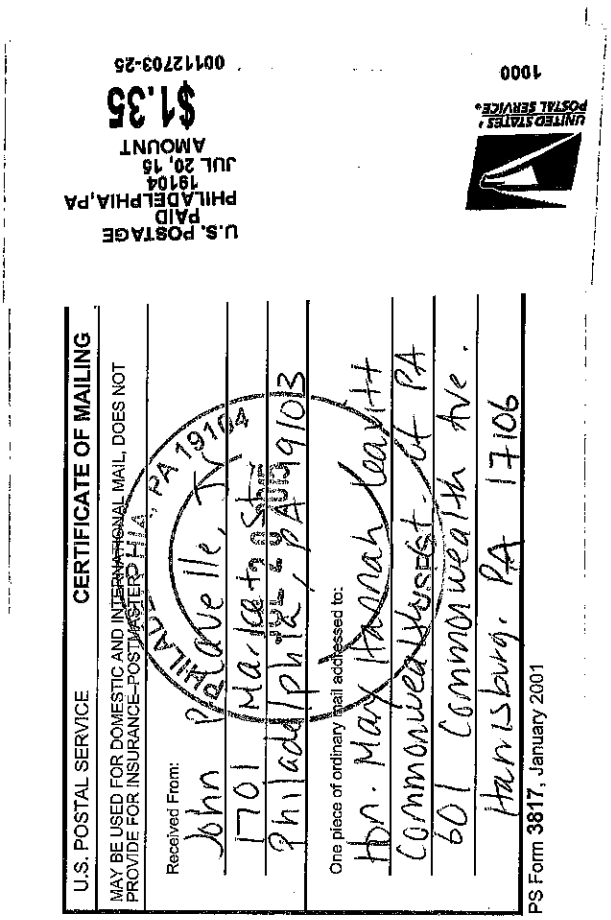
IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Penn Treaty Network America Insurance Company in Rehabilitation	No. 1 PEN 2009
AND	
In Re: American Network Insurance Company in Rehabilitation	No. 1 ANI 2009

OPPOSITION OF THE HEALTH INSURERS TO THE REHABILITATOR'S AMENDED APPLICATION FOR ENTRY OF A PROTECTIVE ORDER



Harold S. Horwich
Benjamin J. Cordiano
MORGAN, LEWIS & BOCKIUS LLP
One State Street
Hartford, Connecticut 06103-3178
Telephone: 860.240.2700
Facsimile: 860.240.2800

John P. Lavelle, Jr.
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
Telephone : 215.963.5000

Attorneys for 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

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 (collectively, the "Health Insurers"), through their undersigned counsel, hereby submit this opposition to the Amended Application for Entry of a Protective Order (the "Amended Application") of Teresa D. Miller, Acting Insurance Commissioner of the Commonwealth of Pennsylvania, in her capacity as statutory rehabilitator (the "Rehabilitator"). The Health Insurers oppose the Amended Application in so far as it (a) seeks to preclude the Health Insurers' requests for discovery based on relevance and (b) relieves the Rehabilitator of any meaningful obligation to retrieve electronically stored information ("ESI") in response to the Health Insurers' discovery requests.

The Rehabilitator seeks to create an abstract rule of relevance with which to later defeat specific discovery requests. The Health Insurers oppose this quest. First, the Rehabilitator's application turns the normal progression of discovery upside down and enmeshes the parties in abstract disputes, when there are specific requests pending. Second, the rule espoused by the Rehabilitator would define relevance so narrowly that no meaningful discovery could ever take place. Finally, the Rehabilitator's allegations of astronomical cost for the retrieval of ESI are completely unsupported by the Amended Application.

BACKGROUND

The Rehabilitator asks the Court to enter an order establishing a rule of relevance, which she will then use to object to various discovery requests of the parties. Br. in Supp. of Am. Appl. at 5-7. The Rehabilitator seeks blanket imposition of the following relevance formula: discovery is "limited to the objections raised in Formal Comments addressing the merits of the

Plan to the extent that such objections assert that the Plan does not meet the legal requirements for its approval *as demonstrated by the plain language of the Plan* and the actuarial methodology and data on which it is based." Am. Appl. at 4 (emphasis added).

