

IN THE MATTER OF THE CHALLENGE AND)
REQUEST FOR HEARING BY GUARDIAN)
LIFE INSURANCE COMPANY OF AMERICA)
REGARDING THE NEW JERSEY INDIVIDUAL)
HEALTH COVERAGE PROGRAM BOARD OF)
DIRECTORS' ISSUANCE OF THE DECEMBER)
18, 2006 INTERIM RECONCILIATIONS OF THE)
1997/1998 AND 1999/2000 LOSS ASSESSMENTS)
AND THE 2001/2002 LOSS ASSESSMENT)

ADMINISTRATIVE ORDER
07-IHC-04

THIS MATTER having been opened by the Individual Health Coverage (IHC) Program Board of Directors (Board) in accordance with the Board's authority pursuant to N.J.S.A. 17B:27A-2 et seq.; and

WHEREAS, the IHC Program Board has authority pursuant to N.J.S.A. 17B:27A-11 and 12 to make assessments against IHC Program members for losses incurred by member carriers offering standard individual health benefits plans; and

WHEREAS, the Legislature amended the statutory formula for determining losses in 1997 pursuant to L. 1997, c. 146; and

WHEREAS, the IHC Program Board proposed rule changes on August 4, 1998 to implement the amendments to the statutory scheme; and

WHEREAS, the IHC Program Board's rulemaking actions and authority were challenged, and the matter was ultimately resolved on May 24, 2004 pursuant to *In re New Jersey Individual Health Coverage Program's Readoption of N.J.A.C. 11:20-1 et seq.*, 179 N.J. 570 (2004) (*In re Readoption*); and

WHEREAS, the IHC Program Board was required by the decision in *In re Readoption* to revise certain aspects of the assessment methodology, including the determination of exemptions, through promulgation of new regulations; and

WHEREAS, the IHC Program Board proposed rules in February 2006 at N.J.A.C. 11:20-2.17 establishing a methodology using “adjusted net earned premium” or “ANEP” for all calculation periods starting with 1997/1998 and going forward¹ based upon the IHC Program Board’s understanding of the New Jersey Supreme Court’s decision in *In re Readoption* and the underlying Appellate case of the same name (353 N.J. Super. 494), in which the courts expressly declined to apply the holding to any calculation periods earlier than 1997; and

WHEREAS, the Supreme Court of New Jersey expressly agreed with and affirmed the Appellate Division's decision with regard to its invalidation of the "second tier" methodology; and

WHEREAS, the Supreme Court of New Jersey's decision in *In re Readoption* invalidated certain aspects of the pro rata exemption methodology and the good faith marketing standards that the IHC Program had established in 1994 as part of the process for determining allocation of losses among members being assessed, and consequently, based on the invalidation of the good faith marketing standards, the IHC Program Board determined it appropriate to grant an exemption from the 1996 loss assessment to a carrier that had previously been denied such an exemption, requiring a refund of \$7,386,877 to that carrier; and

WHEREAS, in the intervening years, the following additional events had occurred:

1. Adjustments to net paid losses as a result of independent audits;
2. Adjustments to multiple carriers’ net earned premiums (including addition of net earned premium from an affiliated carrier in one instance), resulting in adjustments to assessment liabilities; and

¹ Among other things, L. 1997, c. 146 amended the loss calculation period, making it a two-year period instead of a one-year period.

WHEREAS, the IHC Program Board determined it necessary and appropriate to perform a reconciliation in order to collect the monies needed to account for the changes in reimbursable losses and marketshare and to “true-up” the 1996 loss assessment in consideration of the \$7,386,877 refund and the other changes to net paid losses and net earned premium, the IHC Program Board issued an interim reconciliation of the 1996 loss assessment on March 9, 2006 (March 9th IR); and

WHEREAS, Guardian Life Insurance Company of America (Guardian) is and has been a member of the IHC Program since inception of the IHC Program; and

WHEREAS, Guardian received notice of the interim reconciliation of the 1996 loss assessment and its specific liability pursuant to that notice; and

WHEREAS, Guardian and six other carriers² filed a challenge to the March 9th IR with the IHC Program Board primarily contending that the IHC Program Board had not applied the ANEP loss assessment methodology for the 1993 through 1996 calculation periods but should have; and

WHEREAS, on June 20, 2006, the IHC Program Board denied the challenge and the request for a hearing in Administrative Order 06-IHC-01 (AO 06-IHC-01); and

WHEREAS, Guardian and the other carriers filed an appeal of the IHC Program Board’s final decision in AO 06-IHC-01 on August 4, 2006 in the Appellate Division claiming that the IHC Program Board’s actions are arbitrary, capricious and unreasonable because they fail to go back far enough in time in applying the revised assessment methodology (specifically, arguing that the revisions should be applied to loss assessments for 1993 through 1996), and violate the appellants’ rights to due process and equal protection under the federal and New Jersey constitutions; and

² Each company filed a separate appeal, but the appeals were identical, and thus, were consolidated.

