STATE OF MISSOURI

DEPARTMENT OF INSURANCE, FINANCIAL INSTITUTIONS AND PROFESSIONAL REGISTRATION

P.O. Box 690, Jefferson City, Mo. 65102-0690

IN RE: Proposed Acquisition of	)	
	)	
Preservation Life Insurance Company	)	
by	)	Case Number 081210412C
PFHC Medical Management LLC	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Came on for consideration the proposed acquisition of Preservation Life Insurance Company by PFHC Medical Management LLC. Missouri law mandates that such an acquisition receive the approval of the Director of the Missouri Department of Insurance, Financial Institutions and Professional Registration (the "Department"). §382.060, RSMo 2000.[1] Among other statutory bases, the Director is authorized to withhold approval of the proposed acquisition if the acquiring entity will be unable to satisfy the requirements for the issuance of a license to write the lines of insurance that the entity to be acquired is currently licensed to write (§382.060.1(1)), the competence, experience or integrity of those persons who propose to control the operations of the acquired entity are such that the acquisition would be contrary to the interests of the policyholders of the

[1] All statutory references are to the Revised Statutes of Missouri 2000, unless otherwise indicated.

acquired entity and the public (§382.060.1(5)), or if the acquisition is likely to be hazardous or prejudicial to the insurance buying public (§382.060.1(6)). Based on the testimony and other evidence presented, I, Kip Stetzler, Acting, make the following findings of fact, conclusions of law, and order in the above-captioned matter:

Findings of Fact

1. On or about December 5, 2008, PFHC Medical Management LLC ("Applicant"), filed a Form A Statement with the Department in connection with the proposed acquisition of control of Preservation Life Insurance Company ("Preservation Life"), a Missouri stock life insurance company. A public hearing was held on January 5, 2009, as ordered by the Department on December 12, 2008. Jonathan Downard appeared for Applicant and Mark Stahlhuth appeared for the Department's Division of Insurance Company Regulation ("Division").

2. Applicant proposes to acquire control of Preservation Life by purchasing all corporate stock of Preservation Life pursuant to a Stock Purchase Agreement between the Applicant and American Prearranged Services, Inc., and APS Trust dated November 26, 2008.

3. A preponderance of the competent and substantial evidence on the whole record demonstrates that:

A. After the acquisition of control of Preservation Life by the Applicant, Preservation Life will not be able to satisfy the requirements for the issuance of a license to write the lines of insurance for which it is presently licensed. Specifically, Applicant will cause Preservation Life to have only seven directors (Exhibit 2A,

paragraph 2, response to Exhibit 1, request 2), rather than the minimum of nine required by §376.060(5), and to maintain no capital for the years ending 2009, 2010, 2011, 2012 and 2013 (Exhibit 2H), rather than the minimum $600,000 required by §376.280.1, RSMo Supp. 2007.[2] Although Applicant testified (through Mark Vincent) that it would cause Preservation Life to maintain whatever capital and surplus is required, this testimony was contradicted by his testimony elsewhere that Preservation Life would have no assets and no liabilities when acquired. One cannot have capital or surplus without assets. The weightiest evidence is found in exhibit 2H. This exhibit provides specific detail as to what dollar amounts Applicant expects in the next few years to be set aside by Preservation Life for capital and surplus and it outweighs the contradictory testimony of the witness.

B. The competence and experience of those persons who propose to control the operations of Preservation Life are such that it would be contrary to the interests of the policyholders of Preservation Life and of the public to permit the acquisition of Preservation Life by the Applicant. As shown by the financial statements filed in connection with Exhibit A, Applicant failed to file financial statements certified by an independent certified public accountant, as required by Item 12 of the Form A appendix of 20 CSR 200-11.101 (see also §382.050.1(3)). Applicant demonstrated a lack of knowledge of such basic requirements for Missouri life insurance companies as the minimum number of directors and the minimum required capital. Applicant stated a lack

[2] "No joint stock or stock and mutual company ... shall commence to do business or issue policies unless upon an actual capital of at least six hundred thousand dollars and a surplus of at least six hundred thousand dollars...." §376.280.1, RSMo Supp. 2007. While Exhibit 2H states surplus in the statutorily required amount, it does not disclose the required amount of capital.

of familiarity with the basic accounting principles that are required of Missouri life insurance companies, namely statutory accounting principles.

