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

REPLY BRIEF OF APPELLANT GENWORTH LIFE INSURANCE COMPANY

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I. GENWORTH'S CONTRACT CLAUSE CLAIM SHOULD NOT HAVE BEEN DISMISSED

The Amended Regulations are void under the Contract Clause because they materially impair LTCI insurers' right to premium rate increases on guaranteed renewable insurance policies sufficient to achieve the expected loss ratios established in New Hampshire regulations at the time the policies were issued. The Department argues, at pages 44-45 of its Brief, that there was no requirement that the Commissioner approve actuarially justified rate increases and that the Amended Regulations "did not change existing law." The Department fundamentally mischaracterizes the right to rate increases prior to the Amended Regulations.

At all times, RSA 3601.19 has provided, in relevant part:

> (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: [applicable loss ratio calculations]

RSA 3601.19 (emphasis added).

Thus, prior to the Amended Regulations, the Commissioner was **required** to determine rate increase applications using the applicable loss ratio calculation and insurers were entitled to rate increases in an amount sufficient to achieve those expected loss ratios.[1] As the Department acknowledged in a January 29,

[1] The Department's mischaracterization of Genworth's contract right to premium rate increases as "limited" ignores the fact that the only "limitation" expressed in Genworth's policies is that rate increases will be on a class basis without regard to

2015 letter to JLCAR, "[u]nder the existing rule, companies have proposed, and **the Department has lacked a clear basis to disapprove**" rate increases of varying percentages. AC ¶ 83 (App. Vol. II at 117-118) and Exhibit E-12 (App. Vol. I at 413) (emphasis added).[2]

The Amended Regulations superimposed on the existing loss-ratio standards an absolute cap on rate increases based on the attained age of the policyholder. The Amended Regulations were expressly intended to preclude rate increases that the Department had previously been required to approve in order to allow insurers to achieve the applicable expected loss ratios. The Department's Notice of Proposed Amendment provided: "[t]he proposed amendments **place limits on allowable rate increases** . . . ." AC ¶ 57 (App. Vol. II at 110-111) and Exhibit D (App. Vol. I at 310) (emphasis added).

Critically, unlike prior regulatory changes in New Hampshire to premium rate increase standards, the Amended Regulations were not limited to rate increases on policies sold after the effective date of the Amendment. Instead, the Amended Regulations were expressly intended to materially limit the right to rate

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an individual policyholder's age or health. AC ¶ 25 (App. Vol. II at 104); *see also* Exhibits A-1 to A-8 (App. Vol. I at 53-278).

[2] The Department's arguments that in a challenge to the exercise of rule-making authority the Court may not consider the Department's official written and testimonial statements that are part of the rule-making process is specious. Courts routinely look to the legislative history in evaluating claims challenging the validity of statutes or regulations. *See, e.g., Guare v. State of N.H.,* 167 N.H. 658, 668 (2015). Not surprisingly, the Department cites no authority for that proposition. Similarly, the Department's assertion that the records related to the enactment of a regulation are not "relevant" to a facial challenge to the validity of the regulation is also bereft of any supporting authority. The decisions cited by the Department at pages 52-53 of its Brief merely explain the difference between a facial challenge and an as-applied challenge.

increases on policies already in-force. The Amendment changed the existing regulation as follows:

> (a) This section shall apply ~~as follows:~~ **to all requests for premium rate schedule increases.**
>
> ~~(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.~~

N.H. Code Admin. R. Ins. 3601.19(a) (new text in bold, deleted text in strikethrough).

A retroactive impairment of a right that was the basis upon which a contract was formed is a "substantial" impairment and violates the Contract Clause of the United States and New Hampshire Constitutions. *Tuttle v. N.H. Med. Malpractice Joint Underwriting Ass'n*, 159 N.H. 627, 649-50 (2010); *accord In Re Workers Compensation Refund*, 46 F.3d 813, 819 (8th Cir. 1995) (in the context of Contract Clause claims the difference between prospective and retrospective regulatory change is "critical" because retroactive application impairs settled plans and arrangements while a prospective change does not). The Department's Brief completely ignores this critical fact.

