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

RESPONSE OF THE POLICYHOLDERS COMMITTEE TO THE APPLICATION PTAC AND WOZNICKI TO COMPEL DISCOVERY FROM THE REHABILITATOR

The Policyholders Committee, by and through its undersigned counsel, hereby submits this Response to the Application of Eugene J. Woznicki and Penn Treaty American Corporation (collectively "PTAC") for an order to compel discovery from the Rehabilitator, which, if granted, may negatively affect the interests of the Committee and policyholders generally.

1. At page 31, ¶86 of its Application to Compel, PTAC argues that the Rehabilitator's common interest agreements with various parties, including the Policyholders Committee, are not valid because the parties' interests are not perfectly aligned. While the Committee filed Formal Comments concerning the Second Amended Plan, those Comments sought relatively minor modifications of the Second Amended Plan. The Committee may amend its Formal Comments to request that, if the Court finds that the cost of implementing the Second Amended Plan is

disproportionate to the number of policyholders who would benefit and the amount of benefit they would receive, then both Company A and Company B should be liquidated. The probable size of Company A will be an important consideration and will be investigated by the Rehabilitator before the next phase of hearings on the Plan. Notwithstanding any such amendment, the Committee continues to believe that the Second Amended Plan is preferable to any alternative that PTAC and Broadbill have proposed. Thus, the Committee continues to be aligned with the Rehabilitator in opposing the relief sought by PTAC and Broadbill concerning the Plan. The Committee is also generally aligned with the Rehabilitator in opposing the Health Insurers' proposed modifications concerning Uncovered Claims, NAPM allocation of assets, premium rate increases, and applicability of the so-called Moody's adjustment.

To establish a common interest extension of the attorney-client privilege, it is only necessary to show that the communications were made in the course of a joint litigation effort, the communications were in furtherance of that effort, and the attorney-client privilege was not otherwise waived. *In re Condemnation of 16.2626 Acre Area*, 981 A.2d 391, 397 n. 4 (Commw. Ct., 2009); *Executive, Risk Indemnity, Inc. v. Cigna Corp.*, 81 Pa.D.&C. 4th 410, 420-426 (Phila. 2006).

It is *not* necessary for the interests of parties to a common interest agreement to be perfectly aligned. It is sufficient that the parties have a *common legal interest in the shared communication*. *In re Teleglobe Communications Corp.*, 493 F.3d 345, 364 (3d Cir. 2007); accord, *U.S. v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir.1979), *cert. denied,* 444 U.S. 833, 100 S. Ct. 65, 62 L. Ed. 2d 43 (1979); *see also*, *United States v. American Telephone & Telegraph Co.*, 206 U.S. App. D.C. 317, 642 F.2d 1285, 1298 (D.C.Cir.1980) (criticizing earlier opinions that employed a narrow definition of "common interests" and restricted the concept to situations in which the relationship of the parties was similar to that between co-parties in a suit).

The fact that parties with common interests may also have some adverse interests does not destroy the common-interest privilege as to communications regarding the common interest. *Eisenberg v. Gagnon*, 766 F.2d 770, 787-88 (3d Cir. 1985); accord, *Securities Investor Protection Corp. v. Stratton Oakmont, Inc.*, 213 B.R. 433, 438 (S.D.N.Y. Bkrtcy. 1997) ("In joint defense situations, parties purposely retain separate counsel in order 'to avoid difficulties resulting from actual or potential conflicts of interest among the parties.") *See also Condemnation of 16.2626 Acre, supra,* 981 A.2d at 397, citing *Young v. Presbyterian Homes*, 50 Pa.D.&C.

4th 190, 198-199 (Lehigh 2001) ("Frequently, co-defendants with essentially the same interests must retain separate counsel to avoid potential conflicts over contingent or subsidiary issues in the case. To avoid duplication of efforts, such defendants should be able to pool their resources on matters of common interest."); and *Executive Risk*, supra, 81 Pa.D.&C. 4th at 426 (various insurers who provided excess professional liability insurance to Cigna had a common interest in defending against Cigna's claim for coverage in connection with multi district litigation alleging that managed care organizations operated by Cigna failed to provide health care coverage where medically necessary [notwithstanding actual or potential conflicts among themselves]).

2. This Court has power under Pa.R.C.P. 4012 to prevent useless discovery and under Pa.R.C.P. 4011(b) to limit discovery that creates unreasonable burden and expense to the estates of PTNA and ANIC. Not only the policyholders but all creditors in this case have a strong interest in avoiding the imposition of unreasonable burden and expense on the estates, including discovery that has little or no value. Assuming PTAC will continue be reimbursed by the estates, the expense of discovery will include both the Rehabilitator's and PTAC's attorneys and litigation support services.

The intervenor Health Insurers presumably have a similar interest in avoiding unreasonable burden and expense to the estate, because they will be subject to assessment in the future for the difference between allocable assets and premiums on the one hand and claims on the other. Besides conserving the estates, the policyholders and other existing and future creditors have a strong interest in bringing this proceeding to a conclusion as soon as practicable.

