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

[PROPOSED] ORDER

AND NOW, this ____ day of ______________, 2015, upon consideration of the Application of the Committee of Policyholders of PTNA and ANIC to strike the Formal Comments filed on February 13, 2015 by 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") for lack of standing, and the responses thereto, it is hereby ORDERED that the Application is GRANTED.

BY THE COURT:

____

Mary Hannah Leavitt, J.

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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

APPLICATION TO STRIKE THE FORMAL COMMENTS OF THE HEALTH INSURERS FOR LACK OF STANDING

The Policyholders Committee ("Committee") hereby moves to strike the Formal Comments filed on February 13, 2015 by 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"). The Health Insurers raise objections to the Second Amended Plan that, if successful, would dramatically and negatively affect the interests of policyholders. The Committee submits that the Health Insurers lack standing to raise those objections.

"One who seeks to challenge governmental action must show a direct and substantial interest … . In addition, he must show a sufficiently close causal connection between the challenged action and the asserted injury to qualify the interest as 'immediate' rather than 'remote.'" *Wm. Penn Parking Garage, Inc. v. Pittsburgh*, 464 Pa. 168, 202 (1975). "[T]he requirement of a 'substantial' interest … means that the individual's interest must have substance – there must be some discernable adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law.

" *Id.* at 195. "The requirement that an interest be 'direct' ... means that the person claiming to be aggrieved must show causation of harm to his interest by the matter of which he complains." *Id.* at 195. "Further, the interest must be immediate and not a remote consequence" of the governmental action. *Unified Sportsmen of Pa. v. Pa. Game Comm'n*, 903 A.2d 117 (Pa. Commw. Ct. 2006).

A. The Health Insurers Have No Direct, Substantial and Immediate Interest in this Proceeding

The Health Insurers are not, and never will be, creditors of either PTNA or ANIC in their capacity as members of a guaranty association. While the guaranty association is statutorily obligated to pay benefits and continue coverages under the policies of an insolvent insurer in liquidation, the member insurers of the guaranty association are only made liable to pay assessments to the association and have no joint or several obligation to pay benefits to the policyholders of the insolvent insurer. For that reason, the member insurers of the association have no right of subrogation against the insolvent insurer and are not treated as creditors of the insolvent insurer under state guaranty association statutes. The state guaranty association statutes are based on the NAIC's Life and Health Insurance Guaranty Association Model Act, July 2009 (the Model Act").[1]

Section 991.1701 of the Pennsylvania Life and Health Guaranty Association Act, 40 P.S. Article XVII, §§991.1701 to 991.1718 ("Pennsylvania Act"), provides that the purpose of the statute is to protect eligible policyholders against failure in the performance of contractual obligations of insolvent member insurers. "To provide this protection, an association of insurers is created to pay benefits and to continue coverages as limited

[1] http://www.naic.org/store/free/MDL-520.pdf

herein, and members of the association are subject to assessment to provide funds to carry out the purposes of this article." *Id.* *Cf.* Model Act §2.

Section 991.1706(c) of the Pennsylvania Act places on the association, not its members, the obligation to guarantee, assume or reinsure the policies or contracts of an insolvent member insurer (as defined in §991.1702). *Cf.* Model Act §8(B) and §5(L). Section 991.1706(m) provides that any person who receives benefits from the association "shall be deemed to have assigned the rights under and any causes of action relating to the covered policy or contract to the association to the extent of the benefits received ..." and that "the association shall have all common law rights of subrogation ... which would have been available to the ... insolvent insurer or holder of a policy or contract ... ." (Emphasis supplied.) *Cf.* Model Act §8(K). Finally, §991.1712(c) states that the association, not its members, "shall be deemed to be a creditor of the impaired or insolvent insurer to the extent of assets attributable to covered policies reduced by any amounts to which the association is entitled as subrogee pursuant to section 1706." *Cf.* Model Act §14(C).

The member insurers are not individually liable for the obligations of the guaranty association to the policyholders of an insolvent insurer. Section 991.1704(a) of the Pennsylvania Act provides that the association is "a nonprofit, unincorporated association." *Cf.* Model Act §6(A) ("non-profit legal entity"). Under Pennsylvania's Uniform Unincorporated Nonprofit Association Law, 15 Pa.C.S. §§9111-9136, the guaranty association is a legal entity distinct from its members and managers. 15 Pa.C.S. §9114(a). Further, "a debt, obligation or other liability of a nonprofit association, whether arising in contract, tort, or otherwise, is solely the debt, obligation or other liability of the nonprofit association." 15 Pa.C.S. §9117(a)(1). "A member or manager is not personally

liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation or other liability of the nonprofit association solely by reason of being or acting as a member or manager." 15 Pa.C.S.§9117(a)(2). "A judgment or order against a nonprofit association is not by itself a judgment or order against a member or manager." 15 Pa.C.S. §9119. As a result, neither the insolvent insurer nor its policyholders can sue the member insurers directly for covered benefits.

