

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

Pursuant to Pa.R.A.P. 123 and 3776, the Intervenor Superintendent of Insurance of the State of Maine, Commissioner of Insurance of the Commonwealth of Massachusetts, and the Insurance Commissioner of the State of Washington (collectively, the “State Insurance Regulators”) hereby apply to the Court for an order (1) directing the Pennsylvania Insurance Commissioner as Rehabilitator (“Rehabilitator”) of Senior Health Insurance Company of Pennsylvania (“SHIP”) to provide information regarding the Proposed Plan of Rehabilitation (“Proposed Plan”) to the State Insurance Regulators as requested in their Formal Comments, and (2) extending the deadline for submission of witness narrative and exhibits so that the State Insurance Regulators will have time to consider the information when provided. As reasons therefor, the State Insurance Regulators state:

Background

A. The State Insurance Regulators' Intervention, Formal Comments, and Requests for Information

1. In accordance with Paragraph 9 of the Case Management Order dated June 12, 2020, the Maine Superintendent of Insurance and the Massachusetts Commissioner of Insurance filed a Joint Application for Intervention on July 31, 2020 seeking to intervene in this matter with respect to the Proposed Plan. On September 15, 2020, the Washington Insurance Commissioner joined the Joint Application. On September 15 and 18, 2020, the Court entered orders granting the State Insurance Regulators' requests to intervene.

2. September 15, 2020 was also the deadline set in Paragraphs 8 and 9 of the Case Management Order for Commenters and Intervenors to file their Formal Comments concerning the Proposed Plan. The State Insurance Regulators filed Formal Comments by the deadline ("State Regulators' Formal Comments").

3. Among their Formal Comments, the State Insurance Regulators commented that (a) the Rehabilitator, as the proponent seeking approval of the Proposed Plan, has the burden of showing that the plan is feasible, that the effects of the plan upon policyholders and others are fair and equitable, and that the plan complies with statutory and constitutional standards; (b) the Rehabilitator has not shown that the Proposed Plan satisfies the standards for approval as the

Application for Approval of the Plan does not provide the analysis and information necessary to show that the Proposed Plan is fair and equitable, has a reasonable likelihood of success, and satisfies other applicable statutory and constitutional standards; and (c) the Rehabilitator should be directed to provide access to the analysis and information underlying the Proposed Plan. *See* State Regulators’ Formal Comments at 4-11.

4. Specifically, the State Insurance Regulators commented that it is critical that the State Insurance Regulators – and the Court – be presented with the analysis showing how the Proposed Plan will affect various types of policyholders, whether the Proposed Plan has a reasonable chance of success, and whether the Proposed Plan satisfies statutory and constitutional standards, including the requirement that a plan needs “to place policyholders in no worse a position than they would face in a liquidation of SHIP.” Proposed Plan at 8. *See, e.g., Neblett v. Carpenter*, 305 U.S. 297 (1938); *Foster v. Mutual Fire, Marine and Inland Ins. Co.*, 531 Pa. 598, 614 A.2d 1086, 1093-94 (1992); *Consedine v. Penn Treaty Network America Ins. Co.*, 63 A.3d 368, 451-52 (Pa. Commw. Ct. 2012), *aff’d, In re Penn Treaty Network America Ins. Co.*, 632 Pa. 272, 119 A.3d 313 (2015).

5. The State Insurance Regulators commented that it appears that the Proposed Plan may be inequitable and inconsistent with both the *Neblett* standard and the requirement of 40 P.S. § 221.44 that persons – such as policyholders –

within a priority class be treated equally. The Proposed Plan appears to impose different burdens on policyholders in the different States in contravention of these principles. The State Insurance Regulators further commented that the Proposed Plan may not be in the best interests of policyholders because it may require such large increases in premiums that policyholders will be compelled to drop the coverage for which they have paid for years, as the time when they most need it approaches.

6. Meaningful evaluation of these issues requires consideration of information and analysis that the Rehabilitator properly should have assembled and considered as part of developing the Proposed Plan.

7. The State Insurance Regulators accordingly requested in their Formal Comments that the Court order the Rehabilitator to provide the analysis and information to permit the State Insurance Regulators and the Court to assess the impacts and feasibility of the Proposed Plan. *See* State Regulators' Formal Comments at 4-11, 28. The State Insurance Regulators identified seven categories of requested information. *Id.* at 11-12.