The Rehabilitator's stated premise for imposing this severe restriction on discovery is a distortion of comments the Court made earlier this year. The Rehabilitator repeatedly asserts in her moving papers that this Court directed the parties at the February 20, 2015 hearing that all discovery must be "targeted and narrow." *See, e.g.*, Am. Appl. at 2; Rehabilitator's Br. at 2, 4, 8 and 12. In fact, the Court stated: "No one should consider this directive to mean that you're to spend two and a half months on depositions. The depositions should be targeted, narrow, and if there's any dispute I'm assuming I'm going to hear. We have enough lawyers here, I'll hear from the lawyers." (Tr. at 36). This comment cannot reasonably be interpreted as a basis on which to thwart discovery in the manner proposed by the Rehabilitator.

The Amended Application also asks the Court to limit the production of ESI as follows:

> Electronic discovery from or of the Rehabilitator in this receivership shall be limited to the content of the electronic ShareFile, which shall include all actuarial work, methodologies and data supporting the Plan and reports and documents disclosed to or shared with the members of the Multi-Party Rehabilitator Group. The Rehabilitator shall not be required to incur additional time or expense in the production of materials not contained in the ShareFile absent a showing and finding by the Court that good cause exists for such additional materials.

Am. Appl. at 4-5. According to this passage, the only ESI to be placed in the ShareFile will be solely relevant to "actuarial work, methodologies and data supporting the Plan" held by PricewaterhouseCoopers ("PwC"). No ESI of the Company or the Rehabilitator will be provided. And the only ESI of PwC will relate to a narrow set of issues.[1]

[1] The Amended Application also seeks a protective order with respect to specific topics on which the Health Insurers have not sought discovery, and therefore the Health Insurers take no position on this portion of the Order.

ARGUMENT

I. THE AMENDED APPLICATION IS PREMATURE

There are currently pending discovery requests to the Rehabilitator by the Health Insurers, PTAC and Broadbill. Simultaneously, there are discovery requests by the Policyholders Committee and the Rehabilitator to the Health Insurers. The Rehabilitator served extensive objections and responses on July 17, 2015 to some of these sets of discovery.[2] Those objections and responses only serve to emphasize the need to address any issues concerning the scope of discovery in the context of specific requests.

The Rehabilitator has reproduced her objections based on relevance to many of these requests, again erroneously asserting that this Court's comments directed to "targeted and narrow" depositions provides a basis to immunize the Rehabilitator from discovery. It appears highly likely, unless the parties are able to resolve what appear to be substantial discovery disputes, that the Court will be called on to review those objections. That will be the proper time and context for a consideration of relevance.

In the normal course of discovery, parties serve their requests, recipients respond, object or seek protective orders, then the parties meet and confer. Thereafter, the court determines any disputes, including disputes about relevance. Pa.R.C.P. 4012(a). The Amended Application is devoid of any explanation as to why the Court should take matters up in a different order in this case.

II. THE REHABILITATOR'S RULE OF RELEVANCE IS UNSUPPORTABLE

The rule of relevance espoused by the Rehabilitator envisions a confirmation process that immunizes the Rehabilitator from any meaningful challenge.

Likewise, the Health Insurers take no position on the Amended Application's request to preclude the deposition of Michael Consendine.

[2] The Rehabilitator has stated that she will not be answering some interrogatories until July 30.

A. The Rule Would Preclude Discovery That Is Obviously Appropriate.

The rule takes as its point of departure the "plain language of the Plan." This suggests that the Court is construing something that is akin to a statute, where the Court's review is confined to the Plan's four corners. This is completely inappropriate to the task at hand.