The only obligations that the Pennsylvania Act places on member insurers are: (1) the obligation to be a member; and (2) the obligation to pay assessments to the guaranty association. Section 991.1704(a) states that "All member insurers [as defined in §991.1702] shall be and remain members of the association as a condition of their authority to transact insurance in this Commonwealth." *Cf.* Model Act §6(A). Section 991.1707(a) provides that the association's board of directors "shall assess the member insurers ... at such time and for such amounts as the board finds necessary" to provide the funds necessary to carry out the powers and duties of the association. *Cf.* Model Act §9(A). The assessments may not exceed 2% of the average premiums that the member insurer received during the preceding three years, and if the amount is insufficient in any one calendar year to carry out the association's responsibilities, the necessary additional funds may be assessed in the following year. §991.1707(e). *Cf.* Model Act §9(E). Importantly, the member insurers have the right to recoup their assessments by adjusting premiums or through tax credits.

> The assessments [are] in the nature of advances or loans by the solvent insurers, which they are authorized to recover in one of two ways — by adjusting premiums, or through a tax credit. *Id.*, §§991.1707(g), 991.1711(a). The tax credit is only available for that portion of the assessment related to policies with fixed premiums that cannot be increased. *Id.*, §991.1711(b). That is, if the assessment can be recouped by increasing

premiums on the policies for which the assessment is attributable, no tax credit is allowed — conversely, if increasing premiums is not possible, tax credit is the only means of recovering the assessment. The tax credit option is designed to allow the insurer to fully recoup the assessment at a rate of 20% per year over a five-year period following the assessment year. *Id.*, § 991.1711(a).

Allstate Life Ins. Co. v. Commonwealth, 52 A.3d 1077, 1078-1079 (Pa. 2012) (Eakins, J., concurring), affirming *Allstate Life Ins. Co. v. Commonwealth*, 992 A.2d 910 (Pa. Commw. Ct. 2010) *per curiam*. *Cf.* Model Act §9(G) and §13.

To the extent the assessments operate as recoupable advances or loans, they do not represent direct and immediate harm to the Health Insurers. Furthermore, the guaranty association has the power to borrow money against their future assessment capacity and thereby manage and spread out its obligations over time so as not to over-burden member insurers. Pennsylvania Act §991.1706(n)(3). *Cf.* Model Act §8(L)(3); "Testimony for the Record of the National Organization of Life and Health Insurance Guaranty Associations before the House Financial Services Subcommittee on Insurance, Housing and Community Opportunity," November 16, 2011, at pp. 9-10.[2] Moreover, the guaranty associations have the power to seek premium increases on the in-force policies of the insolvent insurer. §991.1706(m)(3) and (n)(6). *Cf.* Model Act §8(K)(3). Premium increases would generate additional premium revenues in the future, which would reduce the amount of future assessments. Premium increases would also cause some policyholders to lapse or take a reduced paid-up policy, which would reduce future claims liabilities and thus reduce the amount future assessments. Because of these intervening factors, the actual financial cost to the Health Insurers as a result of assessments is not directly and immediately related to the covered benefits which the guaranty associations are obligated to pay.

[2] http://www.nolhga.com/resource/file/HFSCnolhgaTestimonyNov15_2011.pdf

Under the Pennsylvania Act, the guaranty association has standing to appear before any court having jurisdiction over impaired or insolvent insurers. §991.1706(l). *Cf.* Model Act §8(J). This makes sense, because the liquidation of an insolvent insurer triggers the obligation of the guaranty association to pay covered benefits to the insolvent insurer's policyholders for covered benefits. By contrast, the guaranty association statute does not grant member insurers standing to appear on their own behalf or on behalf of the guaranty association. This makes sense, because member insurers are not obligated to pay benefits to policyholders of the insolvent insurer and cannot be sued for the association's failure to pay. As explained above, the obligations of the guaranty association are solely the obligations of the guaranty association itself, and not of its member insurers. 15 Pa.C.S. §9117(a)(1). Thus, even if member insurers are assessed by the guaranty association, that does not place them in the shoes of the association so as to become creditors of the insolvent insurer.

