

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

PATRICK M. MCPHARLIN, DIRECTOR
OF THE DEPARTMENT OF INSURANCE
AND FINANCIAL SERVICES,

Petitioner,

v

AFFIRMATIVE INSURANCE COMPANY
OF MICHIGAN,

Respondent.

Case No. 15-898-CR

HON. CLINTON CANADY III

[IN REHABILITATION]

Christopher L. Kerr (P57131)
M. Elizabeth Lippitt (P70373)
Assistant Attorneys General
Attorneys for Petitioner
Corporate Oversight Division
P. O. Box 30755
Lansing, MI 48909
(517) 373-1160

**EX PARTE PETITION FOR APPROVAL TO
SETTLE PENDING HEALTH CARE PROVIDER LAWSUIT AND CLAIM
AGAINST AFFIRMATIVE INSURANCE COMPANY OF MICHIGAN**

Patrick M. McPharlin, Director of the Michigan Department of Insurance and Financial Services (“DIFS”), as Rehabilitator of Affirmative Insurance Company of Michigan (the “Rehabilitator”), by and through his attorneys, Bill Schuette, Attorney General, and Christopher L. Kerr and M. Elizabeth Lippitt, Assistant Attorneys General, petitions this Court pursuant to MCL 500.8115(1) to approve the settlement of a health care provider lawsuit and a separate, disputed health

care provider claim currently pending against Affirmative Insurance Company of Michigan (“AIM”). In support of this *Ex Parte* Petition, the Rehabilitator states as follows:

1. On October 29, 2015, this Court entered an Order placing AIM into Rehabilitation and appointing the DIFS Director as the Rehabilitator of AIM.

2. MCL 500.8115(1) governs legal actions or proceedings involving AIM that were pending when the Rehabilitation Order was entered. The statute provides, *inter alia*, that “[t]he 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.”

3. With respect to claims against AIM arising after entry of the Rehabilitation Order, MCL 500.8114(2) and the Rehabilitation Order authorize the Rehabilitator to “take such action as he considers necessary or appropriate to reform or revitalize AIM.” Rehabilitation Order, p 7, ¶ 11. In addition, this statute, as incorporated by the Rehabilitation Order, grants the Rehabilitator “full power and authority to direct and manage AIM . . . and to deal in totality with the property and business of” the company. Rehabilitation Order, p 6, ¶ 8.

4. The Rehabilitator seeks the Court’s approval to settle the following lawsuit and claim that are currently pending against AIM:

a. ***Mendelson Orthopedics, PC and St. John Macomb-Oakland Hospital v Affirmative Insurance Company.*** This health care provider lawsuit is pending in the Wayne County Circuit Court, assigned Case No. 15-004837-NF. Plaintiffs’ Complaint was filed on April 10, 2015 under the Michigan No-Fault Insurance Act, MCL 500.3101 – 500.3179, and alleges claims for breach of contract against AIM arising from its denial of payment

for certain medical services provided to AIM's insured, Helene Hartwell, following her alleged involvement in an automobile accident on or around March 14, 2010. AIM suspended benefits on November 1, 2013, after an Independent Medical Examiner determined that Ms. Hartwell's injuries related to the auto accident were resolved. However, Ms. Hartwell proceeded to have surgery at St. John Macomb-Oakland Hospital ("St. John") in January 2015, for which St. John sought payment from AIM totaling \$67,025.37, plus interest, costs, and attorney fees. Through negotiations, St. John has agreed to dismiss its lawsuit with prejudice and to release AIM from any and all liability for medical services provided to Ms. Hartwell up to January 2, 2016, in exchange for AIM's payment of \$49,000.00.

