

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

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

Petitioner,

v

CONSUMERS MUTUAL INSURANCE
OF MICHIGAN,

Respondent.

Case No. 15-948-CR

HON. JAMES S. JAMO

[IN LIQUIDATION]

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**EX PARTE APPLICATION FOR APPROVAL OF
SECOND EARLY ACCESS DISBURSEMENT TO
PARTIALLY SATISFY CLAIMS OF THE MICHIGAN LIFE AND
HEALTH INSURANCE GUARANTY ASSOCIATION**

Patrick M. McPharlin, Director ("Director") of the Michigan Department of Insurance and Financial Services ("DIFS"), as Liquidator of Consumers Mutual Insurance of Michigan (the "Liquidator"), by and through his attorneys, Bill Schuette, Attorney General, and Christopher L. Kerr and Mark A. Gabrielse, Assistant Attorneys General, files this application ("Application") pursuant to MCL 500.8134 for the Court's approval of a second early access disbursement to the

Michigan Life and Health Insurance Guaranty Association (“Guaranty Association”) from the assets of Consumers Mutual Insurance of Michigan’s (“Consumers Mutual”) liquidation estate. Specifically, the Liquidator requests Court approval of a proposed second early access disbursement to the Guaranty Association—in the form of a \$815,328.68 cash disbursement and ratification/approval of the Liquidator depositing past and future healthcare provider refunds due to Consumers Mutual with the Guaranty Association for the payment of covered claims—in partial satisfaction of the Guaranty Association’s Class 1 and 2 claims against the liquidation estate arising from its statutory obligation to process and pay covered healthcare claims under Consumers Mutual insurance policies. This Application is made pursuant to MCL 500.8134 and is also consistent with MCL 500.8142 and the terms of the Early Access Agreement between the Liquidator and Guaranty Association that the Court previously approved. In support of this Application, the Liquidator states as follows:

INTRODUCTION

1. On November 13, 2015, the Court entered an Order placing Consumers Mutual into rehabilitation and appointing the Director as the Rehabilitator of Consumers Mutual (the “Rehabilitator”).
2. On February 3, 2016, the Rehabilitator filed with the Court a Petition for Order Converting Rehabilitation to Liquidation and for Judicial Declaration of Insolvency of Consumers Mutual Insurance of Michigan (“Liquidation Petition”), which sought: (a) an order converting the rehabilitation of Consumers Mutual to a

liquidation proceeding; and (b) a judicial declaration of Consumers Mutual's insolvency.

3. On February 10, 2016, the Court granted the Liquidation Petition and entered an Order of Liquidation and Declaration of Insolvency of Consumers Mutual ("Liquidation Order"). Pursuant to the Liquidation Order, the Court appointed the Director as the Liquidator of Consumers Mutual and affirmed the Liquidator's appointment of James Gerber and Julieanne Gulliver as Special Deputy Liquidators.

4. Prior to entry of the Liquidation Order, the Liquidator (then the Rehabilitator) and the Guaranty Association executed an Early Access Agreement and a Service Agreement to assist in the effective and efficient administration of Consumers Mutual's liquidation and to help maximize protection of creditors, policyholders, and the public. The Liquidator filed the Early Access and Service Agreements as exhibits to the Liquidation Petition, and the Court approved those agreements as part of the Liquidation Order.

5. On March 18, 2016, the Court entered an Order granting the Liquidator's *Ex Parte* Application for Approval of Early Access Disbursement to Partially Satisfy Claims of the Michigan Life and Health Insurance Guaranty Association ("First Disbursement Application"), which approved the Liquidator's payment of a first early access disbursement to the Guaranty Association in the amount of \$3 million.

6. Based on the assets of Consumers Mutual's liquidation estate marshaled to date and the company's current finances, the Liquidator has determined that there are sufficient assets available in the estate to support a second early access disbursement to the Guaranty Association.

