

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NATIONAL STATES INSURANCE)
COMPANY,)
)
Petitioner,)
)
vs.) Case No. 06-4804
)
OFFICE OF INSURANCE REGULATION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, Administrative Law Judge Don W. Davis conducted a final hearing in the above-captioned matter on April 16 and April 18, 2007, in Tallahassee, Florida, at the Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUES

Whether the Office of Insurance Regulation (the Office) correctly calculated the New Business Rate in accordance with statutory authority provided by Section 627.9407(7)(c), Florida Statutes, with regard to National States Insurance Company's (National States or Company or Insurer) request for a rate increase.

PRELIMINARY STATEMENT

National States engaged in the sale of the Home Healthcare Care (HHC) policies from 1985 through 2003. The instant litigation regards premium rates to be charged on the HHC policies remaining in effect. The HHC policies provide for home health care benefits in stand-alone policies. The present matter arises from rate filing FLR 06-10794, submitted to the Office by National States for a 48 percent rate increase for those HHC policies.

In a letter to National States dated September 26, 2006, the Office actuary assigned to review the 06-10794 National States rate filing for the HHC policies denied approval of the requested rate increase on the basis that the proposed rate schedule did not comply with the requirements of Section 627.9407 (7)(c), Florida Statutes, and that existing and proposed rate schedules were also significantly in excess of

current new business rates in Florida.

National States' amended petition challenging the Office's disapproval was forwarded to DOAH on November 28, 2006.

At the final hearing, National States offered testimony of two witnesses and six exhibits which were admitted into evidence.

The Office offered the testimony of two witnesses and four exhibits which were admitted into evidence.

The record remained open for submission of written proffers for a period of ten days following the final hearing. Due to a misunderstanding by counsel for the Office, permission for a subsequent proffer of intended testimony was permitted after that time in accordance with the agreement of the parties and pursuant to order of the undersigned entered on May 16, 2007.

The parties requested and were granted leave to file proposed recommended orders more than ten days after the filing of the transcript. Both parties filed such proposed recommended orders which have been reviewed and utilized in the preparation of this Recommended Order.

References to Florida Statutes are to the 2007 edition unless otherwise noted.

FINDINGS OF FACT

1. National States is an insurance company licensed in the State of Florida to engage in the sale of health insurance.

National States has been in business since 1964, and currently sells life and health insurance products in 33 states.

2. National States currently has four HHC policy forms in force in Florida: HNF-1, HNF-3, HHC-1 and HNC-1 (collectively referred to as the AHome Health@ policies).

3. The Home Health policies pay benefits for home nursing care on an expense incurred basis up to the daily maximum specified for periods of 12, 24 or 36 months for the HNF-1 and HNF-3 policies; 12,24,36,48 or 60 months for the HHC-1; and 12 or 24 months for the HNC-1 policy. All policies under HNF-1, HNF-3 and HNC-1 policy forms are in renewal only.

4. The Home Health policies are guaranteed renewable and cannot be canceled due to poor financial performance of the product. Rates can, however, be increased with the approval of the Office.

5. The Home Health policies are known as "stand alone home health care policies" because they provide benefits for care in the policyholder's home as opposed to care provided in an institution such as a nursing home.

6. The policy forms identified in the rate filing are not currently sold by National States, and are defined as a "closed

block" of business, meaning that no new policies are being issued.

7. Under the policy forms in issue in this proceeding, each time a renewal premium is received, another contract term begins which precludes any impairment of a prior contract, per the following language:

This policy may be renewed for another term by the payment, . . . of the renewal premium for such term at the rate in effect at the time of such renewal. We reserve only the right to change the table of premiums for this policy and all the policies in this state. No change in the premium or in this policy may be made solely by us because of a change in your health or job, nor solely because of claims under this policy.

8. On August 16, 2006 National States submitted a rate filing requesting a rate revision for its Home Health policies. The requested rate increase in the 2006 filing was 48.1 percent.

9. The Office denied the requested 48.1 percent increase by National States by a notice of intent to disapprove ("NOI") issued September 19, 2006.

10. Section 627.9407(7)(c), Florida Statutes, was enacted on June 20, 2006, and applies to all long term care policies issued or renewed on or after July 1, 2006.

