

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

**THE HEALTH INSURERS’ OPPOSITION TO THE APPLICATION OF
THE POLICYHOLDERS COMMITTEE FOR LEAVE TO RETAIN
EXPERT WITNESS AT THE EXPENSE OF PTNA AND ANIC**

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 opposition to the Application of the Policyholders Committee (the “Committee”) for Leave to Retain an Expert Witness at the Expense of Penn Treaty Network America Insurance Company (“PTNA”) and American Network Insurance Company (“ANIC” and, together with PTNA, the “Companies”) (the “Application”). The Application should be denied because the testimony sought relates either to matters that are solely issues of law or to matters on which the testimony would merely

duplicate what the Rehabilitator will offer through the Pennsylvania Insurance Department.

I. EXPERT TESTIMONY ON LEGAL ISSUES IS NOT NECESSARY

The Committee seeks to retain an expert at the Companies' expense to testify in support of its contention that assets should be allocated for the payment of claims in excess of the guaranty association limits. The testimony would relate to "aspects of [the] multi-state guarantee system," including the proper allocation of premium and the Companies' assets in light of policyholder claims in excess of guaranty association limits. Application at 1-2, para. 2. This testimony is entirely inappropriate because the existence of policyholder claims in excess of guaranty association limits is purely a matter of law, and has been treated as such in the extensive briefing in this case by the Rehabilitator, the Committee, the National Organization of Life and Health Insurance Guaranty Associations ("NOLHGA"), and the Health Insurers, as well as lengthy oral argument before the Court on May 11, 2015. *See* Health Insurers' Application for Relief Regarding the Use of Estate Assets to Pay Uncovered Claims and Brief in support thereof, dated April 2, 2015; Responses thereto from the Committee, the Rehabilitator and NOLHGA, each dated April 22, 2015; Health Insurers' Reply to Responses, dated April 30, 2015; Supplemental Brief of the Policyholders Committee dated July 17, 2015; and

Supplemental Brief of the Rehabilitator dated July 17, 2015.¹

The operation of the receivership statutes and the guaranty association statutes is not a factual question or a question of public policy. It is purely a function of statutory interpretation, and the testimony of the proposed expert, a former Insurance Commissioner of Kansas, would not be admissible in connection with that interpretation. *See, e.g., FedEx Ground Package Sys. v. Applications Int'l Corp.*, 695 F. Supp. 2d 216, 221 (W.D. Penn. 2010) (“While Federal Rule of Evidence 704(a) allows an expert witness to give expert testimony that embraces an ultimate issue to be decided by the trier of fact, an expert witness is prohibited from rendering a legal opinion. *It is the duty of the court, not of any witness, to explain the law to the jury.*”) (emphasis added).

II. THE PROPOSED EXPERT TESTIMONY ON PREMIUM RATES IS NEITHER NECESSARY NOR WARRANTED

The Committee also seeks to retain the proposed expert to testify concerning “premium rate regulation” and the “policy issue” of “pricing and regulation of LTC insurance products, and how regulators have responded over time to insurers’ requests for premium increases for older LTC policies.” Application at 1-2, para 2. Premium rate increases are not imposed or prohibited by the Second Amended

¹ The Health Insurers also intend to submit a supplemental brief on this issue well in advance of the start of Phase Two of the hearing on the Second Amended Plan. That brief will not raise any factual issues for which testimony will be necessary.

Plan. Thus, the proposed testimony does not appear to concern any matter that will be before the Court.

Intervenor PTAC has suggested that the Court reject the Second Amended Plan and instead implement the Rehabilitator's proposed April 2013 Plans which did contemplate rate increases and benefit reductions. But the April 2013 Plans have been withdrawn, and confirmation of those plans in the current proceedings is not realistically to occur. Even if the Court were to grant Intervenor PTAC's request to reject the Second Amended Plan in its entirety and implement the April 2013 Plans, a new hearing would have to be scheduled, discovery taken, and pre-trial motions addressed.

Moreover, the Rehabilitator has been in lock step with the Committee in her refusal to raise premium rates and modify benefits under the Second Amended Plan. As the regulator that oversees the Companies, she can reliably be expected to provide testimony on the issues identified by the Committee. Adding the testimony of a retired regulator cannot reasonably be expected to add anything substantially different.

III. THE INTERESTS OF THE POLICYHOLDERS ON THE "POLICY ISSUES" IDENTIFIED IN THE APPLICATION ARE ADEQUATELY REPRESENTED

Even if the Court were to determine that the "policy issues" set forth in the Application are at issue and must be resolved at the hearing on the Second

Amended Plan, the interests of the policyholders with respect to those policy issues are already represented without requiring the Companies to bear the additional expense of an expert (and any professionals she requires, including counsel). The Rehabilitator is statutorily charged with representing the policyholders. *See* 40 P.S. §221.1. To the extent these policy issues need to be addressed, the Rehabilitator has a large team at her disposal.² Moreover, as the Companies' statutory Rehabilitator and domiciliary regulator, the Rehabilitator is in a better position to address these issues on behalf of policyholder interests, for which she is charged to protect, than the Committee's proposed expert.

