IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ROBERT L. PRATTER, ACTING INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA,	:	
Plaintiff,	:	
v.	:	**DOCKET NO. 5 M.D. 2009**
PENN TREATY NETWORK AMERICA INSURANCE COMPANY,	:	
Defendant.	:	
ROBERT L. PRATTER, ACTING INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA,	:	
Plaintiff,	:	
v.	:	**DOCKET NO. 4 M.D. 2009**
AMERICAN NETWORK INSURANCE COMPANY,	:	
Defendant.	:	

ORDER

AND NOW, this _____ day of November, 2010, upon consideration of the Motion in Limine to Exclude Argument That Suggests an Improper Liquidation Standard and the Rehabilitator's response thereto, it is hereby **ORDERED** and **DECREED** that said Motion is **DENIED**.

BY THE COURT:

_____
MARY HANNAH LEAVITT

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Plaintiff,	:	
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PENN TREATY NETWORK AMERICA INSURANCE COMPANY,	:	
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AMERICAN NETWORK INSURANCE COMPANY,	:	
Defendant.	:	

MEMORANDUM OF LAW OF THE REHABILITATOR IN OPPOSITION TO INTERVENORS' MOTION TO EXCLUDE ARGUMENT CONCERNING LIQUIDATION STANDARD

INTRODUCTION

Petitioner Robert L. Pratter, Acting Insurance Commissioner of the Commonwealth of Pennsylvania (the "Rehabilitator"), in his capacity as Rehabilitator of Penn Treaty Network America Insurance Company ("PTNA") and American Network Insurance Company ("ANIC"), submits this memorandum of law in opposition to the motion filed by Intervenors Penn Treaty

American Corporation and Eugene Woznicki (collectively "Intervenors") titled Motion in Limine to Exclude Argument That Suggests an Improper Liquidation Standard.

As is demonstrated below, this Motion is not a proper motion in limine at all – it does not seek meaningful relief or remove any witness's testimony or any subject of testimony from the case. See, e.g., Meridian Oil & Gas Enterprises, Inc. v. Penn Central Corp., 418 Pa. Super. 231, 239, 614 A.2d 246, 250 (1992) (purpose of motion in limine is to obtain a ruling on the admissibility of evidence). More fundamentally, however, it does not even fully and accurately state the applicable law.

ARGUMENT

A. Intervenors' Motion Is Not A Basis For Excluding Any Evidence

Intervenors' Motion seeks an order excluding "any evidence that would suggest an improper liquidation standard." (Intervenors' Proposed Order). Such a vague order would make no ruling on what evidence can be presented at the liquidation hearing and would give no guidance as to any issues to be addressed at the hearing. Because the only relief Intervenors seek would not in any way clarify any issue or evidentiary question for the hearing, Intervenors' motion should be denied.

Moreover, the only area of evidence to which Intervenors allude in their Motion would be admissible regardless of their legal arguments. The only factual issue which Intervenors mention is the issue whether the Rehabilitator had reasonable cause to believe that rehabilitation would be futile or reasonable cause to believe that policyholders would be harmed by continued rehabilitation. (Intervenors' Memorandum at 2). Evidence on that issue will be relevant regardless of Intervenors' legal arguments because of issues that Intervenors themselves have injected into this proceeding.

Intervenors have repeatedly and inaccurately attacked and impugned the Rehabilitator's decision-making and motives in filing these liquidation petitions and continue to do so. (See, e.g., Ex. 22 at 4-7; Intervenors' Memorandum in Support of Motion to Exclude Lucker at 4-6; Intervenors' Memorandum in Support of Motion to Exclude Bodnar at 3-4). The Rehabilitator is entitled to respond to those inaccurate attacks. The Insurance Department Act's language makes clear that a rehabilitator's decision to seek liquidation is proper and reasonable "[w]henever he has reasonable cause to believe that further attempts to rehabilitate an insurer would substantially increase the risk of loss . . . or would be futile." 40 P.S. §221.18(a) (emphasis added). Evidence that the Rehabilitator had reasonable cause to believe that rehabilitation would be futile or reasonable cause to believe that policyholders would be harmed by continued rehabilitation is therefore directly relevant and admissible to respond to Intervenors' claims.

