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THE STATE OF TEXAS, v. AMCARE HEALTH PLANS OF TEXAS, INC. and AMCARE MANAGEMENT, INC.	In The District Court In Travis County, Texas 200th Judicial District

RESPONSE OF SPECIAL DEPUTY RECEIVER
TO MOTION OF MEDIMPACT HEALTHCARE SYSTEMS, INC.
FOR RELIEF FROM STAY, MODIFICATION OF INJUNCTION, AND ORDER COMPELLING ARBITRATION AND AMENDMENT

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Executive Summary

MedImpact seeks to enforce rights under an agreement that are not yet ripe as a result of its own failure to perform. Having invoked the claims adjudication process in this receivership, MedImpact now seeks to avoid a result it does not like by attempting to rely on a right to arbitration. In addition to the right to arbitration not being ripe, it is precluded by Texas law as set forth in the claim review process, and as a result of MedImpact having waived that right. Though in certain instances a claimant does have a right to litigate a claim in federal court, to then be presented to the receivership court to be processed as that court determines, this is not such a case. Having sought relief from this Court through the claims process, MedImpact in essence collaterally attacks the authority of the court, and the adjudication of the SDR. This is an impermissible attack.

The most efficient use of assets and judicial time is spent completing the claim adjudication process that MedImpact itself initiated. Using the process advocated by MedImpact adds layers of courts to the process, inserts a costly claims resolution process, and introduces into the process an uncertainty as to timing and conclusiveness that impairs the ability of the SDR to timely and efficiently administer the assets of the estate. Accordingly, the Motion should be denied.

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Jean Johnson, as Special Deputy Receiver of AmCare Health Plans of Texas, Inc., and AmCare Management, Inc. (the *SDR*) submits this response to the Motion for Relief from Stay, Modification of Injunction and Order Compelling Arbitration (the *Motion*) and the amendment thereto (the *Amendment*) submitted by MedImpact Healthcare Systems, Inc. (*MedImpact*):

Introduction

The Motion and Amendment by MedImpact are ill-conceived and are, in a word – wrong. In an effort to shift the receivership proceedings to California (or even Oklahoma)

so that it can attempt to recover on a debt it has written off, MedImpact attempts to create the illusion of legitimacy for its position.[1] Even a cursory review of its arguments, though, reveals that the premise for its position is wrong, and thus, so is its conclusion. Owing to the fact that the Motion and Amendment present no basis to alter the specific language of the receivership statute and long established Texas law on the resolution of claims within an insurance insolvency proceeding, the Motion and Amendment should be denied.

Summary of Argument

The result sought by MedImpact is specifically foreclosed by the very agreement upon which it relies. It has not met conditions precedent to the relief sought, and thus the effort must be rejected.

MedImpact originally wanted an order of the Court allowing it to force the SDR to arbitrate what it referred to as the SDR's "informally asserted allegation that MedImpact overcharged the SDR (sic) under a pharmacy benefits agreement. " [*See* ¶1 of Amendment]. [2] What MedImpact now wants is a free conscience to sue the SDR in Oklahoma so that it can get a court there to force the SDR to arbitrate MedImpact's claim in this receivership rather than follow the statutory guideline. Though characterizing its

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[1] *See* Declaration of David Wheeler, attached as exhibit B-1 to the Motion. ("After AmCare was placed into liquidation and ceased operations, we eventually "Wrote off" the AmCare account receivable for financial statement reporting purposes."

[2] The SDR did not have any agreement with MedImpact. MedImpact had an agreement with AmCare Health Plans of Texas, Inc. MedImpact is not seeking to recover for services that could be regarded as class 1 administrative claims.

recent pleading as an amendment, MedImpact admits that it "seeks substantially the same relief by a different procedural path." [*See* Amendment ¶2]. Indeed, instead of asking this Court to send the SDR to an arbitration panel to resolve claims that have not even been articulated by the SDR (or MedImpact for that matter), MedImpact wants this Court to lift the stay so that MedImpact can add the SDR to a lawsuit that the Oklahoma and Louisiana receivers have that is now pending in federal court in Oklahoma so that court can decide whether to send the matter to arbitration. [3] [*See* Amendment at ¶2]. As if that thinking were not confused enough, MedImpact states that it reserves its right to seek arbitration directly from this Court if the SDR is not joined in the lawsuit in Oklahoma. [*See* Amendment at ¶2]. It is a creative system that MedImpact postures – one in which it gets multiple bites at the apple to get what it wants. While MedImpact attempts to call the apple different things; an apple it remains.

No matter the route to get there, MedImpact wants the SDR ordered to participate in an arbitration of the "dispute" between it and the SDR. [*See* introductory paragraph of Motion at p. 1]. The "dispute", as demonstrated later, is actually the disagreement that MedImpact has with the way the SDR has adjudicated the claim submitted by MedImpact against the assets of the estates, as part of the receivership process. This is not an *in*

[3] The posture of the litigation in Oklahoma also presents a complication to the pending MedImpact request. The Oklahoma and Louisiana Deputy Receivers sued MedImpact in Oklahoma state court. MedImpact removed the case to federal court, but the Oklahoma and Louisiana Deputy Receiver's have apparently challenged removal. Therefore, this Court does not even have certainty that if it lifts the stay that the federal court will make a decision on arbitration. MedImpact leaves this Court in the position of abandoning the Texas SDR to an Oklahoma state court to determine receivership assets. See Amendment at p. 2, fn. 2. And ¶7.

personam claim against the SDR as MedImpact suggests, but rather an attempt to gather assets from the estate. Such actions are *in rem* or *quasi in rem* and within the province of the Texas courts as part of the comprehensive scheme of regulating the business of insurance. Texas law is clear as to how the claims process works, and that process is the exclusive means to recover on a claim. As will be seen, it is also clear that MedImpact has no basis to alter the process.

Not only does MedImpact attempt to blur what it attempts to do here by referring to the denial of its claim as a "dispute", but it also attempts to confuse the entities actually involved in the process. It suggests that it "entered into a certain Services Agreement to provide benefits for a 'Texas-based' group of health plans." [*See* Motion at p.2, ¶2]. This is a wrongful effort by MedImpact to litigate in this Court the dispute it hopes to have arbitrated. To the extent that the issue can be considered here, it demonstrates that it dealt with separate entities.

Finally, MedImpact attempts to obtain the result it wants by suggesting that the Court is really dealing with a bankruptcy matter and should be guided by the law it sees applicable in that context. In attempting to blur the distinction between insurance insolvency law and bankruptcy law, MedImpact disregards an established body of law that rejects the application of arbitration to insurance insolvency proceedings. It is no wonder

that it attempts to shift the Court's focus from the subject area of the dispute, or to shift consideration away from this Court entirely.