The January 2015 surgery on Ms. Hartwell was performed by Dr. Mendelson of Mendelson Orthopedics, PC ("Mendelson"), for which Mendelson sought payment from AIM totaling \$31,285.20, plus interest, costs, and attorney fees. Through negotiations, Mendelson has agreed to dismiss its lawsuit with prejudice and to release AIM from any and all liability for medical services provided to Ms. Hartwell up to December 29, 2015, in exchange for AIM's payment of \$22,000.00.

b. ***In re: Total Toxicology v Affirmative Insurance Company of Michigan.*** Health care provider Total Toxicology has asserted a claim against AIM (a lawsuit has not been filed) under the Michigan No-Fault Insurance Act, MCL 500.3101 – 500.3179, seeking payment for certain medical services provided to AIM's insured, Mark Essad, following his alleged involvement in an automobile accident on or around July 15, 2010. AIM denied payment for the services provided by Total Toxicology because they were unreasonable and unnecessary in nature, and/or excessive and non-customary as to the amounts that Total Toxicology sought to charge. Moreover, the services could have been performed in-office by Mr. Essad's treating physician, Dr. Mendelson. Total Toxicology sought payment from AIM totaling \$12,615.77 for medical services provided to Mr. Essad from March 13, 2012 through December 11, 2015. Through negotiations, Total Toxicology has agreed to release AIM from any and all liability for medical services provided to Mr. Essad up to December 11, 2015, in exchange for AIM's payment of \$6,800.00.

5. With limited exceptions not applicable here, Paragraph 15 of the Rehabilitation Order prohibits the payment of any Creditor claims for goods or services provided prior to the date that the Order was entered until further order of the Court. The foregoing health care provider lawsuit and claim arise in whole or in

part from services provided or actions taken prior to the date of the Rehabilitation Order. More importantly, the exception in Paragraph 15 authorizing the payment of pre-rehabilitation claims “arising from covered losses under AIM insurance policies” does not apply because AIM disputes the existence and/or amount of insurance coverage for these health care provider claims. Accordingly, an order approving these proposed settlements is needed from the Court.

6. The Rehabilitator believes that settlement of the foregoing lawsuit and claim in the amounts indicated above and on the terms contained in their respective settlement agreements (which are not attached due to confidentiality provisions and/or concerns) is necessary and appropriate, is in the interests of justice, and will promote the protection of AIM’s creditors, policyholders, and the public. In each case, a comparison of the settlement amount to the amount of the original claim evidences that these settlements are reasonable and will limit potential liability to the Rehabilitation Estate. Moreover, each of the settlements is relatively modest in amount and would likely be exceeded by legal and other costs if these cases were adjudicated to judgment in this Rehabilitation or otherwise.

7. Personally serving this *Ex Parte* Petition and any resulting Order on all parties that may have a general interest in AIM’s rehabilitation would be impractical at this time because there has been no claims submission or other process to identify these parties. Moreover, attempting to identify and personally notify every party having such a general interest would be time-intensive and costly to AIM’s Rehabilitation Estate. For these reasons, the Rehabilitator requests that

the Court authorize and ratify service of this *Ex Parte* Petition and any resulting Order by posting electronic copies on the DIFS website, www.michigan.gov/difs, under the section “Who We Regulate,” the subsection “Receiverships,” and the subsection “Affirmative Insurance Company of Michigan.” Service in this manner is reasonably calculated to give potentially interested parties actual notice of these proceedings and is otherwise reasonable under the circumstances.

WHEREFORE, for the reasons stated above, the Rehabilitator respectfully requests this Court to approve the settlements reached in the above-referenced matters, in the amounts and on the terms more fully set forth in their respective settlement agreements. The Rehabilitator further requests the Court to authorize and ratify service of this *Ex Parte* Petition and any resulting Order by posting electronic copies on the “Affirmative Insurance Company of Michigan” section of the DIFS website.

Respectfully submitted,

Bill Schuette
Attorney General

Christopher L. Kerr (P57131)
M. Elizabeth Lippitt (P70373)
Assistant Attorneys General
Attorneys for Petitioner
Corporate Oversight Division
P. O. Box 30755
Lansing, MI 48909
(517) 373-1160

Dated: February 17, 2016