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 of Intervenors to Exclude the Expert Report and Testimony of Arthur M. Lucker 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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ROBERT L. PRATTER, ACTING INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA,	:	
Plaintiff,	:	
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PENN TREATY NETWORK AMERICA INSURANCE COMPANY,	:	
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ROBERT L. PRATTER, ACTING INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA,	:	
Plaintiff,	:	
v.	:	**DOCKET NO. 4 M.D. 2009**
AMERICAN NETWORK INSURANCE COMPANY,	:	
Defendant.	:	

MEMORANDUM OF LAW OF THE REHABILITATOR IN OPPOSITION TO INTERVENORS' MOTION TO EXCLUDE EXPERT TESTIMONY AND REPORT OF ARTHUR M. LUCKER

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 in Limine of Intervenors to Exclude the Expert Report and Testimony of Arthur M. Lucker.

As is demonstrated below, Mr. Lucker is amply qualified to give expert testimony on the issues of whether state regulatory approval of long-term care insurance rate increase requests is realistically achievable and his opinions are supported by proper bases and foundation.

FACTUAL BACKGROUND

A. The Origin Of This Litigation.

On January 6, 2009 this Court entered Orders placing PTNA and ANIC in rehabilitation. In pertinent parts, the Rehabilitation Orders provided as follows:

> The Rehabilitator shall take such actions as are necessary to correct the condition of the Company that prompted the Board of Directors request for and consent to the rehabilitation of Penn Treaty.

(PTNA Rehabilitation Order ¶ 5; ANIC Rehabilitation Order ¶ 5). The Rehabilitation Orders did not require the Rehabilitator to file for particular levels of rate increases. Nothing in the Orders required the Rehabilitator to file for any rate increase which had no reasonable chance of being approved or of correcting a hopeless condition.

At the time the Rehabilitation Orders were entered, the companies were believed to be in far better condition than was in fact the case. Prior to the initiation of the rehabilitation proceeding, the negative surplus of PTNA was described as totaling $100-$120 million, a sum viewed as manageable by the Rehabilitator, and ANIC had a positive surplus. (DiMemmo Dep. 75: Exhibit 7 at 2). (A copy of the portions of Mr. DiMemmo's deposition cited herein is attached hereto as Ex. A. Citations to numbered exhibits are to exhibits in the Appendix of Exhibits to the Rehabilitator's Motions in Limine). At the express urging of Intervenor Penn Treaty American Corporation ("PTAC") (Ex. 1, Waite Aff. 2-3), the Rehabilitator retained Milliman to continue as PTNA's and ANIC's actuary in rehabilitation and to evaluate the companies' financial condition. By April 2009, it was estimated that PTNA had a negative

surplus of $227 million dollars, more than twice what PTNA's management portrayed just months earlier, but an amount that with certain adjustments in operations was viewed by the Rehabilitator as potentially surmountable, and ANIC still showed a very small positive surplus.

However, as Intervenors' own consultant and PTAC board member Mr. Hunt admits, by early 2009 it was realized that such surplus figures were based on projections which understated the companies' dire financial condition and were producing deficient claims reserves and it had been determined that new studies would have to be done. (Hunt Dep. 222-27). (A copy of the portions of Mr. Hunt's deposition cited herein is attached hereto as Ex. B). The result of that additional actuarial work showed that the companies' loss reserves were drastically understated and that in reality PTNA's negative surplus exceeded $1 billion and ANIC had a negative surplus of over $40 million. (September 30, 2009 Milliman Report attached to Petitions for Liquidation as Exhibit A).

As a result of these projections and conclusions by Milliman, actuaries highly experienced in the field of long-term care insurance who had the greatest knowledge of and familiarity with PTNA's and ANIC's claims experience, and after examination of numerous possible rehabilitation approaches, the Rehabilitator reasonably concluded that the companies were incapable of being restored to solvency and would not be able to pay all policyholder claims in full. (DiMemmo Dep. 29-30, 114-15, 117, 146-52, 157-58, 215-18, 226-28, 231). Accordingly, on October 2, 2009, the Rehabilitator filed the petitions for liquidation which are the subject of this hearing.

B. PTNA's and ANIC's Inability To Obtain Sufficient Rate Increases

PTNA and ANIC had needed and sought substantial rate increases long before these rehabilitation proceedings began in 2009. Intervenors' consultant and PTAC board member Mr.

