

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

FILED: April 4, 2013

MEMORANDUM OPINION AND ORDER

Presently before the Court is the Application of National Health Administrators (NHA), an intervenor in the above-captioned matter, to recover \$103,864 in professional fees, costs, and other expenses under authority of Section 518(a) of The Insurance Department Act of 1921, 40 P.S. §221.18(a).¹ Because NHA lacks standing to invoke the fee recovery provision in Section 518(a), the Court denies NHA's Application.

NHA, an insurance broker, has an agency agreement with Penn Treaty Network America Insurance Company (In Rehabilitation) (Penn Treaty), a provider of long-term care insurance. Pursuant to their agreement, NHA earns commissions from the renewal of the long-term care insurance policies issued by Penn Treaty.

On January 6, 2009, the Court ordered Penn Treaty and its subsidiary, American Network Insurance Company (collectively, the Companies), into

¹ Act of May 17, 1921, P.L. 789, added by Section 2 of the Act of December 14, 1977, P.L. 280.

rehabilitation. On June 3, 2009, the Pennsylvania Insurance Commissioner, in his capacity as Statutory Rehabilitator of the Companies, applied to the Court to suspend payment of agents' commissions pending completion of rehabilitation or entry of an order of liquidation. The Rehabilitator's application is still pending. NHA petitioned to intervene in the rehabilitation proceeding on July 23, 2009, for the stated purpose of protecting its interest in the agents' commissions. The Court granted NHA's petition to intervene on August 5, 2009.

Thereafter, on October 2, 2009, the Rehabilitator filed petitions seeking orders of liquidation for the Companies. The Court conducted a hearing on the Rehabilitator's petitions over the course of 30 days throughout 2011. Counsel for intervenors Penn Treaty American Corporation (PTAC), the owner of the Companies, and Eugene J. Woznicki, Chairman of the Board of Directors, defended the Companies against the liquidation petitions. On May 3, 2011, the Court denied the Rehabilitator's petitions to liquidate the Companies.

To date, NHA has had a limited role in the above-described proceedings. NHA did not participate in the liquidation hearing, nor does it allege that any of its representatives attended the hearing as observers. NHA has made only a handful of filings: on July 17, 2009, NHA filed objections to the Rehabilitator's application to suspend payment of agents' commissions; on July 23, 2009, NHA filed its petition to intervene; and on September 3, 2009, NHA filed a pre-hearing statement and memorandum of law on the Rehabilitator's application to suspend payment of agents' commissions. NHA filed the instant application to recover its attorney fees and costs on December 28, 2012. The Rehabilitator opposes the application, arguing that NHA lacks standing under Section 518(a) of The Insurance Department Act of 1921, 40 P.S. §221.18(a), to

recover its fees and, even if it had standing, its request for \$103,864 in fees and costs is unreasonable.

As noted, Section 518(a) provides for the recovery of attorney fees and costs; it states:

(a) Whenever he has reasonable cause to believe that further attempts to rehabilitate an insurer would substantially increase the risk of loss to creditors, policy and certificate holders, or the public, or would be futile, the rehabilitator may petition the Commonwealth Court for an order of liquidation. A petition under this subsection shall have the same effect as a petition under section 520. *The Commonwealth Court shall permit the directors to take such actions as are reasonably necessary to defend against the petition and may order payment from the estate of the insurer of such costs and other expenses of defense as justice may require.*

40 P.S. §221.18(a) (emphasis added). NHA contends that it is an “insurer” for purposes of Section 518(a) because it is an entity “doing ... an insurance business, and is ... subject to the authority of, or to liquidation, rehabilitation, reorganization or conservation by any insurance commissioner.” Section 503 of The Insurance Department Act of 1921, 40 P.S. §221.3.² NHA avers that it is “doing an insurance business” because it is “responsible for the issuance and delivery of contracts of insurance to persons within the Commonwealth, as well as the solicitation of insurance contracts and the collection of premiums and other fees to implement

² Section 503 of The Insurance Department Act of 1921, added by Section 2 of the Act of December 14, 1977, P.L. 280, *as amended*, defines “insurer” as follows:

“Insurer” means any person who is doing, has done, purports to do, or is licensed to do an insurance business, and is or has been subject to the authority of, or to liquidation, rehabilitation, reorganization or conservation by any insurance commissioner. For purposes of this article, any other persons included under section 502 shall be deemed to be insurers.

