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March 21, 2016

VIA ELECTRONIC MAIL

James C. Boll
Hearing Officer and Chief Legal Counsel
Office of the Commissioner of Insurance
State of Wisconsin
GEF-III, Second Floor
125 South Webster Street
Madison, Wisconsin 53703-3474

Re: In Re the Acquisition of Control by Aetna Inc. of Humana Insurance Company, HumanaDental Insurance Company, Humana Wisconsin Health Organization Insurance Corporation and Independent Care Health Plan, insurers and health maintenance organizations controlled by Humana Inc. and domiciled in the State of Wisconsin (“the Domestic Insurers”)

Dear Judge Boll:

We are writing on behalf of Aetna Inc. (“Aetna”) and Humana Inc. (“Humana” and together with Aetna, the “Parties”) to respond to the March 15, 2016 letter by SEIU Healthcare Wisconsin and Citizens Action of Wisconsin (collectively, the “Petitioners”) to the Office of the Commissioner of Insurance (“OCI”), which requests intervenor status in the captioned matter pursuant to Wisconsin Statutes section 227.44(2m). For the following reasons, the Parties respectfully request that Petitioners’ request be denied.

The Wisconsin Supreme Court has stated that a petitioner seeking intervenor status must meet the burden of establishing both prongs of a two-part test: (1) that the decision of the agency will directly cause injury to the interest of the petitioner, and (2) that this interest is recognized by law. *Fox v. Wis. Dept. of Health & Soc. Servs.*, 112 Wis. 2d 514, 524 (1983). Importantly, “[a]bstract injury is not enough. The plaintiff must show that he ‘has sustained or is immediately in danger of sustaining some direct injury’ as the result of the challenged official conduct and the injury or threat of injury must be both ‘real and immediate,’ not ‘conjectural’ or ‘hypothetical.’” *Id.* at 525. See also *Waste Mgmt. of Wis., Inc. v. State of Wis. Dept. of Nat. Res.*, 144 Wis. 2d 499, 504-05 (1988) (applying the same two-part test). OCI has confirmed that these standards apply to intervention requests under Wisconsin Statutes section 227.44(2m). (See *Application for*

Conversion of Blue Cross & Blue Shield United of Wisconsin, Case No. 99-C26038 (OCI Nov. 29, 1999) (Order, attached as Exhibit A.)

Here, Petitioners cannot satisfy either prong. First, the Petitioners have not established that a decision by OCI in the captioned matter will cause any “direct,” “real” or “immediate” injury to Petitioners. Instead, as Petitioners acknowledge, they are merely asserting interests that “may be affected by the decision following the hearing.” (See March 15 letter at 1 (emphasis added).) Under well-established Wisconsin law, such “conjectural” or “hypothetical” injury is insufficient to grant Petitioners intervenor status here. *Fox*, 112 Wis. 2d at 525. Moreover, Petitioners cannot establish that they, in particular, are “‘immediately in danger of sustaining some direct injury’ as the result of the challenged official conduct.” *Id.* Instead, Petitioners vaguely purport to “represent Wisconsin consumers” who are “likely” to be impacted by the ruling in this matter. But it is OCI, not Petitioners, who are charged with protecting the public interest in this matter. (See Exhibit A at 3: explaining that the Commissioner, and not third parties, is charged to “balance all the competing interests and make a determination of whether the proposed plan is not in the public interest”.) In short, because Petitioners merely allege potential injury to third parties, instead of immediate injury to themselves, they cannot and do not satisfy prong one.

Second, Petitioners have not identified any interest that is recognized by law. As explained above, Petitioners describe themselves as advocates for the interests of Wisconsin consumers. (See March 15 letter at 1.) But, in the *Blue Cross & Blue Shield United of Wisconsin* matter, OCI explained that such interests are not the type recognized under the law. (See Exhibit A at 4.) In that matter, the third parties seeking to intervene were purportedly “acting as advocates or providing services that relate to health care needs of some portion of the public. . . .” (*Id.*) Specifically, the movants there argued, among other things, that “their substantial interests [were] threatened with injury in [that] proceeding because their missions relate to the health needs of sectors of the public” (*Id.*) OCI found that movants lacked standing because such “interests are not of a ‘type recognized by statute.’” (*Id.* at 4-5.) OCI explained that “there are many, and varied, interests that may compete for a particular outcome of this proceeding,” and that the movants “have no greater claim to a specific protected status” than any others. (*Id.* at 5.) On this basis, OCI found that the movants had not identified any interest that is recognized by law, and therefore denied the movants’ motion to intervene. (*Id.*) Because Petitioners similarly are merely advocates for the interests of Wisconsin consumers, they cannot satisfy prong two.