The Court is left with the fundamental question whether the SDR should be compelled to arbitrate the rejection of the proof of claim with MedImpact. The secondary issue is whether there is a compelling reason this Court should abandon that decision to a federal court in Oklahoma. None of the positions advocated by MedImpact merit the relief sought, and therefore, the Motion and Amendment should be denied.

Argument

1. Neither The Motion Nor Amendment Is Ripe For Decision.

Assuming for the moment that the underlying service agreement is applicable to the SDR, that agreement means that the motion to compel arbitration is not ripe. MedImpact notes and admits that a condition precedent to arbitration is that MedImpact attempt to resolve any dispute by direct negotiation. [*See* Motion p. 2, ¶3]. As shown in the affidavit of Jean Johnson, which is attached as exhibit 1 and incorporated by reference, there has not been any direct negotiation with the SDR. MedImpact does not demonstrate that it engaged in direct negotiation with the SDR.[4] Rather, MedImpact only says that it filed a

[4] As shown in the affidavit of Harold B. Gold, which is attached as exhibit 2, and incorporated by reference, the SDR has attempted to gather information from MedImpact in order to conduct direct negotiation and evaluate MedImpact's appeal of the rejection of the proof of claim. The response of MedImpact was not to provide the information, or even to say that it would not provide the information, but rather to inform this Court that it

claim in the Texas receivership for all sums due under the service agreement, irrespective of which member in which state was involved. [*See* Motion p. 3, ¶4).[5]

MedImpact does not even demonstrate that it engaged in direct negotiation with the other states.[6] First, there would appear to be no reason that it would do so since it seeks all the money from the Texas estate, and not from the other 2 companies in receivership, though most of the money it seeks relates to members of the Oklahoma and Louisiana HMOs. Second, all MedImpact does say is that it has moved for arbitration against the other 2 states in the proceeding in Oklahoma. There is no evidence from MedImpact that it has conducted direct negotiation with the other receivers about the claim now before this Court, or that the motion for arbitration against the receivers of the Oklahoma and Louisiana companies has been granted. Because MedImpact has not satisfied the condition precedent to arbitration contained within the agreement it seeks to enforce, its motion for arbitration is not ripe.

2. The Texas Statute Precludes The Result Sought.

MedImpact argues that it has a "dispute" to resolve with the SDR. What MedImpact really means to say is that it wants its claim in the receivership resolved some other way

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wanted to proceed with a hearing. Perhaps in California setting matters for hearing is considered direct negotiation, here it is referred to as litigation.

[5] In fact, most of the money that is the subject of the proof of claim is on members of the Oklahoma and Louisiana organizations, not Texas.

[6] Exhibit C to the Motion is the Motion for Order Compelling Plaintiff to Proceed to Arbitration, Staying This Action, and Transferring Venue filed in the lawsuit by the Oklahoma and Louisiana Receivers against MedImpact. It does not reveal any direct negotiation.

and in some other place. Texas law does not allow that. MedImpact asserts that Federal law allows such a result, but it is wrong.

a. The Only "Dispute" Is The Rejection of MedImpact's Claim By The SDR

Fundamental to the argument of MedImpact is its assertion that the SDR claims that MedImpact has overcharged AmCare Health Plans of Texas, Inc. What is the source of that assertion? MedImpact does not say. The absurdity of this situation is borne out in the Amendment where MedImpact states that after joining the SDR in the Oklahoma litigation "should the SDR elect not to file an affirmative claim against MedImpact in the Oklahoma Lawsuit, the SDR would, at a minimum be defending against MedImpact's contention that MedImpact is not liable for overcharging." If the SDR has not pursued a claim that MedImpact is overcharging, what claim is MedImpact prosecuting about overcharging? [*See* ¶11 and ¶12 of the Amendment where MedImpact concedes that the Oklahoma and Louisiana receivers have articulated a claim against MedImpact and have pursued it in court, but the SDR has not.] If MedImpact obtains an affirmative finding that it was not overcharging, what impact does that have on the rejection of its claim by the SDR? The fact remains that MedImpact submitted a claim to the SDR, the claim was rejected. MedImpact then exercised its rights under Texas law to have the rejection reconsidered, and it was shortly after seeking reconsideration, which the SDR has not yet acted upon, that

MedImpact sought to have the matter decided in arbitration. [*See* exhibit 1]. MedImpact clearly wants to collaterally attach the claims adjudication process.

The only interaction between MedImpact and the SDR has been the filing of a claim by MedImpact, pursuant to the order of the receivership court and the Insurance Code, its rejection by the SDR, and then MedImpact's appeal of that rejection. Clearly, MedImpact wants to change the result of the claim process. Remarkably, MedImpact takes the position that it is a court in Oklahoma (federal or state) that should decide about changing the Texas claim review process either by deciding that the SDR should go to arbitration to be forced to reconsider the matter, or a Court in Oklahoma should hear MedImpact's appeal of the claim decision. According to MedImpact, under no circumstance should this Court decide the claim resolution by the SDR. Why that is so MedImpact does not say. MedImpact presents no authority sanctioning such an approach.

b. To Create A Dispute, MedImpact Has To Disregard The Corporate Veil

In order to bring any legitimacy to its argument that the claim adjudication process should be shifted to some other forum, MedImpact has to have a determination that all the AmCare entities should be treated as one. However, that is the fundamental issue that MedImpact has to litigate. It cannot do so as a predicate to obtaining arbitration, and to the extent it can, it has failed to do so. MedImpact's position is neither factually nor legally correct.

(1) MedImpact Invoked The Texas Claims Process As To Separateness

MedImpact filed its claim in the Texas receivership proceeding. It sought recovery of money it claimed was owed by AmCare Health Plans of Texas, Inc. regardless of the plan that provided coverage to a member for which a prescription had been processed by MedImpact. In order to prevail on that claim, it had to present information in support of its position. The claim was rejected by the SDR. MedImpact asked that the rejection be reviewed, as allowed by Texas law, and the SDR has been evaluating the additional information from MedImpact and has attempted to obtain additional information from MedImpact to evaluate the claim. [*See* Exhibit 1]. Rather than supply the information to the SDR, and proceed as required by Texas law in the event it does not like the action taken on its proof of claim, MedImpact now wants to litigate elsewhere its proof of claim – that AmCare Health Plans of Texas owed all the money irrespective of the sponsoring plan (e.g., the Oklahoma, Louisiana or Texas company). Having invoked the claim process, it cannot now seek the authority of this Court to alter the result somewhere else. The claim review process is the exclusive means of having a claim resolve against the estate. This is especially so where a party has invoked the process and obtained a ruling. *See e.g.* Daewoo Motor America, Inc. v. General Motors Corp., 459 F.3d 1249 (11th Cir. 2006)(claimant not allowed to challenge foreign bankruptcy proceeding where it participated in proceeding

and filed claim). The receivership court has conferred on the SDR the obligation to receive and evaluate claims. That power cannot be challenged in another court. Cadle v. Baker, 20 Wall. 650, 22, L.Ed. 448; Mutual Reserve Fund Life Ass'n v. Phelps, 190 U.S. 147, 159, 23 S.Ct. 707, 47 L.Ed. 987; Attorney-General v. The Guardian Mutual Life Ins. Company, 77 N.Y. 272, 276 (1879).