8. Paragraph 9 of the Case Management Order expressly contemplated that the Court might permit discovery in this proceeding if warranted, and specified that the opportunity to participate in such discovery was one of the purposes for which persons affected by the Proposed Plan might seek intervention.

B. The Rehabilitator's Refusal to Provide Information so the State Insurance Regulators May Review and Consider It Before the October 30, 2020 Deadline for Witness Narratives and Exhibits

9. The Rehabilitator has effectively declined to provide information to the State Insurance Regulators in response to the requests for information in their Formal Comments.¹ The Rehabilitator has only advised that she expects to provide some information later in October, and she has refused to consent to extending the October 30 deadline. This deprives the State Insurance Regulators of a meaningful opportunity to review and consider whatever information is provided and its sufficiency before being required to provide witness narratives and exhibits.

10. Given the lack of information and the Case Management Order's September 30, 2020 original deadline for intervenors to file witness narratives and exhibits, on September 22, 2020, the State Insurance Regulators filed an application to suspend the September 30, 2020 deadline for the filing of witness narratives and exhibits. That application reflected the State Insurance Regulators' need for time to obtain information from the Rehabilitator, in particular the financial/actuarial assumptions and modeling upon which the Proposed Plan is based, and to review that information before being called on to provide witness

¹ The Rehabilitator is not obligated to respond to Formal Comments. *See* Case Management Order ¶ 14.

testimony and exhibits. The Rehabilitator refused to assent. On September 25, 2020, the Court entered an order extending the deadline to October 30, 2020.

11. On September 23, 2020, the State Insurance Regulators requested that the Rehabilitator either confirm she would not provide information or specify the information to be provided and the date when it would be made available. See Exhibit 1 (Email exchanges between counsel for State Insurance Regulators and counsel for Rehabilitator). On September 25, 2020, the Rehabilitator responded that she was considering the request for information in the Formal Comments. *Id.*

12. The State Insurance Regulators followed up on October 8, 2020, again requesting that the Rehabilitator specify any information she was willing to provide, the date when it would be provided, and whether she would assent to extending the October 30, 2020 deadline. See Exhibit 1. During a call on October 9, 2020, the Rehabilitator indicated that she expected to provide some information to the State Insurance Regulators and file an amended plan with the Court sometime later in October (probably around October 20). However, the Rehabilitator would not assent to an extension of the October 30, 2020 deadline.

13. This is in effect a refusal to provide the information requested in the State Insurance Regulators' Formal Comments. The State Insurance Regulators will only receive whatever information the Rehabilitator has decided to provide a few days before being required to identify witnesses, provide narratives and

identify exhibits. The State Insurance Regulators will be “jammed” against the deadline, without time to review and assess the responsiveness and sufficiency of whatever information is provided and consider its implications for witness narratives and exhibits.

14. Given this refusal, the State Insurance Regulators now request that the Court direct the Rehabilitator to provide the State Insurance Regulators – as Intervenors – with the information requested in their Formal Comments, and also extend the October 30, 2020 deadline so that the State Insurance Regulators will have reasonable time to review and evaluate the information.

**REQUEST FOR ORDER DIRECTING THE REHABILITATOR TO
PROVIDE INTERVENORS WITH THE REQUESTED INFORMATION
CONCERNING THE PROPOSED PLAN**

15. The Rehabilitator’s Application for Approval of the Proposed Plan and the Proposed Plan do not contain information that would allow the Court or the State Insurance Regulators to meaningfully assess the actual effects or feasibility of the Proposed Plan or its compliance with applicable standards.² It is important

² The State Insurance Regulators note that the Proposed Plan has facial deficiencies that warrant disapproval or modification of the Plan regardless of whether additional information is forthcoming. Among their Formal Comments, the State Insurance Regulators made certain objections to the Proposed Plan based on the terms of the Proposed Plan itself that are legal in nature and do not appear to require more information. Those objections include that (1) the Proposed Plan’s attempt to set premium rates exceeds the authority granted by the rehabilitation statute; (2) the Proposed Plan’s disregard of other States’ regulation of rates charged their residents violates the Constitution; (3) the Court should accord comity to the rate-setting statutes of other States; and (4) the Proposed Plan’s continued payment of reinsurance obligations

to know the types, percentages and amounts of benefits the Rehabilitator expects to cut, the percentages and amounts of premiums that the Rehabilitator expects to increase, whether and to what extent policyholders of different types or in different States will bear different burdens or be treated differently, and how the effects on policyholders compare with what would happen in a liquidation.