First, the Plan fundamentally alters the contracts and business operations of a large and complex organization. It includes provisions for the sale of business operations, the treatment of agent commissions and the transfer of policies. (*See* plan Sections IV. F, Q and T). The proposed rule would eliminate any inquiry into business operations or agency agreements. Second, the Plan exists in the context of a six year effort to rehabilitate these companies and a substantial ruling by the Court in May of 2012 providing guidance on what a plan should include. The Rehabilitator has offered testimony that the Plan attempts to respond to the Court's ruling and the course of the proceedings. (Hr'g Tr. (7/13/15), at 18, 36-40). Third, the Rehabilitator has put on the opening portion of her case in chief through the testimony of Special Deputy Rehabilitator Patrick Cantilo (the "SDR") which included testimony on a wide range of topics that go well beyond meeting legal requirements of the plain language of the Plan. The testimony included such topics as the financial condition of policyholders, alternatives considered by the Rehabilitator, the feasibility of rate increases, the prospects for obtaining licenses and triggering guaranty associations and the prospects for obtaining a private letter ruling from the Internal Revenue Service. (Hr'g Tr. (7/13/15), at 40-43, 98-101, 151-193, 208-209, 217-224, 228, 247; Hr'g Tr. (7/14/15), at 8-38, 49-53). Which of these topics would go to the legal requirements for the Plan's approval "as demonstrated by the plain language of the Plan?" Certainly not all of them. Yet each of these topics was the subject of testimony and would be an appropriate topic of discovery.

The Rehabilitator identifies two requests for production by the Health Insurers that she maintains would be barred by the requested order:

> All documents relating to the Rehabilitator's determination not to modify the legal or contractual rights of any policyholder under the Plan. (RFP No. 14)
>
> All documents evidencing the Rehabilitator's analysis that obtaining regulatory approval of premium rate increases (a) during the pendency of the rehabilitation proceeding or (b) as a condition to exiting rehabilitation, are infeasible. (RFP No. 17)

The SDR testified that in developing the Plan, there was consideration of responding to the Court's May 2012 directive to address and eliminate inadequate and unfairly discriminatory premium rates on Old Co policies. (Hr'g Tr. (7/13/15), at 18-20, 95-98, 236-237). The Health Insurers have challenged the proposition that the Rehabilitator has done anything to address rate inadequacy and discrimination. (Hr'g Tr. (7/14/15), at 225). In his testimony, the SDR falls back on the position that this is the best that can be done under the circumstances. (Hr'g Tr. (7/13/15), at 23-25, 211-212). The Health Insurers have a legitimate interest in examining that proposition. The SDR testified that he did not consider it possible or appropriate to seek rate modification while the rehabilitation was pending. (Hr'g Tr. (7/14/15), at 46-48). This is precisely the topic of RFP 14. The Rehabilitator now seeks to have this contention remain unexamined and also seeks to avoid the obvious follow up, which is even if rates could not be modified during the proceeding, why would they not be modified as part of the Plan? This is also the subject of RFP 14. Furthermore, if rates could in fact not be modified during or under the Plan, an equivalent result could have been achieved through policy modification.[3] This is the

[3] The court has asked for authority for the proposition that it has the power to modify policies, and this will be forthcoming.

subject of RFP 17. Again, this inquiry is fairly within the scope of the direct testimony elicited from the SDR in support of the Plan.

In its own discovery served on the Health Insurers, the Rehabilitator seeks to explore precisely the issues that she attempts to bar the Health Insurers from exploring: what were the alternatives to this Plan? In its Request for Production of Documents and Things, the Rehabilitator asks as follows:

> 12. All documents relating or referring to any plan or plans of rehabilitation or components thereof, for ANIC and/or PTNA, that you have considered or support for purposes of identifying an alternative to the proposed Second Amended Plan of Rehabilitation.
>
> 13. If you have prepared an alternative plan of rehabilitation or components thereof for either or both of the Companies, or propose an alternative to the proposed Second Amended Plan of Rehabilitation, produce a copy of that alternative plan or components, and all documents reflecting or relating to any accounting, actuarial, or other expert or consultant analysis performed on your behalf or at your direction related thereto, and any and all documents reviewed, prepared or assembled by any experts or consultants in connection with the development of the plan or components thereof.

