THE STATE OF NEW HAMPSHIRE
SUPREME COURT

GENWORTH LIFE INSURANCE COMPANY

v.

THE STATE OF NEW HAMPSHIRE DEPARTMENT OF INSURANCE

Case No. 2019-0727

Rule 7 Mandatory Appeal from Merrimack County Superior Court

BRIEF OF APPELLANT GENWORTH LIFE INSURANCE COMPANY

Arnold Rosenblatt, Esquire (#2879)
Kathleen Mahan, Esquire (#17124)
Cook Little Rosenblatt & Manson p.l.l.c.
1000 Elm Street, 20th Floor
Manchester, NH 03101

Paul M. Hummer, Esquire (Admitted Pro Hac Vice)
Sean T. O'Neill, Esquire (Admitted Pro Hac Vice)
Saul Ewing LLP
1500 Market Street
38th Floor, Centre Square West
Philadelphia, PA 19102

Counsel for Appellant

Oral Argument by Paul Hummer, Esquire

36447352.7 04/10/2020
36447352.8

TABLE OF CONTENTS

36447352.7 04/10/2020
36447352.8

TABLE OF CASES

36447352.7 04/10/2020
36447352.8

TABLE OF STATUTES AND OTHER AUTHORITIES

QUESTIONS PRESENTED

1. Whether it was error to dismiss the claim under the Contract Clause of the New Hampshire and United States Constitutions where the Amended Complaint avers that:

- The contractual right to rate increases necessary to maintain rate adequacy is express in every policy of long-term care insurance ("LTCI") issued by Genworth in New Hampshire and was central to Genworth's decision to issue those policies;
- The Amended Regulations were promulgated for the express purpose of materially limiting rate increases to which LTCI insurers were entitled under the terms of their existing policies;
- The Amended Regulations retroactively impose attained age rate caps that prevent Genworth from realizing rate increases to which it is entitled under its in-force New Hampshire policies; and
- The Department denied, on the basis of the Amended Regulations, rate increases that Genworth was entitled to receive under the terms of its policies but for the retroactive application of the Amended Regulations.

See Amended Complaint (App. Vol. II at 97)[1]; Plaintiff's Opposition to Motion to Dismiss Complaint (App. Vol. II at 36); Plaintiff's Opposition to Motion to Dismiss Amended Complaint (App. Vol. II at 166).

2. Whether the Superior Court erred in denying summary judgment in favor of Genworth and granting summary judgment in favor of the Department on Genworth's claim that the Amended Regulations were ultra vires where the enabling legislation authorized the Department to promulgate reasonable regulations to "promote premium adequacy and protect the policyholder in the event of a substantial increase" but the undisputed facts establish that:

- The Amended Regulations impose arbitrary caps that, according to the Department, are intended to limit otherwise allowable premium increases without regard to premium adequacy;

---

1 The relevant pleadings from the Superior Court are included in Volumes I and II of the Appendix filed herewith, and will be cited to as "App. Vol. I" or "App. Vol. II" in citations within this brief.

36447352.7 04/10/2020
36447352.8

- The Department's analysis is that the Amended Regulations will limit insurers to premium rates that, on average, will require them to operate at a loss; and
- The Amended Regulations are intended to prevent substantial rate increases rather than protect policyholders in the event of a substantial rate increase.

See Amended Complaint (App. Vol. II at 97); Plaintiff's Motion for Summary Judgment (App. Vol. II at 290), Plaintiff's Opposition to Defendant's Motion for Summary Judgment (App. Vol. II at 370), and Plaintiff's Motion for Reconsideration, (App. Vol. II at 424).

3. Whether the Superior Court erred in denying summary judgment in favor of Genworth and granting summary judgment in favor of the Department on Genworth's claim that the Amended Regulations violate Article 12 of the New Hampshire Constitution and the 5th and 14th Amendments to the United States Constitution where the undisputed facts are:

- The Amended Regulations do not contain the required safety valve that would allow the Commissioner to exercise his or her discretion if necessary to avoid confiscatory rates; and
- The Department has determined that on average the Amended Regulations permit rates that will require insurers to operate at a loss.

See Amended Complaint (App. Vol. II at 97); Plaintiff's Motion for Summary Judgment (App. Vol. II at 290), Plaintiff's Opposition to Defendant's Motion for Summary Judgment (App. Vol. II at 370), and Plaintiff's Motion for Reconsideration (App. Vol. II at 424).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS INVOLVED

Due to their volume, the pertinent text of the following are set forth in the Addendum.

- New Hampshire Constitution, Pt. 1, Art. 23
- New Hampshire Constitution, Pt. 1, Art. 12
- United States Constitution, Art. I § 10, cl. 1
- United States Constitution, Amend. 5
- United States Constitution, Amend. 14
- RSA 415-D:12
- N.H. Code Admin. R. Ins. 3601.19 (2004)
- N.H. Code Admin. R. Ins. 3601.19 (2015)

STATEMENT OF THE CASE

This is an action challenging the validity of the 2015 Amendments to N.H. Code Admin. R. Ins. 3601 ("Amended Regulations") enacted by the Department that retroactively limit rate increases for in-force long-term care insurance ("LTCI") policies. By law, LTCI policies are guaranteed renewable, which means that an insurer cannot cancel or non-renew a policy regardless of whether there is a material change in the risk insured. LTCI insurers manage their risk and ensure continued solvency and claims paying ability through premium rate increases where necessary. New Hampshire's statutes and regulations, including the definition of a "guaranteed renewable" LTCI policy, specifically contemplate and allow for rate increases on in-force LTCI policies. New Hampshire's statutes and regulations measure premium adequacy by reference to an expected loss ratio, i.e., the expected ratio between premiums an insurer will receive and claims it is likely to pay. New Hampshire's statutes and regulations permit LTCI insurers to charge premium rates sufficient to achieve the expected loss ratios set in the Department's regulations.

For decades, Genworth issued LTCI policies in New Hampshire relying on the laws in place at the time of issue. Genworth's policies, written on forms approved by the Department, allow for rate increases while the policies are in-force. Until 2015, changes to New Hampshire's regulations governing LTCI rate increases were expressly prospective, applicable only to policies issued after enactment of the change. Prospective change enabled an insurer to decide whether or not to continue to issue policies under the new regulation and preserved the insurer's constitutionally protected right to continue to rely on the rate increase standards in prior regulations for policies issued during the period those standards were in effect.

In 2015, the Department enacted the Amended Regulations which for the first time applied retroactively and imposed caps on rate increases based on the attained age of the insured. The Amended Regulations did not change the expected loss ratios in the prior regulations but retroactively superimposed caps on allowable rate increases regardless of whether or not the caps would preclude insurers from achieving the specified expected loss ratios. The Amended Regulations do not permit any deviation from the caps, irrespective of whether the capped increase would provide adequate or non-confiscatory premiums.

The Amended Regulations thus materially affect LTCI insurers' existing right to premium increases. The Department admitted to the Joint Legislative Committee on

Administrative Rules ("JLCAR") that the express purpose of the Amended Regulations was to permit the Department to deny rate increases that the Department had lacked the authority to deny under prior regulations. The Department further represented to JLCAR that the Amended Regulations would force LTCI insurers to operate, on average, at a loss.

Genworth challenges the validity of the Amended Regulations on three grounds:

- The Amended Regulations violate the Contract Clause of the New Hampshire and United States Constitutions because they apply retroactively and substantially impair Genworth's contractual right to obtain rate increases in the amount necessary to achieve target loss ratios;
- The Amended Regulations are void as ultra vires because the Insurance Commissioner's rulemaking authority is limited to promulgating regulations that <u>promote</u> premium adequacy <u>and</u> protect the policyholder <u>in the event of</u> substantial rate increases. Here, the Amended Regulations detract from premium adequacy and prevent substantial rate increases, rather than protect policyholders in the event of substantial rate increases;
- The Amended Regulations are unconstitutional in violation of Article 12 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. The Amended Regulations are facially invalid because they do not provide the Commissioner with discretion to avoid confiscatory rates and the Department has represented that the attained age rate caps imposed by the Amended Regulations will result in rates that are, on average, confiscatory.

The Superior Court dismissed the Contract Clause claim and later granted summary judgment in the Department's favor on the other claims. This Court should reverse for the reasons set forth below.

<u>STATEMENT OF FACTS</u>

Long-Term Care Insurance. LTCI policies cover the costs associated with, among other things, nursing home stays, assisted living facility stays and home care services, where the insured is either severely cognitively impaired or needs substantial assistance with certain activities of daily living. Amended Complaint ("AC") ¶ 8 (App. Vol. II at 99). LTCI is guaranteed renewable, meaning that an insurer cannot cancel or otherwise terminate LTCI policies regardless of changes in the cost or utilization of long-term care services over time. AC ¶¶ 1, 10, 16 (App. Vol. II at 97, 98, 100, 102).

LTCI policies provide "long duration" coverage with policies typically in force for decades. AC ¶¶ 12, 13, 20 (App. Vol. II at 100, 101, 102). Because policyholders typically buy their policies when they are relatively young and healthy, most claims occur many years (if not decades) after policies are issued. Consequently, LTCI insurers must at the time policies are initially priced make certain assumptions about how claims and other experience (*i.e.,* interest rates, morbidity, mortality, lapse rates, etc.) will emerge over many years. If actual experience that develops over time is not in line with the pricing assumptions, insurers must adjust rates as actuarially justified. AC ¶¶ 11, 13 (App. Vol. II at 100, 101). Accordingly, rate increases are the primary tool available to LTCI insurers to allow them to ensure continuing premium adequacy. AC ¶¶ 1, 10, 14, 15, 20 (App. Vol. II at 97, 98, 100, 101, 102).

New Hampshire's statutory and regulatory scheme explicitly recognizes that premium rate increases may be necessary for LTCI policies to ensure that they remain adequately funded as actual experience emerges. AC ¶ 15 (App. Vol. II at 101). Genworth's LTCI policies issued in New Hampshire are written on a form approved by the Department and expressly provide that Genworth has the right to raise premium rates while the policy is in force. AC ¶¶ 21-26, 159 (App. Vol. II at 103-104, 133).

Long-Term Care Insurance Act. New Hampshire's Long-Term Care Insurance Act, RSA 415-D, et seq., provides, in relevant part, that:

> The commissioner shall issue reasonable rules to <u>promote premium adequacy **and** to protect the policyholder in the event of substantial rate increases</u>, and to establish minimum standards for marketing practices, agent compensation, agent testing, penalties and reporting practices for long-term care insurance.

RSA 415-D:12 (emphasis added) (Add. at 69).[2] Thus, the New Hampshire legislative scheme requires that the Department's regulations both ensure premium adequacy – protecting the long-

2 The relevant text of the constitutional provisions, statutes, rules and regulations at issue are included in the Addendum submitted herewith, which shall be referred to as "Add." in citations within this brief. The decisions of the Superior Court are also included in the Addendum.

term ability of insurers to make future claim payments when due – and safeguard policyholders when significant premium increases are required to ensure premium adequacy. AC ¶ 19 (App. Vol. II at 102). The Long-Term Care Insurance Act contains no provision that authorizes the Department to enact regulations that prevent rate increases necessary to achieve premium adequacy or that impair premium adequacy.

Regulations Prior To The Amended Regulations. Until February 13, 2015, New Hampshire's LTCI regulatory scheme was faithful to the legislative mandate that the Department promote premium adequacy and protect policyholders in the event of a substantial rate increase. In its simplest form, premium adequacy is a comparison of the premiums received and expected, against the benefits paid and expected – the former must be at least equal to the latter for premiums to be adequate, even without including expenses, overhead and profit. AC ¶ 32 (App. Vol. II at 105). The regulations in effect prior to 2015 predicated the Department's review and approval of premium rate schedule increases on actuarial certification of the rate needed to achieve an expected loss ratio set forth in the regulations.

Before 2004, the standard of premium adequacy applied by the Department authorized actuarially justified premium rate increases necessary to achieve a minimum expected lifetime loss ratio of 60%, (the "Loss Ratio Standard").[3] AC ¶¶ 36-37 (App. Vol. II at 107).

In 2004, the Department promulgated new regulations for rate increase requests (the "Rate Stability Regulations"), that were expressly prospective and applied only to policies issued after enactment of the regulations. N.H. Code Admin. R. Ins. 3601.19(a)(1) (2004) (Add. at 71). Prospective regulations allow insurers to decide whether to continue writing new business based on the then-new regulations and preserving the insurers' constitutionally protected right to rate increases under the standards of the prior regulations for in-force policies. AC ¶¶ 40-41 (App. Vol. II at 107-108). The Rate Stability Regulations established a somewhat higher bar for rate

[3] A loss ratio is the ratio of claims payments to premiums received. Loss ratios are among the measures used commonly in evaluating whether premiums are adequate. AC ¶ 34 (App. Vol. II at 106); *see also* RSA 415-D:3.

increases but still allowed insurers to receive premiums sufficient to enable them to meet an expected loss ratio. AC ¶ 39 (App. Vol. II at 107).

In addition to allowing for rate increases necessary to achieve premium adequacy, the regulations also required LTCI insurers to provide policyholders with the option to change or limit their benefits if the policyholder preferred to avoid or limit the impact of a rate increase. Thus, the regulations in effect prior to the Amended Regulations satisfied the legislatively-required objective of promoting premium adequacy and protecting policyholders in the event of a substantial rate increase. AC ¶ 33 (App. Vol. II at 106).

The Amended Regulations. In 2015, the Department promulgated the Amended Regulations. In relevant part, the Amended Regulations:

- Were, for the first time, expressly retroactive and apply not just to policies issued after the effective date of the amendments but to rate increases on all LTCI policies, including policies already in force. N.H. Code Admin. R. Ins. §3601.19(a) (Add. at 76);
- Retain the expected loss ratio standards that have been the standard for premium adequacy under the Loss Ratio Standard and the Rate Stability Regulations. N.H. Code Admin. R. Ins. §3601.19(c)(2) (Add. at 77);
- Superimpose on the expected loss ratio standards mandatory rate caps that limit the magnitude of any increase over a three-year period based solely on the attained age of the policyholder, without regard to whether or not greater rate increases are actuarially justified and necessary to achieve rate adequacy. N.H. Code Admin. R. Ins. §§3601.19 (d), (f) (Add. at 78, 79);
- Do not allow the Commissioner any discretion to approve rates in excess of the rate caps in order to ensure rate adequacy, even where higher rates are actuarially justified, or to avoid rates that are confiscatory.

AC ¶¶ 66-67 (App. Vol. II at 113, 114).

