IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Penn Treaty Network America Insurance Company in Rehabilitation	No. 1 PEN 2009
AND	
In Re: American Network Insurance Company in Rehabilitation	No. 1 ANI 2009

REPLY OF HEALTH INSURERS TO APPLICATION OF REHABILITATOR TO ESTABLISH STANDARDS OF REVIEW APPLICABLE TO THE PROPOSED REHABILITATION PLAN

Aetna Life Insurance Company, Anthem, Inc., Cigna Corporation, HM Life Insurance Company, Horizon Healthcare Services, Inc. d/b/a Horizon Blue Cross Blue Shield of New Jersey, QCC Insurance Company, United Concordia Life and Health Insurance Company, United Concordia Insurance Company and UnitedHealthcare Insurance Company (collectively, the "Health Insurers") through their undersigned counsel hereby reply to the Brief in Support of Application for Relief *in Limine* of Rehabilitator Teresa D. Miller to Establish Standards of Review Applicable to the Proposed Rehabilitation Plan (the "Rehabilitator's Standards Brief"). In the Rehabilitator's Standards Brief, the Rehabilitator urges the Court to adopt an abuse of discretion standard for the review of the Second Amended Plan of Rehabilitation for Penn Treaty Network America Insurance Company and American Network Insurance Company (the "Plan"). For the

reasons set forth below, the Health Insurers maintain that the abuse of discretion standard should not be applied to the Plan, but rather, legal issues should be reviewed de novo and the Rehabilitator should have the burden of proof on all factual issues.

I. BACKGROUND

Former Pennsylvania Insurance Commissioner Michael F. Consedine filed the pending Plan for Penn Treaty Network America Insurance Company ("PTNA") and American Network Insurance Company ("ANIC" and, together with PTNA, the "Companies") on October 8, 2014. The Plan purports to establish an ongoing company ("Company A"), which will be ANIC, and a company to be liquidated ("Company B"), which will be PTNA. Plan § I.A. at 1. Policies in Company A are supposed to receive the full benefit of their policy at the existing premium rate, and so are not in any way impaired. *Id.* Policies in Company B are expected to get their benefits paid to the extent provided by the Guaranty Associations in the applicable states. *Id.* at 1-2. No policies are being involuntarily modified by virtue of the Plan. Before the liquidation order is entered, the Plan contemplates that thousands of policies and vast sums of money will be transferred between PTNA and ANIC. Plan §§ IV.F-G.

II. QUESTIONS OF LAW IN A REHABILITATION PROCEEDING ARE REVIEWED DE NOVO

As this Court has observed, the standard of review by a court under the rehabilitation statute is more strict than standards under conventional review of administrative proceedings. *Koken v. Legion Ins. Co.*, 831 A.2d 1196, 1231-32 (Pa. Commw. Ct. 2003) ("*Legion*"). In a typical administrative proceeding, the agency is permitted to make a final determination that is appealable to a court. Under the insurance receivership laws, the Commissioner's determination concerning a rehabilitation plan is not sufficient. Rather, a plan cannot be implemented without court approval in the first instance. But in Pennsylvania, even matters that can be the subject of a final determination by the agency are reviewed by the courts on a de novo basis as to legal matters. *Hoffman Mining Co., Inc. v. Zoning Hearing Bd. of Adams Twp.*, 32 A.3d 587, 592 (Pa. 2011); *Holt's Cigar Co., Inc. v. City of Philadelphia*, 10 A.3d 902, 906 (Pa. 2011). The scope of review for such questions is plenary. *Id.* Since the Rehabilitator has even less discretion than an agency would have in a typical agency matter, the Rehabilitator's determinations of law should be entitled to even less discretion before the Court. Therefore, the Rehabilitator is not entitled to deference on her interpretation of the law with respect to the Plan. Any legal issues should be reviewed by the Court de novo.

III. THIS COURT HAS PREVIOUSLY HELD THAT THE REHABILITATOR BEARS THE BURDEN OF PROOF IN SEEKING TO CONVERT A REHABILITATION PROCEEDING TO A LIQUIDATION PROCEEDING

Because the Plan contemplates a liquidation of one of the Companies a large portion of the policies of both Companies, and a large portion of both Companies' assets, this Court should treat it as a petition to convert to liquidation and it should be reviewed under the appropriate liquidation standards. This Court has held in this case that the Rehabilitator has the burden of proof in a petition to liquidate filed under Section 518(a) of Article V of the Insurance Department Act of 1921 ("Article V"). *Consedine v. Penn Treaty Network Am. Ins. Co.*, 63 A.3d 368, 458 (Pa. Commw. Ct. 2012). Although the Rehabilitator has appealed the Court's ruling, unless and until the ruling is reversed, this is law of the case.

