

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Penn Treaty Network America
Insurance Company in Rehabilitation,

and

In Re: American Network Insurance
Company in Rehabilitation,

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: No. 1 PEN 2009
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: No. 1 ANI 2009
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**BRIEF OF AMICUS CURIAE
PENNSYLVANIA LIFE AND HEALTH
INSURANCE GUARANTY ASSOCIATION
REGARDING SECOND AMENDED PLAN OF REHABILITATION**

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I. Introduction

The Pennsylvania Life and Health Insurance Guaranty Association (“PLHIGA”) respectfully requests that the Court consider this Amicus Brief regarding upcoming hearings on the proposed Second Amended Plan of Rehabilitation of Penn Treaty Network America Life Insurance Company (“PTNA”) and American Network Insurance Company (“ANIC”) (the “Second Amended Plan”). PLHIGA understands that the Court will be holding hearings on the Second Amended Plan beginning July 13, 2015. PLHIGA does not seek leave at this time to participate in those hearings, nor is it intervening in these proceedings or entering an appearance other than as an Amicus Curiae.

II. Statement of the Interest of Amicus Curiae Pennsylvania Life and Health Insurance Guaranty Association

PLHIGA is the life and health insurance guaranty association (“GA”) in Pennsylvania, which is the domiciliary state of PTNA and ANIC. If there is an order of liquidation with a finding of insolvency, PLHIGA will have substantial obligations to provide coverage to policyholders pursuant to Article XVII of the Insurance Company Law of 1921, Act of May 17, 1921, P.L. 682, No. 284, added by Act of December 18, 1992, P.L. 1519, No. 178, regarding Life and Health Insurance Guaranty Association, 40 P.S. §§ 991.1701-1718 (“PLHIGA Act”).

In this Amicus Brief, PLHIGA seeks only to provide its perspective on certain issues about which certain of its members have raised concerns. This

Amicus Brief is limited to the issues addressed and does not reflect comprehensive comments or definitive positions of PLHIGA with respect to the Second Amended Plan. To the extent PLHIGA's perspective is no different from that of each of the 50 GA's who are members of the National Organization of Life and Health Guaranty Associations ("NOLHGA"), PLHIGA believes that the Court should continue to take due consideration of the concerns and arguments presented by NOLGHA and by the Health Insurers.¹ To the extent PLHIGA has a unique perspective as the domiciliary GA, it offers this limited Amicus Brief.

III. Background Regarding PLHIGA, NOLHGA and Concerns Raised by Certain PLHIGA Members

A. PLHIGA and NOLHGA

PLHIGA is one of 50 state life and health insurance guaranty associations, established by state statutes enacted based upon the National Association of Insurance Commissioners ("NAIC") Model Life and Health Insurance Guaranty Association Act ("Model Act"). Pursuant to the PLHIGA Act, 40 P.S.

§ 991.1706(o), PLHIGA "may join an organization of one or more other state associations of similar purposes, to further the purposes and administer the powers

¹ The Health Insurers submitting Formal Comments include Aetna Life Insurance Company, Anthem, Inc., Cigna Corporation, HM Life Insurance Company, Horizon Healthcare Services, Inc. d/b/a Horizon Blue Cross Blue Shield of New Jersey, QCC Insurance Company, United Concordia Life and Health Insurance Company, United Concordia Insurance Company and UnitedHealthcare Insurance Company.

and duties of the association.” In accordance with that provision, PLHIGA is a member of NOLHGA. NOLHGA coordinates certain state life and health insurance guaranty association activities in connection with multi-state insolvencies in which coverage by guaranty associations in several states is implicated. NOLHGA has coordinated efforts of the state GA’s, including PLHIGA, with respect to PTNA and ANIC since the inception of these proceedings in 2009, including efforts to achieve a plan that might be acceptable to all interested parties, including the Health Insurers.