Thus, after previously providing that LTCI premium increases would be governed by the standards in effect at the time policies were issued, the Department completely reversed its position and materially changed the standards governing in-force policies. As a result, LTCI insurers were not given the option of determining whether or not to issue policies subject to the Amended Regulations and, as set forth below, were deprived of their constitutionally protected right to have rate increases under in-force policies determined pursuant to the standard established in regulations in effect at the time the policies were issued. AC ¶¶ 41, 150, 151 (App. Vol. II at 108, 132).

The purpose of the Amended Regulations was specifically to limit rate increases that insurers had previously been entitled to receive. The Department's Notice of Proposed Amendment provided: "[t]he proposed amendments <u>place limits on allowable rate increases</u> . . . ." AC ¶ 57 (App. Vol. II at 110-111) and Exhibit D[4] (App. Vol. I at 310). As the Department acknowledged to JLCAR in a January 29, 2015 letter, the Department had no basis under the regulations in effect prior to the Amended Regulations to disapprove actuarially supported requests for rate increases necessary to achieve the expected loss ratio in the applicable regulation. AC ¶ 83 (App. Vol. II at 117-118) and Exhibit E-12 (App. Vol. I at 413).

Impact of the Amended Regulations on Genworth. Genworth has more than 6000 LTCI policyholders in New Hampshire. AC ¶ 4 (App. Vol. II at 98). For every LTCI policy issued by Genworth in New Hampshire, the New Hampshire insurance regulations in effect at the time each policy was issued assured Genworth of the right to rate increases to the degree necessary to achieve the expected loss ratios set forth in the then current regulations, which ensured premium adequacy. AC ¶¶ 37, 39, 70 (App. Vol. II at 107, 114). Under those regulations the Department was required to approve, and in fact did approve, rate increase requests by Genworth in 2007 and 2010. AC ¶¶ 43-52, 82, 83 (App. Vol. II at 108-110, 117-118). For each rate increase, the Department applied the expected loss ratio standard set forth in the regulations in effect at the time the policies were issued. AC ¶¶ 43, 47, 48, 51, 52 (App. Vol. II at 108, 109, 110).

In 2012 and 2013, prior to the enactment of the Amended Regulations, Genworth filed requests for additional rate increases. The requests were supported by actuarial certifications attesting to the need for the rate increase and that the rate increase complied with the expected loss ratio criterion in the regulations in effect at the time each of the policies affected by the increase was issued. AC ¶¶ 71-79 (App. Vol. II at 114-117). The Department never challenged

---

[4] The exhibits to the original Complaint were not reproduced when the Amended Complaint was filed, due to their volume and the fact that none of the exhibits had changed and several exhibits were filed under seal. Accordingly, the operative exhibits to the Amended Complaint appear in the Appendix as the exhibits to the original Complaint.

the actuarial certifications, never contended that the rate increases were not necessary to achieve premium adequacy and never contended that Genworth was not entitled to rate increases under the then-applicable regulations. Instead, the Department simply delayed determination on the pending requests. After the Amended Regulations were enacted, the Department denied Genworth's pending rate increase requests on the basis of the Amended Regulations. AC ¶¶ 85-93 (App. Vol. II at 118-119).

The retroactive limits on rate increases in the Amended Regulations will necessarily prevent Genworth from receiving adequate premiums. AC ¶ 172 (App. Vol. II at 136). The Amended Regulations effectively require Genworth to maintain LTCI policies at a substantial loss. AC ¶ 173 (App. Vol. II at 136).

Procedural History. Genworth's Complaint was filed on June 30, 2016. The Department moved to dismiss the Complaint and by Order dated January 25, 2017, the Superior Court dismissed Genworth's Contracts Clause claim but denied the Motion to Dismiss with respect to the remaining claims.

Genworth timely filed an Amended Complaint alleging additional facts in support of the Contracts Clause claim. The Department again moved to dismiss and by Order dated August 1, 2017, the Superior Court adopted by reference its Order on the prior Motion to Dismiss. The Department answered the Amended Complaint and simultaneously filed a second motion to dismiss the Amended Complaint. By Order dated February 28, 2018, the Superior Court denied the second motion to dismiss and directed the parties to set a briefing schedule for summary judgment motions.

Cross motions for summary judgment were filed and briefed. By Order dated August 27, 2019, the Superior Court granted summary judgment in favor of the Department and denied Genworth's motion for summary judgment. Genworth timely filed a motion for reconsideration which was denied by Order dated November 22, 2019. Thereafter, Genworth timely filed this appeal.

SUMMARY OF ARGUMENT

The Superior Court erred in dismissing Genworth's Contracts Clause claim. Specifically, the Superior Court incorrectly found that Genworth had not alleged any facts demonstrating that its contractual rights under its LTCI policies were, and will continue to be, substantially impaired by the retroactive application of the arbitrary caps on rate increases contained in the Amended Regulations. Genworth pled that under the terms of its contracts and the laws and regulations in place at the time that it issued its LTCI policies, it was entitled to rate increases necessary to achieve the expected loss ratios established in the regulations. Genworth would not have issued LTCI policies if there was an arbitrary cap that would prevent it from obtaining the rate increases necessary to achieve the expected loss ratios established by regulations in effect at the time of issue. The Amended Regulations, which were enacted specifically to give the Department the authority retroactively to deny rate increases that the Department would have been required to approve under the regulations in effect at the time the policies were issued, impair Genworth's contractual right to obtain those rate increases. These allegations, and others as detailed below, when taken as true readily show that the Superior Court's dismissal of this claim was in error.

The Superior Court erred by granting summary judgment in favor of the Department on Genworth's claim that the Amended Regulations are ultra vires. RSA 415-D:12 grants the limited authority to promulgate regulations that <u>promote</u> premium adequacy <u>and</u> protect the policyholder <u>in the event of</u> substantial rate increases. The Amended Regulations subvert premium adequacy by limiting rate increases necessary to meet the expected loss ratios deemed reasonable in New Hampshire's regulations. By the Department's calculation, the Amended Regulations will result in loss ratios substantially in excess of the expected loss ratios that define premium adequacy in New Hampshire. Further, the Amended Regulations do not add any protection for policyholders "<u>in the event</u> of a substantial rate increase." Instead, the Amended Regulations are intended to <u>prevent</u> a substantial rate increase otherwise necessary to achieve premium adequacy.

The Superior Court erred by granting summary judgment in favor of the Department on Genworth's claim that the Amended Regulations are unconstitutional because they do not allow the Commissioner to avoid the imposition of confiscatory rates. A regulatory scheme that limits insurers on average to premium rates at which they will lose money and contains no provision that permits the Commissioner to approve rate increases necessary to avoid confiscatory rates is unconstitutional. The Superior Court erred further by failing to find, based upon the undisputed facts, that the Amended Regulations are unconstitutional because they result in rates that are, on average, confiscatory.

ARGUMENT

I. STANDARD OF REVIEW

Questions of law as to the constitutionality of the Amended Regulations and matters of statutory interpretation are reviewed *de novo*. *Tuttle v. N.H. Med. Malpractice Joint Underwriting Ass'n*, 159 N.H. 627, 640 (2010).

On an appeal from an order granting a motion to dismiss, "the only issue raised is whether the allegations are reasonably susceptible of a construction that would permit recovery." *Royer Foundry & Mach. Co. v. N.H. Grey Iron, Inc.*, 118 N.H. 649, 651 (1978). The interpretation of statutes and regulations, as well as the Superior Court's "application of the law to the facts" is reviewed *de novo*. *Tarbell Adm'r, Inc. v. City of Concord*, 157 N.H. 678, 682 (2008).

On appeal from a grant of summary judgment, this Court considers the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party. *Carter v. Concord Gen. Mut. Ins. Co.*, 155 N.H. 515, 517 (2007). The Court reviews the Superior Court's application of the law to the facts *de novo*. *Id.*

II. THE SUPERIOR COURT ERRED IN DISMISSING GENWORTH'S CLAIM UNDER THE CONTRACT CLAUSE OF THE NEW HAMPSHIRE CONSTITUTION AND UNITED STATES CONSTITUTION

The Contract Clause states in relevant part: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts …." U.S. Const. art. I, § 10, cl. 1 (Add. at 68). Article 23 of the New Hampshire Constitution similarly provides that "Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses." N.H. Const. pt. 1, art. 23 (Add. at 68). New Hampshire courts interpret Article 23 of the New Hampshire Constitution as providing the same protections as the Contract Clause of the United States Constitution. *Tuttle,* 159 N.H. at 640-41; *Opinion of the Justices (Furlough)*, 135 N.H. 625, 630 (1992).

To establish a Contract Clause claim, a party must show: 1) retrospective application of a law; 2) substantial impairment of a contractual relationship; and 3) when balancing the state's police power against the rights protected by the Contract Clause, the law is not reasonable and necessary to serve an important public purpose. *See Tuttle*, 159 N.H. at 640-42.

The Superior Court found that there was no doubt that Genworth enjoyed a contractual relationship with its policyholders and that the Amended Regulations were retroactive. August 1, 2017 Order at 1-2 (Add. at 47-48), adopting by reference the Court's January 25, 2017 Order at 8, 9 (Add. at 41, 42). The sole basis for, and explanation of, the Superior Court's decision to dismiss the Contract Clause claim is as follows:

> Genworth's Complaint, however, does not allege facts establishing that the Amended Regulations are a change that substantially impairs its contractual relationships. As the Department notes, Genworth's LTCl policies do not give it the right to "increase premiums to any particular degree." (Def.'s Mem. Supp. Mot. Dismiss 1, 18.) Rather, the policies say it has only a "limited right to change premiums." (Compl. ¶ 25.) Under the Amended Regulations, Genworth retains its ability to alter its premiums, so even if true the allegations are not sufficient to present a contract clause claim.

Id. (Add. at 47), adopting by reference the Court's January 25, 2017 Order at 9 (Add. at 42).

The Superior Court's statement that Genworth "does not allege facts" establishing that the Amended Regulations "are a change that substantially impairs its contractual relationships" is incorrect. By imposing arbitrary caps on the rate increase that an insurer may receive, which caps become more restrictive based on the age of the affected policyholders, the Amended Regulations substantially diminish, if not eliminate altogether, the possibility that an insurer could ever manage the block of business to the applicable loss ratio set forth in New Hampshire law. The application of the Amended Regulations on a retroactive basis to policies already in force is a fundamental change to the "guaranteed renewable" basis upon which those contracts were issued and anticipated to be managed. Thus, the allegations in the Amended Complaint establish that the rate caps imposed by the Amended Regulations prevent Genworth from increasing its rates to the degree necessary to achieve the applicable expected loss ratio. AC ¶¶ 147, 148, 207-214 (App. Vol. II at 131, 143-144). A retroactive impairment of a right that was the basis upon which a contract was formed is a "substantial" impairment. *Tuttle*, 159 N.H. at 649-50.

Further, the Superior Court's decision is premised on a mischaracterization of the nature of Genworth's contractual right to increase premiums. As averred in the Amended Complaint:

> Each of the individual LTCI policy forms issued by Genworth in New Hampshire and approved for use in New Hampshire by the Department contains nearly identical language on the Declarations page regarding Genworth's right to increase premiums:

> **We have a limited right to change premiums.** Premiums will not change due to a change in Your age or health. We can change premiums based on premium class; but only if We change them for all similar policies issued in the same state and on the same form as this Policy. Premium changes will only be made as of a Policy Anniversary Date. We will give you at least 45 days written notice before We change premiums.

AC ¶ 25 (App. Vol. II at 104); *see also* Exhibits A-1 to A-8 (App. Vol. I at 53-278). The Superior Court seized on the characterization of Genworth's right to change premiums as "limited" but failed to acknowledge that the contractual "limit" was that premium changes would be on a class-wide basis only and would not be based on changes in the age or health of an individual insured.

The Superior Court failed to acknowledge the scope of Genworth's right to premium increases more generally or the manner in which the Amended Regulations impaired that right. The Superior Court's acceptance of the Department's argument that Genworth did not have a right to an increase "in any particular amount" simply ignores the fact, as averred at length in the Amended Complaint and which went undisputed by the Department, that prior to the Amended Regulations, Genworth was entitled to premium increases necessary to achieve the expected loss ratios established in the regulations in effect at the time Genworth's policies were issued.

The regulations in effect at the time Genworth's New Hampshire policies were issued, and which define the scope of Genworth's contractual right to rate increases, explicitly entitle Genworth to raise rates by a particular amount – the actuarially supported level necessary to achieve the expected loss ratio set forth in the regulations. AC ¶¶ 23, 30-39, 55, 70, 160, 207-08 (App. Vol. II at 103, 104, 105-107, 110, 114, 134, 143). Those regulations were incorporated into and became a part of each policy at the time it was issued. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 429-30 (1934); *see also Tuttle*, 159 N.H. at 644, 648 ("the provisions of the regulations in effect at the time of the issuance of the policyholders' policies, and incorporated into the obligations of those contracts, may not be changed retroactively unless such change survives constitutional scrutiny"); *U.S. Trust Co. of N.Y. v. N.J.*, 431 U.S. 1, 19 n.17 (1977) ("The obligations of a contract long have been regarded as including not only the express terms, but also the contemporaneous state law pertaining to interpretation and enforcement.").

The Department has acknowledged that under the regulations in effect at the time Genworth's policies were issued, the Department lacked the authority to deny rate increases necessary to achieve the loss ratio set forth in the applicable regulation. AC ¶¶ 30, 82, 83 (App. Vol. II at 105, 117-118) and Exhibit E-12 (App. Vol. I at 413). The Amended Complaint expressly avers further that the Department was required to approve any premium rate increase sought by Genworth that was actuarially necessary to achieve the expected loss ratios set forth in the controlling regulations. AC ¶¶ 30, 82, 83, 160, 207 (App. Vol. II at 105, 117-118, 134, 143).

Moreover, prior to the Amended Regulations, New Hampshire's regulatory scheme expressly recognized the nature of Genworth's protected contractual right to increases in an amount sufficient to achieve the expected loss ratio set forth in the regulations in effect at the time a policy was issued. Each change in regulatory standard was expressly prospective and the Department itself determined applications for increase, including Genworth's applications, in accordance with the standard of the regulation in effect at the time a policy was issued, without regard to any subsequent regulatory change. AC ¶¶ 40, 41, 43, 47, 51, 52 (App. Vol. II at 107, 108, 109, 110).

