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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re Penn Treaty Network America Insurance Company in Rehabilitation	:	NO. 1 PENN 2009
In Re: American Network Insurance Company in Rehabilitation	:	NO. 1 ANI 2009

2016 AUG 13 P 3: 24
RECEIVED & FILED COMMONWEALTH COURT OF PENNSYLVANIA

OPPOSITION OF INTERVENOR AGENTS TO THE VERIFIED JOINT APPLICATION OF THE COMMISSIONER, PENN TREATY CORPORATION, EUGENE WOZNICKI, AND BROADBILL PARTNERS LP, FOR APPROVAL OF SETTLEMENT AGREEMENT

The Court is intimately familiar with the history of this proceeding. For seven years, the Rehabilitator has been tasked with developing and implementing a Plan of Rehabilitation for Penn Treaty and ANIC. For much of that time, the Rehabilitator has instead attempted to liquidate the two companies and her efforts in that regard have been vigorously, and so far successfully, opposed by PTAC, which is in the unique position of being statutorily entitled to have its litigation expenses and attorney fees reimbursed by the rehabilitation estate. The Commissioner now seeks approval of a settlement in which PTAC will consent to liquidation in exchange for a cash payment of $10 million. The proposed settlement thus represents the

Rehabilitator's attempt to buy the silence of the only party equipped to oppose the liquidation of the companies.

The Verified Joint Application For Approval of Settlement Agreement ("Application") should be denied for the following reasons: (1) the Application fails to provide a sufficient evidentiary basis from which this Court may find that the proposed settlement is in the best interests of the insolvent insurers' policyholders, claimants, and the public; (2) the proposed classification of the $10 Million "Cash Payment" as an administrative expense entitled to first priority is contrary to Article V of the Insurance Law of 1921, 40 P.S. § 221.44(i), which unequivocally provides that payments for the claims of shareholders or other owners have the lowest priority and may be paid only after all other claims have been satisfied; and (3) the proposed settlement is bad public policy because it is nothing more than a thinly disguised attempt to use assets of the rehabilitation estate to buy the silence of the party uniquely positioned to challenge the Commissioner's assertion that liquidation is appropriate and attempts to use the power of this Court to set a bond for appeal to squelch any further judicial review of the proposed settlement.

STANDARD FOR APPROVAL OF A SETTLEMENT

Actions subject to review under the Article V must be in the best interest of insureds, creditors and the public generally. 40 P.S. § 221.1(c). As the Application concedes, the settlement can be approved only if the Court finds that the settlement is "in the best interests of the insolvent insurer's policyholders, claimants and public" and is "fair to the insurer's estate and to . . . policyholders." Application at ¶ 12.

INSUFFICIENT EVIDENTIARY BASIS FOR APPROVAL

The sole basis for approval proffered by the applicants is the Application itself. While full of conclusory statements, the Application falls far short of providing the evidentiary support required for this Court to find that the standard for approval of a settlement has been satisfied.

Paragraph 5 of the Application purports to set forth the "benefits to the Companies' estates, policyholders, creditors and the public." The first "benefit" identified is the "preservation" of net operating loss ("NOL") tax benefits. The Application does not provide any evidentiary basis from which the Court could conclude that those NOL tax benefits are not already available to the estate, that the estate has an actual need for NOL tax benefits, which are used to offset income, and fails to provide any evidentiary basis from which the Court could quantify of the actual benefit to the estate, as opposed to some hypothetical benefit.

The second "benefit" is characterized as "joint submission" of the private letter ruling ("PLR") request to the IRS. The Application itself, however, clarifies that PTAC will only be signing documents and that the Rehabilitator is the entity that will actually request the PLR. The MOU attached to the Application further clarifies that over a year ago the Rehabilitator drafted and submitted to the IRS a "pre-submission request" and that the document PTAC is supposed to execute requests relief that is "substantively" the same as in that pre-submission request. The Application fails to provide any evidentiary basis from which the Court could find that PTAC's signature is actually required, particularly since by statute the Rehabilitator has all the powers of the officers, directors and managers of PTAC and ANIC. 40 P.S. § 221.16(b). The Application also does not provide any evidentiary basis from which the Court could conclude that the risks of adverse tax treatment are real or that the IRS has ever imposed the hypothetical tax liabilities on a liquidating insurance company or its policyholders. Similarly, the Application fails to provide

any evidentiary basis from which the Court could determine the likelihood of receiving the relief requested in the PLR, with or without PTAC's signature, and the MOU itself, which includes a number of provisions that are applicable if the PLR request is denied in whole or in part, makes it clear that the applicants have substantial concerns that the requested relief will not be granted. The only thing that is clear from the MOU (but not expressed in the Application) is that PTAC gets to keep its $10 million payment whether or not the PLR request is granted. There is, however, no evidentiary basis for the Court to make any finding regarding the value of the PLR to the companies, the policyholders, claimants or the public.

