

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

**HEALTH INSURERS' REPLY TO INTERVENOR AGENTS'  
MEMORANDUM IN OPPOSITION TO THE APPLICATION  
FOR RELIEF TO MODIFY THE PLAN TO ELIMINATE  
THE PAYMENT OF AGENT COMMISSIONS ON  
COMPANY A POLICIES**

## TABLE OF CONTENTS

	Page
INTRODUCTION .....	1
ARGUMENT .....	2
A.    Commissions are Not a Distinct Form of Property .....	2
B.    “Legislative Intent” Does Not Turn Premiums into Commissions Owned by the Agents .....	3
C.    Cases Cited from Other Jurisdictions Do Not Support the Agents’ Argument, but Do Support the Health Insurers .....	7
D.    The Agents’ Agreements do not Create an Interest in Premiums .....	10
E.    The Health Insurers Have Standing to Seek Modification of the Plan .....	12
CONCLUSION .....	13

## INTRODUCTION

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 submit this reply in opposition to the Memorandum of Intervenor Agents (the "Agents") in Opposition to the Application for Relief to Modify the Plan to Eliminate the Payment of Agent Commissions on Company A Policies (the "Agents' Memorandum") under the proposed Second Amended Plan of Rehabilitation (the "Plan") for Penn Treaty Network America Insurance Company ("PTNA") and American Network Insurance Company ("ANIC" and, together with PTNA, the "Companies").

In their Application, the Health Insurers requested the Court to modify the Second Amended Plan of Rehabilitation to eliminate the payment of agent commissions on Company A policies and determine that claims of agents for commissions are general creditor claims under 40 P.S. §221.44(e) unless an agent can demonstrate that the agent's agreement creates an interest in property of the estate. The Health Insurers argued that the payment of commissions on Company A policies does not support a rehabilitative purpose. This proposition is not

contested by the Agents. The Health Insurers also argued that the agents do not have any interest in property of the Companies because their agreements do not create such interests. In response, the Agents posit a property interest that arises by virtue of "legislative intent," and also argue that their agency agreements create such an interest. As discussed below, neither the statutes nor Pennsylvania case law supports legislative intent to create a property interest in premiums absent an agreement. And, nothing in the forms of agency agreements before the court create such an interest.

## ARGUMENT

### A. Commissions are Not a Distinct Form of Property.

The Agents' position rests on a confusion about the status of commissions as property. In the first instance, commission is a liability of the insurance company to the agent. The right to receive the commission is an asset of the agent. But that right is just an unsecured claim against the insurance company unless the agency agreement provides for security. The commission does not turn into a cash asset until it is paid, either through a payment from the insurer or withholding from premium paid by a policyholder to the agent. The Pennsylvania cases relied upon by the Agents deal with the latter situation. *Pa. Ass'n of Life Underwriters v. Foster*, 645 A.2d 907 (Pa. 1994) ("Pa. Underwriters") and *In re Prof'l Agents' Ass'n of Pa., Md. & De., Inc.*, Pa. Ins. Dep't Docket No. C89-11-12 (Jan. 31, 1991)

(“Professional Agents”). Those cases dealt with an asset: cash premium collected by the agent under an agency agreement. It became a cash commission asset of the agent once it was withheld from the premium by the agent. When *Pa. Underwriters* and *Professional Agents* refer to the commissions as property, they are referring to the cash premium that became a cash commission asset when it was withheld by the agent pursuant to the agency agreement.

**B. “Legislative Intent” Does Not Turn Premiums into Commissions Owned by the Agents.**

The premise of the Agents’ position is that by operation of law, the estate’s premiums turn into “commissions” that are owned by the Agents rather than the estate. The title to the second section of the Agents’ Memorandum states “COMMISSIONS ON EARNED PREMIUM ARE NOT PART OF THE PTNA AND ANIC ESTATES AS A MATTER OF LAW.” Agents’ Memorandum at 5. The source of this doctrine is stated to be the *Pa. Underwriters and Professional Agents* cases, which are stated to “unequivocally interpret the legislative intent to create two categories of commissions with different ownership rights: ‘[w]here the premium is earned ..... the commission is earned and an asset of the agent. Where the premium is unearned, the unearned commission is an asset of the estate.’ Id. at 15.” Agents’ Memorandum at 10. This is neither a correct statement of the law or the legislative intent, nor is it an accurate reading of the cited cases. A correct statement of the law would be that “Commissions on earned premium which have

been paid out of premium collected by an agent under an agreement creating an interest in premiums are not part of the receivership estate and are not premiums subject to turnover.”

