IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Penn Treaty Network America Insurance Company in Rehabilitation	:	1 PEN 2009
In Re: American Network Insurance Company in Rehabilitation	:	1 ANI 2009

Re: Application for Relief and to Compel

ORDER

AND NOW, this ____ day of _____, 2013, upon consideration of the Application for Relief and to Compel filed by Intervenors Eugene J. Woznicki and Penn Treaty American Corporation, and any response filed by Michael F. Consedine, Pennsylvania Insurance Commissioner and Statutory Rehabilitator of Penn Treaty Network America Insurance Company and American Network Insurance Company, it is hereby **ORDERED** that the Application is **GRANTED**.

The Rehabilitator shall produce to the Intervenors within ten (10) days following the date of this Order: (1) a copy of all communications and documents exchanged between the Rehabilitator, the rehabilitation team, or their counsel or representatives and the National Association of Insurance Commissioners, other state insurance regulators, or their counsel or representatives concerning the Rehabilitator's appeal of the denial of the petitions to convert the rehabilitations of PTNA and ANIC into liquidations, including any efforts to enlist *amicus curiae* brief support for the appeal; and (2) to the extent not included in documents produced above, a list identifying all contacts between the Rehabilitator, the rehabilitation team, or their counsel or representatives and the NAIC, other state insurance regulators, or their counsel or representatives involving the Rehabilitator's appeal of the Court's Orders in this matter, including but not

limited to the dates of the communication, the substance of the communication, and the participants in the communication.

MARY HANNAH LEAVITT, Judge

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Penn Treaty Network America Insurance Company in Rehabilitation	:	1 PEN 2009
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INTERVENORS' APPLICATION FOR RELIEF AND TO COMPEL

Eugene J. Woznicki, Chairman of the Boards of Directors of Penn Treaty Network America Insurance Company ("PTNA") and American Network Insurance Company ("ANIC"), and Penn Treaty American Corporation (collectively, "Intervenors"), file this application under Pa.R.A.P. 3776 and 123 to compel Michael F. Consedine, Pennsylvania Insurance Commissioner and Statutory Rehabilitator ("Rehabilitator") of PTNA and ANIC (collectively, "Companies") to produce: (1) a copy of all communications and documents exchanged between the Rehabilitator, the rehabilitation team, or their counsel or representatives and the National Association of Insurance Commissioners ("NAIC"), other state insurance regulators, or their counsel or representatives concerning the Rehabilitator's appeal of the denial of the petitions to convert the rehabilitations of the Companies into liquidations, including any efforts to enlist *amicus curiae* brief support for the appeal; and (2) to the extent not included in documents produced above, a list identifying all contacts between the Rehabilitator, the rehabilitation team, or their counsel or representatives and the NAIC, other state insurance regulators, or their counsel or representatives involving the Rehabilitator's appeal of the Court's Orders in this matter, including but not

limited to the dates of the communication, the substance of the communication, and the participants in the communication ("Application"), and state in support as follows:

Introduction

1. Over the objections of the Intervenors, the Rehabilitator has authorized his outside law firm, DLA Piper LLP, to concurrently lead the efforts to rehabilitate the Companies while prosecuting an appeal seeking to liquidate the Companies.

2. Any communications with other regulators in an effort to bolster the appeal (in which the Rehabilitator argues, in essence, that any rehabilitation is impossible), including campaigning for *amicus curiae* brief support, interfere with the ordered rehabilitations.

3. The content of such communications made by the rehabilitation team promoting liquidation of the Companies to other regulators is relevant to whether the Rehabilitator is undertaking earnest, meaningful, and legitimate rehabilitation efforts as ordered by this Court. Accordingly, the Intervenors respectfully submit that the relief sought in this Application is needed to permit enforcement of the Court's rehabilitation orders.

Background

4. On January 6, 2009, upon application of the Pennsylvania Insurance Commissioner, the Court ordered the rehabilitations of the Companies and appointed the Commissioner as Statutory Rehabilitator.