The express purpose of the Amended Regulations was to give the Department a basis to deny rate increases that it was required to grant under the regulations in effect prior to the Amended Regulations and at the time Genworth's policies were issued. AC ¶¶ 82, 83 (App. Vol. II at 117-118), Exhibits E-9 and E-12 (App. Vol. I at 392, 413). Thus, the Amended Regulations were intended to abrogate or substantially impair the right of LTCI insurers to receive the actuarially supported rate increases to which they were entitled under the prior regulations.

The allegations of the Amended Complaint establish that the right to raise rates to the degree necessary to achieve the applicable loss ratio is from the insurer's perspective one of <u>the most important</u> contractual provisions. AC ¶¶ 1, 10-14, 20, 142, 157, 164-166, 210, 215 (App. Vol. II at 97, 100-101, 102, 130, 133, 134-135, 144). Without the right to raise rates to the extent necessary to achieve the anticipated loss ratios in the regulations in force at the time the policies were issued, Genworth would not have agreed to insure New Hampshire residents. AC ¶¶ 142, 157, 164-166, 210, 215 (App. Vol. II at 130, 133, 134-135, 144).

The allegations in the Amended Complaint establish that the rate caps imposed by the Amended Regulations prevented Genworth from increasing its rates to the degree necessary to achieve the applicable expected loss ratio. AC ¶¶ 147, 148, 207-214 (App. Vol. II at 131, 143-144). As averred in the Amended Complaint, the Department was required to approve Genworth's requests for rate increases pending at the time the Amended Regulations were enacted but, instead, the Department delayed a decision on the rate increases until it could deny them on the basis of the Amended Regulations. AC ¶¶ 71, 74-79, 81, 82, 85-92, 179-181 (App. Vol. II at 114, 115-117, 118-119, 137-138). A retroactive impairment of a right that was the basis upon which a contract was formed is a "substantial" impairment. *Tuttle*, 159 N.H. at 649-50.

The rates allowed under the Amended Regulations *require* Genworth, for the first time and only after irrevocable policies were in effect, to maintain its policies at a substantial loss. AC ¶¶ 172, 173, 178 (App. Vol. II at 136-137). Under the Amended Regulations, even if current assumptions remain unchanged and Genworth obtained the maximum increases allowable, it would not likely achieve premium adequacy 15 years from now and it would be forced to incur substantial losses for every year that its policies remain in force without adequate premiums. AC ¶¶ 178, 182, 212-213 (App. Vol. II at 137, 138, 144).

On those averred facts, it was error for the Superior Court to dismiss Genworth's Contract Clause claim.

III. THE SUPERIOR COURT ERRED IN DENYING SUMMARY JUDGMENT IN FAVOR OF GENWORTH AND GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEPARTMENT ON GENWORTH'S CLAIM THAT THE AMENDED REGULATIONS WERE VOID AS ULTRA VIRES

"[A]dministrative rules may not add to, detract from, or modify the statute which they are intended to implement." *Bach v. N.H. Dep't of Safety*, 169 N.H. 87, 92 (2016). RSA 415-D:12 authorizes the Department to "issue reasonable rules to promote premium adequacy <u>and</u> to protect the policyholder <u>in the event of</u> substantial rate increases." (emphasis added). Genworth challenges the Amended Regulations as ultra vires because: (1) they do not promote premium adequacy; and (2) they prevent substantial rate increases rather than protect policyholders in the event of a substantial increase.

A. The Amended Regulations Do Not "Promote Premium Adequacy"

The Superior Court expressed the basis for its decision on the first prong of Genworth's challenge to the Amended Regulations as follows:

> The statute authorizes the commissioner to issue rules that govern rates, with the interests of insurers and policyholders in mind. A rule setting caps on premium increases may or may not prove harmful to Genworth's effort to realize a reasonable return. But capping premium increases based on the attained age of the

> policyholder is not an ultra vires act where the statute permits "reasonable rules" promoting premium adequacy while protecting the policyholder.

August 27, 2019 Order at 7 (Add. at 61). The Superior Court erred in its interpretation of the Commissioner's rulemaking authority under RSA 415-D:12 because the statute, which uses the term "and" rather than "or" does not simply require a balancing of interests – it expressly requires that rules must both promote premium adequacy <u>and</u> protect policyholders in the event of a substantial increase.

The Superior Court made no finding that the Amended Regulations would promote premium adequacy as required by RSA 415-D:12 and there is no support in the record for such a finding. Premium adequacy is consistently defined in New Hampshire's regulatory scheme by reference to expected loss ratios.[5] As set forth above, the regulations in effect prior to the Amended Regulations allowed rate increases to the extent necessary to achieve those expected loss ratios, without further limitation.

As set forth above, it is a matter of public record that the Department acknowledged to JLCAR that it "lacked a clear basis to disapprove" rate increases necessary to achieve the expected loss ratios under the regulations then in effect.[6] Rather than promote premium

---

[5] The sole basis upon which premium adequacy is expressed and determined in New Hampshire's insurance regulations is on the basis of expected loss ratios. *See, e.g.*, N.H. Code Admin. R. Ins. 3601.18 (entitled "Loss Ratio" and providing that "[b]enefits under long-term care insurance policies shall be deemed reasonable in relation to premiums provided the expected loss ratio is at least 60 percent . . . ."). The standards for determining allowable rate increases in Section 3601, "Premium Rate Schedule Increases," are expressed as expected loss ratios. Section 3601.19(b)(2)(b) requires an actuarial certification that the requested rate increase is necessary to meet the expected loss ratio allowable pursuant to the regulation. Section 3601.19 (b)(3) requires an actuarial memorandum that "justifies" the rate increase with reference to "[l]ifetime projections of earned premiums and incurred claims based on the filed premium rate schedule increase" and the "development of the lifetime loss ratio." Section 3601.19(c) which sets the formula to be used for calculating the expected loss ratio permissible for a rate increase, represents the Department's determination of the expected loss ratio indicative of premium adequacy. Because the Commissioner only has the authority to promulgate rules that promote premium adequacy, the requirement in 3601.19(c) that rate increases "shall be determined in accordance with" the required loss ratio calculation means that the expected loss ratio is the numerical measure of premium adequacy.

[6] A copy of the Department's written acknowledgment is attached to the Amended Complaint as Exhibit E-12 (App. Vol. I at 413).

adequacy, the Amended Regulations were enacted in order to give the Department a basis to disapprove rate increases it was previously required to approve, thereby preventing rate increases necessary to achieve premium adequacy. The Notice of Proposed Amendment pursuant to which the Department announced the Amended Regulations provided: "[t]he proposed amendments place limits on allowable rate increases . . . ."[7]

The Amended Regulations left in place the expected loss ratios in the Loss Ratio Standard and the Rate Stability Regulations that define premium adequacy but superimposed on them attained age rate caps that limit rate increases otherwise necessary to achieve those expected loss ratios. Under the Amended Regulations, the attained age rate caps apply irrespective of whether they allow an insurer to achieve the expected loss ratio that defines premium adequacy in New Hampshire. Indeed, the Department's analysis for JLCAR was that those amendments would have the effect, on average, of limiting rate increases to loss ratio levels of 112%, well in excess of the expected loss ratios used to define premium adequacy in New Hampshire insurance regulations.[8]

Because the Amended Regulations fail to serve the statutory directive of promoting premium adequacy and were in fact intended to deny rate increases necessary to achieve premium adequacy, this Court should reverse the Superior Court's decision.

B. The Amended Regulations Do Not Protect Policyholders "In The Event Of" Substantial Rate Increases

RSA 415-D:12 authorizes the Department to promulgate rules "to protect the policyholder in the event of substantial rate increases." The Department concedes that the phrase "in the event of" should be interpreted to mean "if."[9] RSA 415-D:12 thus authorizes regulations to protect policyholders "if" there is a substantial rate increase; the statute does not authorize regulations that prevent substantial rate increases.

Under the Amended Regulations, the Commissioner may not approve a rate increase necessary to ensure premium adequacy if the rate increase would exceed the caps based on attained age. The attained age caps do not protect the policyholder if there is a substantial rate

[7] The Notice is a matter of public record. A copy is attached to the Amended Complaint as Exhibit D (App. Vol. I at 310).

[8] A copy of the Department's analysis, which is a matter of public record, is attached to the Amended Complaint as Exhibit E-4 (App. Vol. I at 338).

increase, they give the Department the authority to preclude a substantial rate increase in the first instance. The Amended Regulation thus clearly is intended to, and does, prevent substantial increases rather than protect policyholders in the event of a substantial rate increase.

Nonetheless, the Superior Court determined that "[t]he rule is consistent with the statute. It permits a 'substantial rate increase,' but 'in the event of' one, caps it in order to protect the policyholder from the consequences of a more sizeable one. The regulation is not ultra vires." August 27, 2019 Order at 8 (Add. at 62).

The Superior Court's circular logic is inconsistent with the plain language of RSA 415-D:12. The "more sizable one" referenced by the Superior Court is not protection in the event of a substantial rate increase, it is protection from a substantial rate increase; the "substantial rate increase" from which the policyholder is purportedly being protected never actually occurs.

By comparison, regulations such as N.H. Code Admin. R. Ins. Section 3601.27, which provides for various benefits to be offered to policyholders if there is a substantial rate increase, demonstrate a proper exercise of the Commissioner's rulemaking authority, as it provides for additional benefits following a substantial rate increase. The Superior Court overlooked this distinction between regulations which protect policyholders in the event of a substantial rate increase as opposed to those like the Amended Regulations which prevent a substantial rate increase from occurring in the first place.

Because the purpose and effect of the Amended Regulations is inconsistent with the express direction of RSA 415-D:12, this Court should reverse the Superior Court's decision.

IV. THE SUPERIOR COURT ERRED IN DENYING SUMMARY JUDGMENT IN FAVOR OF GENWORTH AND GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEPARTMENT ON GENWORTH'S CLAIM THAT THE AMENDED REGULATIONS CONSTITUTE A TAKING

A. The Amended Regulations Are Facially Unconstitutional Because They Do Not Provide the Commissioner with Discretion to Avoid Confiscatory Rates

The Amended Regulations are unconstitutional on their face because they do not contain any "safety valve" provision or other mechanism permitting the Commissioner to grant rate

[9] *See* Department's Br. in Support of Objs. to Genworth's Mot. for Summ. J. at 11-12 (App. Vol. II at 358-359).

increases in excess of the attained age rate caps to avoid confiscatory takings. Where, as here, a regulation does not allow for any discretion to avoid rates that are otherwise confiscatory, courts have routinely held that rate regulations limiting rate increases are unconstitutional on their face, without any showing that the regulations will always result in confiscatory rates. As the California Supreme Court recognized in *Calfarm Insurance Co. v. Deukmejian*, 771 P.2d 1247, 1252-53 (Cal. 1989):

> The face of a statute rarely reveals whether the rates it specifies are confiscatory or arbitrary, but necessarily discloses its provisions, if any, for rate adjustment. Recognizing that virtually any law which sets prices may prove confiscatory in practice, courts have carefully scrutinized such provisions to ensure that the sellers will have an adequate remedy for relief from confiscatory rates.

Decisions sustaining a facial challenge because the challenged regulation lacks a safety valve provision without any showing that the challenged regulation will "inevitably" lead to confiscatory rates include: *Guar. Nat'l Ins. Co. v. Gates*, 916 F.2d 508, 512 (9th Cir. 1990) (Nevada statute rolling back and freezing insurance rates was unconstitutional because the statute's provisions allowed rate relief only for insurers in danger of insolvency and therefore failed to assure a constitutionally adequate rate of return; the regulation was facially unconstitutional because it did not provide "any mechanism to guarantee a constitutionally required fair and reasonable return."); *Calfarm Ins. Co.,* 771 P.2d at 1252-53 (holding that insolvency standard in statute was unconstitutional on its face); *Cromwell Assocs. v. Mayor & Council of City of Newark*, 511 A.2d 1273, 1274-75 (N.J. Super. Ct. Law. Div. 1985) (ordinances setting limits on rent increases "have been held valid providing a safety valve, such as a hardship mechanism, exists which can assure an efficient landlord a fair return" but holding ordinance at issue unconstitutional because the rate cap limited the rate increase allowable in any scenario); *Prop. Owners Ass'n of N. Bergen v. N. Bergen Twp.*, 378 A.2d 25 (N.J. 1977) (rent control ordinance setting maximum rent increase of 15% was facially unconstitutional taking where ordinance provided that no rent increases could be applied to senior citizens, and ordinance contained no provision granting landlords opportunity to obtain relief to ensure just and reasonable return); *Birkenfeld v. City of Berkeley,* 550 P.2d 1001 (Cal. 1976) (rent-control ordinance did not meet even minimal due-process standard because ordinance's procedures for reviewing landlords' rent-increase applications entailed such long delays that landlords would be forced to operate at an inadequate rate of return for indefinite periods); *see also State Farm Mut.*

Auto. Ins. Co. v. Ins. Dep't, 577 A.2d 951, 954-55 (Pa. Commw. Ct. 1990) (holding automobile insurance rate rollback regulation unconstitutional on its face insofar as it purported to roll back rates which were approved before its effective date, due to Act's failure to provide any mechanism for review or recoupment of newly approved rates); *Helmsley v. Borough of Ft. Lee*, 394 A.2d 65 (N.J. 1978), *decision clarified*, 411 A.2d 203 (N.J. 1980) (in what turned into an as applied challenge, provision of rent control ordinance imposing 2.5% ceiling on rent increases unconstitutional because provision failed to provide adequate administrative relief from foreseeable future confiscatory effects of such limitation).[10]

Here, the Amended Regulations are facially unconstitutional because they do not contain any provision or other mechanism guaranteeing non-confiscatory rates or authorizing the Commissioner to avoid confiscatory rates by granting relief to individual insurers as necessary to avoid confiscatory rates. To the contrary, the Amended Regulations plainly state that "[t]he **commissioner shall not approve any increase if the resultant increase results in a**

---

[10] *Gilbert v. City of Cambridge*, 932 F.2d 51 (1st Cir. 1991), a decision cited in the Superior Court's Order, made this point as well, finding that the challenged regulation was constitutional specifically because it contained a safety valve, a guarantee of a "fair net operating income," that ensured an unconstitutional taking could be avoided. Consistent with the analysis in *Gilbert*, courts have rejected facial challenges to regulatory schemes that <u>might</u> impose confiscatory rates where the regulation at issue allows for discretion to avoid imposing rates that <u>are</u> confiscatory. The courts' rationale is that under such a scheme, the regulation itself is not unconstitutional and a challenge to a particular application of the regulation is the appropriate vehicle to evaluate the constitutionality of any given rate. *See, e.g., Nationwide Mut. Ins. Co. v. Foster*, 739 F. Supp. 962, 964 (M.D. Pa. 1990) (rejecting confiscatory taking challenge to automobile insurance regulation requiring rate reduction and freeze because the regulation contained a "constitutional 'safety valve'" provision that authorized the Commissioner to grant insurers "whatever relief is required by the federal constitution from the rates imposed by [the regulation]" and thus give insurers "a fair and adequate rate of return"); *State Farm Mut. Auto. Ins. Co. v. State*, 590 A.2d 191, 206 (N.J. 1991) (holding that automobile insurance rate regulation that prohibited insurers from directly passing through to policy holders surcharges and assessment imposed by the regulation did not facially violate the takings clause because regulation contained a mechanism for individual insurers to seek special rate relief from commissioner of insurance to assure fair rate of return); *Main Union Assocs. v. Twp. of Little Falls Rent Leveling Bd.*, 703 A.2d 971, 972, 977 (N.J. Super. Ct. App. Div. 1997) (holding that ordinance was constitutional because it contained a "hardship provision" whereby a landlord could obtain a rate increase if the landlord was otherwise not making a "just and reasonable return" on his investment"). The Amended Regulations contain no comparable provision authorizing the Commissioner to approve rate increases in excess of the attained age rate caps where necessary to avoid rates that would be confiscatory.

percentage increase for any policyholder that exceeds an amount as set forth below based on the policyholder's attained age: [setting forth Table 3601.1 -Maximum Permitted].” Amended Regulations, Rule 3601.19(f) (emphasis added).