NOLHGA has filed Formal Comments on the Second Amended Plan. PLHIGA neither seeks to duplicate or contradict the efforts of NOLHGA, but rather seeks to articulate concerns on particular issues raised by certain members of PLHIGA, without interfering with continuing efforts of NOLHGA.

B. Concerns Raised by the Blues Subsidiaries as Members of PLHIGA

The Health Insurers, many of which are members of PLHIGA, have filed Formal Comments on the Second Amended Plan. In letters dated March 19, 2015 and June 2, 2015, certain members of PLHIGA that are subsidiaries of Blue Cross and Blue Shield organizations in Pennsylvania (“Blues Subsidiaries”)² and most of which are also among the Health Insurers, expressed their concerns to PLHIGA

² The Blues Subsidiaries include Capital Advantage Insurance Company, HM Life Insurance Company, QCC Insurance Company, and United Concordia Life and Health Insurance Company.

and requested that that PLHIGA join in positions asserted by the Health Insurers in their Formal Comments.

The concerns of the Blues Subsidiaries relate to issues that they and the other Health Insurers have presented to the Court, including: (1) concerns about licenses and GA coverage with respect to policies that would be transferred between Company A (ANIC) and Company B (PTNA) pursuant to the Second Amended Plan (“Licensing Issues”); (2) concerns about assets of the estates going into a trust to pay policyholders who are not fully protected by GA coverage and potential application of principles from the Supreme Court’s recent opinion in *Warrantech Consumer Products Services v. Reliance Insurance Co.*, 96 A.3d 346 (Pa. 2014), to this life and health industry insolvency (“Uncovered Benefits Issues”); (3) concerns about provisions for payment of agent commissions on Self-Sustaining Policies in Company A (ANIC) (“Agent Commissions”); and (4) concerns about allocation of assets between Company A (ANIC) and Company B (PTNA) (“Asset Allocation”).

C. PLHIGA Supports Efforts to Develop a Plan Acceptable to All Interested Parties and the Court’s Consideration of Concerns Raised by NOLHGA and the Health Insurers

As noted above, NOLHGA has coordinated efforts on behalf of the state GA’s since the inception of these proceedings in 2009. However, NOLHGA does not decide issues of GA coverage in any state, and each state GA must determine

whether to participate in any consensual plan of rehabilitation or liquidation, based on the governing principles in the state GA statutes, which are based on the Model Act.³

PLHIGA will look to governing principles under the PLHIGA Act if and when it is called upon to determine whether to participate in any consensual plan of rehabilitation or liquidation that NOLHGA may help to forge. PLHIGA will look to governing principles under the PLHIGA Act if and when it is called upon to determine issues of coverage or exemptions following an order of liquidation with a finding of insolvency.

Ultimately, the board of directors of each state GA must determine coverage and exemption issues in the event of a trigger of coverage (typically by entry of an order of liquidation with a finding of insolvency). *See, e.g.*, PLHIGA Act, 40 P.S. § 991.1702 (defining “insolvent insurer” as a “member insurer which . . . is placed under an order of liquidation by a court of competent jurisdiction with a finding of

³ *See generally* PLHIGA Act, 40 P.S. § 991.1701. Purpose:

The purpose of this article is to protect, subject to certain limitations, the persons specified in section 1703(a) against failure in the performance of contractual obligations, under life and health insurance policies and annuity contracts specified in section 1703(b), because of the impairment or insolvency of the member insurer that issued the policies or contracts. To provide this protection, an association of insurers is created to pay benefits and to continue coverages as limited herein, and members of the association are subject to assessment to provide funds to carry out the purpose of this article.

insolvency”); § 991.1703 (providing coverages and exemptions); and § 991.1706(c) & (d) (specifying actions of the association upon a member becoming an “insolvent insurer”).