5. On October 2, 2009, the Rehabilitator filed petitions with the Court to convert the rehabilitations of PTNA and ANIC into liquidations, and subsequently filed amended liquidation petitions ("Petitions"). The Intervenors petitioned to intervene and defend the Companies against the Petitions.

6. On May 3, 2012, following 31 days of testimony and arguments, and after reviewing thousands of pages of trial exhibits, hearing transcripts, and post-trial briefing, the Court issued its Opinion and Order denying the Petitions.

7. As set forth in the Opinion, the primary condition that led to the need for rehabilitation is that the "Companies are saddled with inadequate rates on a subset of policies in a subset of problematic states. This situation arose because regulators in key states such as Arizona, California, Florida, Illinois, and Pennsylvania have denied, delayed, or limited needed premium rate increases for the OldCo policies."[1] Opinion at 28. One OldCo product in particular sold between 1996 and 2001 that provides policyholders with inflation or lifetime benefits, referred to as the "Cadillac" policy, has contributed to the need for rehabilitation. *Id.*

8. The Rehabilitator, both before and during the rehabilitation, "discouraged other state regulators from approving rate increases" and "has not undertaken a meaningful effort to rehabilitate the Companies and, to the contrary, has acted to frustrate rehabilitation[.]" *Id.* at 1-2.

9. As set forth in the May 3, 2012 Order, this Court denied the Petitions for the reasons in the Opinion; ordered that the January 6, 2009 rehabilitation orders remain in effect; and ordered the Rehabilitator to develop a rehabilitation plan that shall address and eliminate the inadequate and unfairly discriminatory premium rates for the OldCo business, in consultation with the Intervenors, and submit it within 90 days.

The Rehabilitator's Ever Present Duties

10. The Commissioner has duties that he must comply with while acting as rehabilitator of PTNA and ANIC, including to: "take such actions as are necessary to correct the

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[1] As set forth in the Opinion, PTNA and ANIC's long-term care insurance policies sold prior to 2002 are referred to as the "OldCo" policies. Their long-term care insurance policies sold beginning in 2002 are referred to as "NewCo."

condition that prompted the Board of Directors' request for and consent to the rehabilitation of Penn Treaty"; prepare and submit a rehabilitation plan; and pursue rehabilitation "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." Opinion at 29 (quoting *Koken v. Legion Ins. Co.*, 831 A.2d 1196, 1229 (Pa. Cmwlth 2003), *aff'd sub nom. Koken v. Villanova Ins. Co.*, 583 Pa. 400, 878 A.2d 51 (2005)).

11. During the hearing on the Petitions, Commissioner Ario acknowledged that he was personally under Orders to rehabilitate the Companies, and he had no discretion to disregard those Orders. *See* Testimony of Joel Ario dated February 11, 2011 at 190.

12. The order proposed by the current Rehabilitator to extend the deadline for filing a rehabilitation plan and entered by the Court on October 31, 2012, provides in part: "1. The Court's Orders of January 6, 2009 and May 3, 2012, remain in effect."

The Rehabilitation Team's Conflicting Roles

13. A successful rehabilitation is in the interest of the public, including taxpayers, and the Companies and their policyholders, employees, insurance agents, shareholders, and creditors. These constituencies deserve a legitimate rehabilitation effort led by a rehabilitation team that is unbiased and free from conflict.

14. The Rehabilitator's outside law firm, DLA Piper LLP, is concurrently leading the efforts to rehabilitate the Companies while prosecuting an appeal seeking to liquidate the Companies.

15. The Jurisdictional Statement in Support of Notice of Appeal filed by the Rehabilitator in this Court on October 26, 2012 establishes that he continues to disagree with

almost all—if not all—of the Court's rulings regarding what can be done in a rehabilitation and even the desirability of a continued rehabilitation.

