



IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ROBERT L. PRATTER, ACTING INSURANCE  
COMMISSIONER OF THE COMMONWEALTH  
OF PENNSYLVANIA,

Plaintiff,

v.

PENN TREATY NETWORK AMERICA  
INSURANCE COMPANY,

Defendant.

ROBERT L. PRATTER, ACTING INSURANCE  
COMMISSIONER OF THE COMMONWEALTH  
OF PENNSYLVANIA,

Plaintiff,

v.

AMERICAN NETWORK  
INSURANCE COMPANY,

Defendant.

DOCKET NO. 5 M.D. 2009

DOCKET NO. 4 M.D. 2009

MOTION IN LIMINE OF THE REHABILITATOR TO PRECLUDE FROM TRIAL  
THE EXPERT REPORT AND TESTIMONY OF DR. STEPHEN HOLLAND

Petitioner Robert L. Pratter, Acting Insurance Commissioner of the Commonwealth of Pennsylvania (the “Rehabilitator” or “Commissioner”), in his capacity as Rehabilitator of Penn Treaty Network America Insurance Company (“PTNA”) and American Network Insurance Company (“ANIC”) hereby moves this Court to preclude from trial the expert report and testimony of Dr. Stephen Holland. The reasons and grounds for this motion are set forth in the

accompanying Memorandum of Law submitted in support thereof and the exhibits set forth in the accompanying Appendix, which are incorporated by reference as if set forth fully herein.

Respectfully submitted,



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James G. Colins  
Thomas Harty  
James R. Potts  
Virginia Lynn Hogben  
Mia Meloni  
Attorney I.D. Nos. 10089, 49987, 73704, 32378,  
94948  
COZEN O'CONNOR  
1900 Market Street  
Philadelphia, PA 19103  
(215) 665-2000

Counsel for Plaintiff,  
ROBERT L. PRATTER, Acting Insurance  
Commissioner of the Commonwealth of  
Pennsylvania as Rehabilitator of PENN TREATY  
NETWORK AMERICA INSURANCE  
COMPANY and AMERICAN NETWORK  
INSURANCE COMPANY

Dated: November 12, 2010

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

**ROBERT L. PRATTER, ACTING INSURANCE  
COMMISSIONER OF THE COMMONWEALTH  
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**Plaintiff,**

**v.**

**PENN TREATY NETWORK AMERICA  
INSURANCE COMPANY,**

**Defendant.**

**ROBERT L. PRATTER, ACTING INSURANCE  
COMMISSIONER OF THE COMMONWEALTH  
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**AMERICAN NETWORK  
INSURANCE COMPANY,**

**Defendant.**

**DOCKET NO. 5 M.D. 2009**

**DOCKET NO. 4 M.D. 2009**

**MEMORANDUM OF LAW OF THE REHABILITATOR  
IN SUPPORT OF HIS MOTION IN LIMINE TO PRECLUDE THE EXPERT REPORT  
TESTIMONY OF DR. STEPHEN HOLLAND**

**I. INTRODUCTION**

Petitioner Robert L. Pratter, Acting Insurance Commissioner of the Commonwealth of Pennsylvania (the “**Rehabilitator**” or “**Commissioner**”), in his capacity as Rehabilitator of Penn Treaty Network America Insurance Company (“**PTNA**”) and American Network Insurance Company (“**ANIC**” and collectively with PTNA, the “**Companies**”), submits this memorandum of law in support of his motion to preclude the introduction of testimony of Dr. Stephen Holland

("Dr. Holland"). Specifically, Plaintiff seeks to preclude the testimony of Dr. Holland as speculative and inadmissible.

Dr. Holland is underwriting and claims expert retained by Intervenor Penn Treaty American Corporation ("PTAC") and Eugene Woznicki (collectively, the "Intervenor"). As discussed below, Dr. Holland's lengthy report lists a series of potential medical advances that may happen in the future. Undeniably, not a single actuary in this case is able to rely upon these "possible" advances. Defendant's expert, Karl Volkmar, has readily acknowledged that it would be inappropriate for him to consider such information in the preparation of his report. (See Exhibit 2, p. 3). Nonetheless, Dr. Volkmar urges this Court to consider Dr. Holland's testimony and written summation. (Exhibit 2, p. 3).

Such an evaluation, however, is inappropriate in this context. Dr. Holland is the author of *The Guide to Long-Term Care Underwriting*. He initially drafted this manual in 1990 and updated it through 9 editions. His guide specifically provides that Alzheimer's Disease and dementia are "uninsurable" conditions and continue to "pose the same risk" as they have in the past. (Exhibit 21, p. 35:12-24 to p. 37:11). However, the Intervenor argues the Court should, nonetheless, consider his testimony with respect thereto. Respectfully, the suggestion that the Court should consider uninsurable risks as part and parcel of its evaluation of whether to force continued rehabilitation of PTNA and ANIC upon the Commissioner is nonsensical. Pennsylvania Rule of Evidence Rule 703 "requires a greater foundation for the opinion and conclusions of an expert witness than a party's 'dreams' or aspirations for the future profitability of a business or professional practice." *Id.* As a consequence, Dr. Holland's report and testimony, while fascinating in many respects, simply proves to be mere conjecture and speculation inadmissible for purposes of this proceeding.