As summarized in NOLHGA’s Comments on the Second Amended Plan at 10:

Ultimately, GA coverage determinations will be made by each affected GA subject to its governing statute. As the Second Amended Plan correctly states, “Each Guaranty Association makes its own coverage determinations in accordance with applicable law. Neither the Rehabilitator nor PTNA is responsible for the coverage decisions of the Guaranty Associations.” Second Amended Plan, at 2.⁴

PLHIGA does not typically intervene in impairment or insolvency proceedings under Article V of the Insurance Department Act of 1921, P.L. 789, added by Section 2 of the Act of December 14, 1977, P.L. 280, No. 92, 40 P.S. §§ 221.1, *et seq.* (“Article V”), and it is not intervening in these proceedings or appearing other than as an *Amicus Curiae*.⁵ In complex multi-state insolvencies, extraordinary efforts are typically made by the insurance regulators and NOLHGA on behalf of the GA’s to resolve issues in ways that may maximize the value of the estate and protect policyholders without unduly burdening the GA’s and their members. The PTNA and ANIC proceedings are no exception.

⁴ PLHIGA offers no comments on coverage issues such as the Moody’s Adjustment as “these issues are outside this Court’s jurisdiction.” Health Insurers’ Comments at 43.

⁵ PLHIGA does not waive any rights or consent to any jurisdiction by submitting this *Amicus Brief*.

Once an insurer becomes insolvent, it is typically important to move quickly to liquidation to avoid dissipation of assets. PLHIGA believes that the PTNA and ANIC insolvencies are no exception. Accordingly, PLHIGA has supported and continues to support, through NOLHGA and the Multi-Party Rehabilitation Group (“MPRG”), a prompt resolution of issues before this Court to avoid further dissipation of assets.

IV. PLHIGA Concerns on Points Raised by the Blues Subsidiaries

PLHIGA does not formally join in or oppose positions asserted by the Health Insurers. However, PLHIGA appreciates that the Court has allowed its members’ concerns to be considered, and expresses its own concerns regarding certain of those issues. In particular, PLHIGA’s perspective regarding the Licensing Issues, as the domiciliary state GA, is more focused than that of NOLHGA, and accordingly PLHIGA addresses that issue first.

A. Licensing Issues: Concerns Regarding Potential “Orphan” Coverage Liability on Policies to Be Transferred from One Insolvent Company to Another

There is one issue raised by the Blues Subsidiaries in their letters to PLHIGA which impacts PLHIGA differently from other GA’s because PLHIGA is the GA in the domiciliary state of the insolvent insurers, PTNA and ANIC.

As summarized in the Second Amended Plan at 63:

Implementation of the Amended Plan will require extensive work to restore or obtain insurance licenses and agreements with Guaranty

Associations in many states. There can be no assurance that all of these efforts will be successful. Failure to obtain such licenses or agreements would complicate the implementation of the Amended Plan materially.

The Second Amended Plan contemplates transferring Self-Sustaining Policies from Company B (PTNA) to Company A (ANIC). However, there are PTNA policyholders who are residents of states in which ANIC is not licensed. Licenses must be obtained from insurance commissioners to allow ANIC to assume PTNA Self-Sustaining Policies in several states.

Non-Self-Sustaining Policies are to be transferred under the Second Amended Plan from Company A (ANIC) to Company B (PTNA).⁶ However, there are at least five states in which ANIC has been licensed, but PTNA has never been licensed, and thus resident state GA coverage is not assured for policies that are transferred to PTNA.

Nevertheless, the Second Amended Plan contemplates that the GA's in Kansas, Maine, Massachusetts, New Jersey and West Virginia will provide GA coverage benefits to policyholders with Non-Self-Sustaining Policies who reside in these states. Such coverage would be based on unspecified special licenses or consent of insurance regulators and GA's in those states. Second Amended Plan at

⁶ There are many more policies in PTNA than in ANIC. If PTNA were to become Company A instead of ANIC, many more Non-Self-Sustaining Policies would need to be transferred into Company B, potentially aggravating the licensing and GA coverage concerns from PLHIGA's perspective.