16. The same lawyer who filed and therefore fully subscribes to the reasoning behind the appeal is also the lawyer who is the main legal advisor to the rehabilitation effort.

17. At least one member of the rehabilitation team at DLA Piper has admitted in conversation with counsel for the Intervenors that he is personally involved in lining up *amicus curiae* brief support for the appeal.

18. Any efforts by the rehabilitation team to enlist other state regulators to file *amici curiae* briefs in support of the appeal frustrates the Ordered rehabilitation and is detrimental to persuading other regulators to do the right thing and assist in rehabilitating the Companies by approving actuarially justified and needed rate increases for the OldCo policies.

The Intervenors' Repeated Requests For Information Concerning The Conflict

19. On repeated occasions by correspondence and through meetings and discussions, the Intervenors asked the Rehabilitator to preserve and produce copies of any documents regarding the appeal that he or members of the rehabilitation team have exchanged with the NAIC and/or state insurance regulators. *See, e.g.*, e-mails and letters dated April 12, 2013, April 17, 2013, and April 19, 2013 described in the Appendix and attached as Exhibits A-C.

20. The Intervenors also requested the Rehabilitator to produce any documents and communications concerning the "update on Penn Treaty" that Commissioner Consedine delivered on November 30, 2012 to the Senior Issues (B) Task Force of the NAIC at a public convention center in Washington, D.C. *See* Agenda for November 30, 2012 NAIC Convention, attached as Exhibit D.

21. The documents and communications sought are relevant to enforcement of the rehabilitation orders because any discussion with the NAIC or other regulators in an effort to support the appeal is diametric and harmful to the concept of a proper rehabilitation as well as the January 6, 2009 Rehabilitation Orders and the clear ruling of the Court on May 3, 2012.

22. As the Court clearly stated, insurance regulators, "who are a necessary part of a workout," have "statutory obligations to approve actuarially justified rate increases." Opinion at 10, 141. That certain regulators are refusing to do so "presents a serious indictment of the existing system of rate regulation of long-term care insurance." *Id.* at 4.

23. The Court ruled that "rate increases for OldCo are critical" and that the Rehabilitator must make "earnest," "meaningful," and "legitimate" efforts to obtain the actuarially justified rate increase relief for the Companies. *Id.* at 1, 139, 159, 164. It is therefore critical that the Rehabilitator lead by example in pursuing OldCo rate increases. Leading by example does not and cannot mean Pennsylvania leading other state regulators to the conclusion that the appeal must be won so that the companies can be liquidated and the regulators won't have to do their jobs.

24. This Court's May 3, 2012 Opinion and Order set forth additional important concerns and expectations regarding the past and future rehabilitation effort. Approvals of actuarially justified rate increases play a crucial role in the rehabilitation. The Court was understandably critical of the 2009 abandonment of pursuit of premium rate increases (now almost four years without a single premium rate increase being sought), and it was specifically concerned about the Commissioner advising "state regulators to follow his example and *not* approve pending rate filings on OldCo business." *Id.* at 10 (emphasis by the Court). The Court clearly and correctly held that the Commissioner not only "has not undertaken a meaningful

effort to rehabilitate the Companies," but he has improperly "acted to frustrate the rehabilitation...." *Id.* at 1. The Court specifically: (1) rejected a "business as usual" approach to seeking future rate increases, *id.* at 111; (2) required a "unified attack on OldCo's rate structure," *id.* at 112; (3) expected "[e]nergy in implementing the plan," *id.* at 112; (4) required a "legitimate effort to devise a rehabilitation plan, noting that "[a]ggressive efforts to pursue actuarially justified rate increases and contract modification options, for policyholders and agents, all hold potential," *id.* at 139; and (5) required that neither the Rehabilitator's "phlegmatic effort" nor his abandonment of the effort is an appropriate response to the companies' "inadequate rate structure." *Id.* at 160. Accordingly, the Court ordered that the "plan of rehabilitation must address and eliminate the inadequate and unfairly discriminatory premium rates for the OldCo business." Order at 2.