The Rehabilitator cannot have it both ways. She cannot have the SDR testify that this is the best plan available and seek information from the Health Insurers about whether they have alternative plans, and at the same time, seek to bar inquiry on the two most fundamental issues in the Plan before the Court: the refusal to modify policyholder benefits and the refusal to raise premium rates.

Discovery concerning other aspects of the Companies' agreements and operations will also undoubtedly prove relevant to the confirmation process. For example, the Health Insurers have sought production of the Company's agreements with its agents. Those agreements define the rights of the agents which are treated under the Plan. The Rehabilitator has indicated at least

a tentative willingness to produce some of these agreements, even though they are outside the "plain language of the Plan."

Confining discovery to matters within the plain language of the Plan would preclude any discovery into the feasibility of implementing the Plan. This issue has been raised by both PTAC and the Health Insurers and was the subject of testimony by the SDR. (Hr'g Tr. (7/13/15), at 157-177, 247-249; Hr'g Tr. (7/14/15), at 8-48). The Court permitted discovery on these issues prior to the commencement of the trial. However, the Rehabilitator has still not responded to seven of the thirteen interrogatories served by the Health Insurers in anticipation of the July 13 hearing, and has only half heartedly responded to several others. Yet, the SDR testified extensively on his approach to resolving formidable licensing and tax issues. (Hr'g Tr. (7/13/15), at 162-178; Hr'g Tr. (7/14/15), at 8-38.)

Confining discovery to matters within the plain language of the Plan would also preclude inquiry into the question of what would happen if the Companies were liquidated, even though the SDR testified that he was confident that policyholders would receive more than they would under the Plan. (Hr'g Tr. (7/13/15), at 252-253). Such a liquidation analysis is beyond the plain language of the Plan, though clearly relevant to whether the Plan is fair and equitable. But under the Rehabilitator's formulation, discovery on this set of issues would be barred.

B. The Rule Precludes Inquiry into the Rehabilitator's Case.

The rule espoused by the Rehabilitator confines discovery to matters raised in the parties' Formal Comments. This ignores the fact that the Rehabilitator must put on evidence in support of her case, and has done so. The Rehabilitator suggests that she has an extremely low burden of proof: "whether the Plan is an objectively reasonable exercise of the Rehabilitator's discretion and meets applicable legal standards." The Health Insurers disagree that this is the standard of

proof. Even if it were, it would still require the Rehabilitator to submit evidence in support of the Plan, and she has done so. Due process requires that, the objecting parties have the opportunity to test the accuracy and completeness of the SDR's testimony.

Such inquiries could not have formed the basis of objections in the Formal Comments of the Health Insurers because at the time of the Formal Comments, the Health Insurers did not know what evidence the Rehabilitator would submit in support of the Plan. Now we do, and the Health Insurers should not be limited only to what was in their objections but should also be entitled to investigate the evidence submitted in the Rehabilitator's case in chief.

C. The Rule Is Contrary to Established Discovery Practice.

The Amended Application attempts to establish a sweeping general rule that would apply to all forms of discovery in the case. It makes no sense to impose such a rule in the abstract without reference to the specific discovery requests at issue. Relevance needs to be evaluated request by request, not in the abstract. For each request challenged, a party needs to identify how the facts sought might be relevant to its case. *Taylor v. Pars Mfg. Co.*, No. 2441, 1985 WL 384557 (Penn. Ct. Comm. Pl. July 22, 1985) ("In the absence of any rational explanation by plaintiff as to how this list was compiled and its relevance to the particular facts of this case, we conclude that this discovery request is oppressive and would 'require the making of an unreasonable investigation' by defendant.") The rule sought by the Rehabilitator would entirely preclude that determination in favor of a general abstract rule. Such a rule would simply shift the dispute from "is a request relevant to the case" to "does a request comport with the rule." The rule will not eliminate the disputes or assist in their resolution. In short, nothing is achieved by imposing the rule.

