IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Penn Treaty Network America Insurance Company in Rehabilitation	:	1 PEN 2009
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MEMORANDUM OF LAW IN SUPPORT OF INTERVENORS' APPLICATION FOR MULTIPLE FORMS OF RELIEF

"The more quickly and aggressively rate increases ... are implemented, the sooner PTNA's surplus can become positive and ANIC's financial position can be improved. Consideration continues to be given to how rate increases could be quickly and effectively authorized and implemented."

The Rehabilitator,
Preliminary Plan at 50,
Five years ago

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"For the past decade, the Companies have pursued rate increase filings on OldCo policies, successfully in some states but not in all. This was not for lack of actuarial justification for those filings. The Rehabilitator's evidence showed that rate regulation is governed by politics, not actuarial evidence or legal principles. The Rehabilitator has even included Pennsylvania in the list of problem states that have refused to approve the Companies' actuarially justified rate increase filings for the OldCo policies. This case presents a serious indictment of the existing system of rate regulation of long-term care insurance."

May 3, 2012 Opinion at 4

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"Want of foresight, unwillingness to act when action would be simple and effective, lack of clear thinking, confusion of counsel until the emergency comes, until self-preservation strikes its jarring gong - these are the features which constitute the endless repetition of history."

Winston Churchill

The endless repetition of history in these "rehabilitations" is the Rehabilitator's: almost *five year* unwillingness to act in terms of seeking premium rate increases after admitting that such an act was crucial to these rehabilitations; lack of clear thinking in the (very expensive) filing and then abandonment of rehabilitation plans (we are now awaiting the filing of yet

another plan); and refusal—though *twice* ordered—to correct the condition that led to the need for the rehabilitation Orders.

Appeasement. That is this Special Deputy Rehabilitator's action plan to address the "serious indictment" of the regulators, including Pennsylvania's Insurance Commissioner, who are not doing their jobs to the detriment of the companies. Keep them happy. Don't do anything that will make them uncomfortable. Don't seek as much as a penny in premium rate increases, even though other companies routinely seek and receive hundreds of millions of dollars of rate increases. File for approval the benefit-reduction plan that was represented by the Special Deputy Receiver under oath as having "the best possibility for success," but then abandon it after conversations with entities that want the companies liquidated ASAP. Spend some *$40 million* of the assets of the estates while doing literally nothing that advances the rehabilitation effort. Wait and hope with fingers crossed that the appeal, support for which was sought and obtained from same regulators who should be receiving requests for premium rate increases and granting them, will somehow make all of this go away.

Throughout the stagnant history of these "rehabilitations," the Commissioner and his designees' repetitive failures and refusals to act when they so clearly should have reveal not mere tardiness or indifference, but a calculated, abusive, and continuing effort to achieve their long-sought goal along the path of least resistance: frustration of rehabilitation and ultimate liquidation. This Court has already determined that the Rehabilitator has actually acted to frustrate the rehabilitations, a finding that was not appealed, and this Court rejected the "easy way out" the application of the corporate death penalty to these companies would provide. *Two years* ago the Court required *action* to "address and eliminate the inadequate and unfairly discriminatory premium rates for the OldCo business," agreeing "with the Intervenors that rate

increases for OldCo are critical and, accordingly, [that] the Rehabilitator must prepare an action plan for obtaining such relief." Order at 2, Opinion at 164.

The *inaction* since then reveals no serious effort to correct the condition that led to the need for rehabilitation. The inaction since then flouts the clear directives of this Court and the very rehabilitation Orders the Commissioner sought and got more than *five years* ago. The inaction since then continues to harm—not help—the companies and their policyholders. Scores if not hundreds of millions of dollars of estate assets squandered by stubborn refusal to seek justified premium rate increases. Many tens of millions of dollars of estate assets spent on too many sets of expensive professionals, with little if any transparency and accountability. And now the complete abandonment of proposed rehabilitation plans—touted in verified applications seeking their approval as "the best possibility for success"—that cost millions of dollars of estate assets to prepare, support, publicize and explain, in favor of an entirely different, nascent, and dilatory scheme bolstered by entities that want these companies liquidated for their own selfish reasons.