25. Efforts to talk regulators into supporting an appeal that argues that rehabilitation is impossible violate the Court's rulings, constitute an abuse of any discretion owed to the Rehabilitator in this context, and continue to frustrate the rehabilitations.

The Communications Sought Are Not Privileged

26. The Rehabilitator has refused to produce a single one of the communications and documents sought based on a raft of purported privileges: the "deliberative process" and attorney-client privileges; the work-product doctrine; and 40 P.S. § 65-2A, 40 P.S. § 323.1, and 40 P.S. § 443. *See* Exhibit B, E-mail dated April 17, 2013 from the Rehabilitator's counsel. None of these privileges or protections is applicable to the situation presented here.

The Deliberative Process Privilege Does Not Apply

27. The deliberative process privilege does not apply. Any post-rehabilitation petition communications of the rehabilitation team campaigning to liquidate the Companies or

seeking to enlist *amicus curiae* brief support from external third-parties would by definition not be a "direct part" of any "pre-decisional" and "'confidential deliberations of law or policymaking.'" *Koken v. One Beacon Ins. Co.*, 911 A.2d 1021, 1027 (Pa. Cmwlth. 2006) (citing *Unified Judicial System v. Vartan*, 557 Pa. 390, 399, 733 A.2d 1258, 1263 (1999)).[2]

(a) The communications sought to be compelled are by definition not confidential or internal to Pennsylvania Insurance Department because the communications were made between the Rehabilitator or rehabilitation team members charged with rehabilitating the Companies on the one hand, and with external persons or entities such as the NAIC or regulators outside of Pennsylvania, on the other hand.

(b) Nor are such communications deliberative in character. To the extent that the rehabilitation team is seeking to enlist support for appeal efforts from third parties, the communications are promotional or campaign like in character. Moreover, communications from any third parties to the Rehabilitator would by definition not constitute any deliberation undertaken by the Rehabilitator.

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[2] Pennsylvania courts disfavor application of the deliberative process privilege for public policy reasons. For example, on April 23, 2013, this Court issued an Opinion affirming the Office of Open Records' decision to require the Governor's Office to produce records pursuant to the Right-to-Know Law. *See Office of the Governor v. Scolforo*, No. 739 C.D. 2011, (Pa. Cmwlth. 2013), setting forth the following important guidance in assessing the applicability of the privilege. First, the records are "presumed 'public'" and the Commonwealth or its agencies have the burden of proving that the deliberative process privilege applies by affidavit containing sufficient detail and which is specific enough to permit the reviewing body to ascertain how disclosure of the documents would reflect the "internal deliberations" on a subject matter. *Id.* at 7, 12, 14. Second, the "protected records must be predecisional and deliberative." *Id.* at 8 (internal quotation marks and citation omitted). Third, the records must be "confidential," and "internal" to the Commonwealth or its agencies and contain "confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice." *Id.* at 8, n.8, and 10 (internal quotation marks and citation omitted). In analyzing these criteria, the privilege is disfavored and is narrowly construed due to the public's interest in prohibiting state secrets, scrutinizing the actions of public officials, and making officials accountable for their actions. *Id.* at 7 (internal quotation marks and citations omitted).

(c) Since the communications sought are not deliberative in character, they are not pre-decisional of anything, let alone a deliberative decision of the Rehabilitator.

28. Assuming *arguendo* that the deliberative process privilege somehow does apply, "such a privilege is not absolute." *Koken v. One Beacon Ins. Co.*, 911 A.2d at 1027. The deliberative process privilege must give way to disclosure in the face of the "extraordinary circumstances." *Ario v. Deloitte & Touche*, 934 A. 2d 1290, 1294 (Pa. Cmwlth. 2007). The need for the Intervenors to obtain the communications in aid of enforcing this Court's rehabilitation orders, and the inability of the Intervenors to obtain the communications elsewhere would constitute precisely the type of extraordinary circumstances to which any deliberative process privilege must give way.