The Superior Court’s Orders on Summary Judgment and Reconsideration completely fail to consider or address this constitutional defect in the Amended Regulations. The Superior Court’s failure to address this issue in its decision is error and its decision should be reversed.

B. The Amended Regulations Are Unconstitutional Because The Department has Admitted That They Will Cause LTCI Insurers to Operate, on Average, at a Loss

The New Hampshire and United States Constitutions preclude the government from setting rates that constitute confiscatory takings. The “constitutional limitations on rate regulation [were] set forth by the United States Supreme Court in *Federal Power Comm'n v. Hope Natural Gas Co.,* 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944).” *In re Pub. Serv. Co. of N.H.*, 130 N.H. 265, 274 (1988). In promulgating rate regulations, a regulatory agency must “engage in a rational process of balancing consumer and investor interests to produce a rate that is just and reasonable.” *Id.* (citing *Fed. Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 602, 603 (1944)). “A just and reasonable rate is one that, after consideration of the relevant competing interests, falls within the zone of reasonableness between confiscation of utility property or investment interests and ratepayer exploitation.” *Id.* (citations omitted); *In re Campaign for Ratepayers Rights*, 145 N.H. 671, 676 (2001) (citation omitted); *Appeal of Conservation Law Found. of New England, Inc.*, 127 N.H. 606, 635 (1986) (citation omitted).

Courts have consistently sustained pre-enforcement or facial challenges to regulations that allow only for rates at which insurers will operate at a loss. *See, e.g., Guar. Nat'l Ins. Co.*, 916 F.2d at 515 (Nevada statute rolling back and freezing insurance rates was unconstitutional in part because it “guarantee[d] only that an insurer will break even; it does not guarantee the constitutionally required ‘fair and reasonable return.’”) (quoting *Fed. Power Comm'n,* 320 U.S. at 603); *Med. Malpractice Joint Underwriting Ass'n of R.I. v. Paradis*, 756 F. Supp. 669 (D.R.I. 1991) (regulation freezing rates at level that results in underwriting losses was unconstitutional); *Aetna Cas. & Sur. Co. v. Comm'r of Ins.*, 263 N.E.2d 698 (Mass. 1970) (regulation that compelled rate reductions to levels at which insurers would sustain an underwriting loss was unconstitutional); *Travelers Indem. Co.*

v. Comm'r of Ins., 265 N.E.2d 90 (Mass. 1970) (regulation freezing premium rates at levels that resulted in underwriting losses was unconstitutional).[11]

The record on summary judgment consists of the Department's representations to JLCAR. The Department proffered to JLCAR an analysis of the impact of the Amended Regulations on the 25 most recent rate increase applications. The Department's analysis found that if the Amended Regulations were adopted, the loss ratios following allowable rate increases would be 112% on average and the Department acknowledged that, at loss ratios of that magnitude, insurers would be "losing money." A copy of the Department's written submission and the relevant pages of the Department's testimony before JLCAR, all matters of public record, are attached to the Amended Complaint as Exhibit E-4 at pp. 84-85, 96-97 (App. Vol. I at 360-361, 372-373) and Exhibit E-3 (App. Vol. I at 335).

At the JLCAR hearing, the Department expressly stated that the purpose of its analysis was to "give you a sense – more sense of what we're talking about, the department – I provided you with statistics on 25 long-term care rate filings." Exhibit E-4 at p. 84 (App. Vol. I at 360). Thus, while the Department's study involved 25 rate filings, the proffered analysis was clearly intended to express more broadly the rates that would be achieved under the Amended Regulations and the resulting losses that insurers would be forced to incur under those rates.

The Department argued in its briefing below that the import of its statements to JLCAR was more limited than the undisputed language used in those statements but the Department did not proffer any additional evidentiary materials, such as an affidavit from the persons who authored the written statements to JLCAR or testified before JLCAR, that would create an issue of disputed fact. The Department's representations to JLCAR about the impact of the Amended

---

[11] Comparable decisions have been rendered in other regulated industries as well. *See, e.g., Mich. Bell Tel. Co. v. Engler*, 257 F.3d 587 (6th Cir. 2001) (granting preliminary injunction where telephone service providers presenting facial challenge to statute imposing rate freeze were likely to prevail on claim that rate freeze violated due process right against imposition of confiscatory rates because provisions merely permitted providers to cover costs, but did not ensure fair and reasonable rate of return on investment); *Mora v. Mejias*, 223 F.2d 814, 818-19 (1st Cir. 1955) (holding price cap regulation unconstitutional after looking at aggregate effect on whole industry which would be compelled to operate at a loss); *Cromwell Assocs.*, 511 A.2d at 1277 ("When the maximum increase allowable by the rent-control ordinance is insufficient to provide an efficient operator a fair rate of return, the ordinance is unconstitutional on its face.").

Regulations and the fact that they can be expected to cause insurers to operate at a loss are thus the undisputed facts which form the basis for a ruling on summary judgment.

In deciding the Department's Motion for Summary Judgment, the Superior Court was obligated to consider the Department's representations to JLCAR, and the inferences properly drawn therefrom, in the light most favorable to Genworth. *Carter,* 155 N.H. at 517. The Superior Court disregarded its obligations in that regard and instead held as follows:

> Genworth relies on the department's testimony before the JLCAR, which it characterizes as the department's conclusion that the rule establishes a loss ratio of 112%. See Compl. Exhibits E-3; E--4, pp. 84-85. "A loss ratio is determined by dividing claims incurred by premiums earned. For example, a loss ratio of 80% means that for every $1 of premiums collected the insurer paid 80¢ in claims." *Excellus Health Plan, Inc. v. Serio*, 757 N.Y.S.2d 345, 346 (2003). A loss ratio of 112% "means that for every dollar of premiums collected the insurer paid" $1.12 "in claims." *Id.*
>
> Genworth overstates the import of the testimony, which explained to the committee how percentage limits would have affected a group of insurers who sought rate increases that, even if approved without the amended regulations, would have had loss ratios of 100%. See Ex. E--4, pp. 96-97. The testimony did not purport to represent a loss ratio of 112% was the inevitable result of enacting the rule.

August 27, 2019 Order at 9 (Add. at 63).

The Superior Court's refusal to credit the Department's presentations and testimony to JLCAR in accordance with the plain words used by the Department and its witnesses and the Superior Court's willingness to accept the Department's after-the-fact characterization of its presentation as "limited" without any evidentiary basis therefor was error. At a minimum, the Superior Court was required to consider the evidence, and the inferences therefrom, in the light most favorable to Genworth. The Superior Court's failure to comply with this obligation is undeniable.

The Superior Court compounded its error by refusing to credit an analysis based on expected loss ratios. The Superior Court held:

> Moreover, assessing premium adequacy based on loss ratio is an imperfect measurement. "For example, "if claims costs have increased, but expenses have decreased, rates requested based solely on a loss ratio analysis may not accurately portray the factors influencing the need for a rate change." *Bankers Life & Cas. Co. v. Commissioner of Insurance*, 691 N.E.2d 929, 934 (Mass. 1998).

August 27, 2019 Order at 9 (Add. at 63). This, too, was error. As set forth above, New Hampshire's entire legislative and regulatory scheme uses anticipatory loss ratios as the basis for evaluating premium adequacy. Indeed, the Department's presentation to JLCAR assumes that expected loss ratios are the appropriate manner in which to express the impact of the Amended Regulations.

The undisputed fact is that the Department has concluded that, on average, the impact of the Amended Regulations is that LTCI insurers will be limited to rate increases at a level at which they will be "losing money." The Department's analysis is the hallmark of a confiscatory rate regulation. This Court should direct the Superior Court to grant Genworth's Motion for Summary Judgment and deny the Department's Motion for Summary Judgment.

CONCLUSION

For all the foregoing reasons, Genworth respectfully requests that this Court reverse the decision of the Superior Court dismissing Genworth's Contract Clause claim and reverse the decision of the Superior Court granting summary judgment in the Department's favor and denying summary judgment in favor of Genworth.

STATEMENT REGARDING ORAL ARGUMENT

Genworth respectfully requests fifteen minutes of oral argument before the full Court. Paul M. Hummer, Esquire will argue on behalf of Genworth.

CERTIFICATE OF DECISIONS APPEALED

Undersigned counsel hereby certify that the decisions of the Merrimack County Superior Court appealed from by Appellant are in writing and that a true and correct copy of each decision has been attached hereto as an Addendum to Appellant's brief.

Respectfully submitted,

Genworth Life Insurance Company

by their attorneys,

COOK, LITTLE, ROSENBLATT &
MANSON, p.l.l.c.

Dated: April 10, 2020

By: */s/ Kathleen Mahan*

Arnold Rosenblatt, Esq. (#2879)
Kathleen M. Mahan, Esq. (#17124)
Cook, Little, Rosenblatt & Manson, pllc
1000 Elm Street, 20th Floor
Manchester, NH 03101
(603) 621-7100
a.rosenblatt@clrm.com
k.mahan@clrm.com

and

Paul M. Hummer, Esquire (Admitted Pro Hac Vice)
Sean T. O'Neill, Esquire (Admitted Pro Hac Vice)
Saul Ewing LLP
1500 Market Street
38th Floor, Centre Square West
Philadelphia, PA 19102

CERTIFICATE OF SERVICE

I am filing this motion electronically. I certify that a copy of this motion is being or has been served on all other parties or their counsel, in accordance with the rules of the Supreme Court, as follows: I am serving registered e-filers through the court's electronic filing system; I am serving or have served all other parties by mailing or hand-delivering a copy to them.

Date: April 10, 2020

/s/ Kathleen Mahan
Kathleen Mahan

ADDENDUM

TO OPENING BRIEF

TABLE OF CONTENTS TO ADDENDUM

TAB 1

The State of New Hampshire

MERRIMACK, SS. SUPERIOR COURT

NO. 217-2016-CV-381

GENWORTH LIFE INSURANCE COMPANY

V.

THE STATE OF NEW HAMPSHIRE DEPARTMENT OF INSURANCE

ORDER

Genworth Life Insurance Company filed a complaint against the New Hampshire Department of Insurance seeking to void amended regulations governing rate increases for long-term care insurance ("LTCI"), and to enjoin the Department from enforcing the amended regulations. The Department moves for dismissal, which requires a comparison between the facts in the complaint and the applicable law, *Tessier v. Rockefeller*, 162 N.H. 324, 330 (2011), and a determination of whether the allegations are "reasonably susceptible of a construction that would permit recovery," *Bohan v. Ritzo*, 141 N.H. 210, 212 (1996) (quotation omitted). "[T]he truth of all well-pleaded facts alleged by the plaintiff" is assumed, and all inferences are drawn "in the light most favorable to the plaintiff." *Id.* at 213 (quotation omitted). "The plaintiff must, however, plead sufficient facts to form a basis for the cause of action asserted." *Mt. Springs Water Co. v. Mt. Lakes Vill. Dist.*, 126 N.H. 199, 201 (1985). A Court "need not accept statements in the complaint which are merely conclusions of law." *Id.* (citation omitted).

Genworth alleges that currently it provides LTCI to over 6,000 New Hampshire residents and is one of the largest writers of LTCI in the country. (Compl. ¶¶ 4, 93.) It and its predecessors have issued such insurance to New Hampshire residents since at least 1986. (Compl. ¶ 4.) LTCI policies cover costs associated with nursing homes, assisted living, and home care services, among other things. (Compl. ¶ 8.) All of Genworth's LTCI policies in New Hampshire are "guaranteed renewable," and may be cancelled only if the policyholder fails to pay the required premium or engages in fraud or misrepresentation. (Compl. ¶ 10.) Because the policies are guaranteed renewable, Genworth must implement actuarially-justified rate increases as needed to control its risk. (Compl. ¶ 10.)

Generally, policyholders tend to buy LTCI policies when they are healthy and relatively young, and most LTCI claims occur many years after the policies are issued. (Compl. ¶ 13.) "Expected future profitability and prices of long-term care insurance are based upon expected claims and payment patterns, using assumptions for, among other things, projected interest rates and investment returns, morbidity rates, mortality rates, lapse rates and expense." (Compl. ¶ 11.) "It follows that the ability to forecast future claim costs for LTCI is more limited than for other types of insurance." (Compl. ¶ 13.) If circumstances develop in the future that are not in line with the assumptions made at the time the policies were initially priced, then the insurer must adjust its premium rates as actuarially justified. (Compl. ¶ 13.)

New Hampshire's Long-Term Care Insurance Act, RSA chapter 415-D, became effective on January 1, 1990. (Compl. ¶ 17.) Under the Act, an insurer may only issue LTCI policies on forms approved by the Department. (Compl. ¶ 21.) "Every Genworth LTCI policy form approved by the Department provides Genworth with the right to increase premiums." (Compl. ¶ 24.) All of these forms contain nearly identical language as follows:

> We have a limited right to change premiums. Premiums will not change due to a change in Your age or health. We can change premiums based on premium class; but only if We change them for all similar policies issued in the same state and on the same form as this Policy. Premium changes will only be made as of a Policy Anniversary Date. We will give you at least 45 days written notice before We change premiums.