The third "benefit" claimed in the Application is "Resolution of All PTAC Intervenors' Objections, Consent to Liquidation and Expedited Proceedings." It is apparent from the paucity of the information submitted regarding the other "benefits"[1] that this is the actual purpose of the proposed settlement and the only real "benefit" that the insolvent estates receive from the settlement. While the Rehabilitator has an interest in buying the silence of the party that has to date thwarted her desire to liquidate the companies, for the reasons set forth below this "benefit" is realized only by a cash payment that is contrary to controlling statutory requirements and driven by bad public policy. This Court should not find that a settlement structure that places the interests of the companies' owners ahead of policyholders and other claimants in violation of the priority of payment provisions of the insolvency statute is in the interest of either policyholders or the public. Similarly, the Court should not countenance a settlement the primary purpose of which is to provide for the convenience of the Rehabilitator by removing an obstacle to liquidation of a company in rehabilitation. *See, e.g., Koken v. Legion Ins. Co.*, 832 A.2d 1196,

[1] The other "benefits" listed in the Application, elimination of agent commissions and premium taxes, as well as the putative benefit of a petition to liquidate sooner rather than later, are all benefits not of the settlement but instead of the actual liquidation and should be considered only in the context of a petition to liquidate, if one is actually filed.

1226-1233 (Pa. Commw. Ct. 2003) *aff'd. sub nom Koken v. Villanova Ins. Co.*, 878 A.2d 51 (Pa. 2005)("Legion").

Noticeably missing from the Application is any discussion of how the $10 million Cash Payment to PTAC was arrived at or why it represents "fair value" to the estate. Indeed, the MOU provides that PTAC is to be excused from the requirement of filing a proof of claim for its $10 million payment, which proof under 40 P.S. §221.38 would require PTAC to substantiate the propriety and amount of the claim. This strongly suggests that the applicants are not comfortable that the value of the payment can be substantiated. There is, in any event, no evidentiary basis from which the Court could find that the payment to PTAC was fair in relation to the "benefits" that the estate is purportedly receiving.

The Application acknowledges the releases that are part of the MOU but fails to address the fact that as part of the proposed settlement, the Rehabilitator is releasing all current and former officers, employees, etc. of Penn Treaty, ANIC and PTAC, among others, from all claims that could have been asserted. In prior liquidations, the liquidators have aggressively pursued claims against former officers and directors for their negligence or intentional misconduct giving rise to the insolvency. Here, the applicants do not explain why it is in the best interest of the estate, the policyholders or other claimants to provide the broad release contemplated by the proposed settlement.

THE PROPOSED SETTLEMENT IS CONTRARY TO LAW

The proposed settlement contemplates that PTAC will be paid $10 million, contingent primarily on its consent to liquidation and agreement not to continue to litigate with the Rehabilitator, and that PTAC will be entitled to retain that $10 million regardless of whether or not the IRS grants the requested tax relief or this Court allows the Rehabilitator to convert the

rehabilitation into liquidations. In other words, in exchange for a release, PTAC gets $10 million regardless of whether or not the Rehabilitator gets any of the supposed "benefits" of the settlement other than PTAC's silence. The Application requests that the Court approve a settlement in which the Cash Payment is "entitled to priority level (a) status pursuant to 40 P.S. § 221.44(a)" and "shall be irrevocably and immediately payable in cash, as and when due, as first priority costs and expenses of the administration of receivership."

The Application does not explain how a settlement payment of the type contemplated can meet the requirements of 40 P.S. § 221.44(a) which defines administrative expenses as:

> The costs of administration, including but not limited to the following; the actual and necessary costs of preserving or recovering the assets of the insurer; compensation for all services rendered in the liquidation; any necessary filing fees; the fees and mileage payable to witnesses; reasonable attorney's fees; the expenses of a guaranty association in handling claims.

Nothing in the Application suggests that the $10 million Cash Payment represents a necessary and actual expense or reimbursement to PTAC of any expenses it has incurred. Instead, the Application and MOU make clear that it is a "settlement" that is the result of lengthy "negotiations," including "settlement conferences," intended to conclude "litigation on all contested issues between the Commissioner and the PTAC Intervenors that currently exist and that could arise in the future." Application ¶¶ 2, 5(f) There is, therefore, no basis for the Court to find that the Cash Payment is an expense entitled to priority under 40 P.S. § 221.44(a).