This Court held a conference on September 24, 2013 to discuss issues relating to a hearing on the plans filed by the Special Deputy Rehabilitator. At that hearing, counsel for the Rehabilitator suggested that "there will likely be amendments" to the filed plans and offered a pre-hearing schedule that delayed hearing on his amended plans until August 2014. Transcript at 24. When counsel for the Intervenors offered that the Rehabilitator's "proposed case management order suggests or establishes that the rehabilitator is no longer interested in approval of the plan as filed," *id.* at 13, and wondered "what's before this Court for approval at this point," *id.* at 14, the Court clearly and definitively stated: "Well, the Court can answer that. There is a plan. It was filed April 30th. That's before the Court. And the Court will approve,

disapprove or modify that plan." *Id.* The Court then directed the parties to take 30-60 days to negotiate to agreement or impasse Phase 1 of the proposed plans, the initial set of benefit reductions proposed by the Rehabilitator: "There will be negotiations ... over the next 30 or 60 days to see if agreement cannot be reached on at least Phase 1 of the plan as proposed by the rehabilitator." *Id.* at 54. In its subsequent Orders of November 7, 2013 and November 26, 2013, the Court confirmed what it had directed the parties to do when it set a conference to "hear a report on the parties' discussions to agree upon, or narrow the issues on, the plan of rehabilitation filed with the Court on April 30, 2013."

The Rehabilitator has now repudiated the plans he says he carefully prepared and proposed in April—including first phase of benefit reduction—and seeks more time to propose another yet-to-be-developed approach. He has now ditched his first plan because he says resolution of the parties' objections is not feasible and that it is more likely that there will be less opposition to a new plan than there was to the proposed plans, plans he approved after "consider[ing] a variety of potential rehabilitation plan structures and explor[ing] them in detail" and plans that, he stated under oath, offered the "best possibility for success." Proposed Plan at 1.

Undeniably, the plans as proposed, verified, and filed by the Special Deputy Rehabilitator are in their entirety insufficient and, as the Intervenors argued in their Comments of August 30, 2013, should not be approved in their entirety. But as the Intervenors also argued, and as the Court seemed to accept, the concrete first phase of the plans—benefit reductions—should be presented for approval so that *something* can be done to get these rehabilitations moving, especially in the absence of premium rate increases. But now, after these discussions with NOLHGA and others, the Special Deputy Rehabilitator offers neither benefit reductions nor rate increases. In fact, two years after the denial of the petitions to liquidate, and many months

after the Rehabilitator was ordered to file rehabilitation plans, the Special Deputy Rehabilitator currently wishes to present *nothing* for approval and instead seeks much more time to attempt to come up with something else.[1]

The Special Deputy Rehabilitator's extraordinarily wasteful flip-flopping on rehabilitation plans, ignorance of Court directives, and staunch refusal to seek actuarially justified premium rate increases from many of the very regulators upon whom he relies for work evidence an immediate need for change in approach, an immediate need for action. They lead to the inescapable conclusion that even if he is qualified to serve as the primary rehabilitator of these companies, he must be ordered to actually rehabilitate them.

These circumstances are truly unprecedented; accordingly, some of the relief sought herein is also unprecedented. But if the Court's Orders of rehabilitation and those denying the petitions to liquidate mean anything—and if the Court expects compliance therewith—this requested relief should be granted:

- Prohibition against further unreasonable delay;
- Immediate and aggressive pursuit of actuarially justified premium rate increases;
- Filing of plans of rehabilitation on or before July 1, 2014 and an expedited schedule for approval, disapproval or modification of the plans;
- The personal involvement of the Insurance Commissioner in the rehabilitation effort, including attendance at meetings and court conferences;
- Complete transparency, reporting, monitoring, justification, and approval—by the Court or a designated Master—of the expenditures of the rehabilitation that are

[1] This is particularly ironic and frustrating to the Intervenors because they basically begged the Rehabilitator to take a little more time to file an appropriate plan back in April, and he simply refused to do so.

charged to the estates, including but not limited to those of the Insurance Department, the Special Deputy Receiver, the Chief Rehabilitation Officer, professionals, and consultants, as well as all contracts and budgets relating thereto;

- Reimbursement by the Department of the funds it has been paid out of these estates and a prohibition against further payments to the Department;
- Complete transparency with regard to communications with the NAIC and regulators regarding the rehabilitation and the appeal, including all information and documents sought in the Intervenors' prior filing seeking such information, as well as NOLHGA and others with whom the Rehabilitator deals in the rehabilitations;
- Complete transparency with regard to the communications, analyses and actions of the rehabilitation team;
- Completion of Mr. Volkmar's actuarial analyses at the expense of the estates;
- Reimbursement of fees and expenses incurred by the Intervenors; and
- Prohibition against the Rehabilitator using the same counsel to represent him in both the rehabilitation and the appeal.