The legislative intent on which the Agents’ argument rests is stated to reside in 40 P.S. § 221.35. The Agents’ position would suggest that the statute granted a property interest or priority in favor of agents in the premiums of a company in receivership without regard to who collected them. But instead, Section 221.35 deals with the turnover of premium to the estate by “an insured, agent, broker, premium finance company or any other person responsible for the payment of a premium.” The agents of Penn Treaty did and do not collect its premium. They were not and are not responsible for turning it over. The only mention of commission in Section 221.35 is the statement that a party that is required to turn over premium must also turn over any commission it has withheld on any unearned portion of the premium. It is this section that is the subject of *Pa. Underwriters* and *Professional Agents*.

In both cases, agents had been ordered to turn over commissions that they had withheld from earned premiums that they had collected under the terms of their agency agreements. The commissioner in one case and the court in the other decided that Section 221.35 barred the turnover of premium to the extent that it had been retained by the agent to pay commission owed by the insurer on earned

premium. The court in *Pa. Underwriters* stated, “[w]e agree with Agents and hold that they are entitled to summary judgment for the reason that their earned commissions are not part of AIBA’s liquidated estate.” *Pa. Underwriters*, 645 A.2d at 911. The Agents maintain that this statement supports the proposition that any premium received by the estate or its successor is burdened with commission as a matter of legislative intent. But this reading of the court’s holding is vastly out of context. The issue before the court was “whether the Commissioner, as statutory Liquidator of AIBA’s estate, may demand the return of earned commissions” as part of his effort to recover premiums under Section 221.35. *Id.* at 910 (emphasis added). The use of the word “return” denotes that the agents had already collected it. The court’s ruling is only a construction of the statutory carve-out from the liquidator’s right to collect premium. It carves out that portion of a premium which has been paid to an agent and withheld by the agent as earned commission.<sup>1</sup> The statute does not create a right of an agent in premiums where it does not otherwise exist, it only recognizes an otherwise existing right.

This proposition is even clearer in the Insurance Department’s ruling in *Professional Agents*. The decision quotes the contractual provision that creates the rights:

---

<sup>1</sup> The Agents’ citation of *Sheppard v. Old Heritage Mutual Ins. Co.*, 405 A.2d 1325 (Pa. Commw. Ct. 1979), *aff’d*, 415 A.2d 304 (Pa. 1980) adds nothing. That case does not deal with commissions other than to recognize that for purposes of determining solvency, commissions must be netted against the company’s stated asset of premiums receivable from agents.

The full amount of all premiums collected by the Agent on policies of the Company, less only the commissions payable to the AGENT with respect thereto, in the amounts provided in the Schedule of Commissions, shall immediately become, be and remain trust funds in the custody of the Agent until actually paid to the GENERAL AGENT.

*Professional Agents*, Pa. Ins. Dep't Docket No. C89-11-12 at 10 (emphasis in original). The case arose out of a demand by the liquidator for payment of all premium including commissions previously withheld. The Insurance Department stated, "[a]ll earned commissions are the property of the producing agent or broker and outside the reach of the Statutory Liquidator." *Id.* at 16. Out of context, this might be read to mean that an earned commission created some property interest in assets of the estate. But the Insurance Department went on to state that "Westmoreland's only property interest was in the gross premiums, less commissions (as specified in the Westland Agency Agreement.)" *Id.* at 17 (emphasis added). This statement puts the matter in context. The case was about turnover of premium, not a claim against the estate for collection of commissions. The Insurance Department recognized the property interest of the agents in premiums that was specifically created under the agency agreement.