The Department's assertion that the Contract Clause does not protect participants in highly regulated industries is also not well founded. As this Court has previously held, a history of regulation alone is never a sufficient basis for rejecting a challenge under the Contract Clause. *Tuttle,* 159 N.H. at 650. Courts have repeatedly found that legislation imposing materially different standards on

pre-existing contracts violates the Contract Clause even for highly regulated activities or industries. *See, e.g., In Re Workers Comp. Refund*, 46 F.3d at 822-23 (retroactive change to distribution of excess premiums for workers compensation insurance violated Contract Clause); *West End Tenants Ass'n v. George Washington Univ.*, 640 A.2d 718, 734-35 (D.C. 1994) (retroactive change to tenant rights statute to include leases violated Contract Clause); *Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1248 (3d Cir. 1987) (retroactive elimination of coverage under Workers' Compensation Act for borrowed employees violated Contract Clause); *Garris v. Hannover Ins. Co.,* 630 F.2d 1001 (4th Cir. 1980) (retroactive change to insurer/agent agreements violated Contract Clause).[3]

The Superior Court did not accept the Department's assertion, reiterated in the Department's Brief, that the Amended Regulations serve a significant and legitimate public purpose. The Amended Complaint contains many averments, each of which must be taken as true for purposes of a motion to dismiss, that establish that the Amended Regulations are not reasonable and necessary to serve an important public purpose and in fact are contrary to industry, actuarial and regulatory standards and practices, discriminatory, inconsistent with actual policyholder behavior and contrary to the best interests of policyholders and the

[3] *Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400 (1983), on which the Department relies, is readily distinguishable. The natural gas supplier in *Energy Reserves* had the option to terminate its supply agreements on 30 days written notice if it decided that the change in price regulation was too burdensome. *Id* at 405. By contrast, LTCI policies are guaranteed renewable, so a limitation on rate increases is a material impairment. In contrast to Genworth's policies, the agreements at issue in *Energy Reserves* expressly provided that contractual terms were subject to relevant present and future state and federal law. *Id* at 416. The price regulations at issue in *Energy Reserves* were limited in time and scope, as it was a temporary measure that applied only to a small percentage of supply agreements where price escalator clauses were not fixed. *Id* at 418. Here, the Amended Regulations have no temporal limitation.

public. AC ¶¶ 122 – 125, 127-135, 187-190 (App. Vol II at 125-129, 139-140) On those averred facts, a court may not conclude that the Amended Regulations were reasonable and necessary as a matter of law. *See, e.g., JSS Realty Co., v. Town of Kittery*, 177 F. Supp. 2d 64, 70 (D. Me. 2001) (determining "whether the contract-impairing enactment was 'reasonable and necessary to serve an important public purpose'—is not appropriate in the context of a motion to dismiss"); *accord N.Y. State Law Enf't Officers Union Council 82, AFSCME, AFL-CIO v. New York*, No. 1:11-cv-1525, 2012 WL 6019703, at *27 (N.D.N.Y. Dec. 3, 2012); *San Diego Police Officers' Ass'n v. Aguirre*, No. 05-CV-1581 H(POR), 2005 WL 3180000, at *8 (S.D. Cal. Nov. 5, 2005); *Kimball v. N.H. Bd. of Accountancy*, 118 N.H. 567 (1978). Thus, it would have been error for the Superior Court to have dismissed the Contract Clause claim on the alternative grounds urged by the Department.

II. THE AMENDED REGULATIONS ARE ULTRA VIRES

The Amended Regulations are ultra vires because they do not promote premium adequacy, as required by RSA 415-D:12 and instead expressly limit actuarially justified rate increases the Department was previously required to approve. The Superior Court made no finding that the Amended Regulations would promote premium adequacy and there is no support in the record for such a finding. The Department also does not contend that the Amended Regulations promote premium adequacy.

Instead, the Department argues that it may adopt regulations that protect consumers from rate increases without regard to premium adequacy. The Department mischaracterizes the scope of its authority. RSA 415-D:12 authorizes the Commissioner to 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 . . . ." (emphasis added)

The Department implicitly acknowledges at page 58 of its Brief that it promulgated the Amended Regulations by assuming that it can replace "and" in RSA 415:-D:12 with "or." The Department's argument that it is entitled to expand the legislative grant of authority and rewrite RSA 415-D:12 to replace "and" with "or" in order to address "tensions" between the two objectives also implicitly acknowledges that the Amended Regulations are not within the scope of the authority granted by RSA 415-D:12. Under RSA 415-D:12 the Department's authority is limited to promulgating reasonable regulations that **both** promote premium adequacy and protect policyholders in the event of a substantial rate increase. As discussed in Genworth's Opening Brief, prior regulations accomplished both objectives. The Amended Regulations, however, do not achieve both purposes required by the statute and thus are ultra vires. *Bach v. N.H. Dep't of Safety*, 169 N.H. 87, 92 (2016) ("[A]dministrative rules may not add to, detract from, or modify the statute which they are intended to implement.").