B. Intervenors' Motion Does Not State The Applicable Legal Standards

The Rehabilitator agrees that the standards set forth by this Court in the Legion case apply here. The snippets of this Court's Legion opinion cited by Intervenors, however, do not fully and accurately set forth all the applicable legal standards and principles laid out by this Court in that decision.

In Legion, this Court held where the Rehabilitator seeks to place an insurer which is under rehabilitation into liquidation, the Rehabilitator must prove a) that the insurer is insolvent and b) that there is reasonable cause to believe either (i) that continued rehabilitation efforts would "substantially increase the risk of loss to creditors, policy and certificate holders, or the public" or (ii) that continued rehabilitation efforts "would be futile." Koken v. Legion Insurance Co., 831 A.2d 1196, 1230, 1243-44, 1246 (Pa. Cmwlth. 2003), aff'd sub nom. Koken v. Villanova Insurance Co., 583 Pa. 400, 878 A.2d 51 (2005); 40 P.S. §221.18(a).

The burden is on the Rehabilitator to prove that the requirements of 40 P.S. §221.18(a) for conversion from a rehabilitation are met and the decision whether those elements have been shown is for the Court. Koken v. Legion Insurance Co., 831 A.2d at 1229, 1230. It is therefore the Rehabilitator's burden to prove that the insurer is insolvent and that one of the two alternative elements of risk of substantial harm or futility is met. Koken v. Legion Insurance Co., 831 A.2d at 1230.

The level of proof required on the issue of substantial risk of loss or futility, however, is not certainty. In Legion, where the issue was substantial risk of loss, this Court held that the Rehabilitator satisfied her burden of proof by "proving reasonable cause to believe that further attempts to rehabilitate Legion and Villanova will substantially increase the risk of loss to policy and certificate holders." Koken v. Legion Insurance Co., 831 A.2d at 1246 (emphasis added). The mere theoretical possibility that a company might be rehabilitated, without evidence that rehabilitation is realistically feasible, does not negate futility. This Court expressly held in Legion that "[s]omething more than blind hope is needed to continue a rehabilitation and avoid a liquidation." Koken v. Legion Insurance Co., 831 A.2d at 1230.

Moreover, futility of rehabilitation exists and the Rehabilitator's burden of proof is satisfied where the insurer's reserves are shown to have been severely understated and its insolvency is so severe that rehabilitation is not feasible. Koken v. Legion Insurance Co., 831 A.2d at 1245. As this Court explained in Legion,

> This is not to say that futility can be established only where there is a proposed plan of rehabilitation. There will be cases where the rehabilitator discovers that the insurer's finances are in total disarray, loss reserves against claim liabilities are drastically understated and investments chimerical. Evidence of this type would also establish futility.

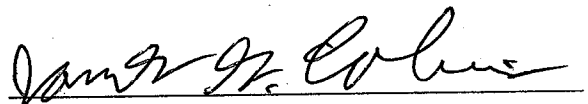
Koken v. Legion Insurance Co., 831 A.2d at 1245 (emphasis added).

The Rehabilitator submits that the evidence at the hearing, both his actuaries' projections and Intervenors' actuary's projections, will show that PTNA and ANIC had drastically understated reserves and are severely insolvent to the point that no reasonably or realistically achievable rate increases or other action would restore them to solvency. These will be issues for the Court to rule upon based on the evidence at the hearing, however, and are not a proper ground for any motion in limine.

CONCLUSION

For the reasons set forth above, the Rehabilitator respectfully requests that Intervenors' Motion titled Motion in Limine to Exclude Argument That Suggests an Improper Liquidation Standard be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Virginia Lynn Hogben, hereby certify that on November 16, 2010, I served the foregoing Response to Intervenors' Motion in Limine on the following person by the following means:

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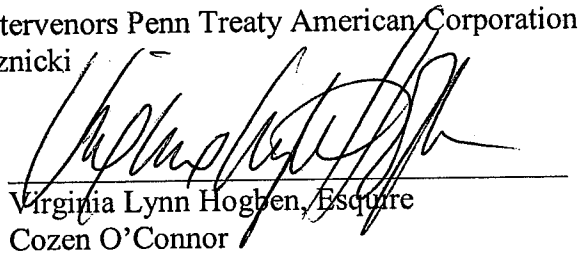

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