ANCILLARY RECEIVERSHIPS:
TREATMENT OF SPECIAL DEPOSITS IN HMO RECEIVERSHIPS

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During 1999 and 2000, New England regulators, providers and consumers were buffeted as significant health maintenance organizations were placed into rehabilitation and receivership proceedings in several jurisdictions. The first such occurrence was in Rhode Island when in the summer of 1999, the Rhode Island Department of Business Regulation ("Department") placed Harvard Pilgrim Health Care of New England, Inc. ("HPHC-NE"), a Rhode Island domiciliary which operated in Rhode Island and Massachusetts, into supervisory status. The Department then placed HPHC-NE into rehabilitation status on October 25, 1999 when it became apparent that its corporate parent, the Massachusetts domiciled Harvard Pilgrim Health Care, Inc. ("HPHC") no longer would subsidize HPHC-NE's operating losses.[1] (HPHC was eventually placed into receivership by the Commonwealth of Massachusetts in January, 2000.[2]) Meanwhile, on November 22, 1999, the State of New Hampshire placed Tufts Health Plan of New England, Inc. ("THP-NE"), a New Hampshire domiciliary with operations in New Hampshire, Maine, and Rhode Island, into rehabilitation status when it was determined that its parent company, Tufts Health Plan ("THP") would no longer support the capital needs of THP-NE.[3] Thus, while dealing with the failure of its own domiciliary, i.e., HPHC-NE, and the subsequent receivership of its corporate parent, HPHC, the Department was also faced with a second failure affecting Rhode Island consumers.

To understand the magnitude of the issues faced by Rhode Island, HPHC-NE, the Rhode Island domiciled HMO, reported in excess of 177,000 members as of September 30, 1999, operated six health centers, employed approximately 122 physicians and 192 other medical providers, and had 888 other employers. It is also fair to say that the operation of the subsidiary and its parent were so entwined that it was difficult, if not impossible, to identify the ownership of their respective assets and the responsible entity for certain liabilities.

The failure of THP-NE on December 20, 2000 was clearly a further burden for the Department. When THP-NE was put into receivership by New Hampshire regulators, the health plan had approximately 145,000 members in Maine, New Hampshire and Rhode Island. Fortunately for Rhode Island regulators, only 5,000 of those members were located in Rhode Island. While THP-NE had entered the market years before, it had not grown appreciably over time; nonetheless, the entity had contracts with various Rhode Island hospitals and other health care providers. The THP-NE receivership further unnerved consumers and the already shaky Rhode Island health insurance market.

However, unlike New Hampshire and Maine, Rhode Island had required THP-NE to make certain deposits with the State of Rhode Island as a condition for entering into the Rhode Island market. Specifically, as a condition to the licensure of the THP-NE, THP-NE and its parent entered into a guaranty agreement whereby certain funds, i.e., $1,280,000 to cover Rhode Island health care providers in the event of insolvency, $150,000 to cover the cost of a receivership and liquidation, and $100,000 to cover the needs of planned enrollees, were deposited with the General Treasurer of Rhode Island. These deposits immediately became the subject of much contention.

When the State of New Hampshire filed its petition on December 20, 1999 to liquidate THP-NE effective January 3, 2000, the New Hampshire Insurance Department demanded the State of Rhode Island forward the deposits it held to New Hampshire so that the deposit money would be administered as part of the management of the liquidation of THP-NE. Recognizing that the removal of the funds to the Granite State might inhibit, delay, or potentially reduce the amounts which would be available to Rhode Island providers and other appropriate claimants, the Department of Business Regulation, acting pursuant to R.I. Gen. Laws §§ 27-14.3-1 et seq., filed a petition in the Providence County Superior Court of Rhode Island on December 30, 1999 for the appointment of an ancillary receiver.[4] The granting of the petitions and order appointing the Director of the Department as ancillary receiver on December 31, 1999 had the practical effect of Rhode Island's retention of the deposits at least until the respective authorities of the two states could be adjudicated. New Hampshire, of course, objected to Rhode Island's retention of the deposits and raised, in a case of first impression, the appropriate use of special deposits in HMO receiverships.[5]

The New Hampshire receiver noted that both New Hampshire and Rhode Island had adopted the Insurers Rehabilitation and Liquidation Act as proposed initially by the National Association of Insurance Commissioners (as enacted, the laws of each state were substantially identical, see New Hampshire RSA 402-C:1 et seq. and R.I.

