

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT
INGHAM COUNTY

E. L. COX, COMMISSIONER OF INSURANCE
FOR THE STATE OF MICHIGAN,

Petitioner,

v

File No. 98-88265-CR

MICHIGAN HEALTH MAINTENANCE
ORGANIZATION PLANS, INC., a
Michigan health maintenance organization,
doing business as OmniCare Health Plan,

Hon. James R. Giddings

A.G. No. 1998053333A

Respondent.

VERIFIED PETITION OF THE
MICHIGAN COMMISSIONER OF THE OFFICE
OF FINANCIAL AND INSURANCE SERVICES
FOR ORDER OF REHABILITATION,
ORDER TO SHOW CAUSE AND INJUNCTIVE RELIEF

NOW COMES Frank M. Fitzgerald, Commissioner of the Office of Financial & Insurance Services of the State of Michigan (OFIS), by his attorneys, JENNIFER M. GRANHOLM, Attorney General of Michigan, and E. John Blanchard, Assistant Attorney General, and hereby petitions this honorable court for an Order of Rehabilitation pursuant to MCL 500.8112 and MCL 500.8113 as follows:

General Allegations

1. Frank M. Fitzgerald is the duly appointed Commissioner of the Office of Financial & Insurance Services of the State of Michigan (hereafter "Commissioner") pursuant to MCL 500.202 and Executive Order No. 2000-4, effective April 3, 2000. Commissioner Fitzgerald is the successor to the former Commissioner E. L. Cox and may be substituted for E. L. Cox pursuant to MCR 2.202(C).

2. Pursuant to MCL 500.3503 and MCL 500.8104(1), only the Commissioner may commence a delinquency proceeding against a health maintenance organization (hereafter "HMO") licensed pursuant to Chapter 35 of the Michigan Insurance Code, being MCL 500.3501 *et seq.*

3. Pursuant to MCL 500.3503(1), for purposes of a rehabilitative receivership, an HMO shall be treated in the same manner as an insurer pursuant to Chapter 81 of the Insurance Code, being MCL 500.8101 *et seq.*

4. Pursuant to MCL 500.8104(3), the Circuit Court for Ingham County shall have the sole jurisdiction of a delinquency proceeding commenced under Chapter 81 of the Insurance Code.

5. A health maintenance organization is defined in § 3501(f) of the Insurance Code, MCL 500.3501(f), as follows:

(f) "Health maintenance organization" means an entity that does the following:

(i) Delivers health maintenance services that are medically indicated to enrollees under the terms of its health maintenance contract, directly or through contracts with affiliated providers, in exchange for a fixed prepaid sum or per capita prepayment, without regard to the frequency, extent, or kind of health services.

(ii) Is responsible for the availability, accessibility, and quality of the health maintenance services provided.

6. Respondent, OmniCare Health Plan (hereafter referred to as "OmniCare"), is a not-for-profit organization formed for the purpose of promoting and operating a health maintenance organization.

7. OmniCare commenced business as a licensed health maintenance organization on December 23, 1975 and is located at 1155 Brewery Park, Suite 200, Detroit, Michigan. OmniCare is providing health care services to approximately 100,000 covered members primarily in the southeastern Michigan-Detroit area.

8. OmniCare contracts with the Michigan Department of Community Health to provide health care services to approximately 70,000 Medicaid enrollees. Approximately 30,000 subscribers are covered under commercial-employer health care contracts.

9. United American Health Care Corporation (United American), licensed as a third party administrator by OFIS, is a for-profit, health care management corporation that provides management and administrative services to OmniCare. OmniCare pays a management fee of 14% of its revenue to United American, or approximately \$26,127,874 for the year 2000. United American exercises control of OmniCare through officers and directors serving on the boards of both corporations.

10. On May 7, 1998, an Ex Parte Order of Seizure and Order to Show Cause Why an Order of Rehabilitation Should Not Issue was issued by Ingham County Circuit Court Judge Carolyn Stell. The order of seizure was issued due to OmniCare's:

- (a) hazardous financial condition due to severe operating losses,
- (b) failure to maintain the requisite net worth as required by law,
- (c) its insolvent condition,
- (d) significant understatement of claims payable,
- (e) failure to maintain the requisite working capital,
- (f) failure to timely pay bills to providers,
- (g) failure to file a certified annual financial statement, as required by law.

11. The seizure order directed the Commissioner, as conservator, to take possession and control of all the property, books, accounts, documents and other records of OmniCare.

12. The Order of Seizure also enjoined all officers, directors, agents, employees and managers from the further transaction of business and disposition of property without the Commissioner's written consent, and ordered the full cooperation of such persons with the Commissioner and his designees.

