

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

**PRICEWATERHOUSE COOPERS RESPONSE IN OPPOSITION TO THE
HEALTH INSURERS' APPLICATION FOR AN ORDER TO COMPEL
PRODUCTION OF DOCUMENTS AND EXTEND TIME FOR
CHALLENGING PRODUCTION BY PRICEWATERHOUSE COOPERS**

The Health Insurers' Application for an Order to Compel Production of Documents and Extend Time for Challenging Production by Pricewaterhouse Coopers should be denied because Pricewaterhouse Coopers ("PwC") has complied (including producing more than 30,000 pages to date) and continues to comply with the Health Insurers' Subpoena *Duces Tecum*. Any request for extension of the time to contest PwC's production and claims of privilege should also be denied as premature because the Health Insurers have not yet reviewed PwC's production and have not yet taken Larry Rubin's deposition.

The Health Insurers' representation and implication that PwC has not complied with their Subpoena in more than five (5) months is incorrect. Discovery in these proceedings was stayed for many months. It was only after the Court held a scheduling conference and issued its Scheduling Order on July 30, 2015 and the

Protective Order was filed on August 4, 2015 that any response to the Subpoena was due. PwC has responded to the Health Insurers' Subpoena and is in the process of producing documents responsive to the Subpoena (including producing more than 30,000 pages to date). Further, and more importantly, the vast majority of working papers, data underlying PwC's expert report, and other documents that the Health Insurers have sought from PwC are already in their possession.¹

PwC's Role in the Proceedings

PwC has been retained by the Rehabilitator in two distinct capacities: (1) as an actuary to provide ongoing actuarial opinions to be included in PTNA's and ANIC's annual financial statements; and (2) to provide the Rehabilitator with an expert report for use in creating the Second Amended Plan and for use in these proceedings. PwC's and Larry Rubin's role as an expert create certain limitations with respect to discovery pursuant to Pa.R.C.P. 4003.5. With respect to its role as an actuary, PwC has provided its actuarial reports for 2012 and 2013. The permissible discovery is limited to the Second Amended Plan, and is limited and "should be targeted [and] narrow." See Conf. Tr. at 36:6-7 (Feb. 25, 2015). PwC's role as an actuary is not implicated in such discovery. PwC has not hid behind its status as an expert. Instead, it has complied with the Subpoena by

¹ The documents have been available on a ShareFile located at <https://ptna.securevdr.com/> and has been made available to the Health Insurers for months via a unique name and password.

providing discoverable documents related to the Second Amended Plan regardless of the role it has played.

Discovery of Expert Materials

A number of the documents included in the Request for Production of Documents that the Health Insurers have demanded in their Subpoena are not discoverable under Pa.R.C.P. 4003.5(a)(4), which provides:

A party **may not discover the communications between another party's attorney and any expert** who is to be identified pursuant to subdivision (a)(1)(A) or from whom discovery is permitted under subdivision (a)(3) regardless of the form of the communications, except in circumstances that would warrant the disclosure of privileged communications under Pennsylvania law. **This provision protects from discovery draft expert reports and any communications between another party's attorney and experts relating to such drafts.**

(emphasis added). Pursuant to this recently amended rule, any drafts of the expert reports and any communications that they have had with counsel for the Rehabilitator are not discoverable. The Health Insurers have specifically demanded that PwC produce "drafts" and "communications" which they "may not discover" pursuant to Pa.R.C.P. 4003.5(a)(4). For example, the Health Insurers have sought "drafts" of its expert report (Request No. 1); working papers (which are nothing more than drafts that were incorporated in the final expert report) (Request No. 2); communications regarding the analysis of the valuation of assets

projected to be allocated to Company B (Request No. 6); communications relied upon in connection with the testimony PwC will provide on behalf of the Rehabilitator (Request No. 7); and communications regarding the Second Amended Plan on which PwC was consulted including NAPM, risk classes, capitalization of Company A (Request No. 8). These documents are simply non-discoverable per Pa.R.C.P. 4003.5(a)(4). Moreover, because these documents are non-discoverable, PwC is not required to provide a privilege log because a privilege log is only necessary for documents that withheld on a basis of some asserted privilege.