16. The Rehabilitator should already have prepared and assembled the type of information requested by the State Insurance Regulators. In preparing the Proposed Plan, the Rehabilitator must have prepared reports and actuarial models concerning the impact of the Proposed Plan (and some variants) on policyholders generally and across the States and comparing those effects with potential outcomes in liquidation. That information and modeling is critical to an understanding of the Proposed Plan and whether it comports with applicable statutory and constitutional standards. It should be made available.

17. The State Insurance Regulators – in their capacity as Intervenors in this proceeding – seek the following information (as also requested at pages 11-12 of the State Regulators’ Formal Comments):

- 1) The “extended analysis by industry experts” on which the structure of the Proposed Plan is based (*see* Proposed Plan at 11);
- 2) All analyses or reports prepared by or for the Rehabilitator or SHIP, including reports by consultants such as Milliman,

violates the Pennsylvania priority statute and constitutional requirements. These objections do not appear to require the presentation of testimony or exhibits beyond the Proposed Plan itself.

concerning the benefit reductions underlying or contemplated by the Proposed Plan, including all reports concerning the magnitude of the reductions and their application or effects in different States;

- 3) All analyses or reports prepared by or for the Rehabilitator or SHIP, including reports by consultants such as Milliman, concerning the premium increases underlying or contemplated by the Proposed Plan, including all reports concerning the magnitude of the increases and their application or effects in different States;
- 4) All analyses or reports prepared by or for the Rehabilitator or SHIP, including reports by consultants such as Milliman, concerning insurance guaranty association coverage of SHIP policies, including all reports concerning SHIP's liabilities in excess of liabilities covered by insurance guaranty associations;
- 5) All analyses or reports prepared by or for the Rehabilitator or SHIP, including reports by consultants such as Milliman, comparing the effects of the Proposed Plan with the effects of a liquidation of SHIP;
- 6) All analyses or reports prepared by or for the Rehabilitator or SHIP, including reports by consultants such as Milliman, concerning the "prospect of success" of the Proposed Plan (*see* Proposed Plan at 11); and
- 7) All other analyses or reports on which the Rehabilitator relies to support the Proposed Plan.

18. Disclosure of the requested information is essential so that the State Insurance Regulators may make informed objections and bring important fact-based considerations before the Court. *See Foster v. Mutual Fire, Marine and Inland Ins. Co.*, 531 Pa. 598, 614 A.2d 1086, 1089-90 (1992). In *Mutual Fire*, the rehabilitator submitted a proposed plan of rehabilitation to the court:

The Policyholders Committee and numerous other parties strenuously objected to the proposed plan on the grounds, *inter alia*, that the

Rehabilitator had released no financial information or documentation to substantiate the projections of 100% payment to policyholders contained therein. Hence, the court ordered the Rehabilitator to allow the Policyholders Committee and all interested persons access to Mutual Fire's books and records.

Id. (emphasis added). The production of information to the State Insurance Regulators here is heightened as they are Intervenor in the action, not merely “interested persons”.

19. For the reasons summarized above and set forth in the State Regulators’ Formal Comments, the Court should direct the Rehabilitator to provide requested information to the State Insurance Regulators so they may develop a better understanding of the effects of the Proposed Plan on policyholders and make a more informed assessment concerning whether the Proposed Plan satisfies statutory and constitutional standards.

**REQUEST FOR ORDER EXTENDING THE OCTOBER 30
DEADLINE FOR SUBMISSION OF WITNESS NARRATIVES
AND EXHIBITS**

20. On September 22, 2020, the State Insurance Regulators filed an application to suspend the September 30, 2020 deadline for the filing of witness narratives and exhibits based on their need for time to obtain information, in particular the financial/actuarial assumptions and modeling upon which the Proposed Plan is based, and to review that information before being called on to

provide witness testimony and exhibits. On September 25, 2020, the Court extended the deadline to October 30, 2020.

21. The October 30, 2020 deadline was necessarily premised upon the Rehabilitator's providing information to the State Insurance Regulators in a timely fashion so that they could review it and consider the issues before determining the witnesses, if any, who they would present and the exhibits they would offer.

22. It is now clear that the Rehabilitator will not provide information in a timely fashion, and it appears likely that litigation will be necessary to obtain the information from the Rehabilitator. Given the time this will require, the October 30, 2020 deadline is unrealistic. The State Insurance Regulators accordingly request that the Court extend the deadline to a date to be determined after the Rehabilitator provides the information requested in the State Insurance Regulators' September 15, 2020 Formal Comments to the State Insurance Regulators.