Hunt, who was PTNA's and ANIC's President and CEO until March 2009, has testified that for the last three years before rehabilitation, the companies were unable to obtain actuarially justified rate increases which they needed. (Hunt Dep. 49-55, 77-91). Indeed, it was Mr. Hunt's opinion as early as 2006 that if PTNA and ANIC needed to get rate increases much "above the 28 percent level, closer to 60 or 70 percent, then we wouldn't be able to get those rate increases." (Hunt Dep. 53).

Notwithstanding the difficulty in obtaining rate increases for the companies, the Rehabilitator actively filed for and pursued rate increases until it became apparent in the summer of 2009 that PTNA was hopelessly insolvent and incapable of rehabilitation. (DiMemmo Dep. 146-151, 158). In 2009, the Rehabilitator filed and pursued new rate increases in 20 states and continued pursuing rate increases in 16 states which were already pending when the companies were placed in rehabilitation. (Exhibit 10). Indeed, Mr. Hunt has admitted that the Rehabilitator made diligent efforts to obtain rate increases for PTNA and ANIC from January through July 2009. (Hunt Dep. 256-58, 264).

It was only when the Rehabilitator concluded based on the information he received from the up-to-date actuarial analysis that rehabilitation was futile and that such rate increase filings would not be approved that new rate increase filings were stopped. (DiMemmo Dep. 57-58, 64-66, 71, 75-76, 144-47, 178-179, 183). Even then the Rehabilitator continued to pursue pending rate increase filings in some fifteen states, succeeding in obtaining rate increases in some states, and implemented almost all additional rate increases which were approved. (Exhibit 10; DiMemmo Dep. 64-65, 290-91). Rate increases were not pursued or not implemented only in a very small number of states with a low share of premium because those states at the time had low $100,000 guaranty association limits. (DiMemmo Dep. 287-90, 294-95; Exhibit 10 at 28).

Intervenors' assertions that rehabilitation significantly increases ability to obtain rate increases and that the Rehabilitator harmed the companies' rate increase efforts are inaccurate. It was Intervenors' position prior to 2009 that rehabilitation would cause "[f]urther resistance by states to allow premium increases." (Ex. C at 2 ¶ 2(c)(iv); Hunt Dep. 65). One of Intervenors' proposed methods of obtaining rate increases in rehabilitation, that the Rehabilitator should "cancel or refuse to renew existing policies in states that refuse to approve necessary and actuarially justified rate increases" (Intervenors' Memorandum at 5), is contrary to the Rehabilitator's and Court's duties to protect policyholder coverage and is not permitted by Pennsylvania law. (See Memorandum of Law of the Rehabilitator in Support of His Motion to Bar Cancelation of Insurance Policies as a Method of Rehabilitation at 2-6). The letters sent by Commissioner Ario that Intervenors quote (Intervenors' Memorandum at 6) were sent March 3, 2010, almost a half-year after the liquidation petitions were filed and were sent to only four states. (DiMemmo Dep. 308-12; Robinson Dep. at 354, attached hereto as Ex. D). After those letters were sent, three of those four states in fact approved PTNA rate increases. (Ex.E).

C. Mr. Lucker's Expert Qualifications And Opinions

Arthur Lucker is an actuary who has worked as a consultant to state regulators in their review and evaluation of the long-term care insurance rate increase filings. (Lucker Dep. 16-19). (A copy of the transcripts of Mr. Lucker's deposition was supplied by Invervenors as Exhibit E to their Motion). He has performed over 500 long-term care insurance rate filing reviews for state regulators in the last five to six years. (Lucker Dep. 18). Mr. Lucker has reviewed rate increase filings for five different states, Iowa, Wisconsin, California, Arkansas and Delaware. (Lucker Dep. 18-19). He has also communicated with regulators in other states on their long term care insurance rate approval practices, including Florida regulators. (Lucker Dep. 56-57,

134-35). Mr. Lucker prior to his retention as an expert witness in this matter had reviewed PTNA rate increase requests for Iowa, Wisconsin and Delaware. (Lucker Dep. 20).