The Rehabilitator's proposed approach is particularly problematic with respect to depositions. Adoption of the abstract convoluted rule proposed by the Rehabilitator will inevitably lead to disputes at depositions as to whether particular questions or lines of questioning fall within the bounds of the rule. Notably, in her motion the Rehabilitator does not seek to protect information that is privileged, private, commercially sensitive or prejudicial. Rather, she seeks only to limit discovery to what she contends to be relevant. This Court should not restrict deposition questioning narrowly and preemptively on the basis of relevance, but permit the parties sufficient leeway to develop facts through deposition questioning. In fact, rejecting the Rehabilitator's motion is likely to increase the efficiency of future hearings and reduce the imposition on this Court's limited resources, by permitting the parties to develop fully in depositions points that would otherwise have to be addressed in Court hearings.

III. THE REHABILITATOR'S PROPOSED LIMITATIONS ON ESI SHOULD BE REJECTED

Pa.R.Civ.P. 4012 requires a movant to show that "justice requires" a protective order to protect against "unreasonable annoyance, embarrassment, oppression, burden or expense." As the party seeking a protective order to limit discovery, the Rehabilitator has the burden of proof to show "good cause." Pa.R.Civ.P. 4012(a); *see generally* Goodrich Amram 2d Procedural Rules Service with Forms (2009) § 4012(a):7 ("the party or person moving for this type of relief bears the burden of establishing that the requested discovery is objectionable and that good cause exists for granting such a motion.") (citations omitted). The Rehabilitator fails to meet that burden.

The Rehabilitator has not furnished an affidavit or any other evidentiary material supporting her claim that the ESI sought by the Health Insurers poses an unreasonable burden. Instead, she has offered only unsupported and unsworn arguments of counsel. Under Pa.R.Civ.P.

4012, a request for relief under Rule 4012 must be supported by evidence of some type -- typically an affidavit. As the Pennsylvania Superior Court explained last year in an *en banc* decision, the arguments of counsel, unsupported by affidavits or other record evidence, are inadequate to carry the burden to show "good cause" for entry of a protective order: "it is self-evident that a party seeking a protective order must, at the very least, **present some evidence of substance that supports a finding that protection is necessary**. Such evidence must address the harm risked, and not merely an unsubstantiated risk ...." *Dougherty v. Heller*, 97 A.3d 1257 (Pa. 2014) (emphasis added); *see generally* Goodrich Amram 2d Procedural Rules Service with Forms (2009) § 4012(a):7 ("at a minimum, the moving party must particularize the reasons warranting this type of relief **and must present some evidence** upon which a court can make a determination that harm will result from the discovery. Such evidence may include appropriate testimony and other factual data, **but can never comprise unsupported contentions and the conclusions of counsel**.") (emphasis added).

The Rehabilitator's assertion concerning ESI is Biblical in its economy and terror. The Rehabilitator cites 50 custodians, 4 terabytes of data and an estimate of at least $2 million from four unnamed e-discovery providers. But none of it is explained, much less supported by evidence. There is no supporting documentation or even an explanation as to what the e-discovery providers were asked to price. There has not been any communication with the Health Insurers regarding search terms. The amount of this number related to their requests is unknown.

The Rehabilitator proposes to provide only ESI related to "actuarial work, methodologies and data supporting the Plan and reports and documents disclosed to or shared with the members of the Multi-Party Rehabilitator Group." This list would evade many of the Health Insurers key inquiries. For instance, the Health Insurers seek discovery with respect to: (a) the status of the

Rehabilitator's efforts to license the Companies in connection with the Plan or obtain guaranty association agreements, (b) the feasibility of operating Company A outside of rehabilitation, (c) disposition of estate assets and (d) consideration of rate increases and policy modifications as part of the Plan. None of these issues would be addressed by the ESI materials proposed to be deposited by the Rehabilitator in the ShareFile. The Health Insurers understand that the Rehabilitator may object to some or all of these requests based on relevance, privilege and other grounds. But those objections need to be considered on a case by case basis, and not preempted by a sweeping order that precludes any meaningful production of ESI.

