

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' APPLICATION FOR AN
ORDER TO COMPEL PRODUCTION OF DOCUMENTS
IMPROPERLY WITHHELD ON THE BASIS OF PRIVILEGE**

The Health Insurers seek an order compelling the Rehabilitator to produce documents withheld on the basis of improperly asserted privileges.¹ The Rehabilitator inappropriately relies on the attorney-client privilege, work-product doctrine, deliberative process privilege, and various “regulatory privileges” to withhold two, broad categories of documents critical for evaluating the alleged feasibility of the Second Amended Plan of Rehabilitation (the “Second Plan”), which is the focus of depositions scheduled to begin October 1, 2015:

- (1) All communications with regulators concerning licensing of PTNA and ANIC in additional states (*see* Second Plan Section IV.O); and
- (2) All communications with guaranty associations concerning coverage of policies owned by individuals who reside in or are covered in states where Company B

¹ On July 17, 2015, the Rehabilitator served its Objections and Responses to the Health Insurers' Amended July 16, 2015 Requests for Admissions, Interrogatories, and Requests for Production of Documents (“Responses”). (Responses attached as Exhibit A).

or Company A are not currently licensed (*see* Second Plan Section IV.O).

(Ex. A at 28.) Further, the Rehabilitator confirmed that it has not searched, and does not intend to search, the documents of any Insurance Department personnel based on the aforementioned privileges. Not only is the Rehabilitator improperly refusing to produce documents on privilege grounds, it has failed to produce a privilege log, thus forcing the Health Insurers to challenge the inappropriate privilege assertions in a tightly circumscribed time-frame without the benefit of even a bare-bones description of the withheld documents. The Rehabilitator should not be permitted to improperly shield these documents from discovery and the Court should compel their production.

I. The Rehabilitator’s Assertion Of “Regulatory Privileges” Is Improper

This Court has expressly rejected the across-the-board “regulatory privilege” asserted by the Rehabilitator here under 40 P.S. § 65-2A (“Authority to share confidential information”), 40 P.S. § 323.5 (“Examination Reports”), and 49 P.S. 443 (“Annual and other reports; penalties”). In *Koken v. One Beacon Ins. Co.*, 911 A.2d 1021 (Pa. Cmwlth. 2006), the Insurance Commissioner of Pennsylvania, in her official capacity as liquidator of an insurance company, filed a complaint to recover alleged preferential payments received by the defendant insurance company from an insolvent insurer. The defendant filed an application to compel the Commissioner to provide answers to interrogatories and produce documents.

The Insurance Commissioner asserted the protections of the various “regulatory privileges” asserted by the Rehabilitator in the instant case. The Court stated,

The [Commissioner] is correct that each of the above-cited sections of the Act protects certain types of information submitted to the Department in particular situations. None of these sections, however, provides an across-the-board “regulatory privilege” as suggested by the [Commissioner], and none are specifically applicable to the situation at bar.

Id. at 1027. The Court further stated, “[a]s a general rule, the law of this Commonwealth does not favor evidentiary privileges.” *Id.* (citing *Joe v. Prison Health Services*, 728 A.2d 24, 31 (Pa. Cmwlth. 2001)).

II. The Rehabilitator’s Assertion Of Deliberative Process Privilege Is Improper

Equally meritless is the Rehabilitator’s assertion of the deliberative process privilege. The deliberative process privilege protects government officials from testifying about, or producing documents that contain, “confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice.” *In re Interbrach Comm’n on Juvenile Justice*, 988 A.2d 1269, 1277-78 (Pa. 2010). The privilege is not absolute and must be demonstrated on a case-by-case basis by showing that: (1) the information is internal to the agency; (2) the information is deliberative in character; and (3) that the information pre-dates the related decision, and thus “predecisional.” *Koken*, 911 A.2d at 1027.

Based on the limited information provided to date, documents withheld by the Rehabilitator are neither internal to the Department of Insurance, nor deliberative in character, nor “predecisional.”² The written communications are not internal to the Department of Insurance because they were between the Rehabilitator and persons or entities outside of Pennsylvania or outside state guaranty associations. The documents are not deliberative because the Rehabilitator was not seeking advice or recommendations from those third parties but instead was seeking support from third parties for the Second Plan, more akin to a promotional campaign. Finally, the communications are not “predecisional,” for the simple reason that they involved no decision-making or deliberation. It appears that none of the communications involved recommendations or deliberations between the Rehabilitator and a third party, but rather involved seeking cooperation from a third party to implement a decision that had already been made.

III. The Rehabilitator’s Assertion Of Attorney-Client Privilege Is Improper

The attorney-client privilege also cannot protect the withheld documents from disclosure. The attorney-client privilege protects only “confidential client-to-

² In meet and confer discussions prior to the submission of this Application, counsel for the Rehabilitator advised that they have not even collected, much less reviewed, communications or documents from the Department on the grounds that any such documents would be protected by the deliberative process privilege. Of course, without collecting and reviewing documents from the Department it is impossible to know whether there are responsive communications between the Department and persons or entities outside of the Department – which, as described above, clearly fall outside of any deliberative process protection. Based on these representations by the Rehabilitator’s counsel, it appears likely that any privilege log that may belatedly be provided will substantially understate the number of responsive documents that have been withheld on the basis of a purported deliberative process privilege.

attorney or attorney-to-client communication made for the purpose of obtaining or providing professional legal advice.” *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 (Pa. 2011). Communications with guaranty associations or with other states’ regulators are neither attorney-client communications nor confidential.