The Attorney-Client Privilege Does Not Apply

29. The attorney-client privilege does not apply to the rehabilitation team's communications, let alone to external communications to enlist support for the appeal from other state regulators. Such communications are neither attorney-client communications nor confidential. The attorney-client privilege only protects "confidential client-to-attorney or attorney-to-client communication made for the purpose of obtaining or providing professional legal advice." *Gillard v. AIG Ins. Co.*, 609 Pa. 65, 15 A.3d 44, 59 (Pa. 2011); *Joe v. Prison Health Servs., Inc.*, 782 A.2d 24, 31 (Pa. Cmwlth. 2001) (ruling that party asserting privilege has initial burden to prove privilege is properly invoked and that disclosure of attorney-client communications to third-party waives privilege).

30. Assuming *arguendo* that the attorney-client privilege somehow does apply, the Rehabilitator has waived such privilege with respect to the work of his rehabilitation team by

opening up their files to the Intervenors in this action, and introducing testimony concerning communications between members of the rehabilitation team and regulators at trial.

The Work-Product Doctrine Does Not Apply

31. The work-product doctrine also does not apply to the external communications sought by this Application. 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. According to the explanatory comment accompanying Pa.R.C.P. 4003.3, "[t]he Rule is carefully drawn and means exactly what it says." *Id.*, Explanatory Comment at ¶ 3.

32. Pa.R.C.P. 4003.3 specifically "immunizes the lawyer's mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research and legal theories, *nothing more*." *Id.*, Explanatory Comment at ¶ 3 (emphasis added). Simply put, non-party communications are hardly the type of internal mental impressions and opinions that the work-product doctrine is aimed at protecting.

33. In any event, any communications received by members of the rehabilitation team from the NAIC or other state regulators or their counsel would not be material prepared "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." Pa.R.C.P. 4003.3. The NAIC and other state regulators are not a party, party's representative, or party's attorney, consultant, surety, indemnitor, insurer, or agent. Accordingly, any such communications by definition are not work-product.

34. Alternatively, assuming *arguendo* that the work-product doctrine somehow does apply, the privilege is not absolute if the "product" sought becomes a relevant issue in the action. Because any communications with other state regulators that serve to frustrate rehabilitation efforts are factually relevant to this inquiry, the work-product doctrine cannot protect these communications from disclosure. In this regard, the Rehabilitator placed the subject matter of communications with other regulators at issue during the hearing on the Petitions.

Any Purported Privileges That Might Have Attached Are Waived

35. By producing extensive portions of the Rehabilitation Implementation Committee's file in this action, the Rehabilitator has already admitted that his rehabilitation team's documents, including communications with regulators, are relevant to whether the Rehabilitator is undertaking earnest, meaningful, and legitimate rehabilitation efforts.

36. Mr. DiMemmo of the Pennsylvania Insurance Department and a member of the Companies' Rehabilitation Implementation Committee testified that his e-mails with "fellow regulators" would be seen by the Intervenors:

> Q. Have you ever had a discussion with any of your fellow regulators from other states in aid of rate increases for PTNA or ANIC?
>
> A. I -- I've had several discussions in that regard.
>
> Q. Any correspondence in that regard?
>
> A. No.
>
> Q. Any E-mails in that regard?

A. If I did and I saved them, you will see them.

Deposition of Joseph DiMemmo dated September 2, 2010 at 215-218, attached as Exhibit E.

37. Not only has the Rehabilitator's counsel permitted members of the rehabilitation team to testify regarding the subject matter of communications with regulators of other states, his counsel insisted on such testimony over the hearsay objections of the Intervenors. Thus, the Rehabilitator has waived the work-product doctrine and any other purported privilege concerning communications with regulators by seeking to introduce testimony concerning such communications at the hearing on the Petitions.