Further, the Application does not even mention 40 P.S. § 221.44(i), which provides that claims of shareholders and other owners shall be <u>last</u> in order of priority. The $10 million cash payment is indisputably in payment of a claim of shareholders or other owners.

40 P.S. § 221.44 is explicit: "The order of distribution of claims from the insurer's estate shall be in accordance with the order in which each class of claims is herein set forth. Every

claim in each class shall be paid in full or adequate funds retained for such payment before the members of the next class receive any payment." The applicants may not circumvent this clear statutory mandate by arbitrarily reclassifying a settlement payment as an "administrative expense."

THE PROPOSED SETTLEMENT IS BAD PUBLIC POLICY

The proposed settlement represents an attempt by the Rehabilitator to take $10 million from the estates of companies she contends are insolvent and pay that money to the companies' owners and shareholders, without the necessity of a proof of claim and before the claims of policyholders and other creditors have been satisfied in full, in order to obtain the owners' consent to liquidation. The settlement represents a fundamental perversion of the statutory scheme for regulation of insurance insolvencies in Pennsylvania.

Under the law, if a Rehabilitator believes a company in rehabilitation needs to be liquidated, she must petition the Court for an appropriate order and present the evidence necessary to support her entitlement to the Order requested. 40 P.S. §§ 221.12 -221.13; 221.18; *see, e.g.*, Legion, 832 A.2d at 1226-1233. If the owners or shareholders dispute the Rehabilitator's position, they are entitled to participate in the proceedings before the Court and to be reimbursed from the estate for their legal fees and costs. 40 P.S. §§ 221.6(c)(i), 221.18. This ensures that the parties best positioned to challenge an arbitrary or unsupported exercise of power by the Rehabilitator have the resources to do so and that the Court has the fullest possible record before it on which to determine whether or not to grant the Rehabilitator the relief she requests. This carefully balanced statutory scheme will be completely gutted if the Rehabilitator can simply use the assets of the estate to buy off the ownership and obtain a stipulation to liquidation.

Further, as noted above, the proposed settlement completely upends the priority of claims established in the insolvency statute. For good reason, the Legislature has determined that claims of owners and shareholders should be paid after all other obligations of the company have been paid in full. It is bad public policy to subvert this order of priority.

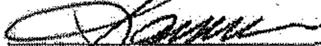
It is telling that the Application references no other agreement of this type that has been approved by a court and cites to no legal precedent for approval of terms of this type. The Court should recognize the proposed settlement for what it is – a substantial payment for silence dressed up and packaged in an effort to make it fit within the confines of a legal framework that is completely antithetical to the actual purpose and effect of the settlement.

Finally, the Application requests that judgment be entered on the settlement immediately and that any appeal of the order approving the Application be conditioned on the posting of a $36 million bond. The only apparent purpose of the punitive bond provision is to foreclose further judicial review of the proposed settlement. This proceeding has been pending for seven years and has already been the subject of substantial appellate proceedings. No bond has ever been requested by the Rehabilitator in connection with any of the actions in the case to date. The fact that the applicants feel compelled to seek a huge bond to foreclose appellate review of the Application speaks volumes about how they really feel about the propriety of the settlement agreement they have reached.

CONCLUSION

For the foregoing reasons, the Application should be denied.

Respectfully Submitted,



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Dated: July 13, 2016

CERTIFICATE OF SERVICE

I certify that on July 13, 2016, I caused the foregoing Opposition of Intervenor Agents to the Verified Joint Application for Approval of Settlement Agreement to be served on the following counsel of record vial e-mail:

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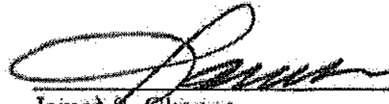

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In Re Penn Treaty Network America Insurance Company in Rehabilitation	:	NO. 1 PENN 2009
In Re: American Network Insurance Company in Rehabilitation	:	NO. 1 ANI 2009

ORDER

And Now, this day of July, 2016, upon consideration of the Verified Joint Application of the Commissioner, Penn Treaty Corporation, Eugene Woznicki, and Broadbill Partners, LP, For Approval of Settlement Agreement, and the Opposition of Intervenor Agents thereto, the Application is hereby DENIED.

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MARY HANNAH LEAVITT, Judge

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OF PENNSYLVANIA
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