The Agents correctly observe that some of the agents in the *Professional Agents* case remitted their commission to the liquidator upon his demand, and were held to be entitled to receive it back. But this does not undermine the point. The Insurance Department found that the demand had been wrongful, that the remitting



agents had a contractual property interest in the premium at the time they remitted it, and were therefore entitled to receive it back. The Companies' agents do not have such an interest and never will.

**C. Cases Cited from Other Jurisdictions Do Not Support the Agents' Argument, but Do Support the Health Insurers**

*Wear v. Farmers & Merchants Bank of Las Cruces*, 605 P.2d 27 (Alaska 1980) involved a setoff by an agent of claims for deferred commission against amounts the agent owed the insolvent insurance company. The commissions were nothing more than receivables which were set off against a payable to the insurance company (later assigned to a bank). The case does not involve a collection of an asset from the insurer's liquidation estate, only a setoff of a receivable against a payable.

The remainder of the cases cited by the Agents do not even involve insurance receivership and do not implicate interests in property of a receivership estate. *Antrim v. Modern Income Life Ins. Co.*, 421 N.E.2d 381 (Ill. App. Ct. 1981) involved a determination of the agent's right to receive an over-write premium from an ongoing solvent insurer. *Nirou v. Nirou*, 545 A.2d 35 (Md. 1988) and *Bigbie v. Bigbie*, 898 P.2d 1271 (Okla. 1995) involved a dispute between divorcing spouses as to whether the husband's insurance commission receivables were part of the property to be divided in the divorce. *Benfield, Inc. v. Monoline*, No. Civ. 04-3513, 2006 WL 452903 (D. Minn. Feb. 22, 2006) involved a dispute about

which of two parties was entitled to a brokerage commission.

The only case cited by the Agents that appears to support their position is the decision of the Oklahoma Court of Civil Appeals in *Cockrell v. Grimes*, 740 P.2d 746 (Okla. Civ. App. 1987). It is somewhat difficult to determine whether the case is correctly decided because the opinion does not quote the critical terms of the agency agreement dealing with the collection of premium and the agent's interest in the premium as collected. There is at least some suggestion that prior to the receivership, Cockrell was collecting the premium and remitting it net of commissions in accordance with the agreement. The court wrote, ". . . UELIC and or the Appellees, upon collection of premiums on insurance policies written by Cockrell were, in effect, collecting agents for Cockrell and held his commission in trust for him, or, in this case, for his assignee." *Cockrell*, 740 P.2d at 748 (emphasis added). This suggests that the receiver had taken over collection and remittance functions that Cockrell was performing prior to the receivership. The opinion is silent on this point. If Cockrell did have the right to collect premium and withhold commission from it, and the company thereafter displaced him, then the decision is not inconsistent with the Pennsylvania authorities. If such provisions were not in the agreement then the case is truly an outlier, as discussed in the Health Insurers' brief in support of their application for relief. Health Insurer's Brief in Support of Application for Relief to Modify the Plan to Eliminate

the Payment of Agent Commissions on Company A Policies at 10.

In any event, the quotation from *Cockrell* provided by the Agents reveals confusion by the Oklahoma appellate court about the nature of the “property” at issue:

As stated above, Cockrell’s commissions vested in him upon payment of the premiums. That money is his property. Whether it was collected by UELIC or the Commissioner or the Association, it remains Cockrell’s property and is not and may not be considered an “asset” of UELIC to be used for payment of claims against UELIC.

*Cockrell*, 740 P.2d at 749 (emphasis added). The “money” referred to was premium paid by the policyholder. The “commissions” which vested were only an obligation of the insurer to pay. The Oklahoma court’s analysis has the money leap from premiums to commissions without any connection or explanation whatever. In *Pa. Underwriters and Professional Agents*, the distance which cash has to travel between premiums and commissions is bridged by the agency agreement. Without a contractual bridge that allows the agent to retain premium funds collected by the agent to pay commissions, the agent is left only with a claim against the insurer.

