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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

REPLY OF COMMISSIONER TERESA D. MILLER, IN HER CAPACITY AS STATUTORY REHABILITATOR, TO THE HEALTH INSURERS' RESPONSE TO THE PETITIONS FOR LIQUIDATION

Before the Court are petitions to liquidate Penn Treaty Network America Insurance Company ("PTNA") and American Network Insurance Company ("ANIC"), under Article V of the Pennsylvania Insurance Department Act of

1921[1]. In relation to those pending petitions, the Court must address two (and only two) questions: (1) are the Companies insolvent?, and (2) does the Commissioner have reasonable cause to believe that continued rehabilitation would substantially increase the risk of loss to policyholders, creditors, and the public, or be futile? *See* 40 P.S. § 221.18(a); *In re Penn Treaty Network America Ins. Co.*, 119 A.3d 313, 322-23 (Pa. 2015) ("[F]or purposes of Section 518(a), the Commonwealth Court ordinarily should confine its inquiry to whether the reasonable cause requirement of Section 518(a) was satisfied, again, with due regard for the Commissioner's expertise in such arena."). The record amply demonstrates that the conditions are met, and the Court should grant the petitions.

The Health Insurers concede in their self-styled "response brief" that they "do not oppose the entry of liquidation orders."[2] (HI Resp. at 2.) That should end the matter, and the Court should grant the liquidation petitions in the form requested by the Commissioner. Nonetheless, the Health Insurers inappropriately and improperly request that the Court defer the effective date of liquidation. Such

[1] Act of May 17, 1921, P.L. § 789 (as amended 40 P.S. §§ 1-326.7).

[2] The Court has already found that both "Companies are insolvent," *Consedine v. Penn Treaty Network Am. Ins. Co.*, 63 A.3d 368, 441 (Pa. Commw. Ct. 2012); *see also In re Penn Treaty*, 119 A.3d at 319 ("Grounds for liquidation existed, because both companies indisputably were and are insolvent. . . ."). The Health Insurers have argued that "it cannot be seriously maintained that there would be a basis upon which to challenge the Rehabilitator's judgment to seek liquidation." (HI Rev. Obj. to Settlement App. (filed July 22, 2016), at 13).

a request, however, is a matter committed to the Commissioner's discretion, and certainly should not be raised by a third party that has no direct interest in the liquidation petition, and further concedes that the statutory relief sought is proper.

The Health Insurers' attempt to request relief by filing a responsive brief is procedurally improper,[3] and there is no statutory basis for them to participate in the conversion process.[4] Article V provides specific procedures and limited, delineated rights for opposing a petition to convert from rehabilitation to liquidation proceedings. At this stage, the only participants and their roles in a liquidation hearing are (1) the Court, *see, e.g.*, 40 P.S. § 221.18(a) ("the rehabilitator may petition the Commonwealth Court for an order of liquidation");

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[3] The Court should decline to consider the Health Insurers' request as it has not been properly sought under the Pennsylvania Rules of Appellate Procedure. A party seeking affirmative relief from the Court must do so by filing an application for relief, and may not do so by raising a request in a responsive brief. *See* Pa. R.A.P. 123(a); *see also c.f. Carpenter v. Wawa*, No. 09-2768, 2009 WL 4756258, at *2 n.4 (E.D. Pa. Dec. 3, 2009) (noting that requests for affirmative relief must be raised via motion rather than in an opposition brief). Here, the Health Insurers simply made their "request" in a responsive brief to the Commissioner's petitions, rather than filing it as a separate application for relief filed under Pa. R.A.P. 123.

[4] Indeed, the Health Insurers' "interest" is already adequately represented. The Insurance Commissioner is "an appointed position pursuant to 40 P.S. § 42," and is "therefore, afforded broad supervisory powers to regulate the insurance business in the Commonwealth, including the power to protect 'the interests of insureds, creditors, and the public generally. . . ." *Foster v. Mutual Fire, Marine & Inland Ins. Co.*, 614 A.2d 1086, 1091 (Pa. 1992) (*Mutual Fire II*) (quoting 40 P.S. § 221.1(c)); *see also, e.g., Koken v. Steinberg*, 825 A.2d 723, 726 (Pa. Commw. Ct. 2003) ("[I]t is now settled law in Pennsylvania that an insurance regulator is charged not only with representing the public interest but the interests of policyholders and creditors as well").

40 P.S. § 221.20(a) ("The commissioner may apply by petition to the Commonwealth Court for an order directing him to liquidate a domestic insurer . . . ."); (2) the Commissioner; and (3) the Companies, the directors of which are "permit[ted] . . . to take such actions as are reasonably necessary to defend against the petition." 40 P.S. § 221.18(a). Article V does not contemplate or authorize participation by any other parties. The Commissioner is executing the law as the General Assembly intended and declared, and should be free of the undue interference of third parties that the legislature did not expressly authorize to participate in the process.

The Court should not permit the Health Insurers (or, for that matter, any other person or entity) to interfere with a properly filed liquidation petition for the purpose of advancing their own agenda. Here the Health Insurers threaten guaranty associations and regulators with "the prospect of immediate litigation from the Health Insurers." (HI Resp. at 5.) They claim, however, that they are engaged in negotiations with various GAs over unspecified "disputed coverage issues" that they intend to litigate if the GAs do not settle to their liking. (*See* HI Resp. at 5.) While any such negotiations are irrelevant to the Commissioner's petition under Article V, if the Health Insurers are actually engaged in them, prompt entry of a liquidation order will only provide impetus to resolve them

efficiently. The Commissioner is ready and willing to participate in such discussions, but they should not derail liquidation.

The Court should reject—if not strike altogether—the Health Insurers' unwarranted attempt to interfere with the liquidation proceedings.

CONCLUSION

For all of the reasons set forth above and in the verified conversion petitions, the Commissioner requests that the Court reject the Health Insurers' improper attempt to seek relief. With full reservation of her rights to contest any further participation by the Health Insurers, the Commissioner respectfully requests that the Court set the petitions for liquidation for hearing consistent with the stipulation the Commissioner entered with PTAC and the Companies' boards of directors.

Dated: September 20, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on September 20, 2016, I caused the foregoing Reply of Commissioner Teresa D. Miller to the Health Insurers' Response to the Petitions for Liquidation to be served on the counsel of record listed below. I further certify that the foregoing was posted to the Companies' receivership website and served in accordance with the Court's order governing service on parties appearing on the Master Service List.

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