40 P.S. §221.3.

such contracts.” NHA Application, ¶11. NHA contends that, as an “insurer,” it may seek recovery of its attorney fees and costs under Section 518(a) and Section 506(c)(i) of The Insurance Department Act of 1921, which states:

An insurer shall have the right to engage legal counsel for defense of and appeal with respect to a delinquency proceeding. Reasonable costs and fees therefore may be paid from the general assets of the insurer, subject to the approval of the administrative or judicial body to which appeal was made.

40 P.S. §221.6(c)(i).³ The Court rejects NHA’s interpretation of the statute.

To begin, NHA is not an “insurer.” An “insurer” is “the party to a contract of insurance who assumes the risk and undertakes to indemnify the insured or pay a certain sum on the happening of a specified contingency.” 3 COUCH ON INSURANCE 3D §39:1 (2011). In Pennsylvania, an insurer is one who is “doing an insurance business”⁴ and holds a certificate of authority from the Insurance Department. Section 208 of The Insurance Department Act of 1921, 40 P.S. §46. In order to obtain and subsequently renew a certificate of authority, the holder must comply with certain statutory requirements, including maintaining

³ Section 506 was added by Section 2 of the Act of December 14, 1977, P.L. 280.

⁴ Under both Section 208 and Section 503 of The Insurance Department Act of 1921, the following activities constitute “doing an insurance business”:

- (1) the issuance or delivery of contracts or certificates of insurance to persons resident in this Commonwealth;
- (2) the solicitation of applications for such contracts, or other negotiations preliminary to the execution of such contracts;
- (3) the collection of premiums, membership fees, assessments or other consideration for such contracts; or
- (4) the transaction of matters subsequent to execution of such contracts and arising out of them.

40 P.S. §§46(b), 221.3. Section 503 was added by Section 2 of the Act of December 14, 1977, P.L. 280.

sufficient reserves and submitting yearly risk-based capital reports to the Department. These requirements ensure that an insurer can pay its debts and liabilities, including obligations arising out of its contracts of insurance as they come due.

Insurance agents and brokers “are distinct from insurance companies and are in the business of helping individuals or businesses acquire insurance from insurance companies typically for a commission.” *Antimary v. Workmen's Compensation Appeal Board (U.S. #1 Auto Sales)*, 655 A.2d 659, 662 (Pa. Cmwlth. 1995).⁵ In Pennsylvania, a broker or agent is an “insurance producer,” which is defined as “[a] person that sells, solicits or negotiates contracts of insurance.” Section 601-A of The Insurance Department Act of 1921, 40 P.S. §310.1.⁶ Insurance producers are subject to different licensing requirements than insurers. Producers’ licensing requirements are codified in a different article of the Act and pertain to the licensing examination, pre-examination education, professional fees and the general fitness, competence and reliability of the producer. *See* Sections 603-A – 614-A of The Insurance Department Act of 1921, 40 P.S. §§310.3 – 310.14.⁷

NHA identifies itself as a “broker,” responsible for soliciting and delivering insurance contracts and collecting premiums from insureds. NHA assumes no risk on the policies of long-term care insurance issued by Penn Treaty

⁵ Treatise authority describes the role of an insurance “broker” as “acting as a middleman between the insured and the insurer; soliciting insurance from the public under no employment from any special company; and, upon securing an order, plac[ing] it with a company selected by the insured, or if the insured has no preference, with a company selected by the broker.” 3 COUCH ON INSURANCE 3D §45:1 (2011).

⁶ Section 601-A was added by Section 2 of the Act of December 6, 2002, P.L. 1183.

⁷ Sections 603-A – 614-A were added by Section 2 of the Act of December 6, 2002, P.L. 1183.

or any of the other insurers it represents. NHA is a producer, not an insurer. As such, NHA lacks standing to invoke the fee recovery provisions of Sections 518 and 506(c)(i) of The Insurance Department Act of 1921, 40 P.S. §§221.18(a), 221.6(c)(i).⁸

For all of the foregoing reasons, the Court denies NHA's application to recover professional fees, costs and other expenses.



MARY HANNAH LEAVITT, Judge

⁸ Because the Court holds that NHA lacks standing, it is not necessary to consider the reasonableness of the attorney fees and costs it seeks to recover.

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ORDER

AND NOW, this 4th day of April, 2013, the Verified Application of National Health Administrators to Recover Professional Fees, Costs, and Other Expenses Pursuant to 40 P.S. § 221.18(a) is DENIED.



MARY HANNAH LEAVITT, Judge