## II. FACTUAL BACKGROUND

### A. *The Consent Order and the Condition of the Company.*

On January 5, 2009 this Court entered by Consent the Order providing for the Rehabilitation of PTNA. In pertinent parts the Order provided as follows:

*The Rehabilitator shall take such actions as are necessary to correct the condition of the Company that prompted the Board of Directors request for and consent to the rehabilitation of the Penn Treaty.*

The Consent Order did not require the Rehabilitator to take steps to correct a hopeless and futile condition. Prior to the initiation of this proceeding the condition of the “company” was described as problematic, as set forth in the correspondence to the Commissioner by counsel for the Intervenors (Exhibit 5). At first the negative surplus was described as totaling \$100 million, a sum viewed as potentially rehabilitatable by the Commissioner. (Exhibit 6 at 75:2-12). By April the negative surplus based on currently available information and analysis had ballooned to \$227 million dollars, but yet again with certain adjustments in operations was viewed by the Rehabilitator as potentially rehabilitatable. (Exhibit 6 at 75:2-12).

Undeniably, matters were determined to be far worse by the fall of 2009. By then the negative surplus had exploded to more than \$1 billion dollars. (Exhibit 6 at 75:2-12). Milliman issued updated Surplus and Continuance Curve analyses and projections dated September 30, 2009 (“Milliman’s Updated Analyses”). (A true and correct copy of Milliman’s Updated Analyses is attached hereto as Exhibit 12.) Milliman’s Updated Analyses showed that PTNA and ANIC were in far worse financial condition than believed at the time the Rehabilitator petitioned the Court for rehabilitation. (Exhibit 6 at 75:2-12).

Among other things, Milliman reported that as of December 31, 2009 PTNA had a negative surplus of approximately \$2.1 billion and ANIC had a negative surplus of nearly \$137 million. The Rehabilitator retained Ernst & Young to perform a peer review of Milliman’s

Updated Analyses, and Ernst & Young reported no material differences in and/or objections to Milliman's work or the Rehabilitator's decision in favor of liquidation. (Exhibit 28).

### **III. LEGAL ARGUMENT**

#### ***A. The Court Should Bar Dr. Holland's Report And Testimony Because They Are Entirely Speculative***

The Court should bar Dr. Holland's opinions and testimony at trial because the support for the central premise of his opinion is entirely speculative.

It is axiomatic that an expert's opinion not be based on conjecture or guesswork. *Commonwealth v. Galvin*, 985 A.2d 783, 801 (Pa. 2009). An opinion may be found conjectural because it does not have an adequate basis in fact. *Hussey v. May Dep't Stores*, 357 A.2d 635, 637 (Pa. Super. 1976); *see also First Methodist Episcopal Church v. Banger Gas Co.*, 130 A.2d 517, 525 (1957) (stating that "where there is no reasonable basis for an [expert] opinion, it is valueless and hence inadmissible"); *Betz v. Erie Ins. Exch.*, 957 A.2d 1244, 1258 (Pa. Super. 2008) (requiring that expert testimony be stated with "reasonable certainty . . . to avoid speculation under the rubric of 'expert opinion'"). An "opinion may be found conjectural because it does not have an adequate basis in fact." *Hussey v. May Dep't Stores, Inc.*, 357 A.2d 635, 637 (Pa. Super. 1976). An expert's testimony "is incompetent if it lacks an adequate basis in fact" and in that case is inadmissible. *Helpin v. Trus. of the Univ. of Pa.*, 969 A.2d 601, 617 (Pa. Super. 2009). Although "an expert's opinion need not be based on absolute certainty, an opinion based on mere possibilities is not competent evidence." Pennsylvania Rule of Evidence Rule 703 "requires a greater foundation for the opinion and conclusions of an expert witness than a party's 'dreams' or aspirations for the future profitability of a business or professional practice." *Id.*

No question exists that Dr. Holland writes an interesting and thoughtful analysis of the possibilities with respect to various critical and disabling diseases in the course of his report. However, the report offers no substantive value in this proceeding.

Dr. Holland is presently the Medical Officer for Univita Health based in Phoenix, Arizona and has substantial experience in the long term care community. He has written a text captioned *Guide to Long Term Care Underwriting Manual* which has been used to underwrite 750,000 applicants for long term care insurance and had been used as the gold standard for underwriting audits for almost every major LTC carrier in the United States. (See Expert Report of Dr. Holland, Exhibit 23, p. 1). In this capacity, Dr. Holland admitted that with respect to many of the risks referenced in his report, no change or modification has been made to underwriting standards to allow them to become "insurable" conditions. For instance:

\* \* \*

Q. How does the underwriting manual suggest that a patient with mid or new dementia or probably Alzheimer's be handled from an underwriting perspective?