(2) Texas Disfavors Disregard Of Corporate Separateness

(a) MedImpact Is Legally Wrong

MedImpact had the burden to demonstrate the basis for its claim. The SDR determined that MedImpact did not do so. MedImpact has requested further review by the SDR, as allowed by the claims process and the SDR is reviewing the additional information from MedImpact, and has requested further information that MedImpact has refused to supply. Bald assertions do not give rise to a basis to hold one corporation liable for the debt of another. *See e.g.* Tex. Bus. Corp. Act art. 2.21; Valero South Texas Processing Co. v. Starr County Appraisal Dist., 954 S.W.2d 863, 866 (Tex. App. – San Antonio 1997, pet. denied)(for the purpose of legal proceedings, subsidiary corporation and parent corporations are separate and distinct "persons" as a matter of law and the separate entity of corporations will be observed by the courts even where one company may dominate or control, or even treat another company as a mere department, instrumentality or agency.)

MedImpact attempts to rely on a Louisiana judgment obtained by the SDR against HealthNet, Inc. as a basis for MedImpact obtaining a right to litigate in another forum its claims against all 3 receivers. MedImpact is wrong. First, MedImpact is not part of the proceeding to which it makes reference and therefore, it has no binding effect on the SDR. Second, MedImpact does not even demonstrate that the issue it seeks to raise here was an issue in the proceeding in Louisiana. Third, and most important, as MedImpact admits, the judgment in Louisiana is on appeal. Because the matter is on appeal the judgment to which it makes reference has no res judicata or collateral estoppel effect. Under La. Rev. Stat. Ann. §13:4231 a valid and final judgment is conclusive between the same parties, except on appeal or other direct review and under La. Code Civ. Proc. Ann. Art. 2166(B) an appeal court's judgment becomes final and definitive when the supreme court denies an application for certiorari. Martin v. Comm-Care Corp., La. App. 38577, 880 So. 2d 1020, 2004 La. App. Lexis 2025 (La. App. 2 Cir., Aug. 30, 2004). Therefore, as a matter of law, there is no alter ego finding to automatically allow MedImpact to say that the 3 separate receiverships should be treated as one, each bearing the liabilities of the other.

(b) MedImpact Is Factually Wrong

Factually, on the face of the record, MedImpact is wrong as well. MedImpact had an agreement with 3 corporate entities, each domiciled in a different state. One is in receivership in Oklahoma, one is in receivership in Louisiana, and one is in receivership in

Texas. MedImpact concedes that the "three Health Plans provided health care benefits in their respective states of incorporation." [*See* Motion at p.2, ¶2]. By its own statements, MedImpact admits that it is dealt with legal entities domiciled in 3 different states, each of which are now administered by courts in those states, each sovereign of the acts of the others. [*See* ¶1 of the Amendment; *see also* ¶11 ("all three AmCare Entities are now insolvent and have been placed in receivership or liquidation proceedings in their respective states of incorporation. . ..")]

Notwithstanding this understanding, MedImpact tries to combine the obligations of each of the health maintenance organizations for their respective members. It merely asserts that "the rights and obligations of the 3 Health Plans are joint, not individual or separate." [*See* Motion at p. 2, ¶2]. MedImpact fails to cite any provision in the Agreement it relies upon for this proposition. Its own statement belies its doubt of the assertion – <u>each organization had respective members</u>. MedImpact understood that it was always dealing with insureds in different states who were members of a health plan incorporated in a specific state.

Moreover, MedImpact knows that its assertion is contentious because it later acknowledges that the SDR has indicated that "the Texas receivership estate is not jointly and severally liable with the Oklahoma and Louisiana estates" . . .. Even if it were unaware of these facts, the fact that each of the companies is in a receivership, in a separate state,

precludes the result it seeks to justify arbitration. Upon the commencement of each receivership, the rights of all parties were fixed.[7] As the rights and property of each estate were fixed on the date of receivership, the property belonging to each company became property of each respective receivership court as part of its *in rem* jurisdiction. United States v. Bank of New York & Trust Company, 296 U.S. 463 (1935); *accord* Tex. Ins. Code §21.005(c). Nevertheless, MedImpact seeks to recover from the Texas SDR all of the money it claims is owed, no matter from what entity. It filed a proof of claim to that effect and now wants to avoid the rejection of its claim, and the subsequent review it has requested of the SDR by obtaining an order allowing the arbitration of the SDR's initial rejection of its claim before a panel compiled by the American Arbitration Association in California, contrary to the provisions of Texas law.

c. The Texas Claims Proceeding Governs Resolution

Section 21A.005(c) of the Insurance code provides that "the receivership court, as of the commencement of a delinquency proceeding under this chapter, has exclusive jurisdiction of all property of the insurer, wherever located, including property located outside the territorial limits of the state. This same statute provides in part (e) that **"[e]xcept as to claims against the estate, nothing in this chapter deprives a party of**

[7] Tex. Ins. Code 21A.151 provides: (b) Upon issuance of the order of liquidation, the rights and liabilities of the insurer and of its creditors, policyholders, shareholders, members, and all other persons interested in its estate become fixed as of the date of entry of the order of liquidation, except as provided by Sections 21A.152 and 21A.255, unless otherwise fixed by the court.

any contractual rights to pursue arbitration.” [*emphasis added*] Finally, part (i) states that **“[t]he claims procedure set forth in this chapter constitutes the exclusive means for obtaining payment of claims from the receivership estate**. [*emphasis added*]. By its very clear language, the insurance code provides that claims may not be resolved by arbitration. Claims may only be resolved in the manner provided in the insurance code. The proof of claim process is set forth at §21A.252.