The Committee also has experienced counsel and an actuary with significant long term care experience, each funded by the Companies' estate. In fact, in its application for leave to retain an actuary, the Committee stated it required the services of a consulting actuary in part to address "such issues as what the fair and appropriate method of allocating assets between the good bank and bad bank would be, and what voluntary premium increases and/or benefit cuts non-self-sustaining policyholders would have to accept to be included in the good bank."

Application of the Policyholders Committee for Leave to Retain a Consulting

² For example, the Rehabilitator recently deployed a team of more than 35 attorneys and paralegals to address document production. That team spent more than 2,000 hours in that effort, at a total cost of over \$1.015 million to the Companies' estate. Rehabilitator's Omnibus Opposition to the Applications to Compel Filed by the Health Insurers, the PTAC Intervenors, and Broadbill, dated October 26, 2015, at 48.

Actuary, on a Limited Basis, at the Expense of PTNA and ANIC, dated November 26, 2013. The non-legal issues the Committee seeks to address through proposed expert opinion testimony are of a similar nature to those cited in its initial application to retain a consulting actuary, and, if necessary, can be addressed by him.

IV. THE COMPANIES' ESTATE SHOULD NOT HAVE TO SUPPORT ADDITIONAL PROFESSIONAL EXPENSES

The Rehabilitator is charged with representing the interests of the policyholders. *See* 40 P.S. §221.1. Due to the size and complexity of this case, the Court appointed the Policyholders Committee, with counsel to be funded by the Companies' estate, on the condition that the Committee would not retain an independent actuary. *See* Transcript of Proceedings dated September 24, 2013, at 55 ("The application [for a policyholders committee] is approved with the proviso that you are not authorized to have any actuarial advice that you choose to obtain at the expense of the estate.") (statement of Leavitt, J.). Two months after its appointment, the Committee sought leave to retain a consulting actuary. *See* Application of the Policyholders Committee for Leave to Retain a Consulting Actuary, on a Limited Basis, at the Expense of PTNA and ANIC, dated November 26, 2013. The actuary had billed over \$269,000 to the Companies' estate as of August 2015. *See* Application of the Policyholders Committee for Leave to Obtain

Liability Insurance, at the Expense of PTNA and ANIC, dated August 21, 2015, at para 3.

The Committee also sought leave to obtain liability insurance at the expense of the Companies' estate. *See* Application of the Policyholders Committee for Leave to Obtain Liability Insurance, at the Expense of PTNA and ANIC, dated August 21, 2015. The cost to the Companies' estate for that insurance was \$150,000, and will likely be more if the proceedings continue for an additional twelve months. Including the fees of Committee counsel, which, over a two year period are likely in excess of \$1.5 million, Committee professional fees and insurance premiums have cost the Companies' estate close to \$2 million. The Committee itself cites the ballooning cost to the Companies' estate to litigate the Second Amended Plan in its Response to the Application of PTAC and Woznicki to Compel Discovery from the Rehabilitator and its Amended Formal Comment, but nevertheless asks the Court to approve its engagement – at the Companies' expense – of a \$350 per hour expert as well as any professionals she may retain (including counsel). *See* Response of the Policyholders Committee to the Application of PTAC and Woznicki to Compel Discovery from the Rehabilitator, dated October 26, 2015, at 4-5; Amended Formal Comments of the Policyholders

Committee, dated November 6, 2015, at 8-9.³ The Court should deny the Committee's request.

The Health Insurers did not object to the appointment of the Committee and its counsel, or the applications to retain an actuary and obtain liability insurance. But the Health Insurers do oppose the Committee's endeavor to engage an expert witness for the purpose of testifying on legal issues where no testimony is allowed or policy issues that are unlikely to be before the Court, and will be ably represented by the Rehabilitator if they are.

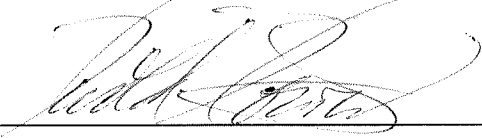
WHEREFORE, the Health Insurers respectfully request that the Application of the Policyholders Committee for Leave to Retain Expert Witness at the Expense of PTNA and ANIC be denied and that an Order be entered in the proposed form attached hereto.

³ With the filing of the Committee's Amended Formal Comment, it appears the only member of the MPRG that actively supports the proposed Second Amended Plan is the Intervenor Agents, who stand to receive commissions on Company A policies while they are run-off.

Dated: November 11, 2015

Respectfully submitted,

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 : 215.963.4824
Facsimile: 215.963.5001

*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*

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[PROPOSED] ORDER

AND NOW, this ____ day of November, 2015, upon consideration of the Health Insurers' Opposition to the Application of the Policyholders Committee for Leave to Retain Expert Witness at the Expense of PTNA and ANIC, the Court hereby ORDERS that said Application is DENIED.

MARY HANNAH LEAVITT, Judge