Article V of The Insurance Department Act of 1921, Act of May 17, 1921, P.L. 789, added by Section 2 of the Act of December 14, 1977, P.L. 280, as amended, 40 P.S. §§ 221.1-221.63 ("Article V") vests in the Commonwealth Court the exclusive jurisdiction and

authority to determine delinquency proceedings,[2] supervise the Rehabilitator in rehabilitating an insurer, and guide the rehabilitation process through to its successful conclusion including by modifying rehabilitation plans and approving them as so modified, and by making the finding that rehabilitation has been accomplished and releasing a company from rehabilitation. *See* Sections 504(a) and (d), 516(d), and 518(b) of Article V, 40 P.S. §§ 221.4(a) and (b), 221.16(d), 221.18(b).

Specifically, Article V vests in the Commonwealth Court the exclusive authority to issue rehabilitation orders, supervise the rehabilitation process, direct the administration of the insurer's assets pursuant to its orders and to make and enforce a decision rejecting a liquidation petition and continue rehabilitation by issuing appropriate orders. *See* 40 P.S. §§ 221.4 (endowing the Commonwealth Court with exclusive jurisdiction to "entertain, hear or determine delinquency proceedings" under Article V); 221.5 (authorizing the Commonwealth Court to issue restraining orders, preliminary and permanent injunctions, and other orders as deemed necessary and proper to prevent, *inter alia*, interference with the proceeding, waste of the insurer's assets and any other "threatened or contemplated action that might lessen the value of the insurer's assets or prejudice the rights of policyholders, creditors, or shareholders, or the administration of the proceeding"); 221.6(c)(i) (providing that "[a]n insurer shall have the right to engage legal counsel for defense of and appeal with respect to a delinquency proceeding," and authorizing the Commonwealth Court to approve payment of reasonable costs and fees therefore from the general assets of the insurer); 221.7 (requiring that "[i]n any proceeding under this article, the commissioner and his deputies shall be responsible on their official bonds for the

[2] "'Delinquency Proceeding'" means any proceeding instituted against an insurer for the purpose of liquidating, rehabilitating, reorganizing or conserving such insurer, and any summary proceeding under sections 510 through 513." Section 503 of Article V, 40 P.S. § 221.3.

faithful performance of their duties[,] and providing "[i]f the court deems it desirable for the protection of the assets, it may at any time require an additional bond from the commissioner or his deputies."); 221.12 (authorizing the Commonwealth Court to issue seizure orders and define the duration of such orders, to order a hearing and review and vacate the order); 221.13 (authorizing the Commonwealth Court to hold summary proceedings and control the confidentiality of documents related to such hearings); 221.15 (authorizing the Commonwealth Court to determine if grounds for rehabilitation exist and to issues rehabilitation orders "after a hearing before the court or pursuant to a written consent of the insurer" and to direct the Insurance Commissioner to administer the assets of the insurer "under the orders of the court"); 221.16 (authorizing the Commonwealth Court to approve, disapprove or modify and approve as modified a rehabilitation plan, and directing the rehabilitator to carry out the plan pursuant to the Commonwealth Court's approval); 221.17 (authorizing the Commonwealth Court to order the rehabilitator to take action respecting pending litigation against the rehabilitator "as the court deems necessary in the interest of justice and for the protection of creditors, policyholders, and the public"); 221.18, .20 (requiring the Commonwealth Court to conduct a hearing to determine whether a rehabilitation should be converted to a liquidation, empowering the Court to terminate the rehabilitation at any time upon its own motion and findings, and authorizing the Commonwealth Court to issue orders governing the liquidation).

An element common to several of the foregoing sections is the protection of the insurer's assets and the supervisory role that the Commonwealth Court has in directing the Commissioner to administer the assets of the insurer "under the orders of the court." Where, as here, the actions of the Commissioner and his Deputy are wasting the insurer's assets, the Commonwealth Court can and should issue appropriate orders to rectify that situation.