13. For more than three years, OmniCare has operated in seizure and has continued to provide medical services to its subscribers. However, OmniCare has failed to restore itself to financial health, and remains in a hazardous financial condition. Facts and analysis presented to the Commissioner, and OmniCare's recent filing of its May 2001 monthly financial statement, March 31, 2001 quarterly statement, and its annual statement for year-end December 31, 2000, have given the Commissioner reasonable cause to believe that OmniCare is in such condition that the further transaction of business would be hazardous financially to its policyholders, creditors, or the public. OmniCare must be placed in rehabilitation to preserve and protect the assets from further dissipation, to protect subscribers, creditors, and the public, and to preserve the provider network and maintain continuity of health care services. Further, based on OmniCare's hazardous financial condition, the Commissioner has determined that the interests of subscribers, creditors, and the public will be endangered by any delay.

14. This Petition for Order of Rehabilitation is verified by Commissioner Frank M. Fitzgerald. The Commissioner's petition justifies the commencement of formal delinquency proceedings as follows:

A. OMNICARE IS INSOLVENT

15. OmniCare has failed to maintain the requisite net worth, as required by law, and is INSOLVENT. The minimum net worth required by MCL 500.3551(3) for OmniCare at May 31, 2001, is \$1,500,000.

16. As set forth in its own monthly financial statement filed with the Commissioner, OmniCare is insolvent with a negative net worth of \$31.9 million as of May 31, 2001. This hazardous financial condition is unacceptable and threatens the interests of policyholders, creditors, and the public.

17. As of May 31, 2001, OmniCare, shows on its own certified annual statement, that it has a negative net worth of \$31.9 million. This is a decrease in net worth of \$23.7 million from year-end December 31, 2000, where its net worth totaled a negative \$8.2 million.

B. OMNICARE HAS NEGATIVE WORKING CAPITAL IN VIOLATION OF LAW

18. Section 3555 of the Insurance Code, MCL 500.3555, requires HMOs to maintain a financial plan that at a minimum meets cash flow needs and provides adequate working capital. MCL 500.3555(b) requires that working capital must be at an adequate level and at no time may it be negative.

19. OmniCare's working capital at May 31, 2001 is a negative \$33.4 million, as reported in its May 31, 2001 monthly financial statement. At December 31, 2000, OmniCare reported working capital of a negative \$9.7 million. This is a further decline of over \$23.7 million in working capital since year-end 2000.

20. Adequate working capital is required in order to pay employees who are providing services to subscribers and to meet obligations as they become due. Continued noncompliance with the working capital requirement is evidence that the company is in a hazardous financial situation requiring immediate action.

C. OMNICARE DOES NOT MEET THE RISK BASED CAPITAL REQUIREMENTS, AND IS NOT SAFE, RELIABLE, AND ENTITLED TO PUBLIC CONFIDENCE

21. Pursuant to MCL 500.3551(4), the Commissioner is required to consider the Risk Based Capital (RBC) requirements, as developed by the National Association of Insurance Commissioners (NAIC), in order to determine compliance with MCL 500.403, which requires that OmniCare be "safe, reliable and entitled to public confidence." Risk based capital is a formula designed to measure the amount of capital that an HMO is required to have in order to support the risks of the business it is writing. This includes consideration of premium volume, provider arrangements, lines of business, and other factors. RBC requirements are described in the Insurance Bureau Bulletin 98-02. Under § 1.H(4) of the NAIC HMO RBC model, a risk based capital level of less than .70 requires the commencement of delinquency proceedings, including an action for rehabilitative receivership.

22. OmniCare would need \$44.5 million in additional capital in order to achieve a net worth in compliance with 200% RBC, which is the standard established to measure needed capital.

23. As a result of the foregoing, the Commissioner has concluded that the continuation of OmniCare's business as it is presently being conducted is hazardous to its subscribers, creditors, and the public. OmniCare does not meet the requirements for licensure and authorization to operate as an HMO. Moreover, the Commissioner has concluded that the interests of subscribers, creditors, and the public will be endangered by any delay in obtaining an order of rehabilitation.

D. AN ORDER OF REHABILITATION IS WARRANTED AND AUTHORIZED BY LAW

24. MCL 500.8103(c) defines a delinquency proceeding as follows:

'Delinquency proceeding' means a proceeding instituted against an insurer for the purpose of liquidating, rehabilitating, reorganizing, or conserving such insurer and a summary proceeding under Section 8109 or 8110. Formal delinquency proceeding' means any liquidation or rehabilitation proceeding.
(Emphasis added)

25. MCL 500.8112 sets forth the grounds for commencement of a formal delinquency proceeding to rehabilitate, reorganize, and conserve, as follows:

The commissioner may apply by petition to the circuit court for Ingham County for an order authorizing the commissioner to rehabilitate a domestic insurer or an alien insurer domiciled in this state on 1 or more of the following grounds:

(a) The insurer is in such condition that the further transaction of business would be hazardous financially to its policyholders, creditors, or the public.