**AUTHORITY FOR LIQUIDATOR'S FILING AND
COURT'S APPROVAL OF APPLICATION FOR SECOND
EARLY ACCESS DISBURSEMENT TO THE GUARANTY ASSOCIATION**

7. Upon entry of the Liquidation Order, the Guaranty Association, pursuant to Chapter 77 of the Michigan Insurance Code, became statutorily responsible for covering eligible healthcare claims under Consumers Mutual insurance policies, subject to the Guaranty Association's statutory limits, terms and conditions of coverage.

8. As stated, to facilitate this process, the Liquidator and the Guaranty Association entered into the Early Access Agreement that the Court approved in the Liquidation Order. The Early Access Agreement is included in the record as Exhibit C to the Liquidation Petition, and is not separately attached.

9. MCL 500.8134(1) provides that within 120 days after entry of the Liquidation Order, the Liquidator "shall make application to the court for approval of a proposal to make early access disbursements out of" Consumers Mutual's assets "to any guaranty association . . . having obligations because of [Consumers Mutual's] insolvency." The Guaranty Association has such obligations due to Consumers Mutual's insolvency, and the Liquidator complied with this provision by filing his First Disbursement Application that the Court granted on March 18, 2016.

10. MCL 500.8134(1) also governs any additional early access disbursements made to the Guaranty Association after the 120-day period following entry of the Liquidation Order. The statute provides that if the estate at any later time “obtains sufficient assets to support an early access disbursement,” the Liquidator must file an application for approval to make a proposed disbursement within 60 days after the estate obtains those assets. MCL 500.8134(1).

11. Any application for approval of a proposed early access disbursement “shall at least include provisions” satisfying MCL 500.8134(2)(a) – (e). This Application satisfies each of these provisions, as explained immediately below.

12. First, MCL 500.8134(2)(a) requires the Liquidator to reserve (i.e., not disburse), based on the best information currently available, funds that are needed to pay: (a) administrative expenses having Class 1 priority under MCL 500.8142(1)(a); (b) claims having Class 2 priority under MCL 500.8142(1)(b); (c) claims of secured creditors to the extent of their security; and (d) uncovered “separate account” claims, which may be granted Class 2 priority under MCL 500.8142(2). Here, the Liquidator has reserved sufficient amounts to pay all anticipated Class 1 expenses for his administration of the Consumers Mutual liquidation estate. Likewise, the Liquidator has reserved amounts needed to pay any anticipated Class 2 claims against the estate for losses incurred under Consumers Mutual insurance policies (separate from the Class 2 claims that the Guaranty Association will cover and pay, resulting in a Class 2 reimbursement claim against the estate). Because Consumers Mutual does not have any secured

creditors or separate accounts, the Liquidator has no reserve obligations with respect to these claims.

13. Second, MCL 500.8134(2)(b) requires “[d]isbursement of the assets marshaled to date and subsequent disbursement of assets as they become available.” The second early access disbursement proposed by this Application is based on all Consumers Mutual assets marshaled to date and presently available for disbursement. The Liquidator will continue to propose additional, future disbursements to the Guaranty Association to the extent that additional estate assets become available.

14. Third, MCL 500.8134(2)(c) requires an equitable allocation of disbursements to each guaranty association entitled to a disbursement. Consumers Mutual only conducted business in Michigan. Consequently, the Michigan Life and Health Insurance Guaranty Association is the only State guaranty association having obligations due to Consumers Mutual’s insolvency and entitled to a disbursement.

15. Fourth, MCL 500.8134(2)(d) requires the Liquidator to secure from the Guaranty Association “an agreement to return to the liquidator such assets, together with income earned on assets previously disbursed, as may be required to pay claims of secured creditors and claims falling within the priorities established in section 8142 [MCL 500.8142] in accordance with those priorities.” Under the Early Access Agreement approved by the Court, the Guaranty Association expressly agreed that any early access disbursements “shall be made pursuant to the early

access provisions and priority of claims contained in” MCL 500.8134 and 500.8142. Early Access Agreement, § 2.1. The Guaranty Association further agreed to timely return to the Liquidator any amounts disbursed that are necessary to pay claims falling within equal or higher priority classes in accordance with MCL 500.8142. *Id.* at § 3.1. Moreover, Consumers Mutual has no secured creditors, while the Liquidator has fully reserved and is not disbursing amounts needed to pay Class 1 administrative expenses of the liquidation estate. Accordingly, the Liquidator has taken adequate precautions—through the Early Access Agreement and otherwise—to satisfy the requirements of MCL 500.8134(2)(d) and fully protect other Consumers Mutual creditors in connection with the proposed second early access disbursement.