C. The proposed acquisition of Preservation Life by the Applicant is likely to be hazardous or prejudicial to the insurance buying public. Exhibits 2A, 2D and 2H show a lack of appropriate actuarial work, including a failure to state key assumptions, as testified to by the Division's life and health insurance actuary. In addition, review of exhibits 2A, 2D and 2H demonstrates that insurance business proposed by Applicant to be conducted by Preservation Life will not only fail to maintain the combined one million two hundred thousand dollars ($1,200,000) in statutory minimum capital and surplus, but also may fall short of risk based capital (RBC) requirements which are often far greater than the statutory minimum and would likely not have sufficient capital and surplus to account for the initial operating costs that Preservation Life is likely to incur, as testified to by the Division's chief financial examiner and director.

4. Applicant has no reasonable basis for its complaints, through the testimony of Mark Vincent, that:

A. The Department, through counsel for the Division, failed to provide sufficient time within which to respond to the questions and requests in exhibit 1. Inconsistent with this complaint are the facts that Applicant made no request for any extension of time within which to answer the questions and requests and made no request for a continuance of the January 5 hearing. In fact, Applicant admits that the Division

offered Applicant the opportunity to agree to a continuance of the January 5 hearing, but Applicant failed or refused to agree to a continuance.

B. The Department, through the Division, should have conducted its investigations more promptly than during the latter part of December, 2008, in light of a meeting that apparently took place between representatives of Applicant and the Division in September, 2008, the agenda of which meeting apparently included the proposed acquisition of Preservation Life. To the contrary, the record reflects that the Form A was not filed until on or about December 5, 2008, thereby precluding the division's review of the Form A until on and after that date. In addition, the record shows that the stock purchase agreement that forms the basis for the Form A was not made until November 26, 2008.

Conclusions of Law

5. By reason of paragraphs 1 and 2 of the findings of fact, the Department has jurisdiction of the Form A and the proposed acquisition of Preservation Life. See §§382.040-382.060.

6. By reason of paragraph 3, above (and its sub-paragraphs), the Department has authority to disapprove the proposed acquisition of control of Preservation Life. See §382.060.1(1), (5) and (6).

7. Despite Applicant's contention to the contrary, Applicant's answers (exhibit 2A) to questions and requests (exhibit 1), business plan (exhibit 2D) and pro forma (that is, projected future) financial statements for Preservation Life (exhibit 2H), as well as the testimony of Fred Heese and David Hippen, are relevant to the issue of

whether Applicant's proposed acquisition of Preservation Life "is likely to be hazardous or prejudicial to the insurance buying public." See §382.060.1(6). Applicant contends that such matters are irrelevant because they concern possible future business, events and transactions and that the only relevant matters are Applicant's present, and possibly past, financial standing and competence, experience and integrity. (Applicant's argument assumes that Applicant possesses sufficient competence and experience. While this assumption is refuted by the record and has been rejected as set forth above, see paragraph 3.A, Applicant's argument warrants a substantive refutation.) Evidence regarding the projected future business of the target domestic insurance company is relevant, and Applicant's argument to the contrary is rejected for the following reasons:

A. The language of the statute is itself forward-looking, as it directs the inquiry into whether the proposed acquisition is "***likely to be*** hazardous or prejudicial...". §382.060.1(6), emphasis added. A statute is construed to "ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning." *President Casino, Inc. v. Director of Revenue*, 219 S.W.3d 235, 240 (Mo. banc 2007). Considering the words of §382.060.1(6) in their plain and ordinary meaning, the Department inquiry into the hazardous or prejudicial extent of the proposed acquisition of Preservation Life must necessarily focus on the future business prospects identified by Applicant.

