

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA,
Department of Insurance, Securities
and Banking,

Petitioner,

v.

DC CHARTERED HEALTH PLAN, INC.,

Respondent.

Civil Action No.: 2012 CA 008227 2
Judge: Wright
Next Event: Hearing
July 31, 2013 at 11:30 a.m.

**REHABILITATOR'S REPLY IN SUPPORT OF CONSENT MOTION FOR
EXPEDITED HEARING TO SET BRIEFING SCHEDULE TO ADDRESS
SETTLEMENT AGREEMENT BETWEEN D.C. CHARTERED HEALTH PLAN, INC.
AND THE DISTRICT OF COLUMBIA**

The Rehabilitator of D.C. Chartered Health Plan, Inc. ("Chartered") has requested the Court:

- 1) to set a briefing schedule under which (i) any party who opposes the Settlement Agreement between Chartered and the District of Columbia Department of Health Care Finance ("DHCF") must file its brief in opposition to such Settlement Agreement by August 9, 2013, and (ii) the Rehabilitator and DHCF (if it chooses) must file any reply brief by August 16, 2013;
- 2) to schedule an expedited hearing on the briefing schedule, if the Court believes such a hearing is necessary;
- 3) to conduct a hearing as scheduled on August 21, 2013 to hear arguments and evidence in support of and in opposition to the Settlement Agreement; and

- 4) at or before the August 21 hearing, to enter an order approving and authorizing the Rehabilitator to consummate the Settlement, thereby allowing Chartered to liquidate its primary asset and pay priority provider claims under the Plan of Reorganization.

Chartered's parent, D.C. Chartered Health Plan, Inc. ("DCHSI"), has filed a brief in opposition in which it primarily attacks the merits of the proposed settlement and urges the Court to put the matter on a track to allow discovery and a "status conference in mid-November 2013 to determine the final steps to an evidentiary hearing on the merits" of the proposed settlement. DCHSI Opposition at 4.

The Rehabilitator respectfully submits this Reply to explain why the glacial pace that DCHSI proposes for addressing the settlement is unnecessary and indeed could kill the deal. The Rehabilitator will not address DCHSI's arguments on the merits of the settlement except to the extent necessary to show that the parties can address those arguments on the schedule that the Rehabilitator has proposed.

1. Whether the settlement is the result of arm's-length negotiations goes to the merits. DCHSI first argues that the proposed settlement with DCHSI is "the product of a negotiation the District *had with itself* . . ." DCHSI Opposition at 1. This is demonstrably not true. The settlement is between Chartered and DHCF. Chartered's Rehabilitator is Commissioner of the Department of Insurance, Securities and Banking, but that in itself is no basis for suggesting that the Rehabilitator did not fulfill his statutory duty to act prudently in the best interest of Chartered's stakeholders. For present purposes, DCHSI's criticism of the process leading to the settlement is not reason to delay briefing on and consideration of the settlement's merits. DCHSI can make its oft-repeated but increasingly stale "conflict" arguments on the schedule that the Rehabilitator proposes.

2. The settlement terms are standard. DCHSI's second criticism, also going to the merits, is that the settlement is "a dramatic departure from normal practice" because it includes a release of all other claims that Chartered could have asserted against the District relating to the Medicaid and Alliance programs. DCHSI Opposition at 2. Again, not so. It is entirely customary for the party that is receiving consideration in exchange for litigated claims to release the party paying that consideration from all claims that could have been asserted in connection with the transaction(s) or relationship sued upon. But here again, whether that is so goes to the merits of the proposed settlement. DCHSI does not explain why it cannot address the matter on the schedule proposed. Moreover, the fact that the settlement resolves claims that Chartered has been pursuing since November 2011, during which time Chartered and its shareholder DCHSI have actively tracked the pursuit and offered input into the positions taken and to be taken confirms that DCHSI is already steeped in the details. The purpose of the schedule and hearing that the Rehabilitator has requested is to address those details and allow the Court to decide whether the consideration Chartered has secured is fair. That the Rehabilitator has not pursued the litigation for additional years to see how the claims and defenses might play out does not prevent DCHSI from "examin[ing] the value of the asserted claims and any potential defenses" (DCHSI Opposition at 3) – just as DCHSI has been doing. Nor does it prevent DCHSI (or the Court) from assessing whether, as the Rehabilitator believes, it is better to avoid the expense and uncertainty of further litigation and accept the substantial consideration that the settlement agreement affords today.