A variant of the attorney-client privilege, the common interest doctrine (also referred to as the joint defense privilege), likewise does not apply. The common interest doctrine is not an independent basis for privilege, but rather an exception to the general rule that no attorney-client privilege attaches when confidential communications are communicated in the presence of or to third parties. The doctrine assumes the existence of a valid underlying privilege.

Pennsylvania courts have strictly limited the application of the joint defense privilege to a narrow set of circumstances. *Young v. Presbyterian Homes, Inc.*, 2001 Pa. Dist. & Cnty. Dec. LEXIS 414, *5-6 (Ct. Com. Pl. Jan. 16, 2001). It applies to prevent waiver of the attorney client privilege only when communications are made in the course of a joint defense effort and the statements were designed to further that effort. *In re Condemnation of 16.2626 Acre Area*, 981 A.2d 391, 398 n.4 (Pa. Cmwlth. 2009). Here, there appears to be no joint defense agreement -- the communications at issue were with non-parties to this litigation -- and the Rehabilitator has not articulated any common legal interest shared by it and other states’ regulators or guaranty associations. Moreover,

nothing in the disclosures so far suggest that the communications the Rehabilitator seeks to shield were made between counsel for the Rehabilitator and counsel for a third party. The communications at issue relate to a request by the Rehabilitator to obtain licenses from regulators under circumstances that are not recognized by the regulator's statutes. It can be inferred, therefore, that each of the parties to the communications was receiving its own legal advice, and the communications were not made for the purpose of seeking or disseminating legal advice or coordinating legal strategy. The purpose of the joint defense privilege is to allow *attorneys* to coordinate a defense or pursue a common interest, not to shield communications among parties whose interests are not aligned. *See, e.g., Young*, 2001 Pa. Dist. & Cnty. Dec. LEXIS 414, at *8-11; *see also Schachar v. American Academy of Ophthalmology, Inc.*, 106 F.R.D. 187, 193 (N.D. Ill. 1985). In seeking the licenses at issue here, the Rehabilitator's interests are no more aligned with the regulator from whom the license is sought than the interests of any applicant for a license would be with the regulator from whom it is seeking the license.

IV. The Rehabilitator's Assertion Of The Work-Product Doctrine Is Improper

The work-product doctrine also does not shield from discovery the documents withheld by the Rehabilitator. The Pennsylvania Rules of Civil Procedure set forth the attorney work-product doctrine, as follows:

Rule 4003.3. Scope of Discovery. Trial Preparation Material Generally

Subject to the provisions of rules 4003.4 and 4003.5, a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his or her attorney, consultant, surety, indemnitor, insurer or agent. The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Pa.R.C.P. 4003.3. The rule is narrow. It "immunizes the lawyer's mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research and legal theories, nothing more." *Id.*, Explanatory Comment at ¶ 3. It does not immunize non-party communications, as the Rehabilitator is attempting to do here. The Rehabilitator appears to be withholding communications that are not "mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories." Nor do these communications appear to consist of "mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics" of a "representative" of the Rehabilitator. Other states' regulators and guaranty associations are not representatives of the Rehabilitator, and the Rehabilitator has failed to articulate why they should be considered such.

The Court should not allow the Rehabilitator to frustrate the Health Insurers'

legitimate interest in discovering the Rehabilitator's bases for the alleged feasibility of the Second Plan by broadly asserting inapplicable privileges. Its failure to produce a privilege log underscores the weakness of its privilege claims.

WHEREFORE, the Health Insurers respectfully request that their Application to Compel Production of Documents be granted and that an Order be entered in the proposed form attached hereto.

Dated: September 28, 2015

Respectfully submitted,

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By: /s/ John P. Lavelle, Jr.

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[PROPOSED] ORDER

AND NOW, upon consideration of the Health Insurers' Application for an Order to Compel Production of Documents Improperly Withheld on the Basis of Privilege, it is hereby ORDERED that:

1. Said Application is GRANTED; and
2. The Rehabilitator shall, within ten (10) days of this Order, produce to the Health Insurers the following categories of documents that have been withheld on the basis of the specific privileges challenged in the Application:
 - a. All communications with regulators concerning licensing of PTNA and ANIC in additional states; and
 - b. All communications with guaranty associations concerning coverage of policies owned by individuals who reside in or are covered in states where Company B or Company A are not currently licensed.

By the Court:

Dated: _____

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2015, I caused a true and correct copy of the foregoing Application for an Order to Compel Production of Documents Improperly Withheld on the Basis of Privilege to be served via U.S. Mail upon counsel for the Rehabilitator, and via e-mail upon the following counsel:

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/s/ John P. Lavelle, Jr.
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