(Compl. ¶ 25.)

Before 2004, the Department allowed actuarially justified premium rate increases necessary to achieve a minimum anticipated lifetime loss ratio of 60%; that is, for every dollar a policyholder pays in premiums, the insurer pays 60 cents on claims and is left with 40 cents for expenses and profit. (Compl. ¶ 31.) The Department promulgated new regulations in 2004, which established new standards for rate increase requests. (Compl. ¶ 33.) The 2004 regulations were nearly identical to the Long Term Care Insurance Model Regulation issued by the National Association of Insurance Commissioners ("NAIC"). (Compl. ¶ 33.) Approximately 45 other states have adopted regulations based on the NAIC model regulation, which remains "the regulatory standard for LTCI rate increases in the majority of states." (Compl. ¶ 49.)

Genworth first sought approval for premium rate increases under the 2004 regulations in 2007. (Compl. ¶ 39.) The Department approved the request to increase premium rates between 8% and 12% for its four oldest LTCI products. (Compl. ¶¶ 39, 43.) The Department likewise approved an 18% rate increase request in 2010. (Compl. ¶¶ 44, 46.) Because the 2004 regulations were prospective, the Department "reviewed requests for rate increases based on the standards that were in place at the time the LTCI policies subject to the rate increase were issued." (Compl. ¶ 38.)

In June 2014, the Department published a notice of proposed amendments to the LTCI regulations. (Compl. ¶ 50.) The Joint Legislative Committee on Administrative Rules ("JLCAR") held a hearing on the proposed amendments. (Compl. ¶ 55.) JLCAR initially entered a preliminary objection to the proposed amendments, but after the Department made some revisions to the proposal, JLCAR withdrew its objection after a second hearing. (Compl. ¶¶ 58–60.) These amended regulations, which are the subject of Genworth's complaint, became effective on February 13, 2015 as N.H. ADMIN. R. Ins. 3601 ("the Amended Regulations"). (Compl. ¶ 61.)

The Amended Regulations cap premium rates based on the "attained age" of the policyholder, rather than the age of the policyholder at the time the policy was issued. (Compl. ¶ 54.) "Attained age has never been a characteristic used to establish premium rates for LTCI policies." (Compl. ¶ 54.) The mandatory rate caps permit the largest premium rate increases for policyholders with younger attained ages, while lesser rate increases are allowed for policyholders whose attained age is higher. (Compl. ¶ 53.) The Amended Regulations are retrospective in application, unlike the prior regulations. (Compl. ¶ 53.) Additionally, under the Amended Regulations, the Commissioner has no discretion to approve rates above the rate caps in order to ensure premium adequacy, even when actuarially justified. (Compl. ¶ 53.) No other state has adopted regulations that eliminate such discretion. (Compl. ¶ 63.) Nor has any other state adopted regulations that establish new rate classifications based on attained age. (Compl. ¶ 64.)

Genworth had sought approval for certain premium rate increases in 2012 and 2013. (Compl. ¶ 66.) The Department did not make an immediate ruling on the requests, but after the Amended Regulations were enacted it invited Genworth to amend its rate increase requests to comply with the Amended Regulations. (Compl. ¶¶ 83, 85.) Genworth responded by stating that the Amended Regulations were unconstitutional and that it would not amend its requests. (Compl. ¶¶ 83, 86.) In March 2015, the Department denied the 2012 and 2013 requests for rate increases. (Compl. ¶¶ 84, 87.)

"Based on the Department's response to its 2012 rate increase requests and the Amended Regulations being proposed by the Department, Genworth decided that it could not continue to sell individual LTCI policies in New Hampshire." (Compl. ¶ 89.) Effective

November 1, 2014, Genworth suspended new sales of individual LTCI policies in New Hampshire. (Compl. ¶¶ 90, 92.)

Genworth filed the present complaint in June 2016. It alleges there is no legislative authority for the Amended Regulations, the Amended Regulations are irrational, their retroactive application impairs Genworth's contract rights, and the mandatory rate cap is confiscatory.

The Department first argues Genworth's *ultra vires* claim is time-barred under RSA 541-A:23, which states, "An action to contest the validity of a rule for noncompliance with any of the provisions of this chapter . . . shall be commenced within one year after the effective date of the rule." RSA 541-A:23, IV. Genworth is not challenging the procedures by which the Amended Regulations were adopted and filed under Chapter 541-A. As a result, the one-year statute of limitations does not apply.

Alternatively, the Department argues that it has the authority to enact the Amended Regulations under RSA 415-D:12. "It is well settled that the legislature may delegate to administrative agencies the power to promulgate rules necessary for the proper execution of the laws." *In re Mays*, 161 N.H. 470, 473 (2011). A court "is not free to substitute its judgment on the wisdom of the rules for that of the [Department]," *In re Concord Nat. Gas Corp.*, 121 N.H. 685, 692 (1981), but "administrative rules may not add to, detract from, or modify the statute which they are intended to implement." *Mays*, 161 N.H at 473 (quotation omitted); *see also Bach v. N.H. Dep't of Safety*, 169 N.H. 87, 92 (2016).

Whether the Amended Regulations result from a proper exercise of administrative rule-making authority starts with an examination of the intended scope and purpose of the rule-making power the legislature gave the Department. *See In re N.H Dep't of Transp.*, 152 N.H. 565, 571 (2005). That analysis begins with the plain language of the statute. *See id.* Under RSA 415-D:12,

> The commissioner shall issue reasonable rules to promote premium adequacy and to protect the policyholder in the event of substantial rate increases, and to establish minimum standards for marketing practices, agent compensation, agent testing, penalties and reporting practices for long-term care insurance.

The Amended Regulations limit LTCI premium rate increases based on the age of the policyholder. For example, an insurer may increase a 70-year old policyholder's premium by 50%, but an increase to a 90-year old policyholder's premium may not exceed ten percent. N.H. ADMIN. R. Ins 3601.19(f). Such rate increases may occur only every three years. *Id.* R. 3601.19(d).

Genworth argues these rules subvert, rather than promote, LTCI premium adequacy because they will cause it to suffer substantial losses. It alleges that premium adequacy is measured based on a loss ratio and that the Amended Regulations impose a loss ratio of 112%. It claims this will cause LTCI insurers, such as Genworth, to lose money on their New Hampshire policies and prevent them from achieving premium adequacy. (Compl. ¶¶ 32, 104, 160–62.) The complaint says further that Genworth cannot earn sufficient premiums under the Amended Regulations to pay for future benefits and will "suffer extensive losses" regardless of how efficiently it operates. (Compl. ¶ 163.) Additionally, it says the

Amended Regulations do not aid policyholders in maintaining the insurance, because when premium rates increase most policyholders pay the increased premium and retain the same benefits, while only a minority reduce their benefits or allow their policies to lapse. (Compl. ¶¶ 125–131.)

"If an administrative rule reasonably and effectively carries out the legislative purpose, it will be upheld." *In re Anderson*, 147 N.H. 181, 183 (2001). Whether the Amended Regulations do so is the question presented by the complaint. Under the highly deferential standard under which motions to dismiss are decided, Genworth's allegations that the regulations neither promote premium adequacy nor are necessary to protect the policyholder are sufficient to form the basis of a claim that the Department exceeded its legislative authority when it enacted the Amended Regulations.

The Department also argues that Genworth's contract clause claim fails because the Amended Regulations do not impair any right of Genworth under its policies. Genworth makes this claim under both the Federal and State Constitutions, which "offer equivalent protections where a law impairs a contract, or where a law abrogates an earlier statute that is itself a contract." *Deere & Co. v. State*, 168 N.H. 460, 471 (2015) (quotation omitted). As the contract clauses are coextensive, the claim is reviewed under the State Constitution, with federal law consulted for guidance only. *Id.*

"The threshold inquiry in a contract clause analysis is whether the law has a retroactive effect upon an existing contract." *Id.* The Amended Regulations apply retroactively, so the issue is "whether a change in state law has resulted in the substantial impairment of a contractual relationship." *Id.* at 472 (quotation omitted). "This inquiry, in turn, has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Id.* (quotation omitted). In order to survive a contract clause challenge, a modification in the law that substantially impairs a contractual relationship "must have a significant and legitimate public purpose." *Id.* (quotation omitted).

> Once a significant and legitimate public purpose is identified, the next inquiry is whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. Unless the State itself is a contracting party, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.

Id. (quotation omitted).

The parties do not dispute the existence of a contractual relationship. Genworth and its predecessors have issued thousands of LTCI policies in the State since 1986. Genworth's complaint, however, does not allege facts establishing that the Amended Regulations are a change that substantially impairs its contractual relationships. As the Department notes, Genworth's LTCI policies do not give it the right to "increase premiums to any particular degree." (Def.'s Mem. Supp. Mot. Dismiss 1, 18.) Rather, the policies say it has only a "limited right to change premiums." (Compl. ¶ 25.) Under the Amended Regulations, Genworth retains its ability to alter its premiums, so even if true the allegations are not sufficient to present a contract clause claim.

The Department also argues that Genworth's takings clause claim fails because it has no right to raise premiums in excess of those permitted by the Amended Regulations. Genworth makes its takings clause claim under both the State and Federal Constitutions, and once more resort is made first to the State Constitution. *Huard v. Town of Pelham*, 159 N.H. 567, 574 (2009).

> The New Hampshire Constitution provides that "no part of a man's property shall be taken from him . . . without his own consent." In the absence of a vested property right, no taking for purposes of Part I, Article 12 of the State Constitution has occurred. [T]o be vested, a right must be more than a mere expectation based on an anticipation of the continuance of existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand, or a legal exemption from the demand of another. A perfect vested right can be no other than such as is not doubtful, or depending on any contingency, but absolute, fixed and certain.

N.H. Health Care Ass'n v. Governor, 161 N.H. 378, 397 (2011) (internal citations and quotations omitted).

As discussed, Genworth has not provided facts to establish a contractual right to increase premiums to a certain degree. Additionally, Genworth is still able to increase premiums under the Amended Regulations, albeit with limits. Genworth argues, however, that the Amended Regulations are confiscatory because they prevent it from earning any profit in New Hampshire. In support of this argument it cites *In re Public Serv. Co. of N.H.*, 130 N.H. 265 (1988), which says in the context of rate-setting for utilities, "the constitution requires only that the regulatory body engage in a rational process of balancing consumer and investor interests to produce a rate that is just and reasonable." *Id.* at 274. "With regard to investment interests, a just and reasonable rate is one which reflects, among other things, a rate of return commensurate with returns on investments in other enterprises having corresponding risks." *Id.* at 275 (quoting *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944)); *see also Med. Malpractice Joint Underwriting Ass'n of Rhode Island v. Paradis*, 756 F. Supp. 669, 675–76 (D.R.I. 1991) ("In the context of rate cases, it is well settled that a rate that is so 'unjust' as to be confiscatory constitutes a taking within the meaning of the Fifth Amendment."); *State Farm Mut. Auto. Ins. Co. v. State*, 590 A.2d 191, 199 (N.J. 1991) (applying takings clause rate-setting principles to insurance). However, there are "no promises with respect to guaranteeing net revenues," nor is there an assurance of profits. *In re Public Serv. Co. of N.H.*, 130 N.H. at 277.

Genworth claims the Amended Regulations preclude it from achieving premium adequacy and that it will "suffer extensive losses" no matter how efficiently it operates, thereby making the rate caps unreasonable. Taken as true, these allegations are sufficient to establish a takings clause claim.

To summarize, the motion to dismiss is granted in part and denied in part. As it relates to Genworth's contract clause claim, the motion is GRANTED. In all other respects, the motion is DENIED.

The contract claim's dismissal is without prejudice to Genworth amending its complaint. If it does not do so within 30 days of the date on the clerk of court's notice of this decision, the dismissal will be with prejudice.

SO ORDERED.

DATE: JANUARY 25, 2017

BRIAN T. TUCKER
PRESIDING JUSTICE

TAB 2

The State of New Hampshire

MERRIMACK, SS. SUPERIOR COURT

NO. 217-2016-CV-381

GENWORTH LIFE INSURANCE COMPANY

V.

STATE OF NEW HAMPSHIRE DEPARTMENT OF INSURANCE

ORDER

Re: **Motion to Dismiss Amended Complaint (document no. 20)**

Ruling: *Granted in part and denied in part.*

Genworth Life Insurance Company filed an amended complaint in order to add facts in support of a previously dismissed claim that amended regulations adopted by the state Insurance Department violate the contract clause by impairing its contractual relationships. The issue is not only "whether there is any contractual relationship between the parties, but . . . whether there is a 'contractual agreement regarding the specific ... terms allegedly at issue' and "whether a change in the law impairs that contractual relationship." *Cycle City, Ltd. v. Harley-Davidson Motor Co.*, 81 F. Supp. 3d 993, 1004 (D. Haw. 2014) (quoting *General Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992)).

For the reasons given in the earlier order dismissing Genworth's contract clause claim, the amended complaint doesn't establish the regulations impinge on contract terms bearing on Genworth's ability to charge a certain premium. The department's motion to dismiss the contract clause claim in the amended complaint is, therefore, GRANTED. Its motion to dismiss (really a motion to reconsider dismissing) other claims in the amended complaint is DENIED, for the reasons given in the earlier order.

SO ORDERED.

DATE: AUGUST 1, 2017

BRIAN T. TUCKER
PRESIDING JUSTICE

TAB 3

The State of New Hampshire

MERRIMACK, SS. SUPERIOR COURT

NO. 217-2016-CV-381

GENWORTH LIFE INSURANCE COMPANY

V.

STATE OF NEW HAMPSHIRE DEPARTMENT OF INSURANCE

ORDER

The New Hampshire Insurance Department makes a third attempt to win dismissal of a complaint in which Genworth Life Insurance Company challenges one of its administrative rules. The issues are whether the rule is "*ultra vires*" because it detracts from the purpose behind the statute it is designed to implement (*In re Mays*, 161 N.H. 470, 473 (2011)), and whether it constitutes an unconstitutional taking because it is confiscatory.