MedImpact concedes that it has filed a proof of claim in the receivership process, and did so before attempting to seek arbitration.[8] Section 21A.253 the Insurance Code sets out provisions for the allowance of a claim. MedImpact has requested reconsideration of its claim, and the SDR has been endeavoring to review the information provided by MedImpact and gather additional information from MedImpact about the claim. Where a claimant objects to the ultimate disposition of a claim by the SDR, a procedure is set forth in §21A.257 for the resolution of the disputed claim. Specifically, the Insurance Code provides that in this instance that “the liquidator shall ask the receivership court for a hearing pursuant to Section 21A.007. [*See* §21A.257(a)]. Where there is a hearing, “[t]he final disposition by the receivership court of a dispute claim is deemed a final judgment for purposes of appeal.” [*See* §21A.257(c)]. Accordingly, Texas law sets out a specific process

[8] MedImpact voluntarily submitted its proof of claim in the Texas receivership on or about October 1, 2003. The SDR denied the proof of claim in total on or about March 3, 2006. On or about April 14, 2006, MedImpact objected to the rejection of its proof of claim by the SDR. On or about May 15, 2006, MedImpact started an arbitration proceeding with the American Arbitration Association regarding this matter. [*See* Affidavit of Jean Johnson, attached as exhibit 1, and incorporated by reference.]

for receiving, hearing, and resolving claims against an insolvent insurance company. The Insurance Code specifically states that such claims may not be resolved through arbitration, and must be ultimately resolved by the receivership court. It is the exclusive means for resolving claims. [Tex. Ins. Code §21A.005(i)]. MedImpact cannot alter the result by saying it has a dispute. Owing to the fact that the law specifically disallows the process now sought by MedImpact, its request must be denied.

When MedImpact contracted with AmCare Health Plans of Texas, Inc. it understood that it was dealing with a Texas insurance company, and was on notice that Texas had a comprehensive scheme for dealing with the assets of an insurance company should it become insolvent. In granting a charter to AmCare Health Plans of Texas, Inc., Texas has the right to reserve the power to determine how claims against the assets of the insolvent estate can be determined. This has been the law for almost 200 years. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 606 (1819). The power of the states to regulate the business of insurance has been repeatedly acknowledged by the courts of the United States and is embodied in the McCarran-Ferguson Act. MedImpact is seeking to recover assets of an insolvent insurance company chartered by the State of Texas, and, therefore, it is bound to the provisions of Texas law with respect to the administration of claims against such assets.

d. The Texas Claims Process Is Not Supplanted By Federal Court Jurisdiction

(1) Federal Case Law Does Not Establish The Result Sought By MedImpact

In an effort to avoid the very clear rule of subject matter jurisdiction over claims against the assets of an insolvent insurance company, MedImpact spends quite a bit of effort in the Amendment attempting to persuade the Court that it has a federal right to sue the SDR in federal court to establish its claim. Under the facts of this case, MedImpact has no federal right to alter the Texas claims process.

While MedImpact asserts that it has a federal right to have its dispute resolved in federal court, citing an 1857 case, MedImpact surely understands that those statutory rights were abrogated by Congress[9] with the passage of the McCarran-Ferguson Act to the extent of resolving claims to the assets of an estate and by its own actions here. Indeed, the states in their regulation of the business of insurance do have the right to alter the claim resolution rights of entities such as MedImpact. Such rights exist even against the federal government. *See* United States Department of the Treasury v. Fabe, 508 U.S. 491, 113 S. Ct. 2202, 2210 (1993)(In holding that the Federal Priority Statute was subordinated to the state's scheme for the payment of claims in an insurance receivership the Court stated that "the primary purpose of a statute that distributes the insolvent insurer's assets to

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[9] Congress has the power to alter the jurisdiction of Article III Courts.

policyholders in preference to other creditors is identical to the primary purpose of the insurance company itself: the payment of claims made against policies.")

If MedImpact were right, why has it not sued the SDR directly in the federal proceeding? Why did it not have an arbitration panel determine its own jurisdiction? If all the authority MedImpact cites about its rights are correct, why is it here? Obviously the federal court has already considered this and rejected the MedImpact analysis. This is conceded by MedImpact in paragraph 5 of the Amendment. ("A Motion for an order compelling arbitration is presently pending in the Oklahoma Federal Court, but that court has agreed to stay its consideration of that motion until MedImpact exhausts its efforts to have the SDR joined as a party in the Oklahoma Lawsuit."). Why would MedImpact's right to arbitration in the federal court be conditioned on the availability of the SDR? MedImpact either has a right, or it does not. If as it contends the entities are one in the same, then there should be no hesitation on the part of the federal court to order arbitration if in fact there is a right to arbitration. This Court must ask why the federal court in Oklahoma would leave to a Texas court the resolution of a matter of federal law. It is beyond question that each Court has the power to determine its own jurisdiction. The answer is obvious. MedImpact is wrong, and the authority upon which it relies is not supportive of the result it seeks. While MedImpact in certain cases may have the right to pursue an *in personam* claim against a statutory receiver in federal court, it does not have the right to pursue an *in*

rem or *quasi in rem action* in order to change the result of a state mandated claims resolution process against assets within the state's jurisdiction - which is what MedImpact is trying to do. Further, MedImpact is not attempting to vindicate a right in federal court, it is seeking to join the SDR so that it can then obtain a complete referral of the case to arbitration. MedImpact has no intent of litigating claims in federal court by its own admission.

MedImpact relies primarily on the decision in Gross v. Weingarten, 217 F.3d 208, 220-21 (4th Cir. 2000) and the cases cited therein. This case is not helpful to MedImpact. Gross was the Virginia Insurance Commissioner who had been appointed the receiver of Fidelity Bankers Life Insurance Company. Gross sued the officers, directors and primary shareholder of Fidelity Banker (an affiliate of American Express: Shearson Lehman Brothers) in federal court on a variety of theories in connection with the failure of the insurance company. In the interim, Shearson settled a federal class action on behalf of policyholders in California (in which Gross had appeared to file an objection to the settlement). Back in the Virginia federal action, Shearson then sought to invoke rights against the estate arising from the settlement by way of counterclaim., including an exclusively federal claim arising under section 10b(5) of the federal securities laws. The trial court found that Shearson could not assert the counterclaim without going through the receivership process. Shearson appealed that ruling.

In part, the Court of Appeals held that it had exclusive federal jurisdiction over the securities claim and diversity and supplemental jurisdiction over the common law claims and consequent appeal. At issue before the Court of Appeals then was the trial court's determination that "the Commission's order asserting exclusive jurisdiction over claims against Fidelity Bankers was entitled to full faith and credit and divested the federal court of subject matter jurisdiction over the counterclaims." 217 F.3d at 220. The Court of Appeals determined that under the circumstances of that case, the order of the state court could not divest the federal court of its exclusive federal jurisdiction over the securities claim, and that the district court could then determine whether it should abstain from exercising that jurisdiction in light of the comprehensive plan of regulation of the insurance company.

In dicta, the Court held that under the facts of the case, it saw no reason that the Court should abstain from exercising its jurisdiction. The claim of Shearson could be determined and then presented to the Receivership Court. That is not this case. Gross did not involve the situation, such as here, where a claimant had already made a claim in the receivership court and had the claim rejected.[10] Rather, the claimant was presenting a new claim that was within the exclusive jurisdiction of the federal court, in a case in which it was already being sued in that federal court by the Receiver.