11. The National States' rate filing in this case, FLR 06-10794, is subject to Section 627.9407(7)(c), Florida Statutes. The policy forms at issue in this case were issued prior to the

enactment of that statute. A guaranteed renewable form cannot be canceled by the insurer and must be renewed by the insurer as long as the policy holder continues to pay the requested premium. National States does, however, have the option under Section 627.6425, Florida Statutes, to request that the State of Florida close its entire block of business if its solvency is in jeopardy.

12. Florida Administrative Code Rule 690-157.108 was enacted in 2003, when the Florida Legislature adopted the NAIC (National Association of Insurance Commissioners) Model Rule of 2000 which states:

(1) An insurer shall provide the information listed in this subsection for approval pursuant to Section 627.410, Florida Statutes, prior to making a long-term care insurance form available for sale.

* * *

(c) An actuarial certification consisting of at least the following:

1. A statement that the initial premium rate schedule is sufficient to cover anticipated costs under moderately adverse experience and that the premium rate schedule is reasonably expected to be sustainable over the life of the form with no future premium increases anticipated;

2. A statement that the policy design and coverage provided have been reviewed and taken into consideration;

3. A statement that the underwriting and claims adjudication processes have been reviewed and taken into consideration;
4. A complete description of the basis for contract reserves that are anticipated to be held under the form, to include:
 - a. Sufficient detail or sample calculations provided so as to have a complete depiction of the reserve amounts to be held;
 - b. A statement that the assumptions used for reserves contains reasonable margins for adverse experience;
 - c. A statement that the net valuation premium for renewal years does not increase; and
 - d. A statement that the difference between the gross premium and the net valuation premium for renewal years is sufficient to cover expected renewal expenses; or if such a statement cannot be made, a complete description of the situations where this does not occur;

13. Section 627.9407(7)(c), Florida Statutes, applies universally to all carriers selling long term care insurance in the state of Florida. For carriers currently issuing coverage (i.e. "open blocks" of business), the new business rate is determined by that insurer's book of business so that the premium charged to existing insureds will not exceed the premium charged for a newly issued insurance policy except to reflect benefit differences.

14. For insurers not currently issuing new coverage (i.e. "closed blocks" of business), the new business rate shall be as

published by the Office at a rate representing the new business rate of insurers representing 80 percent of the carriers currently issuing policies with similar coverage as determined by the prior calendar year earned premium. § 627.9407(7)(c), Fla. Stat.

15. Dan Keating, acting Chief Actuary for the Office, authored the NOI at issue in this proceeding. He is a Fellow of the Society of Actuaries with over 36 years of experience and has reviewed between 250 to 300 rate filings in the state of Florida. His testimony establishes that market share is a percentage that represents how much a particular carrier's sales are represented in the market. Each carrier's percentage of the market is based on earned premium of the total volume of that particular share of the market.

16. Market share theory should be used to determine which carriers represented 80 percent of the market share. Any other type of average would give too much weight to one company who might only sell one percent of the policies in the market.

17. Florida premiums should be used to determine which companies represent the 80 percent market share. The Office instigated a data call to all carriers doing business in Florida to respond with confirmation that they were selling long term care business and to provide their premium information. The request was separated according to the definition for similar

benefits which was identified as "facility-only," "non-facility-only," and "comprehensive."

18. Upon receipt, company data was verified and compared to the annual reports filed through the NAIC. The steps of the data call commenced with the publishing of the new business rate on September 29, 2006. Delays in publishing the new business rate were caused by the time allotted from enactment (June 20, 2006) to effective date (July 1, 2006), the type and amount of data requested, difficulty in getting companies to respond, review of the data once received, and the action of calculating the market share.

19. Calculation to determine which companies represent the 80 percent market share, a necessity pursuant to compliance with Section 627.9407(7)(c), Florida Statutes, also required a review in this case of each companies' first-year earned premium by personnel of the Office. Such a review of first-year earned premium is the proper basis to begin the calculation.

20. Three companies were used to comprise the 80 percent market share: Banker's Life & Casualty, Penn Treaty and Colonial American were chosen. Banker's Life & Casualty, however, alone comprised 80 percent of the market share and would have been sufficient used alone. Nevertheless, in the interest of diversity and variance, and so that the new business rate would not rely solely on one company's rate book, Penn

Treaty and Colonial American rates were added to the market share.

21. By adding the two additional companies, the new business rate was increased to some degree because both of the other companies were charging more. Banker's Life remained the major shareholder. A weighted average was then applied to the rates of each company to calculate a new business rate.

