

STATE OF WISCONSIN
BEFORE THE OFFICE OF THE COMMISSIONER OF INSURANCE

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WISCONSIN COMMISSIONER
OF INSURANCE

In the Matter of:

Proposed Acquisition of Control of
Physicians Insurance Company of Wisconsin, Inc., by
American Physicians Capital, Inc. and
American Physicians Assurance Corporation ("Applicants")

Case No. 04-C29283

APPLICANTS' INITIAL BRIEF IN OPPOSITION TO PARTY STATUS FOR
PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC.

Background Facts.

On October 15, 2004 Physicians Insurance Company of Wisconsin, Inc. ("PIC") filed a Request for Admission As A Party in this matter. On May 31, 2005 at the prehearing conference Applicants were given an opportunity to file a brief in opposition to PIC's participation as a party in this proceeding.

Statement of the Issue.

There is a single issue in this portion of the proceeding: Whether PIC meets the test for "party" status in this proceeding under the applicable legal standards.

Applicable Legal Standards.

Chapter 227 of the Wisconsin Statutes governs administrative proceedings, including contested cases. This matter is a Class 1 contested case as defined in Wis. Stat. § 227.01(3)(a). This particular proceeding is governed by Wis. Stat. § 611.72 which provides, in a case such as this where there has been an application for a "change of control", that the matter must proceed to a hearing prior to the Commissioner's final decision. Wis. Stat. § 611.72(3).

Under Wis. Stat. § 227.44(2m):

Any person whose substantial interest may be affected by the decision following the hearing shall, upon the person's request, be admitted as a party.

There is a dearth of case law which authoritatively construes the scope of Wis. Stat. § 227.44(2m). However, there is case law that discusses who is considered an appropriate party in judicial review proceedings under §§ 227.52 and 227.53. Most important, Wis. Stat. § 227.42(1) addresses similar standing-type considerations in discussing the right to a contested case hearing. Courts look to statutes addressing subjects similar to a statute a court is called upon to construe and treat such statutes as *in pari materia*. When courts are called upon to address statutes contained in the same chapter, the statutes should be read *in pari materia* to assist and harmonize the implementation of the goals, purposes and policies of the statutory

provisions. *R.W.S. v. State*, 162 Wis. 2d 862, 871, 471 N.W. 2d 16 (1991) (citing *State v. Amato*, 126 Wis. 2d 212, 216, 376 N.W. 2d 75 (Ct. App. 1985)).

While agencies have tended to erect a low threshold for participation in a contested case, that standard has been subject to judicial limitation when challenged. These limitations were recognized in *Wisconsin Environmental Decade v. P.S.C.*, 84 Wis. 2d 504, 526, 267 N.W.2d 609 (1978) (“WED”). In that case, the Supreme Court considered whether the Public Service Commission should grant full party status to all persons making appearances in the case and recognized a distinction reflecting a difference in the degree of interest certain participants had in the proceedings versus those who merely appear. *Id.* at 526-27. The Court found that the implications of according full party status to anyone who simply suggested that they had an interest in the case would be impractical, given the fact that a party in a contested case is entitled to notice, the ability to present evidence, receive copies of prepared written testimony and cross-examine and put on witnesses (among other things). *Id.* at 528-29. The Court found that such a broad standard for participation would produce “a chaotic and unmanageable and interminable proceeding.” *Id.* at 529. The Court also indicated it would simply be impractical to allow any person with a generalized interest in a case to be a party. *Id.* at 527-28.

The WED court’s objection to admitting any party with a mere generalized interest in the matter closely tracks one of the bases necessary to obtain a contested case hearing under Wis. Stat. § 227.42(1). Specifically, § 227.42(1)(c) provides:

The injury to the person requesting a hearing is different in kind or degree from injury to the general public caused by the agency action or inaction...

We believe that PIC’s interest in this proceeding is the mere “generalized interest” recognized in both the WED and § 227.42(1)(c) and that should preclude its participation in this proceeding.