3. Time is indeed of the essence. DCHSI argues that "[t]he Rehabilitator's claim of urgency is unavailing." DCHSI Opposition at 3. As noted, the objective is to pay a total of \$48 million in satisfaction of Chartered's claims against the District to the Class 3 priority creditors

(healthcare providers) with undisputed claims filed on or before the August 31, 2013 bar date—and to do so by September 30, 2013, the end of the District’s fiscal year. *Payment by the District on that tight schedule to providers who have waited months to be paid and in many cases need the money desperately is an important component of the consideration for which the Rehabilitator bargained.* Moreover, as stated already, the funding authority for this settlement is based on the District’s fiscal year 2013 appropriations, and it lapses on September 30, 2013. DCHSI counters that “if this year’s District Litigation Fund is not preserved, next year’s fund will be available.” DCHSI Opposition at 3. DCHSI offers no support for this assertion. As for the importance of paying providers sooner rather than later, DCHSI blames “the District’s own failure to pay timely” (*id.*) and argues that “a reasoned evaluation of the proposed settlement remains necessary.” *Id.* The Rehabilitator agrees. The point is that DCHSI offers no reason why it cannot and should not use the schedule the Rehabilitator has proposed.

4. DCHSI faults the Rehabilitator for even attempting to settle. DCHSI next argues that Chartered will not know the full extent of provider claims until after the August 31 bar date, such that it was inappropriate for Rehabilitator even to have “attempt[ed] to fix the District’s liability to Chartered while Chartered’s potential claims against the District remain unfixed and certain.” DCHSI Opposition at 4. The Rehabilitator disagrees. But here again, whether the deal he has negotiated is fair (however premature DCHSI contends it may be) can and should be addressed right away.

Instead, DCHSI asks that the Court permit “a reasonable period for discovery,” says it will submit a brief and an expert affidavit on August 9, and proposes that the Court “hold a further status conference in mid-November 2013 to determine the final steps to an evidentiary hearing on the merits” of the settlement. DCHSI Opposition at 4. The Rehabilitator submits

that such a schedule does not recognize the circumstances before the Court.

- Would the Rehabilitator be obliged to pursue full-bore litigation against DHCF in the meantime?
- What of the loss of District funding that occurs on September 30?
- What of the providers who need money now?
- Since a key benefit of the settlement is significant payments within 60 days, will deferring consideration of its merits for five or 6 months not defeat the purpose and make rejection of the settlement necessary for that reason alone?
- If DCHSI needs discovery, what does it need and why is not pursuing it already?
- What can DCHSI not do by August 21?

DCHSI should have addressed these questions in its request for a five- or six-month schedule. It did not.

As it is, DCHSI has not shown that the schedule the Rehabilitator has proposed is either unworkable or unfair. August 21 affords ample time for the parties to assemble whatever evidence they need to support or oppose the settlement. Moreover, it is important to remember the latitude that the Rehabilitator has to manage the affairs of Chartered, and the discretion that this Court has in evaluating that management. The Rehabilitator has “[a]uthority to take such action as deemed necessary or appropriate to reform and revitalize Chartered.” October 19, 2012, Emergency Consent Order of Rehabilitation 2; *see also* D.C. Official Code § 31-1312(c) (2013). “As the program of rehabilitation takes form and the steps unfold, the trial court in its supervisory and reviewing role may not substitute its judgment for that of the [Rehabilitator], but may and should only intervene or restrain when it is made to appear that the [Rehabilitator] is manifestly abusing the authority and discretion vested in him and/or is embarking upon a

capricious, untenable or unlawful course.” *Kueckelhan v. Fed. Old Line Ins. Co. (Mutual)*, 444 P.2d 667, 674 (Wash. 1968). Again, as this Court has noted:

This Court’s role in the rehabilitation process is to supervise the Rehabilitator and review the Rehabilitator’s actions for abuses of discretion, not to substitute the Court’s judgment, or the judgment of a parent company, for that of the Rehabilitator.

Order Denying D.C. Healthcare Systems, Inc.’s Motion to Compel Rehabilitator (May 9, 2013).

Accordingly, the Rehabilitator respectfully renews his request that the Court adopt the following briefing and hearing schedule:

- August 9, 2013 – Deadline for briefs (and any evidence) in opposition to the settlement
- August 16, 2013 – Deadline for any reply brief(s) in support of the settlement
- August 21, 2013 – Hearing as scheduled.

The proposed schedule, as detailed in the Rehabilitator’s Motion, would permit a fair and orderly presentation of the arguments for and against the settlement and ensure that the Court has sufficient information to issue a ruling. Again, the Rehabilitator requests that the Court, at or before the August 21 hearing, enter an order approving and authorizing the Rehabilitator to consummate the settlement.

July 31, 2013

Respectfully submitted,

TROUTMAN SANDERS, LLP

/s/ Prashant K. Khetan
Prashant K. Khetan
Bar Number 477636
401 9th Street, NW Suite 1000
Washington, D.C. 20004
(202) 274-2950
(202) 274-2994 (facsimile)
prashant.khetan@troutmansanders.com

/s/ David K. Herzog
David K. Herzog (admitted *pro hac vice*)
Faegre Baker Daniels LLP
300 N. Meridian Street, Suite 2700
Indianapolis, Indiana 46204
(317) 237-1240
David.Herzog@faegrebd.com
Attorneys for the Rehabilitator and the
Special Deputy to the Rehabilitator

Certificate of Service

I hereby certify that on this 31st day of July, 2013, a copy of the foregoing
*Rehabilitator's Reply in Support of Consent Motion for Expedited Hearing to Set Briefing
Schedule to Address Settlement Agreement Between D.C. Chartered Health Plan, Inc. and the
District of Columbia* was filed and served by email upon:

William P. White, Rehabilitator
c/o Stephanie Schmelz
DISB, Office of the General Counsel
810 First St., NE, Suite 701
Washington, D. C. 20002
Stephanie.Schmelz@dc.gov

Daniel Watkins
Special Deputy Rehabilitator
1050 K Street NW, Suite 400
Washington, DC 20001
danwatkins@sunflower.com

Charles T. Richardson
Faegre Baker Daniels LLP
1050 K Street NW, Suite 400
Washington, DC 20001
crichardson@faegrebd.com

Stephane J. Latour
E. Louise R. Phillips
Assistant Attorney Generals
441 Fourth Street, NW, 630 South
Washington, D.C. 20001
Louise.Phillips@dc.gov
Stephane.Latour@dc.gov

David Killalea
Manatt, Phelps & Phillips, LLP
700 12th Street, NW Suite 1100
Washington, DC 20005-4075
dkillalea@manatt.com

Steven I. Glover
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, NW
Washington, D. C. 20036
siglover@gibsondunn.com

Joseph D. Edmondson, Jr.
Foley & Lardner LLP
3000 K Street, NW, Suite 600
Washington, D.C. 20007
jedmondson@foley.com

J. Jonathan Schraub
Sands Anderson PC
1497 Chain Bridge Road, Suite 202
McLean, VA 22101
JJSchraub@SandsAnderson.com

/s/ Prashant K. Khetan

Prashant K. Khetan