The result of the foregoing statutory provisions is that the Health Insurers in this case lack any direct, substantial and immediate interest in the administration of the estates of PTNA and ANIC.

B. The Health Insurers Do Not Represent the Interests of PLHGA or Other Guaranty Associations

The Health Insurers assert that they have "a direct financial interest in ensuring that the Guaranty Associations are not unfairly or improperly prejudiced by the Plan." Health Insurer's Comments, p. 4 (emphasis supplied). In effect, the Health Insurers claim to represent the interests of the Pennsylvania Life and Health Guaranty Association ("PLHGA") and other guaranty associations.

The problem with the Health Insurers' position is that they do not represent PLHGA or any other guaranty association. The Pennsylvania Act provides that the association "shall exercise its powers through a board of directors," which includes the power to sue and be sued. Pennsylvania Act §991.1704(a), and §991.1706(n)(2). *Cf.* Model Act §6(A) and §8(L)(2). The Pennsylvania Act does not grant member insurers standing to appear on behalf of PLHGA, presumably because the association is a distinct legal entity from its members, §991.1704(a) and 15 Pa.C.S. §9114(a), and the responsibility for running the association lies with the association's board of directors. The Health Insurers do not claim that the board of directors of PLHGA or any other guaranty association has assigned to them any of the rights possessed by a guaranty association in connection with this case.

Even assuming, for argument's sake, that the Health Insurers identify direct, substantial and immediate harm to a guaranty association, it is not the Health Insurers' place to raise it. The guaranty association is a legal entity distinct from its member insurers. *See* p. 3, above. Member insurers elect the board of directors, §991.1705(a), and presumably stand in much the same relation to the guaranty association as do shareholders to a corporation whose legal rights are at issue. "If the wrong is primarily against the corporation, the redress for it must be sought by the corporation … ." *Hendrickson v. Vandling*, 41 Pa.D&C.3d 568, 571 (Cumberland, 1983), citing 13 W. Fletcher, Cyclopedia of Corporations § 5911, at 309 (1980).[3] "The denial of standing to individual stockholders who sustain an *indirect* injury resulting from the corporation's *direct* injury is consistent with the principle that a corporation is a separate legal entity distinct from its members." *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 733 (3d Cir. 1970) (emphasis supplied).

[3] Now 12B W. Fletcher, Cyclopedia of Corporations § 5911, at 447-448 (2000 Revision)

The decision whether to assert a claim is within the province of the board of directors, and their decision is subject to the business judgment rule. *Cuker v. Mikalauskas*, 692 A.2d 1042, 1048 (Pa. 1997). Thus, it is the guaranty association's board of directors who decide what is in the best interests of the association and how best to protect those interests.

Here, NOLHGA, which coordinates and represents the various guaranty associations in an associational capacity as a collective voice of the guaranty system, NOLHGA's Comments at p. 3, expresses its commitment to continue working with the Rehabilitator and raises none of the objections that the Health Insurers have raised to the Second Amended Plan. Although NOLHGA reserves the right to propose modifications the Second Amended Plan concerning policyholder claims in excess of guaranty association limits and various aspects of asset allocation as described in the Plan, NOLHGA's approach to protecting guaranty association interests differs strongly from the Health Insurers' approach. This proceeding is not the appropriate forum in which to resolve a difference of opinion between the Health Insurers and NOLHGA or between the Health Insurers and the boards of the various guaranty associations. *See Krys v. Official Committee of Unsecured Creditors (In re Refco Inc.)*, 505 F3d 109, 118 (2d Cir. 2007) ("Bankruptcy court is a forum where creditors and debtors can settle their disputes *with each other*. Any internal dispute between a creditor and that creditor's investors belongs elsewhere.")

C. The General Public also Does Not Represent the Guaranty Associations, and the Health Insurers Do Not Represent the General Public

The Health Insurers assert that the general public has the same interest as the Health Insurers in ensuring that the Plan is "lawful, equitable, and not prejudicial to the Guaranty Associations," because "a significant portion of the liabilities assumed by the

Guaranty Associations are ultimately borne by the public (in light of tax credits given on assessments) or by other policyholders (through premium rate increases)." Health Insurer's Comments, p. 4 (emphasis supplied). In other words, the less a guaranty association assesses its member insurers, the lower the amounts that the member insurers will seek to recoup through premium rate increases or premium tax credits. The general public's interest in preventing prejudice to the guaranty associations is even more remote and attenuated than the interest of the Health Insurers, inasmuch as it depends on unforeseeable factors such as when and to what extent the Health Insurers will adjust their premiums on account of guaranty assessments, §991.1707(g) and Model Act §9(G), and whether and when the government may seek to replace lost premium taxes through other taxes and on whom those taxes will fall.

