-by-state rate review.

**B. The Rehabilitator does not have authority to disregard other state rate review laws.**

The Plan states that it is “consistent with ... established insurance rehabilitation practice in the U.S.” (Plan at p. 22.) This “established practice” is the opposite of what was asserted by the Pennsylvania Insurance Department in Considine v. Penn Treaty, 63 A.3d 368 (Pa. Comm. Ct. 2012).

In Penn Treaty, the Pennsylvania Insurance Commissioner sought to convert the rehabilitation of Penn Treaty American Network Insurance Company (Penn Treaty) into a liquidation. To support the argument that the rehabilitation was futile, the rehabilitator argued that it would not be able to obtain necessary rate increases from the states in which Penn Treaty did business. Penn Treaty, 63 A.3d at 449. The rehabilitator could not have raised this futility argument if it believed it had the authority to simply avoid other states insurance rate laws in a rehabilitation and impose whatever rate increases it deemed necessary in the rehabilitation plan. Just so here; the rehabilitator must have state approval for rate increases.

**C. This Court has rejected a nearly identical argument regarding state rate approvals in Penn Treaty.**

The Plan states that it will not seek approval in other states because “the state-by-state approval process might perpetuate or increase the nation-wide premium rate variations the Plan strives to eliminate.” (Plan at p.27.) In Penn Treaty, this Court summarized the department's argument as “based upon the premise that states will refuse to carry out their statutory obligations to approve actuarially justified rate increases.” Penn Treaty, 63 A.3d at 449. In both SHIP and Penn Treaty, the department has asserted the same argument for not seeking rate increases; the assumption that not all rate

increases will be granted. This Court rejected the argument that filing requests for rate increases in other states was futile and should reject the same argument in this case.<sup>4</sup>

**D. The Rehabilitator's policy reasons for disregarding state rate laws are unpersuasive.**

The Rehabilitator has asserted timing considerations and the need to avoid cross-state subsidies as reasons why the Rehabilitator cannot follow state rating laws. These arguments are unpersuasive.

With regard to cross-state subsidization, the Plan makes no distinction between states who have granted rate increases and those that have not. In other words, all states are treated the same regardless of the history of granting rate increases. Wisconsin has approved every rate increase that SHIP has submitted since at least 2010 at the requested amount.<sup>5</sup> (See Attached Declaration of Rebecca Rebholz.) Further, this Court has rejected this argument in Penn Treaty, finding it was unreasonable to assume states would not approve actuarial justified rates in the context of a rehabilitation. The Rehabilitator's argument that violation of state rate approval laws is necessary to avoid rate subsidies is simply not applicable to states like Wisconsin. WIOCI stands ready to carry out its statutory obligations to approve actuarially justified rate increases and to do so in a timely manner. Further, as noted by this court in Penn Treaty, the Rehabilitator may have other remedies if states refuse to grant justifiable rate increases. Penn Treaty, 63 A.3d at 450.

The Rehabilitator's argument that the plan will be unfeasible because of delays caused by rate approvals is also unpersuasive. SHIP showed a capital and surplus deficiency of over \$466 million at the end of year 2018 and nearly \$1 billion at the end of 2019. Plan at p.72. SHIP has not filed for a rate increase in Wisconsin since 2018. Indeed it appears that SHIP has withdrawn rate increases filed in 2019 in at least one state<sup>6</sup>. The need for premium increases would have been readily apparent when the company had a surplus deficiency of nearly half a billion dollars at the end of 2018. The application for rehabilitation was filed in January 2020. The gap between the last rate

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<sup>4</sup> “[T]he Court rejects the Rehabilitator's argument that the rate increases needed are too high to be achievable and, thus, futile.” Penn Treaty, 63 A.3d at 449.

<sup>5</sup> The rate increases were approved subject to the rate increase cap cited above for certain policyholders over age 75.

<sup>6</sup> Joint Application for Intervention of the Maine Superintendent of Insurance and the Massachusetts Commissioner of Insurance at p. 8.

increase and the Plan was not due to any delay caused by the Wisconsin rate review process.