* * *

(m) Is found, after examination, to be in a condition so that it could not presently meet the requirements for incorporation and authorization.
(Emphasis added)

26. MCL 500.8113 provides as to an order to rehabilitation as follows:

(1) An order to rehabilitate the business of a domestic insurer, or an alien insurer domiciled in this state, shall appoint the commissioner and his or her successors in office as the rehabilitator, and shall direct the rehabilitator to take immediate possession of the assets of the insurer, and to administer them under the court's general supervision. The filing or recording of the order with the clerk of the circuit court or register of deeds for the county in which the principal business of the company is conducted, or the county in which its principal office or place of business is located, shall impart the same notice as a deed, bill of sale, or other evidence of title duly filed or recorded with that register of deeds would have imparted. The order to rehabilitate the insurer shall by operation of law vest title to all assets of the insurer in the rehabilitator.

(2) An order issued under this section shall require accounting to the court by the rehabilitator. Accountings shall be at such intervals as the court specifies in the order.

(3) Entry of an order of rehabilitation shall not constitute an anticipatory breach of any insurer contracts. (Emphasis added)

27. MCL 500.8114 sets forth the powers of the rehabilitator by providing that:

(1) The commissioner as rehabilitator may appoint 1 or more special duties, . . . who shall have all the powers and responsibilities of the rehabilitator granted

under this section, and the commissioner may employ such counsel, clerks, and assistants as considered necessary. The compensation of the special deputy, counsel, clerks, and assistants and all expenses of taking possession of the insurer and of conducting the proceedings shall be fixed by the commissioner, with the approval of the court and shall be paid out of the funds or assets of the insurer. The persons appointed under this section shall serve at the pleasure of the commissioner. If the property of the insurer does not contain sufficient cash or liquid assets to defray the costs incurred, the commissioner may advance the incurred costs out of an appropriation for the maintenance of the insurance bureau. Amounts advanced for expenses of administration shall be repaid to the commissioner for the use of the insurance bureau out of the first available money of the insurer.

(2) The rehabilitator may take such action as he or she considers necessary or appropriate to reform and revitalize the insurer including, but not limited to, the powers in section 8121(1)(f), (l), (m), (r), and (u). The rehabilitator has all the powers of the directors, officers, and managers, whose authority shall be suspended, except as they are redelegated by the rehabilitator. The rehabilitator has full power to direct and manage, to hire and discharge employees subject to any contract rights they may have, and to deal with the property and business of the insurer

(3) If it appears to the rehabilitator that there has been criminal or tortuous conduct or breach of a contractual or fiduciary obligation detrimental to the insurer by an officer, manager, agent, broker, employee, or other person, he or she may pursue all appropriate legal remedies.

(4) If the rehabilitator determines that reorganization, consolidation, conversion, reinsurance, merger, or other transformation of the insurer is appropriate, he or she shall prepare a plan to effect those changes. Upon application of the rehabilitator for approval of the plan, and after notice and hearings as the court may prescribe, the court may either approve or disapprove the plan proposed, or may modify it and approve it as modified. A plan approved under this section shall be, in the court's judgment, fair and equitable to all parties concerned. If the plan is approved, the rehabilitator shall implement the plan. For a life insurer, the plan proposed may include the imposition of liens upon the policies of the company, if all rights of shareholders are first relinquished. A plan for a life insurer may also propose imposition of a moratorium upon loan and cash surrender rights under policies, for such period and to such an extent as may be necessary.

(5) The rehabilitator shall have the power under sections 8126 and 8127 to avoid fraudulent transfers.
(Emphasis added)

28. MCL 500.8115(1) addresses stays of pending actions and proceedings by providing that:

(1) A court in this state before which an action or proceeding in which the insurer is a party, or is obligated to defend a party, is pending when a rehabilitation order against the insurer is entered shall stay the action or proceeding for 90 days and such additional time as is necessary for the Rehabilitator to obtain proper representation and prepare for further proceedings. The Rehabilitator shall take action respecting the pending litigation as he or she considers necessary in the interests of justice and for the protection of creditors, policyholders, and the public. The Rehabilitator shall consider immediately all litigation pending outside this state and shall petition the courts having jurisdiction over that litigation for stays if necessary to protect the insurer's estate.