WHEREAS, the IHC Program Board adopted the proposed new rules at N.J.A.C. 11:20-2.17, effective December 18, 2006, and on that same date issued interim reconciliations of the 1997/1998 and 1999/2000 loss assessments (December 18th IR) and an initial loss assessment for 2001/2002 (Initial 2001/2002); and

WHEREAS, on January 11, 2007 Guardian filed a challenge to the December 18th IR and Initial 2001/2002 because the IHC Program Board had not applied the same methodology for the 1993 through 1996 calculation periods, and in addition, Guardian requested that the monies it had paid be maintained in a segregated interest-bearing account, and requested a hearing in the event that the IHC Program Board had arguments opposing the challenge for reasons other than those previously established in AO 06-IHC-01; and

WHEREAS, on February 13, 2007, the IHC Program Board issued Administrative Order 07-IHC-01 (AO 07-IHC-01) denying the request for a hearing and for segregation of Guardian's money on the grounds that Guardian had failed to challenge the actions taken by the Board in the December 18th IR and the Initial 2001/2002; and

WHEREAS, on March 6, 2007, Guardian filed an appeal with the Appellate Division challenging AO 07-IHC-01, and entered a request for *ad interim* relief pursuant to R. 2:9-7, seeking segregation in an interest-bearing account by the IHC Program Board of the monies Guardian had remitted pursuant to the December 18th IR; and

WHEREAS, Guardian specifically stated that it was not seeking *ad interim* relief with respect to the monies it had remitted pursuant to the Initial 2001/2002; and

WHEREAS, Guardian stated in its appeal for *ad interim* relief that the IHC Program Board had "misappreciated" Guardian's challenge to the December 18th IR, which was not premised upon the argument that the IHC Program Board should have applied the Supreme

Court's decision in *In re Readoption* retroactively to the 1993 through 1996 loss assessment periods, albeit Guardian is continuing to pursue that position in a separate appeal³; and

WHEREAS, Guardian contended in its appeal for *ad interim* relief that its challenge to the December 18th IR is premised upon the argument that the IHC Program Board acted in an arbitrary, capricious and unreasonable manner when it applied the Supreme Court's decision in *In re Readoption* when issuing reconciliations for the 1997/1998 and 1999/2000 loss assessment periods, and accordingly, Guardian disputes its loss assessment liability; and

WHEREAS, N.J.A.C. 11:20-2.17(f)2 specifies that when a member of the IHC Program disputes the amount of the loss assessment for which the member was determined liable, and the member identifies the amount in dispute, the amount in dispute (as verified by the IHC Program Board) shall be held in a segregated interest-bearing account until final adjudication of the dispute;

NOW, THEREFORE, IT IS on this 13th day of March, hereby ORDERED that:

1. The IHC Program Board shall transfer funds remitted by Guardian pursuant to the December 18th IR for the 1997/1998 assessment period, totaling \$1,468,216.33, into a segregated interest-bearing account maintained by the New Jersey Department of Treasury until final resolution of this dispute; and

2. The IHC Program Board shall transfer funds remitted by Guardian pursuant to the December 18th IR for the 1999/2000 assessment period, totaling \$313,057.21, into a segregated interest-bearing account maintained by the New Jersey Department of Treasury until final resolution of this dispute; and

³ Oral arguments are now scheduled for May of 2007 for *In the Matter of the Challenges by Chubb Colonial Life Insurance Company of America, Guardian Life Insurance Company, Jefferson Pilot Life Insurance Company, John Alden Insurance Company, Massachusetts Mutual Life Insurance Company, Time Insurance Company and United States Life Insurance Company to the New Jersey Individual Health Coverage Program's Interim Reconciliation of the 1996 Loss Assessment* (Dkt. No. A-6116-06T2).

3. The remitted amounts may be maintained in a single account, at the sole discretion of the Board.

This ORDER constitutes a final agency decision and is effective immediately. Guardian shall file any appeals from this ORDER with the Appellate Division within 45 days following the date of service of this ORDER.

March 27, 2007

/s/ Mary Taylor, Chairperson
Board of Directors
Individual Health Coverage Program