The Health Insurers do not expressly assert that they represent the interests of the general public. To the extent that they purport to do so impliedly, it is not a sufficient ground for standing to assert the general public's interest in procuring obedience to the law. *Tacony Civic Association v. Pa.LCB*, 668 A.2d 584, 588 (Pa. Commw. 1995), citing *Wm. Penn Parking Garage, Inc. v. Pittsburgh*, 464 Pa. 168 (1975).

In any event, as explained above, the guaranty association is a distinct legal entity having a board of directors who decide what is in the best interests of the association.

D. The Health Insurers Are Not Parties in Interest and Cannot Intervene

Under the Bankruptcy Code, "parties in interest" have a statutory right to be heard. Section 1109(b) of the Bankruptcy Code states:

> A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

By contrast, Article V of the Pennsylvania Insurance Department Act does not provide that "parties in interest" have a right to be heard in insurance insolvency proceedings. The only reference to a "parties in interest" is in 40 P.S. §221.30(g), concerning hearings on actions to avoid preferences and liens. Pennsylvania Rule of Appellate Procedure 3775 permits persons who have a "direct and substantial interest in the administration of the insurer's business or estate" to intervene in formal proceedings against insurers under Article V. The Health Insurers have not applied to intervene. Under the Case Management Order of December 3, 2014, persons who do not intervene may nevertheless file comments on the Second Amended Plan and may participate in the hearings on the confirmation of the Plan, upon notice to the Court. Presumably, commenters should qualify as "parties in interest," as there is no prudential reason to entertain comments from persons who have no direct interest of their own to assert.

In this case, the Health Insurers do not qualify as parties in interest, because they are at most debtors of a creditor, who wish to assert positions on that creditor's behalf. *See Krys v. Official Committee of Unsecured Creditors (In re Refco Inc.)*, 505 F3d 109, 118 (2d Cir. 2007). In *Krys*, RefCo brought a preference action against Sphinx, an investment company that had withdrawn over $300 million from its accounts with RefCo just five days before RefCo filed for bankruptcy. Sphinx and RefCo eventually settled the preference action. When some of Sphinx's investors challenged the settlement, the bankruptcy court ruled that the investors were not parties in interest under 11 U.S.C. §1109(b). The District Court and the Court of Appeals affirmed.

> Section 1109(b) provides that the term "party in interest [ ] includ[es] the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee." We previously explored the contours of the term "party in interest" in a

> slightly different context in *Comcoach,* 698 F.2d at 573-74. There, we stated that "[w]hen interpreting the meaning of Code terms such as `party in interest', we are governed by the Code's purposes." *Id.* at 573 (citation omitted). "One of those purposes is to convert the bankrupt's estate into cash and distribute it among creditors." *Id.* "Bankruptcy courts," we noted, "were established to provide a forum where creditors and debtors could settle their disputes and thereby effectuate the objectives of the statute." *Id.*
>
> We acknowledged in *Comcoach* that the term "party in interest" is not defined by the Code. *Id.* But we noted that a "`real party in interest' is the one who, . . ., has the legal right which is sought to be enforced or is the party entitled to bring suit," and we rejected as incompatible with the purposes of the Code the notion that any particular creditor's interest may be asserted by anyone other than that creditor. *Id.*
>
> ... To the extent that the rights of a party in interest are asserted, those rights must be asserted by the party in interest, not someone else. The principle set forth in *Comcoach* therefore applies with equal force to this case. We reaffirm it today.
>
> Investors cannot claim that they seek to enforce any rights distinct from those of Sphinx as a creditor and a defendant in an adversary proceeding. The record establishes that Sphinx is a single legal entity, and that the individual cells are not legally separate entities from Sphinx. By investing in Sphinx, Investors placed control of their funds entirely within the hands of the Sphinx directors (or managers acting on behalf of the directors). Only Sphinx, not individual Investors, or even Investors as a group, could assert a claim against the RefCo estate, and only Sphinx was permitted to negotiate a settlement with the Committee. Investors maintain a financial "interest" in Sphinx, but they are not a "party in interest" within the meaning of the Bankruptcy Code. The party in interest in the bankruptcy sense, representing the Investors' financial interest, is Sphinx.

Krys, supra, 505 F.3d at 116-117. *Accord*, *Peterson v. U.S. Bank National Association*, 918 F.Supp.2d 89, 102-104 (D.Mass. 2013) (bondholders under an indenture trust were not parties in interest, where the indenture trustee controlled the trust's claims against the debtor).