In accordance with the broad authority that Article V vests in this Court to oversee rehabilitations, the Supreme Court of Pennsylvania has affirmed this Court's authority to issue orders concerning several different forms of relief and to direct a rehabilitator to submit a rehabilitation plan addressing perceived obstacles. *See Foster v. Mut. Fire, Marine and Inland Ins. Co.* ("*Mutual Fire II*"), 531 Pa. 598, 605-607, 614 A.2d 1086, 1089-90 (1992). For example, in the Mutual Fire Insurance Company rehabilitation, the Commonwealth Court's directives to the Commissioner included: (i) "to prepare a notice of hearing to be sent to all known policyholders and creditors indicating the procedure for obtaining the plan and raising objections prior to a Court hearing on its approval"; (ii) to file a report on the progress of the rehabilitation; (iii) "to submit to the court a schedule of tasks to be performed in order to complete the evaluation" – with regard to which the Commonwealth Court specified several tasks in advance; (iv) appointment of a deputy rehabilitator upon "close consultation, pursuant to Section 515(c) of the Act"; and (v) upon review of the Rehabilitator's report that the "1987 Plan was not feasible for several reasons," a directive that the Rehabilitator submit a modified plan that would include a provision to trigger applicable state insurance guarantee funds (both in Pennsylvania and other states) and a provision for proportionate periodic payments of policyholders' claims. *Mutual Fire II*, 531 Pa. 598, 605-07, 614 A.2d 1086, 1089-90.

This Court has also long held that "the benefits of rehabilitation-its flexibility and avoidance of inherent delays-are preferable to the static and cumbersome procedures of statutory liquidation." *Grode v. Mutual Fire, Marine & Inland Ins. Co.* ("*Mutual Fire I*"), 132 Pa.Cmwlth. 196, 572 A.2d 798, 803 (1990).

Pursuant to Article V and the *Mutual Fire* decisions, this Court clearly has the authority to: issue orders necessary to rehabilitate the Companies without delay; protect the

insurer's assets; prevent the Commissioner, his Deputy, or anyone else from wasting the insurer's assets; and to order the reimbursement of Intervenors' fees and expenses necessary for them to aid the Companies and the Court in this process.

In addition, "[e]very court has the inherent power to schedule disposition of the cases on its docket to advance a fair and efficient adjudication." *Luckett v. Blaine*, 850 A.2d 811, 819 (Pa. Cmwlth. 2004); s*ee also* Rule 227.1(a)(5) (trial court has authority to "enter any other appropriate order" after trial); *Tanglwood Lakes Community Ass'n v. Laskowski*, 420 Pa. Super. 175, 178, 616 A.2d 37, 39 (1992) (holding that a trial court's order remained in effect, and thus the trial court had authority to impose sanctions when the party failed to comply with the order, despite post-trial motions and the subsequent appeal because the party had never obtained a stay of the order from any court); *Tucker v. Tours*, 602 Pa. 147, 153, 977 A.2d 1170, 1174 (2008) (stating that absent a supersedeas or a stay, the lower court can enforce its orders upon the parties, even while an appeal is pending) (citing Pa. R. App. P. 1701(b)(2)).

Moreover, the Court has inherent authority to require compliance with its Orders of January 6, 2009 including through the issuance of the Order of May 3, 2012 and the enforcement of that Order as well. The Rehabilitator has been subject to the Court's rehabilitation Orders of January 6, 2009 throughout these proceedings. He consented to the Court's inherent authority to control the proceedings before it, including setting deadlines and ordering a plan of rehabilitation, when he requested a rehabilitation order from this Court and failed to object to the Court's January 6, 2009 Orders requiring him to prepare and submit a rehabilitation plan and to submit a preliminary plan of rehabilitation within 90 days thereof.

As explicitly recognized in *Legion*, filing liquidation petitions does not relieve the Rehabilitator of his obligation to continue to pursue rehabilitation in accordance with this

Court's rehabilitation orders. *See Koken v. Legion Ins. Co.*, 831 A.2d 1196, 1244 (Pa. Cmwlth. 2003), *aff'd sub nom. Koken v. Villanova Ins. Co.*, 583 Pa. 400, 878 A.2d 51 (2005) ("[i]f the Insurance Department obtains consent to a rehabilitation, it has a responsibility to move directly on a plan that will correct the insurer's problems. . . ."). Furthermore, "[o]nce the course of rehabilitation has been chosen by the Insurance Commissioner, it must be pursued unless and until the Commissioner satisfies this Court that the rehabilitation should be terminated under Section 518(a) of Article V and a liquidation order entered." *Legion* at 1129. This Court determined that the Rehabilitator "has not undertaken a meaningful effort to rehabilitate the Companies and, to the contrary, has acted to frustrate rehabilitation." Opinion at 1. The Court's denial of the petitions to liquidate reaffirmed its initial rehabilitation orders and the Court remains authorized to enforce those orders and to enforce its May 3, 2012 Order by granting the relief requested herein.

Accordingly, Intervenors respectfully request that a hearing on the Application be scheduled and that the multiple forms of relief sought in this Application be granted.

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