

~~Testimony of Ralph S. Tyler~~  
Maryland Insurance Commissioner

My name is Ralph Tyler and I am the Insurance Commissioner for the State of Maryland, a position I have held since September 2007. I appreciate the opportunity to testify at this important hearing with respect to the review being conducted by the Commissioner of the Department of Insurance, Securities, and Banking (“DISB”) of the surplus of Group Hospitalization and Medical Services, Inc. (“GHMSI”).

My testimony will focus on three points. I will discuss first why the matters at issue in this hearing are of deep interest to Maryland; I will then review the surplus review underway at the Maryland Insurance Administration and the relevance of that review to these proceedings; and finally, I will discuss the question of the proper remedy if the DISB Commissioner determines that “the portion of the surplus of the corporation [GHMSI] that is attributable to the District ... is excessive.” *See Code § 31-3506(e).*

The importance of this matter to Maryland

On August 21, 2009, I wrote to then-Commissioner Hampton expressing Maryland’s interest in the DISB’s surplus review of GHMSI. As that letter explained, Maryland and the District have a common interest in the company’s policyholders and in the company’s well-being. The source of that common interest is that the company’s subscribers (policyholders) include both District and Maryland residents (as well Virginia residents). The District and Maryland also share a common interest in the company’s fulfilling its unique mission in our respective jurisdictions, a mission which separates it from other health insurers operating in the District or Maryland. This mission is referred to in the District as community health reinvestment.

Because some Maryland residents are GHMSI policyholders (irrespective of whether their policies are issued or delivered in the District or in Maryland), Maryland is deeply interested in assuring that GHMSI complies with all applicable laws, including its special nonprofit health mission, is able to pay consumers' (policyholders') claims as they come due, and that the company's surplus is adequate to satisfy claims, upgrade infrastructure, meet unanticipated needs, and for other business purposes. The District, of course, has the same interests.

Assuming it is determined that GHMSI has excessive surplus (and Maryland takes no position on this issue at this time), Maryland also has an interest in assuring that the portion of such excess properly attributable to Maryland is not diverted away from the Maryland policyholders who generated such excess by paying, over time and in the aggregate, what experience proved to be excessive rates. The District law which gives rise to these proceedings recognizes that GHMSI operates in multiple jurisdictions. The law thus expressly limits its reach to "the portion of the surplus of the corporation [GHMSI] that is attributable to the District...." Section 31-3506(e) (emphasis added). The underscored language properly constrains the present inquiry to only that portion of GHMSI's surplus "that is attributable to the District."

The parties' actuarial reports do not identify with any precision how much of the GHMSI surplus is, in fact, attributable to the District. Instead, the reports focus on the company's total surplus, as distinguished from "the portion of the surplus ... that is attributable to the District," and then proceed to reach opposite conclusions on the ultimate question of whether that total is excessive.

Failing to first identify with precision “the portion of the surplus ... that is attributable to the District” removes the legal boundaries placed on this inquiry by § 31-3506(e). Absent those boundaries, any excess surplus determination is at risk of including surplus not “attributable to the District,” notwithstanding the law’s direction to the contrary. Maryland respectfully suggests that the parties be directed to offer their respective views in post-hearing submissions on the appropriate methodology to identify that “portion of the surplus ... that is attributable to the District” for that is the predicate to the determination contemplated by the statute.

The Maryland Insurance Administration’s (“MIA”) surplus review

Maryland law authorizes the Maryland Insurance Commissioner to review the surplus of a nonprofit health service plan such as GHMSI and, if appropriate and after a hearing, to determine that its surplus is “unreasonably large.” See § 14-117(e) of the Insurance Article of the Maryland Code. Pursuant to this authority, the MIA has retained a consultant (the Invotext firm) to review the surplus of GHMSI and an affiliated entity, CareFirst of Maryland, Inc., on an individual company and consolidated basis. The consultant’s report is expected within 45 days.

A principal question which the MIA expects its consultant to address is how to approach the allocation of surplus given that GHMSI operates in three jurisdictions. This question, of course, is central to the DISB’s present inquiry. This allocation question is not one which the MIA has addressed previously. The MIA understands that this is an equally novel question for DISB.