B. Applicant's contention, if accepted would result in an absurdity. Under Applicant's argument, the Department would have to give rubber-stamp approval to any acquisition so long as the proposed acquiring party presently possessed the

requisite competence, experience and integrity and the required financial means, regardless of whether the future insurance business projected by the acquiring party for the Department would likely result in financial calamity. Absent a clear legislative directive to do otherwise, the Department will not merely to stand aside and authorize the acquisition of an insurance company that is doomed to failure.

C. Cases from appellate courts in other states considering statutory provisions substantially identical to section 382.060.1(6) have relied on such evidence in affirming the insurance regulator's decisions regarding acquisitions of domestic insurance companies. In *Blue Cross and Blue Shield of Kansas, Inc. v. Praeger*, 276 Kan. 232, 75 P.3d 226 (2003), the Kansas Supreme Court reversed the Kansas District Court and upheld the Kansas Insurance Commissioner's denial of the request by Anthem Insurance Companies, Inc., to acquire health insurance company Blue Cross and Blue Shield of Kansas, Inc. Similar to the arguments advanced here by Applicant, the district court there concluded that because the target company, Blue Cross and Blue Shield of Kansas, would remain subject to laws requiring insurance commissioner approval for premium rate increases and distributions from surplus after its acquisition by Anthem, the commissioner had acted prematurely in finding that the proposed acquisition was likely to be hazardous or prejudicial to the insurance buying public. 75 P.3d at 244. The Kansas Supreme Court reversed the district court:

> We hold this conclusion erroneous because it eliminates the Commissioner's proactive role and reduces her to being reactive. The acquisition statute does not require the Commissioner to first approve the acquisition and then await future requests for rate increases and surplus reductions before she is authorized to act [citation omitted]... Indeed, the

> acquisition statute permits the Commissioner to prevent an insurer's action that is "unfair and unreasonable to policy holders of the insurer and not in the public interest" and "*likely* to be hazardous or prejudicial to the insurance-buying public." (Emphasis added.) K.S.A. 40-3304(d)(1)(C) and (E).
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> Accordingly, we agree with the statement of *amicus* National Association of Insurance Commissioners that phrases in K.S.A. 40-3304(d)(1) such as "might jeopardize," "plans or proposals," and "likely" clearly communicate the legislature's command to the Commissioner to pass on the proposed acquisition now, rather than attempt to repair or prevent injury to the public at a much later date, when it may be too late to fully protect the public interest and the interests of policy holders. See [citation omitted]... To elaborate on the *Downey* aphorism, the Commissioner is not required to wait until likely future harm to the public appears before locking the barn door; she may do so now as a preventative.

75 P.3d at 244-245, *citing Rhode Island Ins. Co. v. Downey,* 95 Cal.App.2d 220, 212 P.2d 965, 974 (1949) (no requirement of the Insurance Code that the insurance commissioner must wait until an insurance company is insolvent before he takes action to protect the policyholders because to do so is contrary to "the ancient aphorism about locking the barn door after the horse is stolen."). *See also Premera v. Kreidler*, 133 Wash.App. 23, 131 P.3d 930 (2006) (affirming Washington insurance commissioner's findings that three likely future consequences of a proposed for-profit conversion and acquisition of not-for-profit health services corporation and affiliated insurance companies were "likely to be hazardous or prejudicial to the insurance-buying public," 131 P.3d at 947 and 957).

Order

Based on the foregoing Findings of Fact and Conclusions of Law, the proposed acquisition of control of Preservation Life Insurance Company by PFHC Medical Management LLC is **DISAPPROVED**.

Having read the full record including all the evidence or personally considered the portions of the record cited or referred to in the arguments or briefs, the foregoing is so ordered, signed and official seal affixed thereto this 4th day of February, 2009.

Kip Stetzler, Acting Director