16. Fifth, MCL 500.8134(2)(e) requires the Guaranty Association to account to the Liquidator for early access disbursements, including its expenditure of the funds and any interest earned thereon. The Early Access Agreement requires the Guaranty Association to provide the Liquidator with reasonable access to its books, records, and files related to Consumers Mutual, as well as to respond to all reasonable requests from the Liquidator for information, files, and documents relating to the distribution or use of early access disbursements. Early Access Agreement, § 4.2. Furthermore, the Liquidator and Guaranty Association have a longstanding history of mutually providing information needed to discharge their respective duties. Accordingly, the Guaranty Association will provide the

Liquidator any statutory or other reasonably requested information relating to the early access disbursement, in compliance with MCL 500.8134(2)(e).

17. The remainder of MCL 500.8134 imposes additional requirements regarding a proposed early access disbursement, only two of which are relevant to this Application. MCL 500.8134(3) provides that the Liquidator's proposed disbursements shall be in amounts equal to the estimated claim payments that the Guaranty Association has made or will make for which it can assert a reimbursement claim against the liquidation estate, or if available estate assets are insufficient to make disbursements in this total amount, in the amount of estate assets actually available. As of December 21, 2016, the Guaranty Association has already paid over \$14 million in claims and claims processing expenses under Consumers Mutual insurance policies, while the Guaranty Association remains statutorily responsible to process and pay an unknown amount of additional, future claims. However, due to reserve requirements, uncertainties with the liquidation, and other considerations, the Liquidator has determined that estate assets totaling only \$1,458,190.91—in the form of a \$815,328.68 cash disbursement and healthcare provider refunds due to Consumers Mutual totaling \$642,862.23 through December 27, 2016 that the Liquidator deposited with the Guaranty Association for the payment of covered claims—are presently available for a second early access disbursement. The Liquidator's proposed second early access disbursement therefore complies with MCL 500.8134(3) because it represents the total amount of estate assets presently available for disbursement and the Guaranty Association's

actual claims and claims processing payments totaling over \$14 million greatly exceed the less than \$4.5 combined total of the \$3 million first disbursement and proposed second disbursement.

18. Lastly, MCL 500.8134(5) governs notice of an application for approval of a proposed early access disbursement, which must be provided to any affected State guaranty association and insurance commissioner. Again, Consumers Mutual only conducted business in Michigan, so only the Michigan Life and Health Insurance Guaranty Association and Michigan Director of DIFS are affected by this Application and entitled to notice under MCL 500.8134(5). The Director is well aware of this Application, having filed it in his capacity as Liquidator. Likewise, the Application and proposed, accompanying Order were provided to, discussed with, and approved by the Guaranty Association, through its Administrator and General Counsel, John Colpean, before being submitted to the Court.

Consequently, the Liquidator and Guaranty Association, as the only parties entitled by statute to notice of this Application, have been amply notified, consented to the relief sought, and agreed to waive any further notice requirements under MCL 500.8134(5). These circumstances, together with the mandatory nature of early access disbursements when estate assets are available, further justify the *ex parte* filing of this Application and *ex parte* entry of the proposed, accompanying Order.