22. Banker's Life originally submitted data for the size of their premium (not the premium rates) that were based on its nationwide numbers. This error was not discovered until January 2007, after the new business rates were already published and affected the percentage of weight each company's rates were given. When the error was corrected, Banker's Life remained above 80 percent of the market share as required by the statutory language of Section 627.9407(7)(c), Florida Statutes.

23. The Office recalculated the new business rate based on the corrected Florida data which increased the new business rate minimally, but not significant enough to warrant a change to the published rates.

24. The Office disapproved National States' rate filing because approving the filing would have resulted in a premium charged that would have exceeded the new business rate allowed in accordance with Section 627.9407(7)(c), Florida Statutes.

25. Although the percentages differ from one issue age to another, National States current rates without the increase, in the best case scenario, are at least 106 percent above the new business rate, and in general are on average two and one half times the new business rate. Each rate is above 100 percent of the new business rate, indicating that in every situation, for every issue age on all four policy forms, National States' current rates, before any increase, are already above the new business rate.

26. The Bankers Life and Casualty nationwide data was used to calculate the weighted average because it was the data provided to the Office in response to the data call. Experts for both parties concede that access to this data could only be had via submission by the carriers, as there is no central depository where this type of data is maintained. The market share calculation itself was accurate.

27. A conscious decision was made by personnel of the Office to normalize the new business rate to reflect a 90-day elimination period because that policy form is the most commonly sold by the carriers. Banker's Life does not have a corresponding rate for a 90-day elimination period; however, normalizing to Banker's 42-day elimination period produced a higher new business rate because a shorter elimination period

raises the cost of the policy since the policy holder can claim benefits sooner.

28. As with the elimination period, there was a conscious decision to normalize the new business rate to a tax-qualified plan because it was the most commonly sold plan.

29. Normalizing the benefits to calculate the new business rate was done by the use of factors gathered from the carriers making up the 80 percent market share and then weighted as required. The factors were available at the time the office received the data from each company, and prior to the disapproval of National States' rate filing.

30. National States' personnel were aware of the new statute prior to submitting the rate filing to the Office. Additionally, checks of the Office's website were made in July and again in August of 2006, in order to identify the new business rate applicable to this filing. New business rates were not published on the Office website at that time.

31. National States' actuary concedes that he did not make any attempt to contact the Office to determine if the new business rate for stand alone home health care was available prior to submitting the rate filing to the office, although doing so would have been relatively easy.

32. National States' actuary offered testimony that Florida home health care policies have been performing poorly

not just for National States, but for the industry as a whole. This poor performance occurs when the actual claims experience that had emerged is much worse than had been expected when initially pricing the product. He described the pricing process in terms of the durational loss ratio curve, and how that curve impacts subsequent filings under Florida law. National States did not anticipate increasing the premiums at the time the policies were sold.

33. National States' strategy as outlined by its actuary is at variance with requirements of Florida Administrative Code Rule, 690-149.006(3)(b)23b(IV). Under that Rule's provision, the actuary is required to project the experience that he actually expects to occur. For a plan that was developed more than 15 years ago, it is highly unlikely that expectations today would match those in the original pricing product.

34. Rule 690-149.006(3)(b)23b(IV) reads:

(IV) The projected values shall represent the experience that the actuary fully expects to occur. In order for the proposed premium schedule or rate change to be reasonable, the underlying experience used as the basis of a projection must be reflective of the experience anticipated over the rating period. The Office will consider how the following items are considered in evaluating the reasonableness of the projections and ultimate rates. In order to expedite the review process, the actuary is encouraged to provide information

on how each of the following have or have not been addressed in the experience period data used as the basis for determining projected values, or otherwise addressed in the ratemaking process.

- (A) Large nonrecurring claims;
- (B) Seasonality of claims;
- (C) Prior rate changes not fully realized;
- (D) Rate limits, rate guarantees, and other rates not charged at the full manual rate level;
- (E) Experience rating, if any;
- (F) Reinsurance costs and recoveries for excess claims subject to non-proportional reinsurance;
- (G) Coordination of benefits and subrogation;
- (H) Benefit changes during the experience period or anticipated for the rating period;
- (I) Operational changes during the experience period or anticipated for the rating period that will affect claim costs;
- (J) Punitive damages, lobbying, or other costs that are not policy benefits;
- (K) Claim costs paid which exceed contract terms or provisions;
- (L) Benefit payments triggered by the death of an insured, such as waiver of premium or spousal benefits;
- (M) Risk charges for excess group conversion costs or other similar costs for transferring risk;

(N) The extent and justification of any claim administration expenses included in claim costs; and

(O) Other actuarial considerations that affect the determination of projected values.