Finally, there is no practical need for Petitioners to intervene in this matter. According to Petitioners, the purpose of their intervention request is so that they can have the opportunity to present six specific questions to the Parties. (See March 15 letter at 12: “If granted intervenor status, we would pose the following questions to the parties”) At the March 15, 2016 prehearing conference, the Parties agreed to present testimony at the March 30, 2016 hearing responding to all six of Petitioners’ questions. Because Petitioners will receive the relief they are requesting without obtaining intervenor status, there is no practical reason for them to intervene.

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For these reasons, the Parties respectfully request that the Petitioners' request for intervenor status be denied. We thank you for your attention to this matter.

Sincerely,

LOCKE LORD LLP



Steven T. Whitmer
On Behalf of Aetna Inc.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP


With Permission

Michael J. Homison
Elena M. Coyle
On Behalf of Humana Inc.

Exhibit A

In the Matter of Application for Conversion of
Blue Cross & Blue Shield United of Wisconsin'

Decision on Motions
To Intervene as Parties

Motions to Intervene as Parties,
Motions by ABC for Health, WI AARP,
WI Coalition for Advocacy, Medical College
of Wisconsin, and UW-Madison Medical School

Case No. 99-C26038

PRELIMINARY DISCUSSION

Procedural History

On June 14, 1999, Blue Cross and Blue Shield United of Wisconsin ("BCBSUW"), a service insurance corporation organized under ch. 613, Stats., filed with the office of the commissioner of insurance ("Office") an application for approval of a plan of conversion to a stock insurer organized under ch. 611. On November 3, 1999, the Office served notice on BCBSUW that a class 1 contested case hearing regarding the application would be held on November 29, 1999, commencing at 10:00 a.m. in Milwaukee. At the same time the Office caused notice of a public and informational hearing (and notice to the public of the class 1 contested case hearing) to be published in the official state newspaper and in all the major newspapers located in the state ("Notice"). The public hearing commences at noon on November 29, after the class 1 contested case hearing, and continues from 10 a.m. to 4 p.m. on Tuesday, November 30.

The Notice contained a deadline for motions of November 19, 1999. On November 19, 1999, motions to intervene in the class 1 contested case hearing were received by the Office from ABC for Health, WI AARP, WI Coalition for Advocacy, UW-Madison Medical School, and Medical College of Wisconsin ("movants"). BCBSUW filed a brief in opposition to all the motions on November 22. No other motions were filed. On November 23, 1999, at 2 p.m. I, Connie L. O'Connell, Commissioner of Insurance ("Commissioner") presided over a pre-hearing conference regarding the pending motions to intervene.

Appearances

The movants and BCBSUW, appeared, by agreement, at the pre-hearing conference represented as follows:

Joseph C. Branch, Attorney
Foley and Lardner
For Blue Cross & Blue Shield United of Wisconsin, Petitioner
Firststar Center
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Milwaukee, WI 53202-5367

Helen H. Madsen, Attorney
For UW-Madison Medical School, Movant
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Madison, WI 53706-1380

T. Michael Bolger, Attorney, President & CEO
For the Medical College of Wisconsin, Movant
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Robert A. Peterson, Jr., Attorney
For ABC for Health, WI AARP, WI Coalition for Advocacy, Movant
152 W. Johnson Street, Suite 206
Madison, WI 53703-2213

Jeff Spitzer-Resnick, Attorney
For ABC for Health, WI AARP, WI Coalition for Advocacy, Movant
16 N. Carroll Street, Suite 400
Madison, WI 53703

Pre-Hearing Conference Order

At the conclusion of the pre-hearing conference, and with agreement of the movants and BCBSUW, an order was entered providing for argument of the motions by briefs to be simultaneously filed with the Commissioner not later than 3 p.m. November 26. Each of the movants filed a brief or a letter.

DECISION

Summary

The motions to intervene are denied because the movants asserted interests do not constitute interests specifically protected under ss. 611.76 and 613.75, Stats. However, the Office will ensure that each of the organizations seeking party status has a full opportunity to participate in this proceeding, including, if appropriate, to offer expert testimony at a continuation of today's hearing, to pose questions to the applicant, and to discuss the pending application with the investment banking firm retained by the Office. Today's hearing will be continued. Any such further proceedings will be added to the record. The Office intends to ensure that this application receives a complete and public review. The Office has no intention of allowing any consideration, including the applicant's expressed desire to complete the approval process by year end, to supercede that full and fair review.

To have standing as a party in the contested case the petitioners must meet a two part test. They must demonstrate the decision of the agency causes injury to their interest and the interest they are asserting is recognized by law. The potential injury asserted by these parties is no different from potential injury to any member of the general public caused by the agency action or inaction in this proceeding. To allow standing in the instant case would establish a precedent for the agency to admit multiple parties in future proceedings, each with a specific interest that is one among many to be considered by the Office in determining the public interest. This is not what the statute contemplates. Therefore, I have denied the motions to intervene.