Furthermore, the Commissioner can determine whether a person has a “substantial interest” and thus standing to participate in this proceeding under § 227.44(2m) by looking to the requirements a person must meet to have standing to secure a contested case hearing in the first instance under § 227.42(1). Applicants therefore believe that OCI should apply Wis. Stat. § 227.42(1) in conjunction with 227.44(2m) to test PIC’s assertions on party status. Wis. Stat. § 227.42(1) sets forth four conjunctive tests which the person requesting a hearing must meet:

- (a) A substantial interest of the person is injured in fact or threatened with injury by agency action or inaction;
- (b) There is no evidence of legislative intent that the interest is not to be protected;
- (c) The injury to the person requesting a hearing is different in kind or degree from injury to the general public caused by the agency action or inaction; and
- (d) There is a dispute of material fact.

Because a hearing is not discretionary in this proceeding, § 227.42 applies. See § 227.42(3). The application of § 227.42(3) is specifically discussed in *Milwaukee Metropolitan Sewerage District v. DNR*, 126 Wis. 2d 63, 69-70, 375 N.W.2d 649 (1985) (citing *Wisconsin’s Environmental Decade v. DNR*, 115 Wis. 2d 381, 407, 340, N.W.2d 722 (1983)).

The Wisconsin Supreme Court's most cogent discussion of the tests in § 227.42 is in *Milwaukee Metropolitan Sewerage District*, 126 Wis. 2d 63, 73-76. In discussing § 227.42's identical predecessor (§ 227.064) the Supreme Court made it clear in that case that meeting each of the tests in (a)-(d) is required to trigger a putative party's right to a § 227.42(1) contested case hearing.

There is nothing in § 611.72 which speaks directly to the basic question of who is a party. Likewise, Wisconsin Administrative Code § INS 5, is silent except in circumstances, unlike here, relating to orders and determinations of the Commissioner. Wis. Admin. Code § INS 5.09. Nothing in Wis. Admin. Code § INS 5.09 speaks to this proceeding because there is no order yet issued. Likewise, Wis. Admin. Code § INS 5.11, addresses hearings on actions by the Commissioner's Office after the action has been taken.

Burden of Proof.

PIC has the burden of meeting each and every test under § 227.42(1). PIC's Petition for Admission makes only general statements of its interest and provides no evidence from which the Commissioner could conclude that they are entitled to participate as a party. This burden is not insignificant. In previous cases construing § 227.42(1), Wisconsin appellate courts have concluded that a landfill operator does not have a right to hearing on the disapproval of a plan of operation. *Waste Management of Wis., Inc. v. DNR*, 128 Wis. 2d 59, 85-86, 381 N.W.2d 318 (1986) and that neither an environmental group nor the state public intervenor have the right to a contested case hearing on the decision not to prepare an EIS. *Wisconsin's Environmental Decade v. P.S.C.*, 79 Wis. 2d 409, 256 N.W.2d 149 (1977); *Wisconsin's Environmental Decade v. DNR*, 115 Wis. 2d 381, 404-406, 340 N.W.2d 722 (1983). It is clear from the cases and the language of § 227.42(1) that the determination of whether one has a "substantial interest" or whether the injury to the person requesting a hearing is different in kind or degree from injury to the general public are matters of fact. There is nothing in the request of PIC which would give the Commissioner a basis for concluding that the tests under § 227.42(1) (a)-(d) are met.

PIC is unlike the Applicants, whose ability to consummate a contractual purchase of shares of PIC and who clearly have a specific economic interest in the outcome of the proceedings, and unlike the sellers who have a contractual agreement to sell their shares and whose economic contract benefit will be denied if the Application is rejected. Similarly, the State Medical Society represents policyholder interests which are clearly intended to be protected by § 611.72. The Applicants, however, have shown nothing which suggests that they have the type of "substantial interest" in this proceeding required to permit them to participate.

Preliminary Analysis of PIC's Position.

Without benefit of PIC's response but in anticipation of some of the arguments which may be made, it is interesting to observe that the tests in § 611.72(3) focus principally on the interest of "Wisconsin Insureds", "the interest of ... Wisconsin policyholders" and "policyholders of the Domestic Insurance Corporation." PIC is not a policyholder. One can anticipate, however, that PIC will purport to speak for "policyholders", or that it may be interested in participating on their behalf. But PIC is not a policyholder or organization such as the State Medical Society, which actually and actively represents policyholders. Indeed, the fact that insurance companies and their agents often act contrary to the interests of their policyholders and insureds is the entire reason for much of the regulation relating to insurance companies administered by the Commissioner of Insurance.