The Agents observe that *Liberty National Ins Co. v. Reins Agency Inc.*, 307 F.2d 164 (9th Cir. 1962) and *Palmer v. Peoria Life Ins. Co.*, 34 N.E.2d 829 (Ill. 1941), cited by the Health Insurers, pre-date the NAIC Model Acts, but do not indicate in what way the enactment of the model law changes the rules. With

respect to *Peoria Life*, the decision turned on the fact that the agents had no interest in premiums. The Court went on to vehemently disagree with the decision in *General American Life Ins. Co. v. Roach*, 65 P.2d 459 (Okla. 1937), which is the foundational case for the opinion of the court in *Cockrell, supra*. The Agents note procedural issues in *Roush v. National Old Line Ins Co.*, 453 F. Supp. 247 (W.D. Okla. 1978) and *Liberty National Ins. Co. v. Reinsurance Agency Inc.*, 307 F.2d 164 (9th Cir. 1962), but in neither case did such issues prevent the court from considering and rejecting the merits of the agents' contention that their unsecured claim for commissions created an interest in premiums.

**D. The Agents' Agreements do not Create an Interest in Premiums.**

The Agents argue that the Penn Treaty form of agency agreement attached to the Health Insurers' Application gives them some interest in premium collections. But in doing so, they must make the same leap from premiums to commissions without a contractual bridge as was made in the *Cockrell* case. The Agents state, "[t]he pertinent provisions of the contractual language supplied by the Health Insurers is the language that immediately vests in the agent a property interest in the commissions on the initial and 'all future years.'" Agents' Memorandum at 16 (emphasis added.) The agreement establishes a right to receive commissions, but that right is only a claim against Penn Treaty. It is not a property interest in the premiums to be received in the future by Penn Treaty. To establish the property

rights that the Agents seek, their agreements would need to create an interest in the premiums. This is what the agreements (quoted above) provided in the *Professional Agents* case. Those provisions are conspicuously absent from the Penn Treaty agreements.

The Agents argue that because the Health Insurers did not place into evidence all of the Companies' agency agreements, their request for modification of the Plan must fail. Notably, the Agents did not include in their submission to the Court any agency agreements that contained express provisions creating a security interest in premiums. To be sure, the Health Insurers could obtain all of the agreements in discovery and place them in evidence before the Court. Then the parties and the Court could spend days sifting through them in search of a provision that grants an agent an interest in premium. But the Health Insurers have proposed a more practical modification to the Plan. What the Health Insurers have proposed is a modification that eliminates payment of commissions by Company A unless the agent presents an agreement that establishes an interest in premiums to secure one of the Companies' commission obligations. This leaves open to each agent an opportunity to prove an entitlement to payment (if there is any). The agents are in a far better position to know the contents of their agreements than the Health Insurers, and if the Health Insurers are correct that there is no global statutory property right of agents in the premiums of Penn Treaty, then they should

have the burden of proving their interest.

**E. The Health Insurers Have Standing to Seek Modification of the Plan**

Like the Policyholders Committee, the Agents argue that the Health Insurers lack standing. The Court resolved this issue in favor of the Health Insurers in its Memorandum Opinion and Order filed April 17, 2015.

In addition, the Health Insurers have a direct interest in whether Company A pays commissions because it affects the amount of assets that will be allocated to Company A and Company B. If commissions are not required to be paid on Company A policies, then fewer assets will be needed by Company A and more assets will be paid to Company B and the guaranty associations, thereby reducing the Health Insurers' ultimate assessments.

The focal point of this analysis is the Plan's definition of Gross Premium Reserve, which states in part that "[e]xpected expenses include commissions and premium taxes in the case of ANIC...." Plan at 17. If commissions were eliminated from Gross Premium Reserves for ANIC (which will serve as Company A), the required contribution of assets to Company A would drop. *See* Plan at 14 (definition of ANIC Assets) and Plan at 49 ("The sum of all ANIC Assets will be transferred to or retained by ANIC on the Effective Date and all remaining assets will be transferred to or retained by PTNA."). The foregoing establishes a clear interest by the Health Insurers in the outcome of this dispute.