19. The provisions of the Early Access Agreement are consistent with MCL 500.8134, ensuring performance of the foregoing statutory requirements. In addition to the examples previously cited, the Early Access Agreement complies

with MCL 500.8134(2)(a) and MCL 500.8134(3) by authorizing the Liquidator to make to the Guaranty Association, as available, early access disbursements from liquidation estate assets attributable to Guaranty Association covered obligations under Consumers Mutual insurance policies, to the extent those assets are not reasonably necessary for: (a) expenses of administration of the liquidation estate; (b) claims of secured creditors, to the extent of the value of the security held; or (c) as a reserve for claims accorded a higher or equal priority of distribution by Michigan law. Early Access Agreement, § 2.1. The agreement similarly provides that the availability and/or payment of early access disbursements “shall be as determined by the [Liquidator] and approved by the Court.” *Id.*

20. As indicated, the proposed second early access disbursement includes a \$815,328.68 cash disbursement to the Guaranty Association, and the Liquidator also asks the Court to ratify/approve the Liquidator’s ongoing practice of depositing healthcare provider refunds due to Consumers Mutual with the Guaranty Association for the payment of covered claims. As of December 27, 2016, these provider refunds totaled \$642,862.23 that the liquidation estate is entitled to credit against the Guaranty Association’s reimbursement claim. The Liquidator is considering these provider refunds as part of the proposed second early access disbursement, which combined with the \$815,328.68 cash disbursement totals \$1,458,190.91. Because additional provider refunds will be paid after December 27, 2016, the Liquidator also requests the Court to approve this continued practice and

a final accounting of all provider refunds received when the Guaranty Association submits its reimbursement claim.

21. In summary, and as explained in more detail above, the Liquidator has determined that there are currently \$1,458,190.91 in estate assets available for a second early access disbursement to the Guaranty Association. This proposed disbursement is net of amounts that the Liquidator has conservatively and fully reserved/retained in the liquidation estate for the payment of all anticipated claims required under MCL 500.8134. The Liquidator has similarly considered and satisfied every other statutory requirement relevant to this Application. Overall, the Liquidator has determined that this second early access disbursement is necessary and appropriate, will assist with the effective and efficient administration of Consumers Mutual's liquidation, and will help maximize protection of creditors, policyholders, and the public.

22. Pursuant to MCL 500.8134(5), and as discussed in Paragraph 18, a copy of the filed Application and any resulting Order will be personally served via regular mail on John Colpean, the Guaranty Association's Administrator and General Counsel. Beyond the Guaranty Association, providing personal notice of this Application and any resulting Order to other parties that may have a general interest in Consumers Mutual's liquidation: (a) is not required by MCL 500.8134(5); and (b) would be time-intensive and costly to the Consumers Mutual liquidation estate. However, DIFS' standard receivership procedure is to post on its website all filings made in this and other insurance receivership proceedings. For these

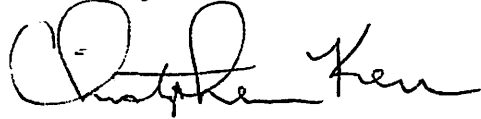
reasons, the Liquidator requests that the Court authorize, approve, and/or ratify courtesy notice of the Application and any resulting Order on any other potentially interested parties by posting electronic copies on the DIFS website, www.michigan.gov/difs, under the section "Who We Regulate," the subsection "Receiverships," and the sub-subsection "Consumers Mutual Ins. of Michigan."

RELIEF REQUESTED

Based on the foregoing, and pursuant to MCL 500.8134, 500.8142, and the terms of the Early Access Agreement, the Liquidator respectfully requests the Court to grant this Application and approve the Liquidator's proposed second early access disbursement to the Guaranty Association in the amount of \$1,458,190.91. The Liquidator further requests the Court to ratify/approve the Liquidator depositing past and future healthcare provider refunds due to Consumers Mutual with the Guaranty Association for the payment of covered claims, and a final accounting of all provider refunds received when the Guaranty Association submits its reimbursement claim. Finally, the Liquidator asks the Court to authorize and ratify service of this Application and any resulting Order by personally serving the Guaranty Association via regular mail, and by posting electronic, courtesy copies on the "Consumers Mutual Ins. of Michigan" section of the DIFS website consistent with DIFS' standard receivership procedure.

Respectfully submitted,

Bill Schuette
Attorney General

A handwritten signature in black ink, appearing to read "Christopher Kerr". The signature is fluid and cursive, with the first name "Christopher" written in a larger, more prominent script than the last name "Kerr".

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