29. A rehabilitator may be entitled to injunctive relief as provided in MCL 500.8105,

which states that:

(1) A receiver appointed in a proceeding under this chapter may at any time apply for, and the circuit court for Ingham county may grant, a restraining order, preliminary injunction, permanent injunction, and any other order as may be considered necessary and proper to prevent any of the following:

- (a) The transaction of further business by the insurer.
- (b) The transfer of property.
- (c) Interference with the receiver or with a proceeding under this chapter.
- (d) Waste of the insurer's assets.
- (e) Dissipation and transfer of bank accounts.
- (f) The institution or further prosecution of any actions or proceedings.
- (g) The obtaining of preferences, judgments, attachments, garnishments, or liens against the insurer, its assets, or its policyholders.
- (h) The levying of execution against the insurer, its assets, or its policyholders.
- (i) The making of a sale or deed for nonpayment of taxes or assessments that would lessen the value of the insurer's assets.
- (j) The withholding from the receiver of books, accounts, documents, or other records relating to the insurer's business.
- (k) Other threatened or contemplated action that might lessen the value of the insurer's assets or prejudice the rights of policyholders, creditors, or shareholders, or the administration of a proceeding under this chapter.

(2) The receiver may apply to a court outside of the state for the relief described in subsection (1).

30. In summary, this court's Order of Rehabilitation is necessary and appropriate because OmniCare:

(a) is insolvent and has failed to maintain the requisite net worth as required by law,

(b) has negative working capital in violation of law,

(c) does not meet the risk based capital requirements established by the National Association of Insurance Commissioners and the Division of Insurance, and its financial condition renders it unsafe, unreliable, and not entitled to public confidence,

(d) the further transaction of business as it is presently being conducted would be hazardous financially to its subscribers, creditors, and the public,

(e) does not meet the requirements for licensure and authorization.

31. Furthermore, it is essential that the Commissioner, as rehabilitator, be vested by operation of law with legal title to all assets of OmniCare so as to reorganize, consolidate, convert, merge, or effectuate such other transformation of OmniCare as is appropriate. In addition, an Order of Rehabilitation is necessary so as to preserve the continuity of health care to the approximately 100,000 OmniCare subscribers and to do all that is possible to preserve the provider network rendering the health care services.

32. It is critical that this court act immediately to issue an order to Show Cause and Order of Rehabilitation, appointing the Commissioner as Rehabilitator. Continuation of the seizure order is no longer prudent. Such a reaction could be hazardous and destructive to the preservation of OmniCare as an ongoing entity and to the continuity of health care services being provided by OmniCare to approximately 100,000 subscribers. The Commissioner must be authorized through this court's Order of Rehabilitation to pursue efforts leading to rehabilitation, reorganization, merger, or other transformation of OmniCare. This requires that OmniCare be preserved and maintained. It is therefore essential that in order to preserve OmniCare, that

providers be assured of payment, that subscribers and employers be assured of continued health care services, and that United American Health Care Corporation continue to administer claims, subject to further order of this court.

33. Section 8105 of the Insurance Code MCL 500.8105 authorizes this Court to grant a restraining order, preliminary injunction, permanent injunction, and any other order as may be necessary and proper to prevent (1) the transfer of property, (2) interference with the Receivership, (3) waste, (4) and any other threatened or contemplated action that might lessen the value of the assets or prejudice the rights of subscribers, creditors, or the administration of this proceeding.

34. The Commissioner's overriding concern is to preserve the provider network and continuity of health care services. To do so, it is essential that United America be ordered by this Court to continue its administrative processing of claims for OmniCare and that it take no action to lessen the value of OmniCare's assets or prejudice the rights of subscribers or creditors. Injunctive relief in this regard is therefore appropriate and necessary.

35. Due to the need to take immediate action to prevent subscribers, employers and providers from leaving OmniCare due to adverse publicity, the Commissioner requests the Court to issue an Order to Show Cause as to why an Order of Rehabilitation should not be granted. The Commissioner requests that the hearing be held as soon as possible due to the emergency nature of the situation.

Relief Requested

WHEREFORE, the Commissioner of the Office of Financial and Insurance Services respectfully requests that this court immediately issue a Preliminary Order of Rehabilitation and Injunctive Relief and Order to Show Cause as to why a Final Order of Rehabilitation should not be issued pursuant to MCL 500.8113 and 500.8114. In addition, the Commissioner requests that injunctive relief be granted pursuant to MCL 500.8105 to preserve the status quo of the provider network and claims payment process, and maintain continuity of medical services. Further, the Commissioner requests whatever further relief the court deems just, necessary and appropriate.

Frank M. Fitzgerald, Commissioner
Office of Financial & Insurance Services

Subscribed and sworn to before me
this 30th day of July, 2001.

Notary Public, _____ County, MI
My Commission Expires: _____.

Respectfully submitted

JENNIFER M. GRANHOLM
Attorney General

E. John Blanchard (P28881)
Assistant Attorney General
Insurance & Banking Division
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1160

Dated: July 30, 2001