Further, the Rehabilitator's request to set aside other state laws is likely lead to the delays and uncertainty the plan purports to avoid. The Rehabilitator's unprecedented position that it need not follow the law in states in which SHIP operates is likely to lead to legal challenge if included in the Plan. Some states have already sought intervenor status to oppose the plan and Wisconsin agrees with the argument the health insurers have made in their motion for intervention that the legal uncertainty and likely legal challenges are going to lead to further erosion of SHIP's financial status.<sup>7</sup> The decision to circumvent state rate filing laws is likely to result in the delays that the Plan purports to avoid.

### **III. Request for an Opportunity to Respond to the Rehabilitator's arguments.**

WIOCI requests leave from the Court to file a short reply to the extent the Rehabilitator files a detailed response to these or similar objections. In the Plan, the Rehabilitator provided very little legal support for its request to disregard state rate filing laws. Presuming that the Rehabilitator will expand on its argument that it has the authority to unilaterally impose rate increases, WIOCI requests leave from the Court for objectors to have the opportunity to provide a short response.

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<sup>7</sup> Application of the Health Insurer for Leave to Intervene for a Limited Purpose at p. 4-5.

## Conclusion

For the reasons stated above, WIOCI files this limited objection to the rehabilitation plan. WIOCI asks the Court to reject the Rehabilitator's request to forgo compliance with state rate review requirements and state rate cap laws. WIOCI requests that this Court modify the rehabilitation plan to require the Rehabilitator to comply with all state rating laws as they pertain to the proposed rate increases for policyholders.

Respectfully Submitted,

Dated: September 9, 2020

By:  \_\_\_\_\_

Richard B. Wicka  
Chief Legal Counsel,  
Wisconsin Office of the Commissioner of  
Insurance

PROOF OF SERVICE

I, Richard B. Wicka, hereby certify that on September 9, 2020, I served the foregoing via email upon the Rehabilitator's counsel and the Special Deputy Rehabilitator at the following:

Cozen O' Connor  
shipcomments@cozen.com

Patrick Cantilo  
service@cb-firm.com

Dated: September 9, 2020

By: 

Richard B. Wicka  
Chief Legal Counsel,  
Wisconsin Office of the Commissioner of  
Insurance

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Senior Health Plan of  
Pennsylvania in Rehabilitation

No.1 SHP 2020

**DECLARATION of REBECCA L. REBHOLZ**

I, Rebecca L. Rebholz hereby declare as follows:

1. I am the Administrator of the Division of Market Regulation and Enforcement at the Wisconsin Office of the Commissioner of Insurance (WIOCI) located in Madison, Wisconsin. I have been employed in this position since August 2016. My responsibilities include supervising market analysis activities, industry and consumer issues, the agent testing and licensing process, as well as the rate and forms review section.

2. I have compiled the information in the statements set forth below through personal knowledge. I have also familiarized myself with past rate increase requests of Senior Health Plan of Pennsylvania (SHIP) and other long-term care providers.

3. I have reviewed all of the rate increase submissions I could locate for SHIP since 2010 and all of those rate increases were

4. approved by WIOCI without modification. For policies issued from August 1, 1996 to December 31, 2001, the rate increase approved were limited to 10% for insureds over the age of 75 whose policy has been in force at least 10 years as required by Wisconsin code.

5. Pursuant to Wis. Admin. Code § Ins 3.455(6), every insurer who offers long-term care insurance in the state of Wisconsin must file an annual loss ratio report.

6. I have reviewed the loss ratio report filed by insurers for 2019 and no insurer with credible data reported a loss ratio lower than 74 percent.

I, Rebecca L. Rebholz, hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904.

Executed this 9<sup>th</sup> day of September 2020 at Madison, Wisconsin.

/s/ Rebecca L. Rebholz  
Rebecca L. Rebholz  
Administrator of the Division of  
Market Regulation and Enforcement  
Wisconsin Office of the Commissioner of Insurance