Conclusion

For all of the above reasons, the State Insurance Regulators request that the Court issue an order (1) directing the Rehabilitator to provide the information requested in paragraph 17 above (and in the State Regulators' Formal Comments) to the State Insurance Regulators, and (2) extending the October 30, 2020 deadline

to a date after the Rehabilitator provides the information to the State Insurance Regulators.

October 13, 2020

Respectfully submitted,

By: Steve Harvey Law LLC,

/s/ Stephen G. Harvey
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Of Counsel:

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(appearing *pro hac vice*)

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

Shana Fallon

From: Smith, Eric A. EAS <esmith@rackemann.com>
Sent: Tuesday, October 13, 2020 3:34 PM
To: Broadbent, Michael
Cc: Hamilton, Dexter; Kaldis, Haryle; Steve Harvey; Leslie, J. David
Subject: RE: SHIP

Michael,

Thank you for talking with us last Friday. However, this proposal does not work. First, the Rehabilitator offers no commitments as to either (a) what information/reports will be produced in response to the State Insurance Regulators' requests or (b) when any information will be provided. Second, it puts the State Insurance Regulators in the position of having to make a present filing (which they cannot meaningfully do without the requested information) and then seeking leave of Court to make a supplemental filing. Third, it lets the Rehabilitator choose the information she wants to make available and positions the State Insurance Regulators to pursue additional information only after the present deadline has passed and when the train may be moving toward a hearing date. In our view the October 30 deadline contemplated the State Insurance Regulators having had access to substantive information responsive to the requests sufficiently far in advance of the deadline to meaningfully consider it and determine what, if any, manner of witnesses and exhibits to offer. That is plainly not going to happen, so the State Insurance Regulators will proceed with the motion that we discussed last week.

Regards,

Eric

Eric A. Smith
Rackemann Sawyer & Brewster, P.C.
160 Federal Street
Boston, MA 02110
617-951-1127
esmith@rackemann.com

From: Broadbent, Michael <MBroadbent@cozen.com>
Sent: Tuesday, October 13, 2020 11:33 AM
To: Smith, Eric A. EAS <esmith@rackemann.com>; Leslie, J. David <dleslie@rackemann.com>
Cc: Steve Harvey <steve@steveharveylaw.com>; Hamilton, Dexter <DHamilton@cozen.com>; Kaldis, Haryle <HKaldis@cozen.com>; Patrick Cantilo - CB Email <phcantilo@cb-firm.com>
Subject: RE: SHIP

David and Eric

Thank you for joining us on the phone last week to discuss the exchange of information in this case. I am writing to set out the proposal we offered on the phone regarding the timing of your clients' witness and exhibit lists.

Your clients will agree not to file a motion to suspend the current deadline for exhibits and witnesses, and they will file their exhibits and witnesses responsive to the Plan as currently constituted by October 30, 2020. In exchange, the Rehabilitator will agree not to oppose a future motion to supplement their filing based on any issues arising from the

Amended Plan or supplemental information received, so long as the supplement is filed no later than sixty days before the hearing on the merits of the Rehabilitator's proposed Rehabilitation Plan. If the hearing is set at a time that makes the sixty-day requirement impractical, we would be willing to jointly seek postponement of the hearing to allow sufficient time for the supplement to be filed sixty days before the hearing.

Please let us know if you agree.

Michael



Michael J. Broadbent
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From: Broadbent, Michael

Sent: Thursday, October 8, 2020 4:43 PM

To: 'Smith, Eric A. EAS' <esmith@rackemann.com>; Hamilton, Dexter <DHamilton@cozen.com>; Kaldis, Haryle <HKaldis@cozen.com>

Cc: Steve Harvey <steve@steveharveylaw.com>; Leslie, J. David <dleslie@rackemann.com>; Patrick Cantilo - CB Email <phcantilo@cb-firm.com>

Subject: RE: SHIP

Eric

As it turns out, our respective clients have been in communication, and I believe the Commissioner sent to each of them a seriatim file for their states earlier today.

Moreover, independent of your email, the Commissioner asked me to reach out to you and David to set up a call to address your Formal Comment requests with SDR Patrick Cantilo. Please let me know when you might be available for such a call.