Genworth's amended complaint could be construed as one contesting the rule on an "as-applied" basis, but in its reply to the dismissal motion it represents that its challenge is "facial" in nature. See *Genworth Mem. in Opp. to Mot. Dism.* (doc. no. 42), p. 3. So, Genworth must be prepared to prove "there is no set of circumstances under which [the rule] might be valid," *In re Southern N.H. Medical Center*, 164 N.H. 319, 326 (2012) (citation omitted), or in other words that "the law could never be applied in a constitutional manner." *American*

Federation of State, Cty. & Mun. Employees Council 79 v. Scott, 717 F.3d 851, 863 (11th Cir. 2013). Given that formula, a facial challenge is "the most difficult challenge to mount successfully." *State v. Furgal*, 161 N.H. 206, 210 (2010).

Genworth's clarification caused the department to adjust its argument for dismissal, but it maintains its position even if the challenge is facial. The motion to dismiss is decided under the familiar rule that calls for it to be denied if "the allegations in the plaintiff's pleadings are reasonably susceptible of a construction that would permit recovery." *Sanguedolce v. Wolfe*, 164 N.H. 644, 645 (2013).

First, the department says Genworth's characterization notwithstanding, the "complaint does not present purely 'facial' claims." *Reply to Opp. to Mot. Dism.* (doc. no. 44), ¶ 13. But Genworth is bound by its representation that its complaint is one of facial invalidity and the case will proceed on that basis. As such, considerations are limited to the terms of the regulation and the enabling statutes, and won't venture into issues of appropriate rates.

Second, the department argues "there is no such thing as a facial confiscatory rate-taking claim to a regulation that sets forth only all or part of a rate-setting methodology." *Reply*, ¶ 14. There is case law that says otherwise. See *20th Century Insurance Co. v. Garamendi*, 878 P.2d 566, 617 (Cal. 1994) ("When, as here, the question arises whether a regulation is violative of the takings clause on its face, the question is whether its terms preclude the setting of a rate that is just and reasonable as to the regulated firm, and hence nonconfiscatory."); *Cromwell Assocs. v. Mayor & Council of City of Newark*, 511 A.2d 1273, 1277 (N.J. Super. 1985) ("when an ordinance is so restrictive as to facially preclude any possibility of a just and reasonable return, a court may declare it invalid without considering the actual effect on a specified landlord."); *Calfarm Ins. Co. v. Deukmejian*, 771 P.2d 1247, 1252–53 (Cal. 1989) ("The face of a statute rarely reveals whether the rates it specifies are confiscatory or arbitrary, but necessarily discloses its provisions, if any, for rate adjustment. Recognizing that virtually any law which sets prices may prove confiscatory in practice, courts have carefully scrutinized such provisions to ensure that the sellers will have an adequate remedy for relief from confiscatory rates."); *State Farm Mutual Auto. Ins. Co. v. State*, 590 A.2d 191, 201 (N.J. 1991) ("facial constitutionality of the . . . Act depends on whether the new burdens on the insurers, the surtaxes and assessments, necessarily preclude a fair rate of return.")

For these reasons, the case will proceed on Genworth's claim that the rule is facially invalid because it is *ultra vires* and incapable of a construction that avoids the unconstitutional taking of property. The third motion to dismiss the complaint (document no. 32) is DENIED.

This leaves the question of scheduling. "[A] facial challenge to the text of a statute does not typically require discovery for resolution because the challenge focuses on the language of the statute itself." *General Electric Co. v. Johnson*, 362 F. Supp. 2d 327, 337–38 (D.D.C. 2005). See *New Hampshire Motor Transport Assoc. v. Rowe*, 324 F. Supp. 2d 231, 232–33

(D. Me. 2004) ("discovery or an 'evidentiary showing' on the effect of the challenged provisions . . . is not necessary to a ruling on a facial preemption challenge," because "such a ruling examines only the express terms of the statute, not the actual effect of the law.") It seems, therefore, that the case could be resolved by summary judgment, with oral argument at the request of either side. In any event, the parties shall renew their effort to agree on a case structuring order and within 30 days of the date on the clerk of court's notice of this decision either file a stipulated order or their own proposed orders if agreement is not reached.

SO ORDERED.

DATE: FEBRUARY 28, 2018

Brian Tucker

BRIAN T. TUCKER
PRESIDING JUSTICE

TAB 4

The State of New Hampshire

MERRIMACK, SS. SUPERIOR COURT

NO. 217-2016-CV-381

GENWORTH LIFE INSURANCE COMPANY

V.

STATE OF NEW HAMPSHIRE DEPARTMENT OF INSURANCE

ORDER

Genworth Life Insurance Company sued the New Hampshire Department of Insurance seeking a declaratory ruling that the department's amended regulations governing rate increases for long-term care insurance are void, and an order enjoining the Department from enforcing them.

The background to the case is from Genworth's complaint. Genworth provides long–term care insurance ("LTCI") to over 6,000 New Hampshire residents and is one of the largest writers of LTCI in the country. (Compl. ¶¶ 4, 93.) It and its predecessors have issued such insurance to New Hampshire residents since at least 1986. (Compl. ¶ 4.) LTCI policies cover costs associated with services such as nursing homes, assisted living, and home care. (Compl. ¶ 8.) All of Genworth's New Hampshire LTCI policies are "guaranteed renewable," and may be cancelled only if the policyholder fails to pay the required premium or engages in fraud or misrepresentation. (Compl. ¶ 10.)

Generally, policyholders buy LTCI policies when they are healthy and relatively young, and most LTCI claims occur many years after the policies issue. (Compl. ¶ 13.) "Expected future profitability and prices of long-term care insurance are based upon expected claims and payment patterns, using assumptions for, among other things, projected interest rates and investment returns, morbidity rates, mortality rates, lapse rates and expense." (Compl. ¶ 11.) "It follows that the ability to forecast future claim costs for LTCI is more limited than for other types of insurance." (Compl. ¶ 13.) If circumstances develop in the future that are not in line with the assumptions made at the time the policies were initially priced, then the insurer must adjust its premium rates as actuarially justified. (Compl. ¶ 13.)

New Hampshire's Long-Term Care Insurance Act (RSA chapter 415-D) went into effect on January 1, 1990. (Compl. ¶ 17.) Under the Act, an insurer may only issue LTCI policies on forms approved by the Department. (Compl. ¶ 21.) "Every Genworth LTCI policy form approved by the Department provides Genworth with the right to increase premiums." (Compl. ¶ 24.) All of these forms contain nearly identical language as follows:

> We have a limited right to change premiums. Premiums will not change due to a change in Your age or health. We can change premiums based on premium class; but only if We change them for all similar policies issued in the same state and on the same form as this Policy. Premium changes will only be made as of a Policy Anniversary Date. We will give you at least 45 days written notice before We change premiums.

(Compl. ¶ 25.)

Before 2004, the Department allowed actuarially justified premium rate increases necessary to achieve a minimum anticipated lifetime loss ratio of 60%. With a 60% loss ratio, for every dollar a policyholder pays in premiums, the insurer pays 60 cents on claims and retains 40 cents for expenses and profit. (Compl. ¶ 31.) The Department promulgated new regulations in 2004, which established new standards for rate increase requests. (Compl. ¶ 33.) The 2004 regulations were nearly identical to the Long-Term Care Insurance Model Regulation issued by the National Association of Insurance Commissioners ("NAIC"). (Compl. ¶ 33.)

In 2007, Genworth first sought approval for premium rate increases under the 2004 regulations. (Compl. ¶ 39.) The Department approved the request to increase premium rates between 8% and 12% for Genworth's four oldest LTCI products. (Compl. ¶¶ 39, 43.) The Department likewise approved an 18% rate increase request in 2010. (Compl. ¶¶ 44, 46.) The 2004 regulations were prospective, so the Department "reviewed requests for rate increases based on the standards that were in place at the time the LTCI policies subject to the rate increase were issued." (Compl. ¶ 38.)

The present case arises from amendments to the LTCI regulations in 2014. In June 2014, the Department published a notice of proposed amendments. (Compl. ¶ 50). The Joint Legislative Committee on Administrative Rules ("JLCAR") first rejected the amendments after a hearing, (Compl. ¶ 55), but later approved them after revisions by the department and a second hearing. (Compl. ¶¶ 58–60.) The amended regulations are the subject of

Genworth's complaint, and became effective on February 13, 2015 as N.H. ADMIN. R. Ins. 3601 ("the Amended Regulations"). (Compl. ¶ 61.)

The Amended Regulations cap premium rates based on the "attained age" of the policyholder, rather than on the policyholder's age at the time the policy issued. (Compl. ¶ 54.) They permit the largest percentage premium rate increases for policyholders with younger attained ages, and smaller increases for policyholders whose attained age is higher. (Compl. ¶ 53.) So, a premium increase of up to fifty percent may be approved for policyholders who have attained the age of fifty through seventy, while a maximum increase of ten percent is allowed for policyholders 90 years of age or older. N.H. CODE ADMIN. R. § 3601.19 (f). The rule directs that "[t]he commissioner shall not approve any increase if the resultant increase results in a percentage increase for any policyholder that exceeds an amount as set forth [in the rate cap table] based on the policyholder's attained age[.]" N.H. CODE ADMIN. R. § 3601.19 (f). However, statutory and regulatory procedures allow review of rules decisions. See RSA 400-A:17; R. 3601.16.

In 2012 and 2013, Genworth sought department approval of certain premium rate increases. (Compl. ¶ 66.) The Department did not rule on the requests immediately, but once the Amended Regulations were enacted, it invited Genworth to amend its requests to comply with the Amended Regulations. (Compl. ¶¶ 83, 85.) Genworth took the position that the Amended Regulations were unconstitutional and declined to do so. (Compl. ¶¶ 83, 86.) In March 2015, the Department denied the 2012 and 2013 requests for rate increases. (Compl. ¶¶ 84, 87.)

Over time, the case has come down to two issues. The first is whether the amended rules are *ultra vires*. The second is whether setting rate caps is unconstitutional on its face because it is confiscatory and constitutes an unlawful taking. Both sides move for summary judgment on these issues of law.

1. *Whether the Regulation is Ultra Vires*

The commissioner issued administrative rule 3601.19 (f) under the authority of RSA 415–D:12, which is part of the Long–Term Care Insurance Act. As it applies here, the statute directs the commissioner to "issue reasonable rules to promote premium adequacy and to protect the policyholder in the event of substantial rate increases." Genworth contends the commissioner's promulgation of rate caps in section 3601.19(f) was an *ultra vires* amendment of RSA 415–D:12.

Although it

> is well settled that the legislature may delegate to administrative agencies the power to promulgate rules necessary for the proper execution of the laws, the authority to promulgate rules and regulations is designed only to permit the [agency] to fill in the details to effectuate the purpose of the statute.
> Thus, administrative rules may not add to, detract from, or modify the statute which they are intended to implement.

Bach v. New Hampshire Dept. of Safety, 169 N.H. 87, 92 (2016) (quotations omitted). Deciding whether a regulation "adds to, detracts from, or modifies" a statute starts with the statute itself. *In re Wilson*, 161 N.H. 659, 662 (2011).

> We first examine the language of the statute and ascribe the plain and ordinary meanings to the words used. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language the legislature did not see fit to include. Furthermore, we interpret statutes in the context of the overall statutory scheme and not in isolation. In so doing, we are better able to discern the legislature's intent, and therefore better able to understand the statutory language in light of the policy sought to be advanced by the entire statutory scheme.

Id. (citations and quotation omitted). "Additionally, we interpret disputed language of a statute or regulation in the context of the overall statutory or regulatory scheme and not in isolation. We seek to effectuate the overall legislative purpose and to avoid an absurd or unjust result." *New Hampshire Resident Partners of Lyme Timber Co. v. New Hampshire Dept. of Revenue Administration,* 162 N.H. 98, 101 (2011) (citations and quotation omitted). Deference to the agency's judgment is not absolute, *Appeal of Morrissey,* 165 N.H. 87, 91 (2013), but "[a]n administrative regulation adopted by an agency pursuant to a statute is "*prima facie* evidence of the proper interpretation of the . . . statute." *Cagan's, Inc. v. Dept. of Revenue Administration,*126 N.H. 239, 248 (1985). See RSA 541–A:22, II.

RSA 415–D:12 authorizes the commissioner to issue rules that both "promote premium adequacy and . . . protect the policyholder in the event of substantial rate increases." Regulators "must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests." *Duquesne Light Co. v. Barasch,* 488 U.S. 299, 313–14 (1989). In context, the statute enables the commissioner to issue rules that balance the interests of insurers with those of the policyholder.

The rule allows insurers to increase premiums within specified limits at three–year intervals. Genworth does not argue the commissioner lacks statutory authority to approve rate increases and determine their size, but it questions whether setting percentage limitations on rate increases will result in premium adequacy. That issue, however, is "a distinctly separate question from deciding whether the regulation was *ultra vires*." *Lopez Lopez v. Aran*, 844 F.2d 898, 902 (1st Cir. 1988). The statute authorizes the commissioner to issue rules that govern rates, with the interests of insurers and policyholders in mind. A rule setting caps on premium increases may or may not prove harmful to Genworth's effort to realize a reasonable return. But capping premium increases based on the attained age of the policyholder is not an *ultra vires* act where the statute permits "reasonable rules" promoting premium adequacy while protecting the policyholder.

Genworth makes a second *ultra vires* argument based on the section of the statute authorizing the commissioner to issue rules "to protect the policyholder in the event of substantial rate increases." RSA 415–D:12. According to Genworth, the rule modifies the statute because the statute requires rules to protect policyholders "in the event of" a substantial rate increase, while the rule seeks to protect the policyholder *from* such an increase. So, Genworth says, the commissioner may issue a rule that aids policyholders in the aftermath of a rate increases, but not a rule that protects policyholders from a significant increase in the first instance.

The rule is consistent with the statute. It permits a "substantial rate increase," but "in the event of" one, caps it in order to protect the policyholder from the consequences of a more sizeable one. The regulation is not *ultra vires*.

2. *Whether Application of the Regulation Will Lead Inevitably to a Confiscatory Result*

Genworth challenges the rule on the limited basis that it is unconstitutional on its face because it will lead inevitably to a confiscatory result. "To prevail on a facial challenge, the challenger must establish that no set of circumstances exists under which the [rule] would be valid." *State v. Lilley*, 171 N.H. 766, 772 (2019). For that reason, a facial challenge is "the most difficult challenge to mount successfully." *State v. Furgal*, 161 N.H. 206, 210 (2010) (quotation omitted).