38. For example, the Rehabilitator's counsel sought to introduce into evidence testimony of Mr. DiMemmo and Mr. Waite regarding conversations with insurance regulators from other states. *See* Testimony of Joseph DiMemmo dated February 2, 2011 at 146-150, attached as Exhibit F; Testimony of Cameron Waite dated January 31, 2011 at 126:12-127:10, 153:20-156:16, and 164:14-165:22, attached as Exhibit G. The Intervenors attempted to object to such testimony based on hearsay grounds, and the Rehabilitator's counsel nonetheless repeatedly sought to introduce testimony concerning what other state insurance regulators told the Rehabilitator or members of the rehabilitation team. *See id.*

39. It is inconsistent to seek to introduce testimony concerning communications with regulators from other states when the Rehabilitator believes that such information is favorable to his position, and to now seek to assert the protection of any privilege over communications with regulators only when the information may be less favorable to the Rehabilitator's position.

40. Accordingly, if and to the extent that any purported privilege concerning communications with other state regulators might have attached, it has been waived through selective disclosure. *Nationwide Mut. Ins. Co. v. Fleming*, 605 Pa. 468, 477 (2010); *Nationwide Mut. Ins. Co. v. Fleming*, 2007 PA Super 145, 924 A.2d 1259, 1265 (2007) ("A litigant

attempting to use attorney-client privilege as an offensive weapon by selective disclosure of favorable privileged communications has misused the privilege; waiver of the privilege for all communications on the same subject has been deemed the appropriate response to such misuse."); *Murray v. Gemplus Int'l*, 217 F.R.D. 362 (E.D. Pa. 2003) (where party attempts to utilize privilege as weapon, via selectively disclosing communications, party waives privilege); *Miniatronics Corp. v. Buchanan Ingersoll, P.C.*, 23 Pa. D. & C.4th 1, 18-21 (Allegheny Co. 1995) (voluntary disclosure of confidential information to gain tactical advantage waives attorney-client privilege for all communications involving same subject matter); *Messner v. Korbonits*, 39 Pa. D. & C.3d 182, 187 (Chester Cty. Ct. Com. Pl. 1982) ("Under these circumstances wherein plaintiffs' counsel permitted Mrs. O'Connell to testify to those communications with counsel in her deposition and by reason of her later selective disclosure of certain material within the claimed privilege, we find that the attorney-client privilege has been waived).

No "Regulatory Privilege" Otherwise Applies To This Situation

41. The statutory provisions in 40 P.S. § 65-2A, "Authority to share confidential information," 40 P.S. § 323.1, "Purpose," and 49 P.S. § 443, "Annual and other reports; penalties" also do not apply to the communications sought in this application. The words of this Court in *Koken v. One Beacon Insurance Company*, 911 A.2d at 1027 apply with equal force here:

> 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.

42. Some of these sections, for example, 40 P.S. § 443(d), create a work product privilege for insurance company financial statements and examinations; none of these sections applies to communications by the rehabilitation team or its counsel seeking to undermine the rehabilitation by campaigning for support in liquidating the Companies that they are supposed to be rehabilitating pursuant to rehabilitation orders of this Court.

43. Efforts to talk regulators into supporting an appeal that argues that rehabilitation is impossible violate the Court's rulings, constitute an abuse of any discretion owed to the Rehabilitator in this context, and continue to frustrate the rehabilitations.

Conclusion

WHEREFORE, the Intervenors respectfully request the Court to grant this Application and enter an order in the form of the attached proposed order.

Respectfully submitted,

Benjamin M. Schmidt

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Dated: April 29, 2013

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VERIFICATION

I, Douglas Y. Christian, verify that the statements of fact in the foregoing Intervenors' Application for Relief and to Compel are true and correct to the best of my knowledge, information and belief. I understand that this statement is made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

Douglas Y. Christian

Dated: April 29, 2013