Gen. Laws § 27-14.3-1 et seq.) Under the statutes of both states, the liquidator appointed in the domiciliary state is charged with the responsibility to marshal the insurer's assets, oversee the administration and allowance of claims asserted by creditors, and provide payments to holders of allowed claims. Similarly, under such laws, an ancillary receiver may be appointed in other than a domiciliary state and may also marshal assets and make allowance and payment of claims of persons in the ancillary state.

And, now, the nub of the issue. The New Hampshire regulator, in her original verified petition for liquidation, requested that administrative cost status be given to certain providers from the date of the filing of the liquidation petition on December 20, 1999 through February 2, 2000. The Rhode Island ancillary proceeding recognized no such administrative claim status. The New Hampshire regulator also desired to require Rhode Island claimants, including those holding administrative claims, to be paid first from the special deposit, and if and when such deposit was exhausted, New Hampshire would pay claims from the general fund of THP-NE in equal priority with others by classes established by law. Thus, said New Hampshire, creditors who are residents of Maine or New Hampshire would not be required "to bear the disproportioned burden that would result from the payment of Rhode Island claims with general funds of the estate." In essence, New Hampshire argued, claimants from Maine and New Hampshire do not enjoy the benefit of the special deposits – if Rhode Island claimants could initially bypass the special deposits, there would be an impact on the total available funds. So, New Hampshire contended, let New Hampshire proceed with its plans, including the payment, as a priority, of its providers, adjudicate Rhode Island claims, pay Rhode Island claims from the deposits, and the Rhode Island claimants would be treated like all others similarly situated.

Rhode Island naturally objected to this reasoning.[6] New Hampshire was requesting that Rhode Island service providers be treated differently than all others in New Hampshire and Maine by requiring that their proper expenses be taken first from the Rhode Island deposits. Rhode Island argued that since New Hampshire and Rhode Island were "reciprocal states" under their respective acts, the claimants thereunder had to be treated equally, and without distinction and without regard to the state in which the general assets are located.[7] While agreeing that special deposit funds would generally be accessed first by claimants in the depository state and such claimants would share in the general funds of the insurer only to the extent that they did not receive the same percentage payout as other creditors, Rhode Island asserted that the obvious corollary was that creditors in a deposit state cannot end up with a lower percentage than the percentage paid to creditors from general assets. The creation of a special class of creditors, i.e., Rhode Island providers whose funds would be paid by the special deposit first, would violate RSA 402-C:44 which states in pertinent part ". . . every claim in each class shall be paid in full or adequate funds retained for the payment before members of the next class receive any payment. No subclasses shall be established within any class." See also, R.I. Gen. Laws § 27-14.3-46.

Rhode Island also argued that New Hampshire's position would also violate RSA 402-C:60 ("Interstate Priorities") which requires that ". . . all claims of residents of reciprocal states shall be given equal priority of payment from general assets regardless of where such assets are located." It was also noted that the proposed order of liquidation required Rhode Islanders to continue to send their insurance premiums to New Hampshire through February 2, 2000, which fund would presumably be part of the general estate while provider's claims would be paid from the special deposit.

With issues joined, Superior Court Judge George Manias rendered his decision.[8] The court noted New Hampshire's argument that it would be unfair to allow Rhode Island claimants to get partial satisfaction from the general assets of the liquidation estate first while protecting its claimants access to the special deposit rate. It also summarized Rhode Island's argument that its claimants should not be disadvantaged simply because Rhode Island had the foresight to require THC-NE to make special deposits.