Fortunately, the Office has broad discretion to structure the review process to maximize participation by organizations such as those represented by the petitioners. I will use this discretion to ensure each of the organizations seeking party status has a full opportunity to participate in this proceeding. Therefore, although I cannot, under the law, grant the petitioners status as parties, I can grant them similar ability to participate in the process.

The Office has already met with a wide range of organizations (including all of the movants) which have expressed their views regarding issues associated with the pending application. For example, I personally have met with representatives of ABC for Health and WI Coalition for Advocacy on June 23, 1999 and November 4, 1999 (as well as on May 4, 1999, in a meeting which preceded, but foreshadowed the current application). Wisconsin AARP participated in the meeting on November 4. In addition I have received letters dated June 23, July 21, August 31, October 21, and November 17, 1999, from those organizations. These letters include expressions of satisfaction that suggestions made by the organizations were adopted by the Office. Office staff have had innumerable contacts or discussions with representatives of these

organizations. I intend to continue to use the statutory discretion to structure the review of the BCBSUW application to allow these organizations meaningful participation in that process.

Discussion

The application of BCBSUW for approval of a plan of conversion to a stock insurer is governed by s. 613.75, Stats. Section 613.75, Stats., provides that a service insurance corporation may convert to a stock insurer organized under ch. 611, Stats., "upon complying with ... as much of s. 611.76 as is applicable...." Section 611.76, Stats., is the statute that governs the conversion of a mutual insurer to a stock insurer.

There are two significant aspects to note regarding s. 611.76, Stats. First, it applies to a conversion that affects rights policyholders have in a mutual insurer (voting, interest in equity etc.) Policyholders do not have any similar rights with respect to a service insurance corporation. This leaves a great deal to the Commissioner's judgement as to what portion of s. 611.76, Stats., is "applicable" to a service insurance corporation conversion. Second, s. 611.76, Stats., gives substantial discretion to the Commissioner to control the conversion subject to the standard that the Commissioner must approve the conversion unless the Commissioner finds that "the plan violates the law or is contrary to the interests of policyholders or the public." The relevant portions of these statutes are as follows:

613.75 Conversion of a service insurance corporation into a stock or mutual insurance corporation. (1) Authorization. Any service insurance corporation may be converted into a stock insurance corporation under ch. 611 upon complying with sub. (2) and as much of s. 611.76 as is applicable, or into a mutual under ch. 611 upon complying with sub. (2) and s. 611.75.

611.76 Conversion of a domestic mutual into a stock corporation. (6) Hearing.
(a) The commissioner shall hold a hearing after receipt of a plan of conversion, notice of which shall be mailed to the last-known address of each person who was a policyholder of the corporation on the date of the resolution under sub. (2), together with a copy of the plan of conversion or a copy of a summary of the plan, if the commissioner approves the summary, and any comment the commissioner considers necessary for the adequate information of policyholders. If the plan of conversion is submitted under sub. (4m), the hearing shall be held not less than 10 days nor more than 30 days after notice is mailed. Failure to mail notice to a policyholder does not invalidate a proceeding under this section if the commissioner determines the domestic mutual has substantially complied with this subsection and has attempted in good faith to mail notice to all policyholders entitled to notice.

(b) With regard to a mutual life insurance company, the notice, the plan or a summary of the plan, and any comments under par. (a) shall also be mailed to the commissioner of every jurisdiction in which the mutual life insurance company is authorized to do any business.

(c) Any policyholder under par. (a) and any commissioner under par. (b) may present written or oral statements at the hearing and may present written statements within a period after the hearing specified by the commissioner. The commissioner shall take statements presented under this paragraph into consideration in making the determination under sub. (7).

(7) Approval by commissioner. (a) The commissioner shall approve the plan of conversion unless he or she finds that the plan violates the law or is contrary to the interests of policyholders or the public.

601.62 Hearings. (2) Special insurance hearings. Chapter 227 shall apply to all hearings under chs. 600 to 655, except those for which special procedures are prescribed.

Section 611.76, Stats., provides for a hearing with respect to the special proceeding governing conversion of a mutual insurer (and by virtue of s. 613.75, Stats., a service insurance corporation) to a stock insurer. The hearing is a public and informational hearing, not a contested case hearing under ch. 227, Stats. Section 611.76 (6) (c) allows any policyholder to participate by providing oral or written statements. The Office, recognizing the discretion granted it under the statutes, also extended that right to any member of the public and any organization. The Office has made great efforts to make available to the public and interested organizations the documents associated with the BCBSUW application. The Notice continues the invitation for any person to access those documents. Key documents may be accessed or downloaded from or through the Office web site, and the Office has routinely responded to requests for copies.