At page 23, ¶63 PTAC justifies discovery concerning the 2013 Plans on the ground that "they present alternative methods of rehabilitating the Companies and support objections for modifying the Second Amended Plan to include benefit reductions as an immediate first phase of rehabilitation." PTAC insinuates that the 2013 Plans are viable because the Rehabilitator once described them as "the best possibility for success." However, the Rehabilitator did not represent that the 2013 Plans were viable. On the contrary, the Rehabilitator stated:

> While the Plan does provide the potential for the future restoration of full policy benefits to any policyholders remaining at that time and the payment of all other creditor claims in full, *the Rehabilitator does not anticipate at this time and based on current information that this is likely to occur.* Therefore, *the Rehabilitator is not anticipating that the company will be able to exit rehabilitation and recommence issuing new business.* However, if sufficient rate increases are approved and implemented and/or financial results are

> otherwise significantly better than projected, an exit from rehabilitation may be possible.

April 30, 2013 Plans for the Rehabilitation of PTNA and ANIC, at page 20 (emphasis supplied).

At the December 17, 2013 scheduling conference, the Rehabilitator's counsel advised the court that about mid-way through the third MPRG meeting it was "pretty evident that the objections to the April 30th plan were going to prove insurmountable" and that the participants had begun to consider a "good bank/bad bank plan" as an alternative. 12/17/13 Tr. at page 4 line 19 to page 5 line7. Since that time, the Companies' assets have declined as claims have continued to be paid, and the Companies' projected GPR has increased as PWC has refined its work.

To accomplish its goal, PTAC must undermine and discredit PWC's current assumptions and projections and demonstrate the superiority of the assumptions and projections on which the 2013 Plans were based. In addition, PTAC must overcome all the objections that were raised to the 2013 Plans. In effect, PTAC contemplates a dual hearing on the Second Amended Plan and the 2013 Plans, without any basis to believe that the 2013 Plans are not already dead on arrival.

Importantly, there is no time for experimentation with requests for rate increases on behalf of these companies. Although PTAC continually

cites the increases obtained by solvent insurers, PTAC has not cited any instance where deeply insolvent, closed block companies in receivership, such as PTNA and ANIC, have been rehabilitated by obtaining massive rate increases. For that reason, the value of such evidence is uncertain and speculative, rather than probative. Is it an appropriate use of estate assets to make the Rehabilitator perform all the necessary factual investigation to verify and admit all the rate increase data that PTAC has collected (other than rate increases in Pennsylvania)?

PTAC continually charges the Rehabilitator with bad faith and sabotage regarding rate increases and hopes to support its charges by delving into the Rehabilitator's internal communications and communications with regulators in other states. However, the pursuit of such evidence is of no real use, if there is no precedent for obtaining massive rate increases to rescue long term care insurers in receivership like PTNA and ANIC. Why, then, should the assets of the estate be spent on this kind of discovery?

From the point of view of policyholders, the above-mentioned aspects of PTAC's discovery entail unreasonable burden and expense to the estate on whose assets the policyholders have claims. Further, they appear very likely to prolong this proceeding. If it becomes necessary to litigate the Rehabilitator's motives, the credibility of older versus more recent actuarial

projections and the objections to the 2013 Plans as part of the hearing on the Second Amended Plan, additional discovery will be needed and additional time and expense to prepare for depositions and trial will also be needed beyond what is already scheduled. If the hearing on the Second Amended Plan takes as long as the hearing on the October 2, 2009 petition for liquidation, the Committee fears there will be nothing left to rehabilitate.

CONCLUSION

For all the foregoing reasons, the Policyholders Committee respectfully requests: (a) that the Court uphold the Rehabilitator's common interest agreement with the Committee; and (b) limit the discovery sought by PTAC so as to bring this process to a speedy conclusion and avoid

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unreasonable burden and expense to the estates of PTNA and ANIC, by precluding discovery concerning the 2013 Plans and the pursuit of evidence concerning rate increases that will be of little or no consequence to the approval or disapproval of the Second Amended Plan.

Respectfully submitted,
OBERMAYER REBMANN
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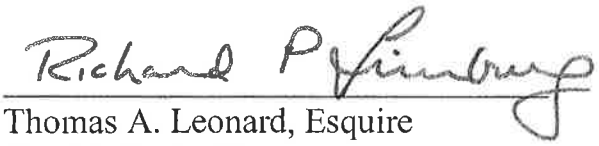

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Dated: October 26, 2015

CERTIFICATE OF SERVICE

I certify that on October 26, 2015, I caused a true and correct copy of the foregoing Response to be served on the following persons by email at the email addresses indicated below:

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[PROPOSED] ORDER

AND NOW, this ____ day of _____, 2015, upon consideration of the Response of the Policyholders Committee to the Application of Eugene J. Woznicki and Penn Treaty American Corporation (collectively "PTAC") for an order to compel discovery from the Rehabilitator, and the responses thereto, it is hereby ORDERED:

(a) that PTAC's request for documents covered by the Rehabilitator's common interest agreement with the Policyholders Committee is DENIED;

(b) that PTAC's request for discovery concerning the 2013 Plans is DENIED; and

(c) that PTAC's request for admissions concerning rate increases and for communications concerning rate increases is DENIED.

BY THE COURT:

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Mary Hannah Leavitt, J.