As the schedule now stands, DISB is to issue its report in this matter by September 30, 2009. Unfortunately, the MIA will not have received its consultant’s

report by that date. The MIA believes that its consultant's report could well assist the DISB in addressing the difficult and novel questions presented by this matter. The DISB may wish to consider seeking an extension of the deadline for its report or, alternatively, issuing an interim report so that it would have the benefit of the MIA's consultant's report prior to issuing a final report in this matter. In any event, the MIA will make its consultant's report available to DISB and Maryland wants to continue to cooperate with DISB in this matter.

The remedy if the surplus is determined to be excessive

The parties' papers focus on the question of the existence (or not) of excess surplus with scant attention to the question of remedy "[i]f the [DISB] Commissioner determines that the surplus of the corporation [GHMSI] is excessive." Maryland takes no position on the question of whether GHMSI's surplus is excessive because this is among the questions under review by the MIA's consultant. Maryland addresses the question of remedy to make clear its position of what the law allows and what makes sense (again, assuming for present purposes only that a determination is made that the surplus is excessive).

There is no question that GHMSI has public benefit obligations. The scope and extent of those obligations are entirely separate, however, from the question of an asserted "obligation" that GHMSI satisfy its public obligations by distributing any excess surplus. Maryland is here addressing only the question of some asserted "obligation" on the part of GHMSI to satisfy its public purpose mission through a compelled reduction in any excess surplus. Maryland's limited focus is not intended to denigrate or to diminish GHMSI's public purpose obligations.

The remedial section of the District statute, § 31-3506(g), is modeled on § 14-117(e)(2) of the Insurance Article of the Maryland Code. Section 31-3506(g), like § 14-117(e)(2), has two components. Under § 31-3506(g)(1), “the Commissioner shall order the corporation to submit a plan for dedication of the excess to community health investment reinvestment in fair and equitable manner.” Then, and importantly, § 31-3506(g)(2) makes clear that “[a] plan submitted pursuant to paragraph (1) of this subsection [§ 31-3506(g)(1)] may consist entirely of expenditures for the benefit of current subscribers of the corporation.” (Emphasis added.)

GHMSI’s opponent in this proceeding largely ignores these provisions and assumes that any excess surplus belongs to the “public.” See pre-hearing report by DC Appleseed Center for Law and Justice, Inc. at 13 (“GHMSI’s assets belong to the public”) (quoting memorandum of Attorney General Spagnoletti) (footnote omitted). This assumption is wrong.

If there is any excess surplus, that excess was the result of premiums paid by or on behalf of policyholders, and plainly not the result of anything which the “public” did. As a matter of fact, therefore, the excess belongs to policyholders because they generated it (that is, they paid for it). Similarly, under the plain words of § 31-3506(g)(2), the company has the unconditional right to spend down any excess “for the benefit of current subscribers of the corporation” by, for example, providing them with prospective rate relief. The “public” has no colorable right to share in any excess absent a determination by GHMSI in its distribution plan that the public should do so.

Moreover, as a matter of sound public policy, it would be manifestly unwise for the company to develop an excess surplus distribution plan from which the “public” at

large, as distinguished from policyholders, would benefit. If the company's surplus were to become a source of general public revenue, even assuming that such revenue would be used for the best possible public health purposes, that would distort the insurance regulatory system by creating an incentive to find the surplus excessive. Government always needs revenue, and more so now than in normal economic times. Government's need for revenue should not influence the decision of whether GHMSI's surplus is excessive, but that need would inevitably influence the excess surplus determination if that excess were a general source of public revenue. The integrity of decisions regarding the fiscal soundness of an insurer should not be compromised by putting those decisions in direct conflict with government's need to generate revenue. Section 31-3506(g)(2) was designed to prevent this from occurring.

The Maryland statute upon which § 31-3506(g) is modeled limits any excess distribution "to subscribers who are covered by the corporation's nonprofit health service plan at the time the distribution is made." Insurance Article, § 14-117(e)(3). While § 31-3506(g)(2) is permissive (the corporation's plan "may consist entirely of expenditures for the benefit of current subscribers"), the "public" has no right nor any claim of right to the excess and GHMSI could (and for the reasons stated above should) satisfy any excess distribution obligation which it may have by way of a distribution to policyholders through rate reductions or otherwise.

This matter undeniably presents issues which are novel for both the District and Maryland. Because of the complexity and novelty of the issues and our shared interests, including ensuring that GHMSI meets its public obligations, I believe we need to continue to work together. I commit to share our consultant's report and any follow-on

actions we might take in Maryland to assist in any way possible in this important matter.

Again, thank you for allowing me to testify.