The United States and New Hampshire Constitutions prohibit the government from taking property without just compensation. U.S. Const., Amend. 5; N.H. Const., pt. 1, art. 12. Regulations, and price setting regulations especially, may violate this principle if they set prices so low as to be "unjust" or "unreasonable." *Duquesne Light Company v. Barasch*, 488 U.S. at 310. A rate is not unreasonably low, however, if it "enable[s] [a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risk assumed. . . ." *Id.* See *Anthem Health Plans of Maine, Inc. v. Superintendent of Insurance*, 40 A.3d 380, 390 (Me. 2012) ("a 'confiscatory rate' occurs in the insurance rating field where the approved rate denies a regulated entity the opportunity to realize a reasonable return on [its] investment and where the inadequate return results directly from the rate approval process and not from other causes.") (quotation omitted)).

Genworth relies on the department's testimony before the JLCAR, which it characterizes as the department's conclusion that the rule establishes a loss ratio of 112%. See Compl. Exhibits E–3; E–4, pp. 84–85. "A loss ratio is determined by dividing claims incurred by premiums earned. For example, a loss ratio of 80% means that for every $1 of premiums collected the insurer paid 80¢ in claims." *Excellus Health Plan, Inc. v. Serio*, 757 N.Y.S.2d 345, 346 (2003). A loss ratio of 112% "means that for every dollar of premiums collected the insurer paid" $1.12 "in claims." *Id.*

Genworth overstates the import of the testimony, which explained to the committee how percentage limits would have affected a group of insurers who sought rate increases that, even if approved without the amended regulations, would have had loss ratios of 100%. See Ex. E–4, pp. 96–97. The testimony did not purport to represent a loss ratio of 112% was the inevitable result of enacting the rule. Moreover, assessing premium adequacy based on loss ratio is an imperfect measurement. "For example, "if claims costs have increased, but expenses have decreased, rates requested based solely on a loss ratio analysis may not accurately portray the factors influencing the need for a rate change." *Bankers Life & Cas. Co. v. Commissioner of Insurance*, 691 N.E.2d 929, 934 (Mass. 1998).

Decisions of the United States Supreme Court and the New Hampshire Supreme Court establish that whether a ratemaking procedure is confiscatory depends on the rate produced by the procedure. "The constitution is only concerned with the end result of the rate order; *i.e.*, that it be just and reasonable. . . . The particular ratemaking methodology employed by the regulatory agency is, for the most part, constitutionally irrelevant." *In re Public Service Co.*, 130 N.H. 265, 275 (1988). See *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 524–25 (2002) ("[t]h[e]want of any rate to be reviewed is significant, given that this Court has never considered a taking challenge on a rate setting methodology without being presented with specific rate orders alleged to be confiscatory."); *Federal Power Commission v. Hope Natural Gas*, 320 U.S. 591, 602 (1944) ("[I]t is the result reached not the method employed which is controlling. It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry ... is at an end.") (citations omitted).

In order to succeed on its facial challenge, Genworth must show not only that the rule's system of rates is "confiscatory," but also that the "mere enactment" of the percentage caps is a taking without just compensation. *Gilbert v. City of Cambridge*, 932 F.2d 51, 56 (1st Cir.1991). That is, Genworth must show the mere existence of a system that caps premium increases based on the attained age of the policyholder necessarily deprives it of a reasonable return, without regard to other causes. *Anthem Health Plans of Maine, Inc.*, 40 A.3d at 390. Genworth has not attempted to satisfy this requirement, apart from its incorrect assertion that the department's testimony before the JLCAR proves the caps will cause it to lose money on policies and provide an unfairly low return. As Genworth has not shown "that application of the regulations will inevitably lead to a confiscatory result," *Fireman's Fund Ins. Co. v. Quackenbush*, 87 F.3d 290, 294–95 (9th Cir. 1996), its facial challenge to the regulation fails.

The department's motion for summary judgment seeking negative findings on the questions of whether the regulation is *ultra vires* and whether the regulation is unconstitutional on its face (doc. no. 48) is GRANTED. Genworth's cross–motion for affirmative findings on the same questions (doc no. 50) is DENIED.

Because of the delay in issuing the order, but also because the parties briefed the issues thoroughly, the order issues without oral argument. If after reviewing the order either side wishes oral argument, the party should file a motion for reconsideration and a hearing will be scheduled on request.

SO ORDERED.

DATE: AUGUST 27, 2019

Brian Tucker

BRIAN T. TUCKER
PRESIDING JUSTICE

TAB 5

The State of New Hampshire

MERRIMACK, SS. SUPERIOR COURT

NO. 217-2016-CV-381

GENWORTH LIFE INSURANCE COMPANY

V.

STATE OF NEW HAMPSHIRE DEPARTMENT OF INSURANCE

ORDER

Re: Motion of Genworth Life Insurance Company for Reconsideration (doc. no. 60)

Ruling: Denied.

As discussed in the underlying order, the State and federal constitutions focus on whether regulatory rates as finally set are confiscatory, so as to cause an unconstitutional "taking." The way in which the regulation sets rates does not affect its facial validity unless its terms lead necessarily to a confiscatory result. I adhere to my view that the department's testimony before JLCAR does not mean the regulations preordain an unconstitutional taking. Accordingly, reconsideration of the ruling on whether the regulations are invalid on their face is denied.

I reviewed Genworth's arguments on whether the amended regulations are *ultra vires*, and deny the request to reconsider the order.

So Ordered.

Date: November 22, 2019

Brian Tucker

Brian T. Tucker
Presiding Justice

Relevant Text of Constitutional Provisions, Statutes, Ordinances, Rules and Regulations Involved

- New Hampshire Constitution, Pt. 1, Art. 23

Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses.

- New Hampshire Constitution, Pt. 1, Art. 12

Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary. But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. Nor are the inhabitants of this state controllable by any other laws than those to which they, or their representative body, have given their consent.

- United States Constitution, Art. I § 10, cl. 1

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

- United States Constitution, Amend. 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

- United States Constitution, Amend. 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

- RSA 415-D:12

The commissioner shall issue reasonable rules to promote premium adequacy and to protect the policyholder in the event of substantial rate increases, and to establish minimum standards for marketing practices, agent compensation, agent testing, penalties and reporting practices for long-term care insurance.

- N.H. Code Admin. R. Ins. 3601.19(a) (2004)

See Addendum at 39.

- N.H. Code Admin. R. Ins. 3601.19(a) (2015)

See Addendum at 44.

INsource on the Web - Document Delivery

Archive Document: Doc. No. 8036, eff. 5-1-2004.

New Hampshire
Insurance Regulations

NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES...RULES OF THE INSURANCE COMMISSIONER...Chapter Ins 3600 -- LONG-TERM CARE INSURANCE...Part Ins 3601. Long-Term Care Insurance

Ins 3601.19

Premium rate schedule increases

(a) This section shall apply as follows:

(1) Except as provided in paragraph (2), this section applies to any long-term care policy or certificate issued in this state on or after the effective date of this rule.

(2) For certificates issued on or after the effective date of this amended rule under a group long-term care insurance policy as defined in RSA 415-D:3 IV. (a), which policy was in force at the time this amended rule became effective, the provisions of this section shall apply on the policy anniversary following 6 months after the effective date of this rule.

(b) An insurer shall provide notice of a pending premium rate schedule increase, including an exceptional increase, to the commissioner at least 30 days prior to the notice to the policyholders and shall include:

(1) Information required by Ins 3601.08;

(2) Certification by a qualified actuary that:

a. If the requested premium rate schedule increase is implemented and the underlying assumptions, which reflect moderately adverse conditions, are realized, no further premium rate schedule increases are anticipated;

b. The premium rate filing is in compliance with the provisions of this section;

(3) An actuarial memorandum justifying the rate schedule change request that includes:

a. Lifetime projections of earned premiums and incurred claims based on the filed premium rate schedule increase; and the method and assumptions used in determining the projected value, including reflection of any assumptions that deviate from those used for pricing other forms currently available for sale;

1. Annual values for the 5 years preceding the 3 years following the valuation date shall be provided separately;

2. The projections shall include the development of the lifetime loss ratio, unless the rate increase is an exceptional increase;

3. The projections shall demonstrate compliance with subsection (c); and

4. For exceptional increases,

(i) The projected experience should be limited to the increases in claims expenses attributable to the approved reasons for the exceptional increase; and

(ii) In the event the commissioner determines as provided in Ins 3601.03(a)(4) that offsets may exist, the insurer shall use appropriate net projected experience;

b. Disclosure of how reserves have been incorporated in this rate increase whenever the rate increase will trigger contingent benefit upon lapse;

c. Disclosure of the analysis performed to determine why a rate adjustment is necessary, which pricing assumptions were not realized and why, and what other actions taken by the company have been relied on by the actuary;

d. A statement that policy design, underwriting and claims adjudication practices have been taken into consideration; and

e. In the event that it is necessary to maintain consistent premium rates for new certificates and certificates receiving a rate increase, the insurer will need to file composite rates reflecting projections of new certificates.

(4) A statement that renewal premium rate schedules are not greater than new business premium rate schedules except for differences attributable to benefits, unless sufficient justification is provided to the commissioner; and

(5) Sufficient information for review and approval of the premium rate schedule increase by the commissioner.

(c) All premium rate schedule increases shall be determined in accordance with the following requirements:

(1) Exceptional increases shall provide that 70 percent of the present value of projected additional premiums from the exceptional increase will be returned to policyholders in benefits;

(2) Premium rate schedule increases shall be calculated such that the sum of the accumulated value of incurred claims, without the inclusion of active life reserves, and the present value of future project incurred claims, without the inclusion of active life reserves, will not be less than the sum of the following:

a. The accumulated value of the initial earned premium times 58 percent;

b. Eighty-five percent of the accumulated value of prior premium rate schedule increases on an earned basis;

c. The present value of future projected initial earned premiums times 58 percent; and

d. Eighty-five percent of the present value of future projected premiums not in subparagraph c. on an earned basis;

(3) In the event that a policy form has both exceptional and other increases, the values in paragraph (2) b. and d. will also include 70 percent for exceptional rate increase amounts; and

(4) All present and accumulated values used to determine rate increases shall use the maximum valuation interest rate for contract reserves. The actuary shall disclose as part of the actuarial memorandum the use of any appropriate averages.

(d) For each rate increase that is implemented, the insurer shall file for review by the commissioner updated projections, as defined in (b)(3) a., annually for the next 3 years and include a comparison of actual results to projected values. The commissioner may extend the period to greater than 3 years if actual results are not inconsistent with projected values from prior projections. For group insurance policies that meet the conditions in subsection (k), the projections required by this subsection shall be provided to the policyholder in lieu of filing with the commissioner.

(e) If any premium rate in the revised premium rate schedule is greater than 200 percent of the comparable rate in the initial premium schedule, lifetime projections, as defined in subsection (b)(3) a., shall be filed for review by the commissioner every 5 years following the end of the required period in subsection (d). For group insurance policies that meet the conditions in subsection (k), the projections required by this subsection shall be provided to the policyholder in lieu of filing with the commissioner.

(f)(1) If the commissioner has determined that the actual experience following a rate increase does not adequately match the projected experience and that the current projections under moderately adverse conditions demonstrate that incurred claims will not exceed proportions of premium specified in subsection (c), the commissioner may require the insurer to implement any of the following:

a. Premium rate schedule adjustments; or

b. Other measures to reduce the difference between the projected and actual experience.

(2) In determining whether the actual experience adequately matches the projected experience, consideration should be given to subsection (b)(3) e., if applicable.

(g) If the majority of the policies or certifies {Footnote 1} to which the increase is applicable are eligible for the contingent benefit upon lapse, the insurer shall file:

(1) A plan, subject to commissioner approval, for improved administration or claims processing designed to eliminate the potential for further deterioration of the policy form requiring further premium rate schedule increases, or both, or to demonstrate that appropriate administration and claims processing have been implemented or are in effect; otherwise the commissioner may impose the condition in subsection (h) of this section; and

(2) The original anticipated lifetime loss ratio, and the premium rate schedule increase that would have been calculated according to subsection (c) had the greater of the original anticipated lifetime loss ratio or 58 percent been used in the calculations described in subsection (c)(2) a. and c.

(h)(1) For a rate increase filing that meets the following criteria, the commissioner shall review, for all policies included in the filing, the projected lapse rates and past lapse rates during the 12 months following each increase to determine if significant adverse lapsation has occurred or is anticipated:

a. The rate increase is not the first rate increase requested for the specific policy form or forms;

b. The rate increase is not an exceptional increase; and

c. The majority of the policies or certificates to which the increase is applicable are eligible for the contingent benefit upon lapse.

(2) In the event significant adverse lapsation has occurred, is anticipated in the filing or is evidenced in the actual results as presented in the updated projections provided by the insurer following the requested rate increase, the commissioner may determine that a rate spiral exists. Following the determination that a rate spiral exists, the commissioner may require the insurer to offer, without underwriting, to all in force insureds subject to the rate increase the option to replace existing coverage with one or more reasonably comparable products being offered by the insurer or its affiliates.

a. The offer shall:

1. Be subject to the approval of the commissioner;

2. Be based on actuarially sound principles, but not be based on attained age; and

3. Provide that maximum benefits under any new policy accepted by an insured shall be reduced by comparable benefits already paid under the existing policy.

b. The insurer shall maintain the experience of all the replacement insureds separate from the experience of insureds originally issued the policy forms. In the event of a request for a rate increase on the policy form, the rate increase shall be limited to the lesser of:

1. The maximum rate increase determined based on the combined experience; and

2. The maximum rate increase determined based only on the experience of the insureds originally issued the form plus 10 percent.

(i) If the commissioner determines that the insurer has exhibited a persistent practice of filing inadequate initial premium rates for long-term care insurance, the commissioner may, in addition to the provisions of subsection (h) of this section, prohibit the insurer from either of the following:

(1) Filing and marketing comparable coverage for a period of up to 5 years; or

(2) Offering all other similar coverages and limiting marketing of new applications to the products subject to recent premium rate schedule increases.

(j) Subsections (a) through (i) shall not apply to policies for which the long-term care benefits provided by the policy are incidental, as defined in Ins 3601.03(b), if the policy complies with all of the following provisions:

(1) The interest credited internally to determine cash value accumulations, including long-term care, if any, rate guaranteed not to be less than the minimum guaranteed interest rate for cash value accumulations without long-term care set forth in the policy;

(2) The portion of the policy that provides insurance benefits other than long-term care coverage meets the nonforfeiture requirements as applicable in any of the following:

a. RSA 409;

b. RSA 409-A;

(3) The policy meets the disclosure requirements of RSA 415-D:8 VI., VII., and VIII.;

(4) The portion of the policy that provides insurance benefits other than long-term care coverage meets the requirements as applicable in policy illustrations as required by Ins 309.

