IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In re: Penn Treaty Network America Insurance Company and In re: American Network Insurance Company	1 PEN 2009 and 1 ANI 2009

RESPONSE OF THE POLICYHOLDERS COMMITTEE TO THE REHABILITATOR'S *IN LIMINE* APPLICATION CONCERNING THE APPLICABLE STANDARD OF REVIEW

The Committee of Policyholders of Penn Treaty Network America Insurance Company ("PTNA") and American Network Insurance Company ("ANIC"), by their undersigned counsel, hereby respond to the Rehabilitator's *in limine* application concerning the standard of review applicable to the Second Amended Plan of Rehabiliation.

Cases interpreting 42 Pa.C.S. §221.18(a) have not focused on the phrase "whenever [the rehabilitator] has reasonable cause to believe." A plain reading of this phrase supports the Rehabilitator's contention that she need not prove by a preponderance of the evidence that continued rehabilitation would be futile or would substantially increase the risk of loss to policyholders.

In Fourth Amendment jurisprudence, "probable cause" does not require proof beyond reasonable doubt or by preponderance of the evidence, but only a "fair probability" on which "reasonable and prudent [people], not legal technicians, act." *Florida v. Harris*, 133 S. Ct. 1050, 1055 (U.S. 2013); *Wilson v. Russo*, 212 F.3d 781, 789 (3d Cir. 2000); *Welfel v. Luzerne County*, 2014 U.S. Dist. LEXIS 180157 at *20-*21 (M.D. Pa. Dec. 2, 2014). The Pennsylvania Supreme Court has defined "probable cause" as facts and circumstances sufficient to warrant a person of reasonable caution in the belief that an offense has been committed," based on the totality of circumstances. *Commonwealth v. Rogers*, 578 Pa. 127, 849 A.2d 1185, 1192 (Pa. 2004);

Commonwealth v. Gray, 509 Pa. 476, 503 A.2d 921 (1985). As the Third Circuit Court of Appeals has noted, "all interpretations of probable cause require "a belief of guilt that is *reasonable as opposed to certain.*" *Wright v. City of Philadelphia*, 409 F.3d 595, 602 (3d Cir. 2005) (emphasis supplied).

"Reasonable belief" is considered a lesser standard than "probable cause" and may be based on a "consideration of common sense factors and the totality of the circumstances." *United States v. Pruitt*, 458 F.3d 477, 483-484 (6th Cir. 2006); *United States v. Magluta*, 44 F.3d 1530, 1535 (11th Cir. 1995); *United States v. Pitts*, 2015 U.S. Dist. LEXIS 17115 at *22-*23 (E.D. Pa. Feb. 12, 2015).

Outside the criminal context, federal law recognizes that an administrative search or safety code inspection does not require as strong a showing of probable cause as an arrest or a search warrant. *Secretary of Labor, United States Department of Labor v. International Matex Tank Terminals-Bayonne*, 928 F.2d 614, 621 (3d Cir. 1991).

There is nothing in the concept of "reasonable belief" in §221.18(a) that requires the rehabilitator to prove by a preponderance of evidence that continued rehabilitation "would substantially increase the risk of loss to creditors, policy and certificate holders, or the public, or would be futile." Rather, the statute requires only that the rehabilitator establish that she has a *reasonable belief* that continued rehabilitation would be either ineffective or potentially injurious to policyholders. To prove by a preponderance of the evidence that rehabilitation would be futile might indeed require showing that efforts to rehabilitate have been made and have failed. However, proof of actual failure is not required to establish a reasonable belief of futility.

Proof of actual failure would also be inconsistent with the statutory provision that a petition under §221.18(a) has the same effect as a petition under §221.20. Section 221.20 does

not require proof that rehabilitation has failed before an insolvent insurer can be liquidated. Section 221.20 requires proof that one of the statutory grounds for liquidation exists, and nothing more. Because the statutory grounds for liquidation are identical to the statutory grounds for rehabilitation, *see* §221.19, one cannot derive from the statute a preference for rehabilitation over liquidation. There is no question that the choice whether to petition for rehabilitation under §221.15 or to petition for liquidation under §221.20 is within the Insurance Commissioner's administrative discretion. To obtain an order of liquidation under §221.20, the Insurance Commissioner need not even prove her *belief* that rehabilitation would be futile or potentially injurious. Her belief concerning rehabilitation is irrelevant to the granting of a liquidation petition under §221.20.

If, having obtained an order of rehabilitation, the receiver comes to the belief that rehabilitation would not be effective or would potentially be injurious to policyholders, §221.18(a) requires that she explain why her belief is reasonable under the totality of the circumstances. It does not, however, require actual proof that such belief is correct or certain. Moreover, to the extent the Insurance Commissioner's belief represents her administrative judgment, she is entitled to the same deference as for any other matters within her administrative expertise. *Foster v. Mutual Fire Insurance Co.*, 614 A.2d 1086, 1091-1092 (Pa. 1992); *Insurance Federation of Pa., Inc. v. Commonwealth*, 970 A.2d 1108, 1125 (Pa. 2009). It is always open to the directors of the insolvent insurer to demonstrate that liquidation would be an abuse of discretion by proving up a feasible plan of rehabilitation. *See Sheppard v. Old Heritage Mutual Insurance Company*, 425 A.2d 304 (Pa. 1980). Short of such proof by the directors, however, the rehabilitator should be able to convert a rehabilitation to a liquidation without having to prove that efforts to rehabilitate have been made and have failed.

Here, the Rehabilitator has not filed a petition to convert from rehabilitation to liquidation, but has instead presented a plan of rehabilitation under §221.16 that calls for the liquidation of one insolvent insurer and the rehabilitation of another, after causing each to assume policies from the other. As such, §221.18(a) does not on its face apply. In an important sense, the insolvent insurer that will be liquidated under the Plan does not yet exist. It will be created by transforming ANIC and PTNA under the authority of §221.16(d), so that ANIC's block of business will consist entirely of self-sustaining policies and PTNA's block of business will consist entirely of non-self-sustaining policies. As a result, the futility of rehabilitating the transformed PTNA should be self-evident, even if §221.18(a) applied to the Plan, which it does not.

WHEREFORE, the Committee respectfully requests that the Court grant the Rehabilitator's in limine application concerning the standard of review applicable to the Second Amended Plan.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 17, 2015, I caused a true and correct copy of the foregoing Application to be served on the following persons by email at the email addresses indicated below:

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