A. It is an uninsurable condition.

Q. And why is it an insurable condition?

A. Because it has a very – a condition like many other conditions, has a high likelihood of becoming disabled and dependant in the individual lifetime higher than can be accounted for in an insured product.

(See Exhibit 21, p. 35:12-24 to p. 36:1-2).

In fact, the only modifications made to the Guide were to adopt additional screening tools which would ensure that persons with Alzheimer's and dementia don't "wind up as a policyholder". (Exhibit 21, p. 36:3-20. See also p. 36:21-24 to p. 37:1-4). As a consequence, Dr. Holland would not recommend to an insurance company that Alzheimer's and dementia did not pose the same risk it had for the past 5 years. (Exhibit 21, p. 37:5-11).



Finally, Dr. Holland conscientiously acknowledged that he did not evaluate the claims experience of PTNA or ANIC in connection with his evaluation (Exhibit 21, p. 62:23-24 to p. 63:13) nor did he consider the underwriting which was in effect at the time to ascertain its liability. (Exhibit 21, p. 63:14-17). He further candidly acknowledged that he was unaware of any drugs or treatments that would either cure or substantially decrease the severity of dementia or Alzheimer's disease in the next 5 years. (Exhibit 21, p. 81:2-23 to p. 83:1-9).

Nonetheless, Intervenors urge the Court to consider Dr. Holland's information as relevant in the Court's consideration of PTNA and ANIC's abysmal financial status. Unfortunately, the circumstances confronting these companies are dire – "hope" and "speculation" will not salvage the day. Dr. Holland's report offers nothing but exactly that.

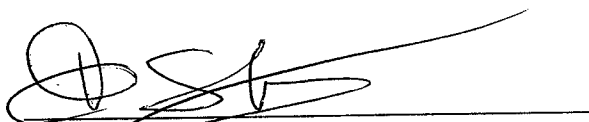
In closing, Pennsylvania Rule of Evidence Rule 703 "requires a greater foundation for the opinion and conclusions of an expert witness than a party's 'dreams' or aspirations for the future profitability of a business or professional practice." *Id.* No criticism is offered of Dr. Holland's interesting explanation of the possibilities for medical advances in the future. We are left to hope that his view of the world in fact comes to fruition. The purpose of this hearing, however, is to address what is known at the present moment – like Dr. Holland is forced to do every day in dealing with underwriting risks and to address it in the context of PTNA and ANIC. While the information he has supplied is fascinating, it is simply speculation and conjecture at the moment. One would hope that a treatment substantially delaying the impact of Alzheimer's could be found, however none is present, nor is Dr. Holland aware of any future remedy to this effect. As a result, Dr. Holland has truthfully acknowledged that he could not, in good conscience, tell his own carrier to eliminate or reduce the possibility of this risk as part of their analysis in considering policyholders. In fact, Dr. Holland was unequivocal in noting such illnesses are "uninsurable". For these reasons, it is respectfully submitted that his expert analysis simply is

not appropriate for the Court to consider when evaluating the circumstances now confronting PTNA and ANIC.

**IV. CONCLUSION**

For the foregoing reasons, the Rehabilitator respectfully requests that the Court preclude Dr. Holland's report, opinion and testimony from the hearing on this matter.

Respectfully submitted,



James G. Collins  
Thomas Harty  
James R. Potts  
Virginia Lynn Hogben  
Mia Meloni  
Attorney I.D. Nos. 10089, 49987, 73704, 32378,  
94948  
COZEN O'CONNOR  
1900 Market Street  
Philadelphia, PA 19103  
(215) 665-2000

Counsel for Plaintiff,  
ROBERT L. PRATTER, Acting Insurance  
Commissioner of the Commonwealth of  
Pennsylvania as Rehabilitator of PENN TREATY  
NETWORK AMERICA INSURANCE  
COMPANY and AMERICAN NETWORK  
INSURANCE COMPANY

**CERTIFICATE OF SERVICE**

I, Thomas S. Harty, hereby certify that on November 12, 2010, I served the foregoing Rehabilitator's Motion in Limine of the Rehabilitator to Preclude From Trial The Expert Report and Testimony of Dr. Stephen Holland, supporting Memorandum of Law and Appendices by the following means:

**By Hand Delivery:**

Douglas Y. Christian, Esquire  
Ballard Spahr LLP  
1735 Market Street, 51<sup>st</sup> Floor  
Philadelphia, PA 19103  
[christian@ballardspahr.com](mailto:christian@ballardspahr.com)

Counsel for Intervenors Penn Treaty American Corporation and  
Eugene J. Woznicki



---

Thomas S. Harty  
Cozen O'Connor  
Attorney I.D. No: 49987  
1900 Market Street, 5th Floor  
Philadelphia, PA 19103  
(215) 665-2000