The Rehabilitator has two burdens to carry in petitioning this Court for liquidation: (i) an initial burden in proving insolvency as of the date the petition is filed, and (ii) a burden that continued rehabilitation would "substantially increase the risk of loss to creditors, policy and certificate holders, or the public, or would be futile." *Id; see Legion*, 831 A.2d at 1230 (quoting Section 518(a), 40 P.S. § 221.18(a)). This Court declined to grant deference to the Rehabilitator's petition for liquidation.

> Deference is not appropriate where, as here, the Court must apply specific statutory standards to the evidence presented...To apply deference to the job of fact-finding would undermine this Court's

> responsibility to act upon the Rehabilitator's petition in a fair and neutral manner. Further, to apply the deference standard as proposed by the Rehabilitator would shift the burden of proof, improperly, to those opposing a petition to liquidate.

Penn Treaty, 63 A.3d at 440 (citing *Legion*, 831 A.2d at 1232). The Rehabilitator is not entitled to deference in the context of conversion to liquidation.

IV. THE STANDARD OF REVIEW APPLIED TO CONVERSION TO LIQUIDATION PROCEEDINGS SHOULD BE APPLIED TO THE PLAN

A. Standard of Review as Applied to the Plan

The Rehabilitator contends that all aspects of the Plan other than the conversion of the PTNA rehabilitation to a liquidation should be considered under the "abuse of discretion" standard which the Pennsylvania Supreme Court held was applicable to rehabilitation cases in *Foster v. Mutual Fire, Marine and Inland Ins. Co., 614 A.2d 1086, 1093 (Pa. 1992) ("Mutual Fire II"), affirming sub nom., remanding in part, Grode v. Mutual Fire, Marine and Inland Ins. Co., 572 A.2d 798 (Pa. Commw. Ct. 1990).* The Plan is unlike the plan at issue in Mutual Fire II or any other plan previously reviewed by this Court or the Supreme Court of Pennsylvania. In none of those cases did the court have to confront liquidation as part of the plan. *See also, Koken v. Fidelity Mut. Life Ins. Co.*, 907 A.2d 1149 (Pa. Commw. Ct. 2006) ("*Fidelity Mutual*"). In both *Mutual Fire II* and *Fidelity Mutual*, the plans contemplated the run off of business, paying all policyholders in full, and avoiding formal liquidation proceedings or trigger of the guaranty

associations. *Mutual Fire II,* 614 A.2d at *1095-1105; Fidelity Mutual*, 907 A.2d at 1151-56.

By contrast, in this case, the centerpiece of the Plan is the conversion of the PTNA rehabilitation proceeding to liquidation after transferring assets and policyholders to and from ANIC, lodging the majority of the policyholders with PTNA. Plan § IV.C. at 35-36. The Rehabilitator seeks to separate the question of whether PTNA, ANIC or both should be placed in liquidation from the question of what assets and policies should be assigned to PTNA if it in fact is liquidated. The distinction is artificial. In fact, the vast majority of the policies are expected to land in PTNA and PTNA is to be liquidated. The key features of the Plan deal with shuffling assets between PTNA and ANIC in preparation for that liquidation. *See, e.g.*, Plan § I.A. at 1-10, §§ IV.D-G. at 43-51. Notably absent from the Plan are issues of policy modification or policyholder impairment, which are issues typically to be considered in a rehabilitation plan. Insofar as all aspects of the Plan are inextricably interwined with the PTNA liquidation, the Court should review the Plan under the standards applicable to a petition for liquidation. As discussed in the previous section, this Court has already rejected the argument that deference is to be afforded a rehabilitator seeking a petition for liquidation under Article V.