RELIEF SOUGHT

For the reasons set forth above, the Health Insurers request that the Amended Application be denied, or at least that its consideration be deferred until after all parties have responded to pending.

Respectfully submitted,

Dated: July 20, 2015

MORGAN, LEWIS & BOCKIUS LLP

By: /s/ Harold S. Horwich

Harold S. Horwich
Benjamin J. Cordiano
MORGAN, LEWIS & BOCKIUS LLP
One State Street
Hartford, Connecticut 06103-3178
Telephone: 860.240.2700
Facsimile: 860.240.2800

John P. Lavelle, Jr.
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
Telephone : 215.963.5000

Attorneys for 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

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2015, I caused a true and correct copy of the foregoing Opposition of the Health Insurers to the Rehabilitator's Amended Application for Entry of a Protective Order to be served via U.S. Mail upon counsel for the Rehabilitator, and via e-mail upon the following counsel:

Carl M. Buchholz Stephen Schwab Jayne Anderson Risk Adam Brown Nathan Heller DLA Piper LLP (US) One Liberty Place 1650 Market Street, Suite 4900 Philadelphia, PA 19103-7300 carl.buchholz@dlapiper.com	Elizabeth J. Goldstein Dilworth Paxson, LLP 112 Market Street, Suite 800 Harrisburg, PA 17101 egoldstein@dilworthlaw.com Stephen H. Warren O'Melveny & Myers LLP 400 South Hope Street Los Angeles, CA 90071 swarren@omm.com
James R. Potts Cozen O'Connor 1900 Market Street – Fourth Floor Philadelphia, PA 19103 JPotts@cozen.com	Douglas Y. Christian Benjamin M. Schmidt Ballard Spahr LLP 1735 Market Street, 51st Floor Philadelphia, PA 19103 christiand@ballardspahr.com schmidtb@ballardspahr.com
Paul M. Hummer Saul Ewing LLP Centre Square West 1500 Market Street, 38th Floor Philadelphia, PA 19102-2186 PHummer@saul.com	Thomas A. Leonard Richard P. Limburg Obermayer Rebmann Maxwell & Hippel LLP One Penn Center, 19th Floor 1617 John F. Kennedy Blvd. Philadelphia, PA 19103-1895 thomas.leonard@obermayer.com richard.limburg@obermayer.com
Charles T. Richardson Caryn M. Glawe Faegre Baker Daniels 1050 k Street NW, Suite 400 Washington, DC 20001-4448 charlie.richardson@FaegreBD.com caryn.glawe@FaegreBD.com	

/s/ John P. Lavelle, Jr.
John P. Lavelle, Jr.

Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
Tel. +1.215.963.5000
Fax: +1.215.963.5001
www.morganlewis.com

John P. Lavelle, Jr.
Partner
+1.215.963.4824
jlavelle@morganlewis.com

Morgan Lewis

July 20, 2015

VIA FEDERAL EXPRESS AND FIRST CLASS MAIL

The Honorable Mary Hannah Leavitt
Commonwealth Court of Pennsylvania
Pennsylvania Judicial Center
601 Commonwealth Avenue
Harrisburg, PA 17106

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

Dear Judge Leavitt:

Enclosed please find The Opposition of the Health Insurers to The Rahabilitator's Amended Application for Entry of a Protective Order.

Respectfully,

John P. Lavelle, Jr.

JPL/dmn
Enclosure

cc: All Counsel of Record (w/encl., via e-mail)
Vance Fink, Law Clerk (w/encl., via e-mail)