[10] In a case in the 4th circuit that is directly on point, and involving the same estate as in Gross the Court held that the receiver of an insolvent insurance company did not have to go to arbitration to adjudicate a claim. Eden Financial Group, Inc. v. Fidelity Bankers Life Ins. Co., 778 F.Supp. 278 (E.D. Va. 1991)

The Court in Gross made clear that its decision did not apply to all cases: "We realize that in some limited circumstances, the exercise of federal diversity jurisdiction might in fact impair state laws establishing exclusive claims proceedings for insurance insolvencies." 317 F.3d at 221. The present case is that exception. The SDR has not sued MedImpact in any court, much less federal court. MedImpact is not attempting to establish a claim against the Receiver. What MedImpact wants to do is challenge a finding of the SDR in the claims process established by the receivership, outside of that court, in order to obtain a right to assets from the estate. Those assets are within the exclusive jurisdiction of this Court and the SDR is the Court's officer. To allow MedImpact to institute litigation or arbitration proceedings to challenge the statutory and court ordered claim review process is a disruption of the state's comprehensive scheme of regulation of insolvent insurance companies. What MedImpact seeks to do is collaterally attack the finding of the SDR in the statutory and court ordered claims resolution process. Not only does the context of this issue preclude the result sought by MedImpact on federal jurisdiction grounds, but as discussed further below, it also constitutes a waiver of the arbitration rights it seeks to impose.

(2) Texas Case Law Does Not Establish The Result Sought By MedImpact

MedImpact suggests to the Court that Texas law supports the result it seeks. It is wrong. MedImpact relies on the decision in Bodine v. Webb 992 SW2d 67 (Tex. App. –

Austin 1999, pet. denied) for the proposition that a state court injunction cannot prevent a party from resorting to a federal court. [*See* ¶25 of the Amendment]. That is not the holding of the case.

Bodine involved the receivership of Employers Insurance Company. Rather than file a claim in the receivership (as MedImpact did here), certain members of a defined benefit plan offered by Employers sued various defendants, including the receiver, for mismanagement of the Plan. They did so under ERISA. The Receiver went to the state court to enjoin the lawsuit, and the district court granted that injunction. The Court of appeals dissolved the injunction. The Court of Appeals dissolved the injunction because it found that the case was one *in personam* and not against the assets of the estate. The plaintiffs were suing the Receiver and others for mismanagement. The Court also observed, that had the action been *in rem*, or *quasi in rem*, a different result would obtain. Further, it found that the subject matter of the lawsuit was exclusively in the federal court pursuant to the ERISA provisions, which is a federal law that specifically addresses the business of insurance and falls within the exception of reverse preemption established in the McCarran Ferguson Act. The case does not stand for the proposition that where a party pursues a claim in a receivership and then does not like the result, it can sue the receiver *in personam* in federal court in an effort to get a different result and then use that *in personam* judgment to get assets of the estate.

The authority on which MedImpact relies for a right to be in federal court is not applicable to this situation. This is not an original claim by MedImpact, but a challenge to the claim review process by the SDR. There is no allegation of exclusive federal jurisdiction. Indeed, MedImpact cannot even provide assurance to this Court that the ultimate decision will be made by a federal court. The matter pending in federal court in Oklahoma may be remanded to the Oklahoma state court. MedImpact certainly presents no authority that an Oklahoma state court should take control of a review of the claims review process of a company in receivership in Texas. Again, we are left with the proposition that MedImpact wants to be in arbitration, and the law is clear that under these circumstances it has no such right.

3. The Analysis Of MedImpact On Arbitration Is Flawed.

MedImpact attempts to demonstrate through a 4 part analysis why arbitration is appropriate. Assuming that the motion is ripe, and is not precluded by the specific provisions of Texas insurance receivership law, MedImpact is still wrong.

a. The SDR Is Not The Same As AmCare Texas In The Resolution Of Claims.

MedImpact suggests that in the bankruptcy context, if the SDR were the same as AmCare Texas, then arbitration could be compelled. It concludes that the SDR is the same as AmCare Texas in this respect and therefore, arbitration is appropriate. The analysis is wrong on its face.

MedImpact concedes that "if [the SDR] were exercising rights created uniquely by Chapter 21A that AmCare Texas itself could not have asserted, then it would be difficult to argue that she would be bound by Article IX of the Agreement and could not be compelled to arbitrate." [*See* Motion, p. 5, ¶11]. That is exactly the case and, therefore, by its own analysis, the Motion and Amendment must fail.

As demonstrated above, Section 21A of the Texas Insurance Code creates a unique role for the SDR to receive an adjudicate claims that are then subject to objection, to be reviewed by the SDR and then to be heard by the receivership court. This chapter specifically excludes the arbitration of claims and makes the claims process the exclusive means of recovery on a claim. In that the SDR is exercising rights "created uniquely by Chapter 21A, that AmCare Texas itself could not have asserted," the SDR is not bound by Article IX of the Agreement and cannot be compelled to arbitrate. [*See* Motion, p. 8, ¶19].

b. The Provisions of the Federal Arbitration Act are Subject to Reverse Pre-emption from the McCarran-Ferguson Act.

The power to regulate insurance lies primarily within the province of the states. This allocation of power originally developed in the courts and was later codified by Congress in the McCarran-Ferguson Act. 15 USC 1011-1015. The legislative intent underlying the Act was to preserve state regulation and taxation of insurance. *See* Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 319 (1955); Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429 (1946). The Act provided that the states could regulate the

"business of insurance" without federal interference as long as Congress did not specifically legislate in that field.[11]

Over the past few decades, arbitration has become a significant method of contract dispute resolution. However, the Federal Arbitration Act is not a law that specifically relates to the business of insurance and thus the right of the states to regulate the business of insurance takes precedence. There is little question that the resolving of claims and marshaling of assets of an insolvent insurance company is part of the business of insurance. United States Department of the Treasury v. Fabe, 508 U.S. 491, 113 S. Ct. 2202, 2210 (1993)("The primary purpose of a statute that distributes the insolvent insurer's assets to policyholders in preference to other creditors is identical to the primary purpose of the insurance company itself: the payment of claims made against policies.") While MedImpact chooses not to discuss them with the Court, there are several cases within the context of insurance company insolvencies (as opposed to cases under the Bankruptcy Code) that address the interplay of the Federal Arbitration Act with state schemes of insurance insolvency regulation. Not surprisingly, for almost 50 years at least the Courts have been

[11] The McCarran-Ferguson Act provides, in relevant part:

> (a) The business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
> (b) No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . ..