62-63. See NOLHGA Comments at 9 (“In all cases, the authority granted needs to be sufficient to ensure that the insurer will be considered a ‘member insurer’ pursuant to the applicable GA statutes.”).

The Health Insurers’ Comments at 46-47 suggested that the Second Amended Plan is not feasible based on the regulatory hurdles of the proposed transfer of policies. In an April 22, 2015 Health Insurers’ Response to Intervenors’ Application for an Order Rejecting the Plan or Alternative Relief,⁷ the Health Insurers suggested that the Rehabilitator should be required to show that the licenses could be obtained before any confirmation hearing commences.

In an April 30, 2015 reply to that Health Insurers’ filing, the Rehabilitator suggested that failure to obtain licenses may not be fatal to the Second Amended Plan because the claims of the affected policyholders *could be channeled through the estate* or, alternatively, policyholders might receive coverage through PLHIGA, as the domiciliary GA through “orphan” coverage. See PLHIGA Act, 40 P.S. 991.1703(a)(2)(ii) (reciting circumstances for coverage of non-residents). Similarly, Rehabilitators’ attorney stated at the May 11, 2015 hearing “If the Rehabilitator cannot obtain a license for some reason, the affected policyholders could be covered by the Pennsylvania GA *or coverage could be channeled through the estate*, and all of that would be fleshed out and provided in evidence at the

⁷ The Court denied Intervenors’ Application on May 19, 2015.

hearing, just by way of example, Your Honor.” May 11, 2015 Rough Transcript at 21 (emphasis added).

At the May 11, 2015 hearing, the Health Insurers’ attorney noted concerns with an attempt to fall back on PLHIGA as the domiciliary state GA, including the potential disparate impact on Pennsylvania domiciled health insurers that may not do business in other states. May 11, 2015 Rough Transcript at 27.

PLHIGA appreciates the efforts of the insurance regulators and GA’s in the affected states to facilitate coverage from those GA’s for state residents, notwithstanding a transfer in policies pursuant to the Second Amended Plan. However, in the event that licenses and coverages cannot be obtained or confirmed, PLHIGA has not made a final determination as to whether it would apply orphan coverage under the PLHIGA Act under the circumstances of non-resident “orphans” created by the Second Amended Plan itself.⁸

PLHIGA has been led to believe that efforts are under way to attempt to obtain licenses and confirm coverage by resident state GA’s. PLHIGA believes it is important that these efforts be pursued to their fullest, and that all incentives be aligned with obtaining and confirming all necessary licenses and resident state GA

⁸ There may be a distinction between coverage of non-resident policyholders, for example, who have moved from a state where PTNA was licensed to a state where PTNA is not licensed, and non-resident policyholders who have resident state GA coverage for existing policies that is effectively cut off by operation of the Second Amended Plan itself.

coverage. Further, the extent of any such orphan liability remains unclear. PLHIGA encourages the Rehabilitator to clarify as promptly as possible which regulators and GA's have confirmed that licensing and coverage is available. PLHIGA further encourages the Rehabilitator to develop a fall back contingency *to channel coverage through the estate*, as the Rehabilitator has suggested is a possibility.

In the last resort, to the extent there can be no alternative for a defined limited number of non-resident policyholders, PLHIGA may determine whether coverage is appropriate. PLHIGA has not categorically rejected the possibility of such coverage, but believes that all other possibilities should be exhausted. All parties appear to agree that further elaboration is needed on this topic, and that is a proposition with which PLHIGA agrees.

B. Issues Impacting All GA's Addressed by NOLHGA and the Health Insurers

1. Uncovered Benefits Issues

PLHIGA understands that the Health Insurers have objected to the creation of a trust to provide benefits to policyholders above and beyond those that would be due from the GA's. PLHIGA understands that the Health Insurers object to any assets of the estate being allocated to address claims based on uncovered policies or claims in excess of GA limits because they believe that Article V, as interpreted by the Pennsylvania Supreme Court in *Warrantech*, effectively terminates such

policies thirty days after an order of liquidation without right to claims against the estate for future benefits.