B. Federal Bankruptcy Law Suggests that the Rehabilitator Bears the Burden of Proof

The Health Insurers concur with the Rehabilitator that Pennsylvania courts may look to federal bankruptcy law in insurance receivership matters for instruction regarding analogous features of the bankruptcy processes and Article V, particularly Chapter X of the Bankruptcy Act of 1898 (the "Bankruptcy Act"). *Ario v. Ingram Micro, Inc.*, 965 A.2d 1194, 1203 (Pa. 2009); *accord Koken v. Legion Ins. Co.*, 900 A.2d 418, 426 (Pa. Commw. Ct. 2006). The Health Insurers disagree with the Rehabilitator's assertion that a bankruptcy court would have afforded deference to a trustee's "business judgment" in seeking confirmation of a Chapter X reorganization. The "business judgment" standard applies only to a trustee's (or debtor's) acceptance or rejection of an executory contact,[1] not to judicial review of an entire plan of reorganization under Chapter X. *In re Tilco, Inc.*, 558 F.2d 1369, 1272-73 (10th Cir. 1977) ("the question whether a lease should be rejected and, if not, on what terms it should be assumed is one of business judgment."); *In re Van Sweringen Corp.*, 155 F.2d 1009, 1013-15 (6th Cir. 1946) (examining a corporate reorganization involving a major modification of a commercial lease and citing the "business judgment" standard as applicable

[1] The term "executory contract" is not defined in the Bankruptcy Code, but a proposed scholarly definition is a contract or lease "where the obligations of the debtor and the other party are unperformed so far that the failure of either to complete the required performance would constitute a material breach excusing the performance of the other." Countryman, Executory Contracts in Bankruptcy: Part I, 57 Minn. L. Rev. 439, 460 (1973)

municipal and railroad proceedings under Chapter IX of the former Bankruptcy Act); *In re Duplan Corp.*, 455 F. Supp. 933, 936 (S.D.N.Y. 1977) ("Applying this standard, it is apparent that the Reorganization Trustee exercised sound business judgment consistent with his obligation to conduct the business and manage the property of the debtor in renegotiating and seeking approval of the (collective bargaining) agreement."). The "business judgment" standard found in Chapter X applied to the trustee's authority to modify a debtor's contracts, and not to a level of deference given or standard of review used by the court for an entire plan of reorganization under the Bankruptcy Act.

Indeed, the court in *Van Swerigen* strongly suggested that deference was completely inappropriate in connection with confirmation of a plan. The court stated:

> *Those accepted principles are that whether a plan of reorganization is fair and equitable within the meaning of the pertinent provisions of the Bankruptcy Act is a question of law*; that, if a plan of reorganization is not fair and equitable as a matter of law, it cannot be confirmed by the court even though the percentage of the various classes of security holders required by the Act for confirmation of the plan has consented to and approved it; *that the court must use its own informed and independent judgment in every important determination in the administration of the reorganization proceedings*; and that, to accord a creditor his full right of priority against the corporate assets where the debtor is insolvent, the participation of the stockholder 'must be based on a contribution in money or in money's worth, reasonably equivalent in view of all the circumstances to the participation of the stockholder.'

Van Swerigen, 155 F.2d at 1013 (emphasis added). There are numerous decisions under the Bankruptcy Code holding that the proponent of a Chapter 11 plan has the burden of proof on all elements of the plan. *In re Featherworks Corp.*, 25 B.R. 634, 642 (Bankr. E.D.N.Y. 1982), *aff'd*, 10 C.B.C.2d 212, 36 B.R. 460 (E.D.N.Y. 1984) ("As the proponent of the plan, the debtor had the burden of establishing that it met the requirements of the Code"); *In re Unbreakable Nation Co.*, 437 B.R. 189, 197 (Bankr. E.D. Pa. 2010) (citing In *re H.H. Distributions, L.P.*, 400 B.R. 44, 50 (Bankr. E.D. Pa. 2009)) ("In Order for a bankruptcy plan to be confirmed, the plan proponent must show that each of the elements enumerated in 11 U.S.C. § 1129(a) have been met"); *In re Exide Technologies*, 303 B.R. 48, 58 (Bankr. D. Del. 2003) (citing *Matter of Genesis Health Ventures, Inc.*, 266 B.R. 591, 598–99 (Bankr. D.Del. 2001) ("The requirements for confirmation are set forth in § 1129 of the Bankruptcy Code. The plan proponent bears the burden of establishing the plan's compliance with each of the requirements set forth in § 1129(a), while the objecting parties bear the burden of producing evidence to support their objections."); *Matter of Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213, 221 (Bankr. D.N.J. 2000)).

V. CONCLUSION

The Health Insurers respectfully request that the Court enter an order holding that the Rehabilitator has the burden of proof on confirmation of the Plan and that all issues of law will be reviewed de novo.

Respectfully submitted,

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