15 U.S.C. §1012.

holding that a receiver is not bound to arbitrate. *See* In The Matter of the Arbitration Between Knickerbocker Agency, Inc. and Holz, 4 N.Y.2d 245, 149 N.E.2d 885 (N.Y. 1958); Bernstein v. Centaur Insurance Company, 606 F.Supp. 98 (S.D.N.Y. 1984)[12]; Washburn v. Corcoran, 643 F.Supp. 554 (S.D.N.Y. 1984); Corcoran v. Ardra Insurance Company, Ltd., 77 N.Y.2d 235 (1990); Eden Financial Group, Inc. v. Fidelity Bankers Life Ins. Co., 778 F.Supp. 278 (E.D. Va. 1991)[13]; Benjamin v. Pipoly, 155 Ohio App. 3d 171 (Ohio Ct. App. 2003)[14]

Remarkably, MedImpact states that "applying or enforcing the FAA would not invalidate, impair or supersede Chapter 21A." The statement is remarkable because notwithstanding the very clear prohibition of arbitration in the claims process, that is what MedImpact hopes to impose.

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[12] Here, the Court specifically held that "if New York has a law that specifically prohibits arbitration in disputes involving the insurance business, arbitration may be precluded in this case." Id. at 102

[13] "The McCarran-Ferguson Act bars interference with state laws regulating the business of insurance, unless such laws specifically relate to insurance. Because the FAA does not specifically relate to the business of insurance, an insurance company in state rehabilitation and conservation proceedings, such as FBL finds itself, is excepted from the provisions of the FAA where a party attempts to invoke arbitration against the company or its receiver." Id. at 282. Interestingly, this is still good law in the 4th Circuit. As opposed to Gross this decision is directly on point. A party may not seek relief in federal court through the Federal Arbitration Act to avoid a state mandated claim review process of an insolvent insurer.

[14] Citing in part Blackhawk Heating & Plumbing Co. v. Geeslin, 530 F.2d 154, 159 (7th Cir. 1976 which stated:

> The states have a paramount interest in seeing that liquidation proceedings conducted by court-appointed liquidators and overseen by their courts are free from the interference of outside agencies. This interest is of even greater importance when the company undergoing liquidation is a domestic insurance company or other financial institution. The interests of the company's owners, policyholders, and creditors, as well as the public, are best served and protected by an orderly and efficient process of liquidation. The liquidation of an insolvent insurance company is best left to a proceeding which will settle all of its affairs and dispose of all of its property.

Id. at 183.

As noted previously, Chapter 21A clearly precludes arbitration of claims. MedImpact goes so far as to quote the specific language of the statute that bars the result it wants. [*See* Motion, p. 10, ¶25]. Yet MedImpact then convolutes the clear language out of existence under the guise of conducting the exercise that "[a]ll provisions of a statute should be read in context, and full effect should be given to each part." [*See* Motion, p. 11, ¶ 26]. MedImpact concludes that "a party has a right to pursue a claim or counterclaim against the insolvent insurer in arbitration; but (d) the claim or counterclaim must be subject to §21A.209, the statute governing setoff rights." [*See* Motion, id.]. Of course, if this is what the Legislature intended to say, it could have said that. It did not. Rather, the Legislature said that nothing in Chapter 21A deprives a party of any contractual right to pursue arbitration, except as to claims against the Estate. Claims have to be pursued exclusively in the receivership through the process provided. If a party has an unfettered right to pursue arbitration, that is all the Legislature needed to say; but it did not. It said claims are not subject to arbitration. If a party is otherwise in arbitration, and presents a claim against the estate, it is subject to set off. [15] If MedImpact is going to give meaning to all the terms in the section, then that is what it needs to do. Using the construction offered by MedImpact, the limitation of arbitration of claims is removed. The exclusivity of the

[15] The more likely interpretation of the statute is that it was intended to alter the result in Bard v. Charles R. Myers Insurance Agency, Inc., 839 S.W.2d 791 (Tex. 1992) in which the Court held that an agent could not assert a counterclaim against the Receiver suing him, but rather had to present the claim in the receivership proceeding. Such a result would be consistent with the rationale in Gross that if the receiver is suing a defendant in a particular court, the defendant should have the right to present its claims in the same forum, to be decided at the same time.

claims process is ignored. That is hardly the "most straightforward and grammatical reading of the statute, which is the one that courts should refer." [*See* Motion, p. 11, ¶26, citing Fleming Foods of Texas, Inc. v. Rylander, 6 S.W.3d 278, 284 (Tex. 1999)].

Further, contrary to the assertion of MedImpact, its construction of the statute eviscerates the provisions of the Insurance Code with respect to handling claims. [*See* Motion, p. 11, ¶27]. The Insurance Code provides a unified approach for resolving claims against the estate. Despite what MedImpact believes, "Texas recognizes a compelling policy interest in having claims against an insolvent insurer's estate resolved in a single proceeding." Bryant v. United Shortline Inc. Assurance Services, N.A., 972 S.W.2d 26, 29 (Tex. 1998). By seeking to relitigate in another forum the SDR's resolution of MedImpact's proof of claim, it disrupts the claims process.

c. MedImpact Wrongly Seeks To Litigate Issues

MedImpact seeks to avoid the compelling policy Texas has by suggesting that it is only fair to have all three estates in one arbitration because their obligations are joint, and thus, assumedly, the SDR would be responsible for all of the debt, including that incurred by members of other HMO operations in Oklahoma and Louisiana. MedImpact does not cite any authority for that proposition. Rather it wrongly attempts to litigate the liability issue as noted above. That is not for this Court to decide. If there is an arbitration clause, the Court can only determine whether it is applicable. It cannot partly litigate the dispute.

In determining generally whether a matter should be referred to arbitration, the court is to consider only evidence that a written agreement to arbitrate exists, and that the claims raised are within the scope of the agreement, and then whether there is a bar to arbitration. Capital Income Props. v. Blackman, 843 S.W.2d 22, 23 (Tex. 1992). It is not for the Court to delay a determination for discovery to determine whether the agreement meets the requirement. In re MHI Partnership, Ltd., 7 S.W.3d 918, 923 (Tex. App. – Houston [1st Dist.] 1999, orig. proceeding). Accordingly, it is not for this Court to determine whether the Texas company has any responsibility for the other estates, or *vice versa*.[16] The extent of the evidentiary offer can only be that there is an agreement by AmCare Texas to arbitrate, and that the matter in issue falls within the scope of the arbitration agreement. Capital Income Props. v. Blackman, *supra*. Here, there cannot be an arbitration agreement because the Insurance Code expressly prevents it and even if it did not, the right to arbitration has been waived or is not yet ripe.

d. Arbitration Does Not Present A More Just Or Equitable Process

There is an additional compelling reason that the Motion and Amendment should be denied. MedImpact has filed a proof of claim in the Texas proceeding. The claim is for the full amount sought by MedImpact from all 3 companies. The claim was denied, and MedImpact has gone to the 2nd level of claims adjudication, seeking review of the

[16] That is, unless the Court wants to deny the Motion and leave the parties to the claims process; which ultimately in a hearing before the receivership court will deal with the issue of joint liability, if any.

determination. If it further objects to the disposition of its claim, there will be a hearing before the receivership court, as provided by the claim resolution provisions. There is no risk that MedImpact will not have a forum for its claim. It chose the forum and now it is trying to escape it because (a) it does not like the result so far in Texas, and (b) it got sued by someone other than the Texas SDR. MedImpact has sought affirmative relief in this proceeding, and the SDR is prejudiced not only with respect to the time and expense incurred in adjudicating the claim, but also in that MedImpact seeks to have the SDR incur prohibitive expense to determine a claim that she would not otherwise have to incur.