## CONCLUSION

For the reasons set forth above, the Health Insurers respectfully request that the Court enter an order modifying the Plan to provide that all claims for agent commissions with respect to the policies of the Companies, whether they are Company A or Company B policies, should be treated as general creditor claims against Company B unless an agent can prove that such agent's particular agreement creates an interest in property of the estate.

Respectfully submitted,

Dated: April 30, 2015

MORGAN, LEWIS & BOCKIUS LLP

By: 

Harold S. Horwich  
Benjamin J. Cordiano  
MORGAN, LEWIS & BOCKIUS LLP  
One State Street  
Hartford, Connecticut 06103-3178  
Telephone: 860.240.2700  
Facsimile: 860.240.2800

John P. Lavelle, Jr.  
MORGAN, LEWIS & BOCKIUS LLP  
1701 Market Street  
Philadelphia, PA 19103  
Telephone : 215.963.5000

*Attorneys for 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*



**CERTIFICATE OF SERVICE**

I certify that on April 30, 2015, I caused a true and correct copy of the foregoing document to be served on the following persons by email at the email addresses indicated below:

Patrick H. Cantilo  
Special Deputy Rehabilitator  
Cantilo & Bennett, LLP  
11401 Century Oaks Terrace, Suite 300  
Austin, TX 78758  
[phcantilo@cb-firm.com](mailto:phcantilo@cb-firm.com)

Carl M. Buchholz  
Jayne A. Risk  
DLA Piper LLP  
One Liberty Place  
1650 Market Street  
Philadelphia, PA 19103-7300  
[carl.buchholz@dlapiper.com](mailto:carl.buchholz@dlapiper.com)  
[jayne.risk@dlapiper.com](mailto:jayne.risk@dlapiper.com)

Stephen W. Schwab  
DLA Piper LLP  
203 North LaSalle Street  
Suite 1900  
Chicago, IL 60601-1293  
[stephen.schwab@dlapiper.com](mailto:stephen.schwab@dlapiper.com)

Douglas Y. Christian  
Benjamin M. Schmidt  
Ballard Spahr LLP  
1735 Market Street  
51st Floor  
Philadelphia, PA 19103  
[christiand@ballardspahr.com](mailto:christiand@ballardspahr.com)  
[schmidt@ballardspahr.com](mailto:schmidt@ballardspahr.com)

Charles T. Richardson  
Caryn M. Glawe  
Faegre Baker Daniels  
1050 K Street NW, Suite 400  
Washington, DC 20001-4448  
[crichardson@faegrebd.com](mailto:crichardson@faegrebd.com)  
[caryn.glawe@faegrebd.com](mailto:caryn.glawe@faegrebd.com)

Paul M. Hummer  
Saul Ewing LLP  
Centre Square West  
1500 Market Street, 38th Floor  
Philadelphia, PA 19102-2186  
[phummer@saul.com](mailto:phummer@saul.com)

James R. Potts  
Cozen O'Connor  
1900 Market Street  
Philadelphia, PA 19103  
[jpotts@cozen.com](mailto:jpotts@cozen.com)

Andrew Parlen  
O'Melveny & Myers, LLP  
1625 Eye Street, NE  
Washington, DC 20006  
[aparlen@omm.com](mailto:aparlen@omm.com)

Thomas A. Leonard, Esq.  
Richard Limburg, Esq.  
Obermayer, Rebmann, Maxwell & Hippel LLP  
One Penn Center – 19th Floor  
1617 John F. Kennedy Blvd.  
Philadelphia, PA 19103  
[thomas.leonard@obermayer.com](mailto:thomas.leonard@obermayer.com)  
[richard.limburg@obermayer.com](mailto:richard.limburg@obermayer.com)

/s/ Benjamin J. Cordiano \_\_\_\_\_  
Benjamin J. Cordiano