Discovery of Privileged Documents

PwC is further constrained from producing certain of the documents demanded by the Health Insurers because the Rehabilitator has asserted the deliberative process privilege over such documents. As the holder of the privilege, the Rehabilitator is the only one who can assert the privilege. The Health Insurers' demand that PwC produce documents as to which the Rehabilitator has asserted its privilege is wholly inappropriate as it is nothing more than an attempt to circumvent the privilege. This Court should not allow the Health Insurers to simply require PwC to produce otherwise privileged documents that they cannot receive from the Rehabilitator. For example, the Health Insurers could not demand documents protected by attorney-client privilege by serving a subpoena on the

attorney when the client has objected to such requests directed to him or her based on the attorney-client privilege. This is the same exact tactic: serving a subpoena to the other party of privileged communications (in this case PwC and Rubin) when the holder of the privilege (the Rehabilitator) has raised the privilege as an objection to production (in this case the deliberative process privilege).

Further, it would be unduly burdensome and duplicative to require PwC to provide a privilege log for the same documents subject to a privilege log produced by the Rehabilitator. As the holder of the privilege, it is the Rehabilitator who has to provide a privilege log. Requiring PwC and Rubin to provide an identical privilege log would be duplicative, unduly burdensome and an unnecessary waste of resources.

Specific Responses to the Health Insurers' Requests Table

In response to the chart submitted by the Health Insurers, PwC states as follows:

Request No.	Request Text	Health Insurers Comment
2h	All PwC and Rehabilitator working papers used to develop: Estimate of projected assets of PTNA as of December 31, 2015 assuming the Base Case.	PwC responded that it will produce non-privileged documents but has thus far failed to do so.

PwC Response: The 2013 Expert Reports explains in great detail how PwC

determined the projected assets of PTNA as of December 31, 2015 assuming the Base Case. The underlying data supplied by PTNA has been made available on the ShareFile months ago or is in the process of being produced. Any other "working papers" (undefined) are non-discoverable as drafts pursuant to Pa.R.C.P. 4003.5(a)(4).

Request No.	Request Text	Health Insurers Comment
6	All documents and communications regarding the analysis of the valuation of assets projected to be allocated to Company B under the Second Amended Plan.	PwC responded that it will produce non-privileged documents but has thus far failed to do so.

PwC Response: The documents and communications in this Request are non-discoverable as drafts pursuant to Pa.R.C.P. 4003.5(a)(4) or are protected by the deliberative process privilege raised by the Rehabilitator. Hence, PwC stated that it would not produce and has not produced any documents in response to this Request.

Request No.	Request Text	Health Insurers Comment
2f	All PwC and Rehabilitator working papers used to develop: Net Accumulated Premium Method, including precedents used in the development of same.	PwC claims to have no working papers, even though this is the subject of Appendix C to the 2013 Actuarial Report.

PwC Response: The 2013 Expert Reports explains in great detail how PwC

developed the Net Accumulated Premium Method ("NAPM") and the reason for doing so (compliance with this Court's Order to ensure fair treatment of all policyholders). In developing NAPM, PwC simply did not generate any "working papers" (undefined). NAPM was developed based on PwC and Rubin's experience and consultations with PwC team members. As such there simply are no documents responsive to this Request. Any underlying data supplied by PTNA and ANIC and used in NAPM has been made available on the ShareFile months ago or is in the process of being produced.