MedImpact wants a 3 person panel convened in San Diego to resolve the claim. Each of the panel members will have to be paid. Presently, the SDR incurs no expense to have the claim of MedImpact adjudicated in the receivership proceeding. She also incurs no administrative expense. The Agreement in issue calls for the arbitration to be administered by the American Arbitration Association. A recent case out of the San Antonio Court of Appeals demonstrates that the low cost of arbitration is a fallacy. In that case, a claim of approximately $22,000 for a damaged foundation resulted in a demand from the American Arbitration Association for an upfront fee of $63,670.00 (divided equally between the 2 parties) to arbitrate the dispute. The Court of Appeals found this approach to be ridiculous and refused to send the parties to arbitration. Olshan Foundation Repair Company v. Ayala, 180 S.W.3d 212 (Tex. App. – San Antonio 2005, pet.

filed). Further, the SDR and the estate will incur the expense of litigating the claim of MedImpact in California, presumably with 2 other parties, the receivers of the HMO estates in Oklahoma and Louisiana. This is not an expense that the SDR would incur at all in the present forum under the Texas receivership statutes. At most, there will be the expense of a hearing before the receivership court if MedImpact remains dissatisfied with the adjudication of its claim by the SDR. This expense in an estate that cannot pay claims in full is unwarranted. Further, convening a panel of 3 arbitrators, and then litigating the dispute will be far more time consuming that utilizing the claims process established by the Texas Insurance Code. That delay will only further delay the final determination of assets and prevent a complete distribution of assets to persons in need.

e. MedImpact Has Waived Its Right to Arbitration

With the action that MedImpact has taken in the proceeding, it is not unfair to conclude that MedImpact has waived its right to seek arbitration. Waiver is the intentional relinquishment of a known right or conduct inconsistent with claiming that right. Jernigan v. Langley, 111 S.W.3d 153, 156 (Tex. 2003)(per curiam). Like any other contract right, the right to arbitrate can be waived. Miller Brewing Co. v. Fort Worth Distributing Co., 781 F.2d 494, 497 (5th Cir. 1986). Waiver may be express or implied. A party may waive its right to arbitration by expressly indicating that it wishes to resolve the case in a judicial forum. In re Currency Conversion Fee Antitrust Litigation, 361 F.Supp.2d 237, 257 (S.D.N.Y. 2005).

Alternatively, a party may waive its right to arbitrate by taking an action inconsistent with that right to the opposing party's prejudice. Miller Brewing Co., 781 F.2d at 497. "A party to arbitration does not have a right to the pre-trial discovery procedures that are used in a case at law." Miller Brewing Co. v. Fort Worth Distributing Co., 781 F.2d at 498. An attempt to go to the merits and still retain the right to arbitrate is clearly impermissible. Id.; Graig Shipping Co. v. Midland Overseas Shipping Corp., 259 F.Supp. 929, 931 (S.D.N.Y. 1966). Here, MedImpact has violated the Agreement upon which it relies by not seeking direct negotiation with the SDR. Then it filed a claim, which was adjudicated by the SDR. MedImpact thereby learned of the SDR's analysis and opinion of the merits of the claim. MedImpact then filed an objection with the SDR presenting additional evidence in support of its cause. That matter is still pending. MedImpact does not have the right to develop the case and take a shot at having its claim adjudicated in a fashion it likes, only then to seek arbitration when things do not turn out as it likes. Had the receivers of the Oklahoma and Louisiana HMO estates not filed suit against MedImpact, the record demonstrates that it would not have pursued arbitration against the Texas SDR. At this stage in the receivership, the Estate is prejudiced in incurring the substantial expense that would be involved in moving the claim resolution process to California. Such an approach is contrary to the specific language of the Texas Insurance Code and should be rejected.

Conclusion

In seeking arbitration, MedImpact relies on an agreement with which it has not complied. It must first enter into direct negotiation with the SDR and have those negotiations fail before it may seek arbitration. Even then, however, it is without recourse because the provisions of the Texas Insurance Code make the claims process articulated there the exclusive means to resolve claims. Arbitration is specifically excluded. Also, because the claims process is part of the state's comprehensive scheme for the regulation of the business of insurance, its provisions take precedence over the provisions of the Federal Arbitration Act. MedImpact concedes that if there is a unique process created by the statute, which is the case, then the SDR is not bound to arbitrate.

MedImpact has a forum for the resolution of its claim, which not only is the exclusive means provided by Texas law, but is a process that minimizes expense to the estate, while affording an organized and consistent approach to resolving claims. The arbitration approach suggested by MedImpact only increases the time and expense involved. Because it has sought to invoke its rights in this process, and only now in the face of disappointment seeks to change the rules, its motion should be denied. Altering the forum at this point would prejudice the SDR because of the time and expense involved.

Request

The SDR requests that the relief sought by MedImpact be denied, and that she have such other and further relief, at law and equity, to which she is entitled.

Respectfully submitted,

Wisener ✯ Nunnally ✯ Gold, L.L.P.

By: ______________________
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Bar No. 08069600

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Bar No.

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Attorneys for Jean Johnson, Special Deputy Receiver of AmCare Health Plans of Texas, Inc. and AmCare Management, Inc.

Certificate of Service

This document was served by email on the service list on October 16, 2006.