The court found, however, that New Hampshire's argument failed on two grounds. First, RSA 402-C:57 permits claimants in reciprocal states to file their claims with either the ancillary receiver or the domiciliary receiver. New Hampshire's proposal to limit Rhode Islanders to a claim in Rhode Island would essentially negate their rights to choose the place of filing. Secondly, the New Hampshire position would have made the provision of law permitting special deposits to be almost meaningless because the only reason for special deposits is "to provide an advantage to residents of that state." "The drafter of RSA Chapter 402_C could not have intended this statute to create a situation in which claimants in Special Deposit States could receive fewer cents on the dollars than claimants in states without Special Deposits."

Lastly, Judge Manias noted that Rhode Island premiums continued to flow into the estate while New Hampshire was advocating that they be paid first from the special deposits. The exhaustion of those deposits, while the general estate is increased by those premiums, seemed inequitable and "seems counter to both the spirit and letter of RSA Chapter 402-C."

Judge Manias' decision is correct on both the law and the equity of the situation. A creditor in each state should be treated equally with those in its class. RSA 402-C:44; R.I. Gen. Laws 27-14.3-46. No use of the wide discretion given to a liquidator should impact a creditor's right to recourse to the court of its choosing. RSA 402-C:57. On a policy basis, if a domiciliary state can cause the claimants in an ancillary state to first exhaust any special deposit before being treated as an equal *within the liquidation* to others similarly situated in the liquidation, the entire concept of reciprocity breaks down. Also, since the domiciliary state has wide discretion as to the administrative costs which are inherent any attempt to stabilize a health care market when an HMO fails, the ancillary state is at a substantial disadvantage since it may not have the same needs or policies as the domiciliary state, and thus may find that the classes of debtors in its state are disadvantaged. Hence, special deposits are rightly used to serve as a backup to the assets of the trust estates.

Lastly, as pointed out by Judge Manias, liquidations of HMO's are unlikely to be a "surgical strike" of simply closing the doors. Health care preservation concerns and, indeed certain state statutes, make it impractical to do so; thus, administration costs would likely continue so long as there is the need for individuals to change their health care providers or health care insurers in a manner causing the least disruption in the continuation of health care within the state. The payment of providers in such circumstances is clearly now recognized as a prudent administrative cost for a liquidator but it nonetheless has the effect of potentially limiting the amount of trust assets in the estate. Thus, a special deposit in an ancillary state is good public policy; its use as a "backup" and not as the initial fund for the payment of the ancillary state's claimants also is both consistent with a close reading of the reciprocal acts and public policy for the prompt resolution of HMO receiverships.

Endnotes

1. Tom Schumpert in his capacity as Director of Business Regulation v. Harvard Pilgrim Health Care of New England, Inc., Superior Court, Providence County, M.P. No. 99-5453 (1999).

2. In Re the Rehabilitation of Harvard Pilgrim Health Care, Inc. et al., Supreme Judicial Court for Suffolk County, No. SJ-2000-003 (2000).

3. In the matter of the Liquidation of Tufts Health Plan of New England, Docket No. 99-E-0410, Merrimack County, New Hampshire (1999).

4. Tom Schumpert in his capacity as Director of Business Regulation v. Tufts Health Plan of New England, Inc., Superior Court, Providence County, M.P. No. 99-6627 (1999).

5. Motion for Expedited Entry of Supplemental Order of Liquidation, Docket No. 99-E-0410, Merrimack County, New Hampshire, dated January 5, 2000.

6. Objection of Rhode Island Ancillary Receivership/Intervenor to Motion for Expedited Entry of Supplemental Order of Liquidation, Docket No. 99-E-0410, Merrimack County, New Hampshire, dated January 11, 2000.

7. 1 Couch on Insurance Sec 6:14 (3rd).

8. Order Denying Liquidator's Motion for Expedited Entry of Supplemental Order of Liquidation, Manias J, Docket No. 99-E-0410, Merrimack County, New Hampshire, dated January 4, 2000.