The Amended Regulations are also ultra vires because they are intended to **prevent** substantial rate increases rather than protect policyholders "in the **event of** a substantial rate increase." The Department's Brief again rewrites 415-D:12. This time, the Department replaces the legislative grant of authority to "protect policyholders in the event of a substantial rate increase" with the authority to "shield long-term care policyholders if substantial rate increases are requested" and before they are granted. (Department's Brief at 62) Because it is the Legislature, not the Department, that defines the scope of the Department's authority, the Amended Regulations are ultra vires.

III. THE AMENDED REGULATIONS VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST CONFISCATORY RATES

The Amended Regulations are unconstitutional because they do not contain any "safety valve" provision or other mechanism permitting the Commissioner to grant rate increases in excess of the attained age rate caps to avoid confiscatory takings. As noted in Genworth's Opening Brief, the Superior Court failed to address this deficiency.

The Department's argument that rate making is judged by the end result rather than the methodology employed addresses the scope of review in an as-applied challenge to a particular rate determination but does not address the deficiency apparent from the face of the Amended Regulations. The absolute prohibition on rate increases that exceed the attained age caps, which deprives the Commissioner of the discretion necessary to avoid confiscatory rates, is precisely the type of structural flaw that the Court can and should address in the context of a facial challenge to the Amended Regulations. 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.[4]

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[4] The Department's implication that there cannot be a facial challenge to a statute as confiscatory is simply wrong. *See, e.g., Guar. Nat'l Ins. Co. v. Gates*, 916 F.2d 508, 515 (9th Cir. 1990) (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.'"); *Mich. Bell Tel. Co. v. Engler*, 257 F.3d 587 (6th Cir. 2001) (rate freeze for telephone service providers were likely to prevail on facial challenge to rate freeze as confiscatory); *Mora v. Mejias*, 223 F.2d 814, 818-19 (1st Cir. 1955)

For the same reason, the Department's various arguments that there are administrative hearing and appeal rights following a denial of a rate increase application fails to satisfy the constitutional requirement. The Amended Regulations provide, 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 below based on the policyholder's attained age. . .." N.H. Admin. R. Ins. 3601.19(f) (emphasis added). Thus, the Commissioner lacks the discretion to approve rates that exceed the rate caps, even where the evidence at an administrative hearing or in an administrative appeal or other form of administrative proceeding proves those rates are confiscatory. Similarly, the right to challenge an adverse determination in court following exhaustion of administrative appeals in an as applied challenge does not cure the constitutional defect in the Amended Regulations. The fact that a court can prevent rates that are unconstitutionally confiscatory does not legitimize a regulation that authorizes or fails to protect against those rates in the first instance.

As set forth in Genworth's Opening Brief, it was also error for the Superior Court to grant the Department's Motion for Summary Judgment on

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(holding price cap regulation unconstitutional after looking at aggregate effect on whole industry which would be compelled to operate at a loss); *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); *Cromwell Assocs. v. Mayor & Council of Newark*, 511 A.2d 1273, 1277-78 (N.J. Super. Ct. Law Div. 1985) ("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.").

Genworth's challenge to the Amended Regulations as unconstitutionally confiscatory. The record before the Court consisted of the Department's statements and submissions to JLCAR concerning the impact of the Amended Regulations but no other evidence submitted by the Department. The JLCAR materials include the Department's analysis of the impact of the Amended Regulations on the 25 most recent rate increase applications which concluded that if the Amended Regulations were adopted, insurers would be "losing money." AC Exhibit E-4 at 84-85, 96-97 (App. Vol. I at 360-361, 372-373) and Exhibit E-3 (App. Vol. I at 335-336). 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 84 (App. Vol. I at 360).

The Department argued in its briefing below, and argues again to this Court, that the import of its statements to JLCAR was more limited than the undisputed language used in those statements. However, 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 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.

On the record before it, the Superior Court should have granted Genworth's Motion for Summary Judgment and it was error for the Superior Court to grant the Department's Motion for Summary Judgment. Genworth, as the party opposing the Department's Motion, was entitled to all reasonable inferences in its favor from the record. The Superior Court failed to apply that standard and the Department's Brief ignores that error, instead focusing solely on

renewing its arguments that the Superior Court should not have granted Genworth's Motion for Summary Judgment.

IV. CONCLUSION

Genworth respectfully requests that this Court reverse the decisions of the Superior Court.

Respectfully submitted,
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by its attorneys,

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Date: August 11, 2020 */s/ Kathleen Mahan*
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