35. Testimony of National States' actuary is not credited.

CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stats.

37. National States' requested 48.1 percent rate increase is above the calculated new business rate.

38. Section 627.410(6), Florida Statutes, provides:

(6)(a) An insurer shall not deliver or issue for delivery or renew in this state any health insurance policy form until it has filed with the office a copy of every applicable rating manual, rating schedule, change in rating manual, and change in rating schedule; if rating manuals and rating schedules are not applicable, the insurer must file with the office applicable premium rates and any change in applicable premium rates. . . .

(b) The commission may establish by rule, for each type of health insurance form, procedures to be used in ascertaining the reasonableness of benefits in relation to premium rates

39. Section 627.9407, Florida Statutes, necessarily requires that the Office publish its new business rate for those carriers no longer issuing new long term care coverage.

40. Section 627.9407(7)(c), Florida Statutes provides:

Any premium increase for existing insureds shall not result in a premium charged to the insureds that would exceed the premium charged on a newly issued insurance policy, except to reflect benefit differences. If the insurer is not currently issuing new coverage, the new business rate shall be as published by the office at the rate representing the new business rate of insurers representing 80 percent of the carriers currently issuing policies with similar coverage as determined by the prior calendar year earned premium.

41. Section 627.9407(7)(c), Florida Statutes, provides an independent definition of a rate level that is defined to be excessive, and is an additional test for determining a level of excessiveness. Those provisions preclude a carrier from charging a premium rate that is above the published new business rate.

42. In accordance with Section 627.410(6)(b), Florida Statutes, the Office drafted Rule 690-157.301 to establish a framework for evaluating rate increases for long term care insurance, and to ensure that the rate increases are not excessive. The Notice of Proposed Rule Development was published in the Florida Administrative Weekly and scheduled for workshop on May 2, 2007.

43. Under provisions of Section 120.57 (1)(e), Florida Statutes, any agency action that determines the substantial

interests of a party, based on an unadopted rule, must explicate that policy in the course of formal administrative proceedings.

44. The Office must demonstrate that the unadopted rule:

- a. Is within the powers, functions, and duties delegated by the Legislature or, if the agency is operating pursuant to authority derived from the State Constitution, is within that authority;
- b. Does not enlarge, modify, or contravene the specific provisions of law implemented;
- c. Is not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency;
- d. Is not arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational;
- e. Is not being applied to the substantially affected party without due notice; and
- f. Does not impose excessive regulatory costs on the regulated person, county, or city

45. The actions of the Office in establishing the new business rate are within the powers, functions and duties delegated to it by the legislature. § 627.9407(7)(c), Fla Stat.

46. The Office reviewed the first-year earned premium of carriers currently selling business in the State of Florida and determined that Bankers was the predominant seller in the market place and, alone, represented more than the 80 percent market share as required by the statute.

47. The Office added Penn Treaty and Colonial American, representing the number two and three carriers selling HHC policies in Florida, as determined by first-year earned premium, to the market share, not wanting to have the new business rate rely solely on one carrier's rate book.

48. The actions of the Office did not enlarge, modify, or contravene the specific provisions of the laws implemented.

49. The actions of the Office were not vague, because the statute provides an adequate standard for agency action. The language of the statute is not ambiguous. The statute requires the office to publish a new business rate representing 80 percent of the carriers issuing new coverage as determined by prior calendar year earned premium. The new business rates were calculated and published accordingly.

50. The action of the Office was not arbitrary or capricious because its actions are supported by logic or the necessary facts, and was not adopted without thought or reason.

51. The Office met the requirements imposed upon it in this proceeding in accordance with requirements of Section 120.57(1)(e), Florida Statutes.

52. National States is not required to continue to do business in Florida at a loss. Under Section 627.6425, Florida Statutes, National States can request that the state close its entire block of business if its solvency is in jeopardy.

53. The Office correctly calculated the new business rate in accordance with the statutory authority provided by Section 627.9407(7)(c), Florida Statutes.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered denying National States' requested rate increase.

DONE AND ENTERED this 15th day of June, 2007, in Tallahassee, Leon County, Florida.

S

DON W. DAVIS
Administrative Law Judge
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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.