Request No.	Request Text	Health Insurers Comment
2c	All PwC and Rehabilitator working papers used to develop: Statutory reserves (based on assumptions as of December 31, 2007) organized on a: i. Seriatim basis; ii. Split between Company A and Company B assuming the Base Case; and iii. Risk Class basis.	PwC claims to have no working papers, even though it issued actuarial opinions for PTNA and ANIC on their statutory reserves (See 2013 Actuarial Report, Appendix G)
2d	All PwC and Rehabilitator working papers used to develop: Re-cast Statutory Reserves (based on current assumptions determined as of December 31, 2007) organized on a: i. Seriatim basis; ii. Split between Company A and Company B assuming the Base Case; and iii. Risk Class basis.	

PwC Response: PwC was not retained to "develop" the statutory reserves and the

re-cast statutory reserves. Instead, it used the locked-in statutory reserves as of December 31, 2007 provided by PTNA and ANIC. Consequently, no "working papers" were used to "develop" the statutory reserves and there are documents responsive to this Request.

Request No.	Request Text	Health Insurers Comment
2a	All PwC and Rehabilitator working papers used to develop: Gross Premium Reserve organized on a: <ul style="list-style-type: none"> i. Seriatim basis; ii. Split between Company A and Company B assuming the Base Case; and iii. Risk Class basis. 	PwC claims to have no working papers, even though this is the subject of Appendix A and Appendix G to the 2013 Actuarial Report.

PwC Response: PwC has already provided "working papers" used to develop the Gross Premium Reserve on a seriatim basis. PwC has not developed the Gross Premium Reserve organized on a "split between Company A and Company B assuming the Base Case" or on a "Risk Class Basis." Consequently, no "working papers" were used to "develop" the Gross Premium Reserve organized on these two bases and there are no further documents responsive to this Request.

Request No.	Request Text	Health Insurers Comment
2b	All PwC and Rehabilitator working papers used to develop: Adverse deviation assumptions used in Gross Premium Reserve calculation.	PwC claims to have no working papers, even though this is the subject of Appendix A and Appendix G to the 2013 Actuarial Report.

PwC Response: The 2013 Expert Reports explains in great detail how PwC

developed the adverse deviation assumptions used in Gross Premium Reserve calculation. PwC has already provided "working papers" used to develop these adverse deviation assumptions. The underlying data supplied by PTNA and ANIC has been made available on the ShareFile months ago or is in the process of being produced. Any other "working papers" (undefined) are non-discoverable as drafts pursuant to Pa.R.C.P. 4003.5(a)(4).

Request No.	Request Text	Health Insurers Comment
8	All documents and communications regarding the Second Amended Plan on which PwC was consulted including NAPM, risk classes, capitalization of Company A.	PwC objects to this request on various privilege grounds and on the basis that the documents should be sought from the Rehabilitator. It appears that PwC does not intend to produce any documents on this topic.

PwC Response: The documents and communications in this Request are non-discoverable as drafts pursuant to Pa.R.C.P. 4003.5(a)(4) or are protected by the deliberative process privilege raised by the Rehabilitator. Hence, PwC stated that it would not produce and has not produced any documents in response to this Request.

Request to Extend the Time for Objections

The Court should similarly decline to extend the time for the Health Insurers to challenge PwC's production, as such a request is premature. The Health Insurers

have not yet reviewed PwC's production and have not deposed Larry Rubin. Once those two steps are concluded and the Health Insurers may have no basis for challenging PwC's production. As such, it is simply too early for the Court to decide whether to extend the time or not. If the Health Insurers determine at a later date that still need to challenge PwC's production, then the Court can simply permit them to do so at that time.

WHEREFORE, Pricewaterhouse Coopers respectfully requests that the Court deny the Health Insurers' Application for an Order to Compel Production of Documents and Extend Time for Challenging Production by Pricewaterhouse Coopers.

Dated: October 26, 2015

Respectfully submitted,

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[PROPOSED] ORDER

Upon consideration of the Health Insurers' Application for an Order to Compel Production of Documents and Extend Time for Challenging Production by Pricewaterhouse Coopers, and any or all responses thereto, it is ORDERED, ADJUDGED and DECREED that the application is DENIED.

BY THE COURT,

DATED: _____, J.