Michael



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From: Smith, Eric A. EAS <esmith@rackemann.com>

Sent: Thursday, October 8, 2020 1:37 PM

To: Broadbent, Michael <MBroadbent@cozen.com>; Hamilton, Dexter <DHamilton@cozen.com>; Kaldis, Haryle <HKaldis@cozen.com>

Cc: Steve Harvey <steve@steveharveylaw.com>; Leslie, J. David <dleslie@rackemann.com>

Subject: RE: SHIP

****EXTERNAL SENDER****

Michael,

We have heard nothing from you concerning the State Insurance Regulators' request for information in the Formal Comments since your September 25 email saying the Rehabilitator is considering the request. In the absence of a response, and given the upcoming October 30 deadline, the State Insurance Regulators need to file an application with the Court seeking the information. If, in fact, the Rehabilitator intends to provide information, please advise us (a) what information the Rehabilitator will provide, (b) when the Rehabilitator will provide it, and (c) whether the Rehabilitator will join in a motion to extend the deadline. Given the October 30 deadline, we request a response by noon on Tuesday, October 13. We will otherwise file an application to obtain information and extend the deadline.

Regards,

Eric

Eric A. Smith
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From: Broadbent, Michael <MBroadbent@cozen.com>
Sent: Friday, September 25, 2020 5:06 PM
To: Smith, Eric A. EAS <esmith@rackemann.com>; Hamilton, Dexter <DHamilton@cozen.com>; Kaldis, Haryle <HKaldis@cozen.com>
Cc: Steve Harvey <steve@steveharveylaw.com>; Leslie, J. David <dleslie@rackemann.com>
Subject: RE: SHIP

Eric

I assume you have seen the judge's order resetting the deadline for the exhibits and witnesses. With respect to your request for information raised for the first time in your formal comments, we are still considering that request, and I believe the order has mooted your immediate concern.

Outside of your request, we do expect additional information to be provided, and as I mentioned during our call, we are anticipating an amended plan that you may consider relevant in developing any exhibits or witness lists.

Michael



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From: Smith, Eric A. EAS <esmith@rackemann.com>
Sent: Wednesday, September 23, 2020 3:24 PM
To: Hamilton, Dexter <DHamilton@cozen.com>; Broadbent, Michael <MBroadbent@cozen.com>; Kaldis, Haryle <HKaldis@cozen.com>
Cc: Steve Harvey <steve@steveharveylaw.com>; Leslie, J. David <dleslie@rackemann.com>
Subject: RE: SHIP

****EXTERNAL SENDER****

Dexter and Michael,

The intervenor State Insurance Regulators filed Formal Comments concerning the Proposed Plan on September 15. The Formal Comments requested that the Rehabilitator provide the State Insurance Regulators with information concerning the Proposed Plan so that they could evaluate its impacts on policyholders and compliance with the statutory and constitutional standards for approval. State Insurance Regulators' Formal Comments at 11-12. The Rehabilitator should be able to provide that information promptly. In preparing the Proposed Plan, the Rehabilitator (or her consultants) must have prepared reports and actuarial models concerning the impact of the Proposed Plan (and some variants) on policyholders generally and across the States and comparing those effects with potential outcomes in liquidation. The State Insurance Regulators seek that existing information.

Yesterday, the Rehabilitator refused to assent and expressed opposition to the State Insurance Regulators' application to suspend the September 30 deadline so that they would have time to receive and review the information. It is evident from this that the Rehabilitator does not intend to provide the information requested in the State Insurance Regulators' Formal Comments. (We note that under paragraph 14 of the Case Management Order the Rehabilitator is not required to respond to Formal Comments.)

The State Insurance Regulators accordingly intend to apply to the Court for an order directing the Rehabilitator to provide the State Insurance Regulators with the requested information. However, to avoid any potential misunderstanding, please confirm that the Rehabilitator does not intend to provide the information requested by the State Insurance Regulators. If, in fact, the Rehabilitator intends to provide information, please advise us (a) what information the Rehabilitator will provide, and (b) when the Rehabilitator will provide it.

Given the upcoming deadline, we request that the Rehabilitator respond to this email promptly and in any event before close of business on Friday. Thank you.

Regards,

Eric

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From: Hamilton, Dexter <DHamilton@cozen.com>

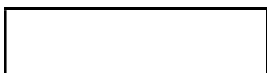
Sent: Tuesday, September 22, 2020 9:42 AM

To: Broadbent, Michael <MBroadbent@cozen.com>; Smith, Eric A. EAS <esmith@rackemann.com>

Cc: Kaldis, Haryle <HKaldis@cozen.com>; Steve Harvey <steve@steveharveylaw.com>; Leslie, J. David <dleslie@rackemann.com>

Subject: RE: SHIP

That works for me.



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