The concept that a person must assert his or her own legal rights and may not assert the rights of third parties in is well recognized in bankruptcy proceedings. *In re PWS*

Holding Corp., 228 F.3d 224, 248, 2000 U.S. App. LEXIS 23393, *69-*70 (3d Cir. Del. 2000), where the Third Circuit Court of Appeals stated:

> Bankruptcy proceedings regularly involve numerous parties, each of whom might find it personally expedient to assert the rights of another party even though that other party is present in the proceedings and is capable of representing himself. Third-party standing is of special concern in the bankruptcy context where, as here, one constituency before the court seeks to disturb a plan of reorganization based on the rights of third parties who apparently favor the plan. In this context, the courts have been understandably skeptical of the litigant's motives and have often denied standing as to any claim that asserts only third-party rights.

(citations omitted). *See also, In re Simplot*, 2007 Bankr. LEXIS 2936 at *33 (Bankr. D. Idaho) (persons may not assert confirmation objections that relate to others); *In re Cypresswood Land Partners, I*, 409 B.R 396, 416-417 (Bankr. S.D.Texas 2009) (a person's bid for standing can be defeated if the person is asserting a third party's rights), citing *In re A.P.I., Inc.*, 331 B.R. 828, 857-858 (Bankr. D. Minnesota 2005); *EFL Ltd. v. Miramar Resources (In re Tascosa Petroleum Corp.)*, 196 B.R. 856, 863 (D. Kansas 1996).

The same reasoning applies in insurance insolvency cases:

> Significantly, the Court notes that the Objectors are not policyholders, and, indeed, no FGIC policyholder has objected to the Settlement Agreement. Nor are the Objectors FGIC's credit holders or stockholders. Notwithstanding this, the Objectors complain that they were not consulted about the settlement and were not aware of the settlement negotiations. However, the Objectors are no more than mere creditors of certain FGIC's creditors and their consent is simply not required to consummate a settlement of policy claims. *See In Re Refco, Inc.*, 505 F3d 109, 117 (2nd Cir 2007). If the Rehabilitator were required to negotiate with extended parties who are not FGIC's policyholders, and with whom FGIC does not have privity, the rehabilitation would be more complicated, and would serve to delay the rehabilitation. *Id.* at 118.

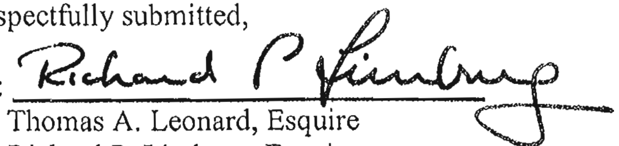
Matter of Financial Guaranty Insurance Co., 975 N.Y.S.2d 712 (NY Supreme Ct. 2013), 2013 N.Y. Misc. LEXIS 3607 at *8-*9.

Member insurers of guaranty associations always have an interest in minimizing their assessments. If the Health Insurers in this case have standing, then all member insurers of all potentially responsible guaranty associations have standing. Moreover, all member insurers would have standing in any insurance insolvency where they could assert that the receiver has neglected an opportunity to reduce the need for future assessments, such as by increasing premiums or reducing policy benefits. Finding that the Health Insurers have standing in this case would open the door to numerous other member insurers, which would complicate and prolong the confirmation process, while the assets of Penn Treaty and ANIC continue to run off. Moreover, to the extent the member insurers' agendas differ from the agendas of the guaranty associations and NOLHGA, the process of agreeing on and confirming a plan would be that much more protracted and difficult. Policyholders have a strong interest in avoiding further delays in this case.

CONCLUSION

Because the Health Insurers do not have a direct, substantial and immediate interest in this case, they do not have standing. Also, because the Health Insurers purport to make arguments on behalf of guaranty associations of which the Health Insurers are merely members, they are not parties in interest. Accordingly, they should not be heard to object to the Second Amended Plan, and their Formal Comments should be stricken.

Respectfully submitted,

By: 

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Dated: March 20, 2015

CERTIFICATE OF SERVICE

I certify that on March 20, 2015, I caused a true and correct copy of the foregoing Application to be served on the following persons by email at the email addresses indicated below:

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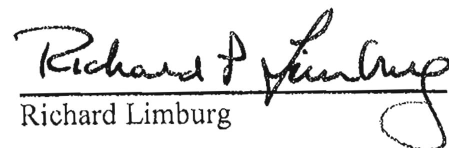

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