While s. 611.76 (6), Stats., does not contemplate a ch. 227, Stats., contested case hearing the Office has the discretion to convene a class 1 contested case hearing to aid in the consideration of the BCBSUW application:

"Though a hearing is not expressly proscribed by statute, the Commissioner is of course not prohibited from having one." (W.S.A., Committee Comment to s. 601.62, Stats.)

In the Notice the Office scheduled such a class 1 contested case hearing, in addition to the public and informational hearing. Now the movants seek the status of parties in the class 1 contested case hearing in addition to the broad opportunity to participate and express their views which the statutes and the Office has afforded them in the public hearing or otherwise in the process.

To have standing the movants must demonstrate they are entitled to standing under s. 227.44 (2m), Stats. That is, they must show they are a "person whose substantial interest may be affected by the decision following the hearing...". The courts have not interpreted this particular provision, but have discussed ss. 227.52 and 227.53, Stats., which apply a similar standard:

"(T)he first step is to determine 'whether the decision of the agency directly causes injury to the interest of the petitioner. The second step is to determine whether the interest asserted is recognized by law.'" Fox v. Department of Health and Social Services, 112 Wis. 2d 514, 524 (1983).

"Abstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" Fox v. Department of Health and Social Services, supra, 525.

In determining whether the movants asserted interest in the proceeding is one recognized by law the courts look to law applied by the agency. The second part of the test requires a determination whether "the injury is of a type recognized, regulated, or sought to be protected". (Waste Management of Wisconsin v. Wisconsin Department of Natural Resources, 144 Wis. 2d 499, 505 (1988).

ABC for Health Inc., Wisconsin AARP, and Wisconsin Coalition for Advocacy describe their interest generally as related to their respective missions. These are described as acting as advocates or providing services that relate to health care needs of some portion of the public, whether as a public interest law firm in the case of ABC for Health Inc., a protection and advocacy agency for the mentally ill and persons with other disabilities in the case of Wisconsin Coalition for Advocacy Inc. or as an association of older persons in the case of AARP. These movants argue that their substantial interests are threatened with injury in this proceeding because their missions relate to the health needs of sectors of the public, they may wish to obtain grants from funds made available through the results of the proceeding, and a number of members of the organizations are policyholders of BCBSUW.

It is difficult, from the assertions contained in the motions filed by these organizations, to conduct a thorough analysis of the degree of any threatened injury to their interests through this proceeding. However, their

interests are not of a "type recognized by statute." Section 611.76, Stats., instructs the Commissioner to apply a broad standard for approval or disapproval of a conversion. The statute gives wide discretion to the Commissioner to protect the "public interest." Its apparent that there are many, and varied, interests that may compete for a particular outcome of this proceeding. No interest was given a particular right to be weighed more heavily than any other under the statute. Rather the statute contemplates that the Commissioner, with the benefit of broad public discussion, should balance all the competing interests and make a determination of whether the proposed plan is not in the public interest.

This standard does not provide a specific zone of protection for the missions of the movant organizations. Rather it places all competing interests on an equal footing with no particular rights in this proceeding. (I also note that the Wisconsin Supreme Court has concluded that a private cause of action, that is independent standing to bring a civil action, is not provided for under the Wisconsin Insurance Code Kranzush v. Badger State Mutual Casualty Company, 103 Wis. 2d 56 (1981).)

This conclusion is reinforced by s. 611.76 (6) (c), Stats., that provides for a public, rather than a contested, hearing for policyholders. As noted earlier, the Office has extended this right to submit statements to the public at large. This recognizes that service insurance corporation policyholders, unlike a mutual insurer policyholders, do not have rights in the service insurance corporation.

Any other construction of the intent of the legislature would open the door to "permit hundreds of persons appearing in an agency proceeding to cross examine witnesses, to make opening statements, and to depose witnesses, would produce a chaotic, unmanageable and interminable proceeding." It would leave agency proceedings "vulnerable to deliberate obstruction." Wisconsin Environmental Decade Inc. v. Public Services Commission, 84 Wis. 2d. 504, 528 (1978). This is not the process contemplated by the legislature. It is not a precedent that the Office can accept.

The asserted interest of UW-Madison Medical School and Medical College of Wisconsin is obvious. Their respective foundations are the proposed beneficiaries of proceeds that may result from the BCBSUW conversion. However, they have no greater claim to a specific protected status than the other movants.

Order

I fully expect to make provision for further opportunity for these movants to participate in this proceeding, including after the conclusion of the proceedings today. However the motions to intervene as parties are denied.

Dated at Madison, Wisconsin, this 29th day of November, 1999.


Connie L. O'Connell
Insurance Commissioner