(5) An actuarial memorandum is filed with the insurance department that includes:

a. A description of the basis on which the long-term care rates were determined;

b. A description of the basis for the reserves;

c. A summary of the type of policy, benefits, renewability, general marketing method, and limits on ages of issuance;

d. A description and a table of each actuarial assumption used. For expenses, an insurer shall include percent of premium dollars per policy and dollars per unit of benefits, if any;

e. A description and a table of the anticipated policy reserves and additional reserves to be held in each future year for active lives;

f. The estimated average annual premium policy and the average issue age;

g. A statement as to whether underwriting is performed at the time of application. The statement shall indicate whether underwriting is used and, if used, the statement shall include a description of the type or types of underwriting used, such as medical underwriting or functional assessment underwriting. Concerning a group policy, the statement shall indicate whether the enrollee or any dependent will be underwritten and when underwriting occurs; and

h. A description of the effect of the long-term care policy provision on the required premiums, nonforfeiture values and reserves on the underlying insurance policy, both for active lives and those in long-term care status.

(k) Subsections (f) and (h) shall not apply to group insurance policies as defined in RSA 415-D:3 IV. (a) where:

(1) The policies insure 250 or more persons and the policy has 5,000 or more eligible employees of a single employer; or

(2) The policyholder, and not the certificateholders, pay a material portion of the premium, which shall not be less than 20 percent of the total premium for the group in the calendar year prior to the year a rate increase is filed.

Statutory Authority - RSA 400-A:15; RSA 415-D:12

{Footnote 1} As in original.

History	Doc. No. 8036, eff. 5-1-2004.
Cross Reference	415-D:3; 415-D:8
Date New	2003
Lines of Business	**Health** Group Long Term Care, Individual Long Term Care
Functions	Actuarial Policy Management Product Filing
Subject Categories	004 - Duedates 020 - Life insurance / insurers 060 - Health insurance / insurers 065 - Health service corporations 080 - Group insurance (all lines) 300 - The policy 360 - Filing and reporting requirements 760 - Premium rates / rating organizations 940 - Model Laws

Index	Long term care insurance Premium rates Rate increases Group policies Filing requirements Notice Actuarial opinions Rate schedules Loss ratios Loss experience Replacement policies Records maintenance
Information Type	TEXT

N.H. Code Admin. R. Ins 3601.19

Ins 3601.19. Premium Rate Schedule Increases

(a) This section shall apply to all requests for premium rate schedule increases.

(b) An insurer shall provide notice of a pending premium rate schedule increase, including an exceptional increase, to the commissioner at least 30 days prior to the notice to the policyholders and shall include:

(1) Information required by Ins 3601.08;

(2) Certification by a qualified actuary that:

a. If the requested premium rate schedule increase is implemented and the underlying assumptions are realized, then no further premium rate schedule increases are anticipated;

b. The premium rate filing is in compliance with the provisions of this section;

(3) An actuarial memorandum justifying the rate schedule change request that includes:

a. Lifetime projections of earned premiums and incurred claims based on the filed premium rate schedule increase; and the method and assumptions used in determining the projected values, including reflection of any assumptions that deviate from those used for pricing other forms currently available for sale;

1. Annual values for the 5 years preceding the 3 years following the valuation date shall be provided separately;

2. The projections shall include the development of the lifetime loss ratio ;

3. The projections shall demonstrate compliance with subsection (c); and

4. For exceptional increases:

(i) The projected experience should be limited to the increases in claims expenses attributable to the approved reasons for the exceptional increase; and

(ii) In the event the commissioner determines as provided in Ins 3601.03 (a)(4) that offsets may exist, the insurer shall use appropriate net projected experience;

b. Disclosure of how reserves have been incorporated in this rate increase whenever the rate increase will trigger contingent benefit upon lapse;

c. Disclosure of the analysis performed to determine why a rate adjustment is necessary, which pricing assumptions were not realized and why, and what other actions taken by the company have been relied on by the actuary;

d. A statement that policy design, underwriting and claims adjudication practices have been taken into consideration; and

e. In the event that it is necessary to maintain consistent premium rates for new certificates and certificates receiving a rate increase, the insurer will need to file composite rates reflecting projections of new certificates;

(4) A statement that renewal premium rate schedules are not greater than new business premium rate schedules except for differences attributable to benefits, unless sufficient justification is provided to the commissioner;

(5) Sufficient information for review and approval of the premium rate schedule increase by the commissioner; and

(6) In assessing the reasonableness of the assumptions proposed, the commissioner may use the services of an independent actuary and may charge the insurer for the cost of these services. The commissioner may also accept a review done by or for another state or states for the same or substantially the same policy form where any differences in benefits and premiums are not material and such review was completed within 18 months of the date of the premium rate schedule filing and substantially complies with these standards.

(c) All premium rate schedule increases shall be determined in accordance with the following requirements:

(1) Exceptional increases shall provide that 70 percent of the present value of projected additional premiums from the exceptional increase will be returned to policyholders in benefits;

(2) Premium rate schedule increases shall be calculated such that the sum of the accumulated value of incurred claims, without the inclusion of active life reserves, and the present value of future projected incurred claims, without the inclusion of active life reserves, will not be less than the sum of the following:

a. For policies issued on or after May 1, 2004:

1. The accumulated value of the initial earned premium times the difference between 2 percent and the greater of the original anticipated loss ratio when the product was originally filed and 60 percent.;

2. Eighty-five percent of the accumulated value of prior premium rate schedule increases on an earned basis;

3. The present value of future projected initial earned premiums times the difference between 2 percent and the greater of the original anticipated loss ratio when the product was originally filed and 60 percent; and

4. Eighty-five percent of the present value of future projected premiums not in subparagraph 3. on an earned basis;

b. For policies issued prior to May 1, 2004:

1. The accumulated value of earned premium, using rates that had been approved and implemented prior to January 1, 2016, times the difference between 2 percent and the greater of the original anticipated loss ratio when the product was originally filed and 62 percent;

2. Eighty percent for individual policies and 75 percent for group policies of the accumulated value of premium rate increases approved and proposed for implementation on or after January 1, 2016;

3. The present value of future projected earned premium using rates that had been approved and implemented prior to January 1, 2016, times the difference between 2 percent and the greater of the original anticipated loss ratio when the product was originally filed and 62 percent; and

4. Eighty percent for individual policies and 75 percent for group policies of the present value of future projected premiums not in subparagraph 3. on an earned basis;

(3) In the event that a policy form has both exceptional and other increases, the values in paragraph (2) b. and d. will also include 70 percent for exceptional rate increase amounts;

(4) All present and accumulated values used to determine rate increases shall use the maximum valuation interest rate for contract reserves. The actuary shall disclose as part of the actuarial memorandum the use of any appropriate averages;

(5) All calculated accumulated values shall use the actual experience of the product, except for the interest rate as specified in (4), in as close a manner to that used in the original development of rates as possible. This shall not preclude the inclusion of multiple policy forms into one rate increase determination if such pooling enhances the credibility of the combined accumulated experience; and

(6) All calculated present values shall use reasonable estimates of future premium payments and claim payments. Such estimates shall be based on reasonable assumptions, which may include a margin for moderately adverse experience, as characterized herein.

(d) For any single increase approved, at the requested amount and based on the actuarial assumptions pursuant to (b) above, the insurer shall not be permitted to implement any further increases on the subject policy for a period of 3 years following the date the approved increase was implemented and no increase shall be implemented for a period of 3 years following the issue date.

(e) In lieu of a single increase, the commissioner may approve a series of scheduled increases that are actuarially equivalent to the single increase pursuant to (d) above. The insurer shall not be permitted to implement any further increases on the subject policy during the period of such scheduled increases. The insurer shall not be permitted to implement any further increases within a period of 3 years following the date the first approved scheduled increase was implemented.

(f) The commissioner shall not approve any increase if the resultant increase results in a percentage increase for any policyholder that exceeds an amount as set forth below based on the policyholder's attained age:

Table 3601.1

Maximum Permitted

```
Attained Age Increase
Under 50 50%
50 50%
51 50%
52 50%
53 50%
54 50%
55 50%
56 50%
57 50%
58 50%
59 50%
60 50%
61 50%
62 50%
63 50%
64 50%
```

```
65 50%
66 50%
67 50%
68 50%
69 50%
70 50%
71 48%
72 46%
73 44%
74 42%
75 40%
76 38%
77 36%
78 34%
79 32%
80 30%
81 28%
82 26%
83 24%
84 22%
85 20%
86 18%
87 16%
88 14%
89 12%
90 10%
Over 90 10%
```

(g) For each rate increase that is implemented, the insurer shall file for review by the commissioner updated projections, as defined in (b) (3) a., annually for the next 3 years and include a comparison of actual results to projected values. The commissioner may extend the period to greater than 3 years if actual results are not consistent with projected values from prior projections. For group insurance policies that meet the conditions in subsection (n), the projections required by this subsection shall be provided to the policyholder in lieu of filing with the commissioner.

(h) If any premium rate in the revised premium rate schedule is greater than 200 percent of the comparable rate in the initial premium schedule, lifetime projections, as defined in subsection (b)(3)a., shall be filed for review by the commissioner every 5 years following the end of the required period in subsection (g). For group insurance policies that meet the conditions in subsection (n) , the projections required by this subsection shall be provided to the policyholder in lieu of filing with the commissioner.

(i) (1) If the commissioner has determined that the actual experience following a rate increase does not adequately match the projected experience and that the current projections demonstrate that incurred claims will not exceed proportions of premiums specified in subsection (c), the commissioner may require the insurer to implement any of the following:

a. Premium rate schedule adjustments; or

b. Other measures to reduce the difference between the projected and actual experience.

(2) In determining whether the actual experience adequately matches the projected experience, consideration should be given to subsection (b)(3)e., if applicable.

(j) If the majority of the policies or certificates to which the increase is applicable are eligible for the contingent benefit upon lapse, the insurer shall file:

(1) A plan, subject to commissioner approval, for improved administration or claims processing designed to eliminate the potential for further deterioration of the policy form requiring further premium rate schedule increases, or both, or to demonstrate that appropriate administration and claims processing have been implemented or are in effect; otherwise the commissioner may impose the condition in subsection (k) of this section; and

(2) The original anticipated lifetime loss ratio, and the premium rate schedule increase that would have been calculated according to subsection (c) had the greater of the original anticipated lifetime loss ratio or 58 percent been used in the calculations described in subsection (c)(2)a. and c.

(k) (1) For a rate increase filing that meets the following criteria, the commissioner shall review, for all policies included in the filing, the projected lapse rates and past lapse rates during the 12 months following each increase to determine if significant adverse lapsation has occurred or is anticipated:

a. The rate increase is not the first rate increase requested for the specific policy form or forms;

b. The rate increase is not an exceptional increase; and

c. The majority of the policies or certificates to which the increase is applicable are eligible for the contingent benefit upon lapse.

(2) In the event significant adverse lapsation has occurred, is anticipated in the filing or is evidenced in the actual results as presented in the updated projections provided by the insurer following the requested rate increase, the commissioner may determine that a rate spiral exists. Following the determination that a rate spiral exists, the commissioner may require the insurer to offer, without underwriting, to all in force insureds subject to the rate increase the option to replace existing coverage with one or more reasonably comparable products being offered by the insurer or its affiliates.

a. The offer shall:

1. Be subject to the approval of the commissioner;

2. Be based on actuarially sound principles, but not be based on attained age; and

3. Provide that maximum benefits under any new policy accepted by an insured shall be reduced by comparable benefits already paid under the existing policy.

b. The insurer shall maintain the experience of all the replacement insureds separate from the experience of insureds originally issued the policy forms. In the event of a request for a rate increase on the policy form, the rate increase shall be limited to the lesser of:

1. The maximum rate increase determined based on the combined experience; and

2. The maximum rate increase determined based only on the experience of the insureds originally issued the form plus 10 percent.

(l) If the commissioner determines that the insurer has exhibited a persistent practice of filing inadequate initial premium rates for long-term care insurance, the commissioner may, in addition to the provisions of subsection (k) of this section, prohibit the insurer from either of the following:

(1) Filing and marketing comparable coverage for a period of up to 5 years; or

(2) Offering all other similar coverages and limiting marketing of new applications to the products subject to recent premium rate schedule increases.

(m) Subsections (a) through (l) shall not apply to policies for which the long-term care benefits provided by the policy are incidental, as defined in Ins 3601.03 (b), if the policy complies with all of the following provisions:

(1) The interest credited internally to determine cash value accumulations, including long-term care, if any, rate guaranteed not to be less than the minimum guaranteed interest rate for cash value accumulations without long-term care set forth in the policy;

(2) The portion of the policy that provides insurance benefits other than long-term care coverage meets the nonforfeiture requirements as applicable in any of the following:

a. RSA 409; and

b. RSA 409-A;

(3) The policy meets the disclosure requirements of RSA 415-D:8 VI., VII., and VIII.;

(4) The portion of the policy that provides insurance benefits other than long-term care coverage meets the requirements as applicable in policy illustrations as required by Ins 309;

(5) An actuarial memorandum is filed with the insurance department that includes:

a. A description of the basis on which the long-term care rates were determined;

b. A description of the basis for the reserves;

c. A summary of the type of policy, benefits, renewability, general marketing method, and limits on ages of issuance;

d. A description and a table of each actuarial assumption used. For expenses, an insurer shall include percent of premium dollars per policy and dollars per unit of benefits, if any;

e. A description and a table of the anticipated policy reserves and additional reserves to be held in each future year for active lives;

f. The estimated average annual premium policy and the average issue age;

g. A statement as to whether underwriting is performed at the time of application. The statement shall indicate whether underwriting is used and, if used, the statement shall include a description of the type or types of underwriting used, such as medical underwriting or functional assessment underwriting. Concerning a group policy, the statement shall indicate whether the enrollee or any dependent will be underwritten and when underwriting occurs; and

h. A description of the effect of the long-term care policy provision on the required premiums, nonforfeiture values and reserves on the underlying insurance policy, both for active lives and those in long-term care status.

(n) Subsections (h) and (k) shall not apply to group insurance policies as defined in RSA 415-D:3 IV. (a) where:

(1) The policies insure 250 or more persons and the policyholder has 5,000 or more eligible employees of a single employer; or

(2) The policyholder, and not the certificateholders, pays a material portion of the premium, which shall not be less than 20 percent of the total premium for the group in the calendar year prior to the year a rate increase is filed.

CREDITS

Source. #8036, eff 5-1-04; ss by #10154, eff 6-25-12; ss by #10782, eff 2-13-15

End of Document