It is no accident that most Form A change of control proceedings are resolved on the basis of a lengthy record created by the Applicants and by the staff of the Office of the Commissioner of Insurance which focus on the concerns of the Office in meeting its obligation to assure that the statutory grounds for approval are met and the grounds for disapproval are not ignored. That someone has this task does not necessarily mean that any person, including in this case PIC, has the right to participate in these proceedings as a party.

PIC's interests sound like those that all citizens have in the proper administration of the laws of the state. This generalized interest has specifically been held not to confer party status. *WED*, 84 Wis. 2d at 527-28. The grounds for disapproval stated in Wis. Stat. § 611.72(3) are interests which the legislature has recognized as the interests to be protected. The issue of "injury" goes to whether PIC is positioned vis-a-vis those issues in a manner requiring party status. It will be interesting to see whether PIC can assert any injury, recognized under § 611.72, different from the concerns which the general public might have in the efficient and thorough investigation of this transaction by the Commissioner.

PIC's Arguments to Date.

On October 15, 2004, PIC filed a letter, a document entitled "Request for Admission as a Party" along with a cover letter. While the documents clearly illustrate PIC's enthusiasm for participation as a party, and raise a series of questions about the transaction, at least one of them is demonstrably false on its face and others are, as observed above, not matters on which PIC has an interest recognized in § 611.72. That is not to say that the State and the Commissioner do not have an interest. But the question of whether PIC has an interest is a different matter.

Turning first to the Request for Admission as a Party, there are a list of 8 stated reasons and a reference to the affidavit of William T. Montei, President and CEO of PIC-Wisconsin. The question of financial impact of the transaction on PIC are stated in No. 2 "Petitioner's financial difficulties and financial status could adversely affect PIC-Wisconsin's financial stability." Assuming for the purpose of argument that Applicants have either financial difficulties or their financial status is a matter of concern, a purchase of 22.7% of PIC shares will have no effect on PIC. Before and after the transaction, PIC's financial status will be unencumbered by the financial condition of its shareholders. The financial status of those shareholders does not effect the balance sheet or the operations of PIC. No shareholder – even with 100% "control," can drain money out of PIC without regulatory approval and oversight.

While PIC makes many allegations about this transaction, its main complaint seems to be that a substantial interest effected by a decision in this matter is "... its ability to fulfill its core mission, that is, serving the interest Wisconsin physicians by providing stable and affordable medical liability insurance." Assume that Mr. Montei accurately states the PIC mission in paragraph 14 of his affidavit. One can be sure that whatever PIC's mission is, it would have been cited in connection with this proceeding. But that mission is also the mission of the Office of the Commissioner of Insurance and its concerns are those of every other participant in this market, including the policyholders. Does this mean all such persons are admitted into this proceeding? Paragraph 15 of Mr. Montei's affidavit talks about the acquisition being "contrary to the interest of the public in general". This is really PIC's complaint which is, in turn, a smoke screen for its real interest – preserving management and board discretion by avoiding the presence of shareholders who know the business and could, in the future, be influential.

Furthermore, the Form A filed in this case makes clear that the applicants do not want to change the core mission of PIC. Applicants are interested in PIC because it has been a successful company – the Applicants have no interest in materially changing the features of PIC that have brought that success.

In prior cases the fact that an organization of persons interested is generally identified with that of the public at large has been determined to be a basis to deny the Application since the asserted injury to PIC is not different from the injury to the public as a whole giving PIC no special status of standing. *WED*, 84 Wis. 2d at 527-28.

Until PIC goes beyond allegations and directs itself to the statutory tests provided in §§ 227.42(1) and 227.44(2m) it has utterly failed to meet its burden. Neither the Commissioner nor other parties should be forced to speculate about why they meet these tests.

Conclusion.

PIC's Request for Admission As A Party fails to meet the burden of demonstrating its right to participate as a party. PIC's interest in preserving its ability to treat passive shareholders like sheep is not an interest to be protected in these proceedings.

Respectfully submitted this 6th day of June, 2005:



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