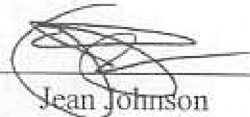
Harold B. Gold

STATE OF TEXAS §
§ AFFIDAVIT OF JEAN JOHNSON
COUNTY OF DALLAS §

BEFORE ME, the undersigned notary public, on this day personally appeared Jean Johnson, who upon being duly sworn to tell the truth, stated on her oath the following:

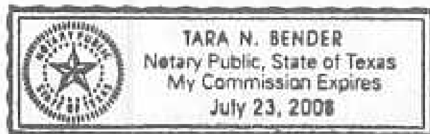
1. "I am Jean Johnson, I am over 21 years of age and do not suffer from any mental or physical infirmity that affects my ability to recall facts or to communicate them to others. Each fact contained in this affidavit is from my personal knowledge and is true and correct."
2. "I am the Special Deputy Receiver of AmCare Health Plans of Texas, Inc. and AmCare Management Company, Inc."
3. "In my role as Special Deputy Receiver I have developed a claim process and a system to review claims filed against the companies in receivership. The review of claims is part of the responsibility of the Special Deputy Receiver. This process has been ongoing since October 2003. My office has received and adjudicated over 190,000 claims filed by approximately 25,000 claimants. Where there have been objections to the determination by the Special Deputy Receiver we have followed the appellate process specified by Texas law. As a consequence the claims adjudication process has been smooth and we have been able to administer claims consistently based on the ongoing experience in the resolution of the claims within the receivership."
4. "At present, the estates have insufficient assets to pay claims in full."
5. "MedImpact submitted a proof of claim in the AmCare Texas receivership on or about October 1, 2003. As Special Deputy Receiver, I denied the proof of claim in total on or about March 3, 2006. On or about April 14, 2006, MedImpact submitted an objection to me of my rejection of its proof of claim. On or about May 15, 2006, MedImpact instituted an arbitration proceeding against the 'Receiver for AmCare Texas' by submitting a request for arbitration to the American Arbitration Association. As Special Deputy Receiver, prior to that time, and currently, I had not asserted a claim against MedImpact and made no demand for payment of MedImpact. Prior to its demand for arbitration, and subsequently, I have had no direct negotiation with MedImpact regarding its claim for payment."
6. "The request by MedImpact Health Care Systems, Inc. to have its claim resolved in arbitration introduces needless expense to the claims adjudication process of these estates. By moving the claims adjudication to arbitration, MedImpact Health Care Systems, Inc. introduces into the claims adjudication process, expense and delay not present within the statutory framework for claims determination. In addition to the expense of the arbitrators, the estates would incur the expense associated with discovery and eventually trial. These expenses were removed from the claim resolution process by

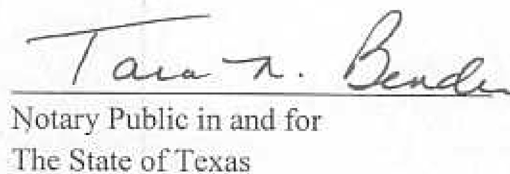
the Texas legislature with its enactment of Chapter 21A of the Insurance Code. Incurring this expense will only further deplete the assets of the estate, thereby reducing the funds available to pay all claimants. Further, the time involved in going through the arbitration process would substantially delay the resolution of not only the claim of MedImpact, but also the distribution of assets from the estate. The parties would have to go through the arbitrator selection process, have hearings on the alignment and association of all the parties to be involved in the arbitration, determine the process for and conduct discovery and then develop a plan and schedule for hearing of the dispute. Finally, the arbitration panel would have a substantial period of time in which to make a decision and render it to the parties. None of this time or expense is present in the statutory claims process."



Jean Johnson

SUBSCRIBED AND SWORN TO BEFORE ME by Jean Johnson, on the 16th day of August 2006, to certify which witness my hand and official seal.





Notary Public in and for
The State of Texas

No. GV 204534

THE STATE OF TEXAS, v. AMCARE HEALTH PLANS OF TEXAS, INC. and AMCARE MANAGEMENT, INC.	In The District Court In Travis County, Texas 200th Judicial District

AFFIDAVIT OF HAROLD B. GOLD

STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared Harold B. Gold, who upon being duly sworn to tell the truth, stated on his oath the following:

1. "I am Harold B. Gold. I am over 21 years of age and do not suffer from any mental or physical infirmity that affects my ability to recall facts or to communicate them to others. Each statement contained herein is from my personal knowledge, and is true and correct.

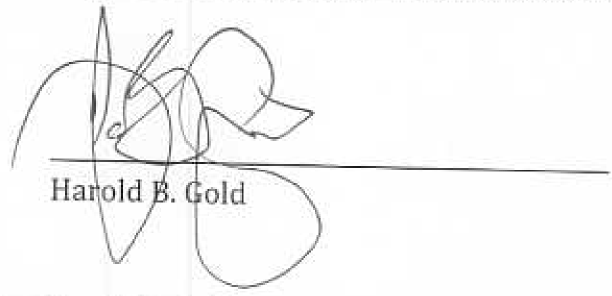
2. I am an attorney duly licensed to practice law in California, Texas and Illinois. I am a partner in the law firm Wisener ★ Nunnally ★ Gold, L.L.P. That law firm has been engaged by the Special Deputy Receiver of AmCare Health Plans of Texas, Inc. and AmCare Management, Inc. to provide legal services in connection with a claim against the estates by MedImpact HealthCare Systems, Inc. (*MedImpact*).

3. In August 2006, I had correspondence with and my partner Robert Nunnally, Jr. had conversations with attorneys for MedImpact about the need for direct negotiation of

any dispute that MedImpact had with the AmCare estates under the Service Agreement MedImpact relied upon to assert a claim against assets of the estates.

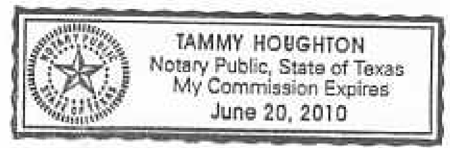
4. In October 2006, I sent correspondence to counsel for MedImpact continuing to express the desire of the Special Deputy Receiver to pursue direct negotiation and to that end requesting certain information from MedImpact concerning the demand it was making. Counsel for MedImpact did not respond to this request, but rather set for hearing before the Special Master appointed to hear disputes in the receivership estates, its application for a modification of the existing injunction or a lifting of the stay against litigation against the Special Deputy Receiver, so that it could pursue litigation and/or arbitration against the Special Deputy Receiver.

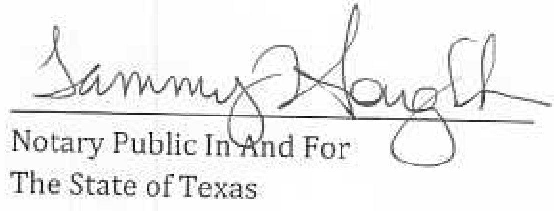
5. MedImpact has not engaged in direct negotiation of any dispute with the Special Deputy Receiver as required by the Service Agreement on which it relies to assert a claim."



Harold B. Gold

SUBSCRIBED AND SWORN TO BEFORE ME, by Harold B. Gold on October 13, 2006, to certify which witness my hand and official seal.


TAMMY HOUGHTON
Notary Public, State of Texas
My Commission Expires
June 20, 2010



Notary Public In And For
The State of Texas