Unlike the Licensing Issues above, which potentially impact PLHIGA as the domiciliary GA differently from other GA's, PLHIGA understands that the questions of whether and how the *Warrantech* opinion might apply in the context of the PTNA and ANIC long term care insolvencies are not unique to the domiciliary GA. PLHIGA appreciates that the Court has allowed certain of its member insurers who will bear a significant portion of any GA obligations nationwide relating to Penn Treaty and ANIC to participate in these proceedings, and believes that the Court should weigh and consider the concerns expressed by the Health Insurers and those expressed by NOLHGA with respect to application of *Warrantech* in a life and health insolvency to the extent it is necessary to address this issue.

2. Agent Commissions

PLHIGA understands that the Second Amended Plan provides for agency commissions to be paid on the Self-Sustaining Policies which will be held in Company A (ANIC). PLHIGA understands that the Health Insurers have objected to such payment and have briefed to the Court why they believe that the agents are not entitled to commissions. PLHIGA also understands that NOLHGA has stated that it does not oppose the Health Insurers' request to eliminate the payment of

agent commissions in the Second Amended Plan, that it could support the Policyholders Committee's suggestion of deferral of decision on this issue, and that it has not ruled out a potential compromise in the context of the Second Amended Plan as a whole. *See* NOLHGA Response to Health Insurers' Application for Relief to Eliminate the Payment of Agent Commissions on Company A Policies.

Like NOLHGA, PLHIGA does not oppose the Health Insurers' request. Like NOLHGA, PLHIGA is not categorically opposed to compromise if it would further prompt resolution.

3. Asset Allocation

PLHIGA understands that the Health Insurers have objected to the allocation of assets between Company A (ANIC) and Company B (PTNA). Health Insurers' Comments at 16-30. The allocation of assets between Company A (ANIC) and Company B (PTNA) should not be unduly weighted in favor of ANIC. PLHIGA understands the desire of all interested parties to avoid a future insolvency of ANIC and to ensure that ANIC is adequately capitalized, consistent with governing law and actuarial analysis.

There may be some aspects of judgment and discretion as well as differing expert opinions on these topics that the Court will likely have to consider.

NOLHGA has suggested in its Comments that it "will work with the Receiver to

clarify certain aspects of the asset allocation methodology described in the Second Amended Plan.” NOLHGA Comments at 9. PLHIGA appreciates NOLHGA’s efforts, and appreciates the Court’s consideration of the concerns raised by the Health Insurers.

V. Conclusion

PLHIGA recognizes that delay results in dissipation of assets. Accordingly, PLHIGA supports prompt resolution through a negotiated solution or prompt adjudication and modifications of the Second Amended Plan.

PLHIGA has worked and will continue to work through NOLHGA to avoid duplication of GA efforts and expenses and inconsistent positions of multiple GA’s impacted by these insolvencies. PLHIGA believes that NOLHGA’s efforts have significantly contributed to moving these matters closer to resolution. PLHIGA reserves its right to make appropriate determinations at appropriate times, and does not waive any rights or consent to any jurisdiction.

Notwithstanding the cap on assessments of 2 percent of pertinent premiums and tax offset provisions, members of PLHIGA – even if they have never written a single long term care insurance policy – will likely have to pay substantial assessments if the Second Amended Plan is implemented. Failure to implement some plan promptly could result in even higher assessments down the line. PLHIGA appreciates the efforts of the Court to consider the perspective of

members of PLHIGA like the Health Insurers and the Blues Subsidiaries, as well as the perspective of NOLHGA.

Respectfully submitted,

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Dated: June 26, 2015

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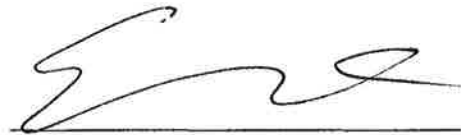
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