Through his rate filing review work for state regulators, Mr. Lucker has become familiar with a variety of different approaches states take in deciding whether to fully approve, approve a smaller amount or disapprove rate increases. (Lucker Dep. 21-23, 26-28, 30-37). From his experience working with state regulators on rate filing reviews, Mr. Lucker has knowledge that many state regulators do not approve or do not approve the full amount of a rate increase simply because it is actuarially justified. (Lucker Dep. 21-23, 26-28, 30-36). For example, in his rate filing reviews, state regulators have instructed him to test rate increases against loss ratios higher than the normal loss ratio test of 60% or 65% which long-term care insurers submit as actuarial justification, a procedure which significantly lowers the amount of rate increases which can be approved. (Lucker Dep. 27-28, 30-31, 34-35). Mr. Lucker has been instructed to perform nationwide cumulative rate increase comparisons of proposed rate increases in addition to evaluating actuarial justification and has been advised by a state regulator that rate increases above a specific percentage will not be approved even though the company could supply actuarial justification for a much higher increase. (Lucker Dep. 32-35). He is also aware of at least one state limiting rate increases to the percentage increase disclosed in the policy form and having the state insurance commissioner review every long-term care rate increase before approval. (Lucker Dep. 22 -23, 62).

While Mr. Lucker did rate filing review of PTNA rate filings in only the states of Iowa, Wisconsin and Delaware (Lucker Dep. 20),[1] his knowledge from that work is not limited to those

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[1] Intervenors' claim that these three states "represent less than 0.4% of PTNA's liabilities" (Intervenors' Memorandum at 13 n.6) is simply false. The summary of PTNA policies by issue

three states. In his PTNA rate increase reviews for Iowa in 2009, he was asked to perform and did perform an analysis of PTNA's nationwide rate increase history and the percentage rate increases and rate increase success rate PTNA had achieved in other states throughout the country. (Lucker Dep. 30-31, 35, 54). From that analysis performed in his rate increase review work, he has knowledge and familiarity with whether and to what degree states throughout the country approve "actuarially justified" PTNA rate increases.

Mr. Lucker's expert opinion in this matter, based on his experience with the state regulatory long-term care rate increase review processes, is that aggregate nationwide rate increases of the magnitude set forth in the Milliman and Volkmar reports as necessary to restore PTNA and ANIC to solvency will not be granted by state regulators even if actuarially justified. (Lucker Dep. 157, 221-22).

ARGUMENT

The standards for admissibility of expert testimony are clear. Under Pennsylvania law, a witness is qualified to testify as an expert on a subject if he has any reasonable pretension to specialized knowledge on that subject beyond the knowledge possessed by an ordinary layman. Miller v. Brass Rail Tavern, Inc., 541 Pa. 474, 480-81, 664 A.2d 525, 528 (1995); Von Der Stuck v. Apco Concrete, Inc., 779 A.2d 570, 574 (Pa. Super. 2001):

> [T]he standard for qualification of an expert witness is a liberal one. The test to be applied when qualifying an expert witness is whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation. If he does, he may

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state on which they base this assertion shows that Iowa alone accounts for 2.9% of PTNA's liabilities, has over $6 million annualized in-force premiums and is the 10th largest state by liabilities of the 44 jurisdictions where PTNA issued long term care policies. (Intervenors' Ex. G at 1). In addition, Wisconsin shows in-force premiums of over $1.8 million and a greater percentage of PTNA liabilities than Intervenors claim for all three states combined. (Id.)

> testify and the weight to be given to such testimony is for the trier of fact to determine.

Miller, 541 Pa. at 480-81, 664 A.2d at 528 (emphasis in original). A witness may qualify as an expert and offer opinion testimony on a subject based on knowledge which he has acquired through experience even if he has not received education or formal training on the subject. Miller, 541 Pa. at 481, 664 A.2d at 528; West Philadelphia Therapy Center v. Erie Insurance Group, 751 A.2d 1166, 1168 (Pa. Super. 2000).

Mr. Lucker is amply qualified by his experience to offer expert opinion to this Court on the issue whether approval of the level of long-term care rate increases here can be obtained from state regulators. As is set forth above, he has performed over 500 long-term care insurance rate filing reviews for state regulators in the last five to six years. He has worked with the long-term care rate increase regulators of five different states, including California, one of the states with large amount of PTNA policies. He is also familiar, from dealings with regulators in his work, with long-term care insurance rate approval practices in other states, including Florida, another important PTNA state. In addition, as part of his regulatory review of PTNA's 2009 rate increase filings in the state of Iowa, he analyzed PTNA's nationwide rate increase history and has knowledge concerning whether and to what degree states throughout the country approve actuarially justified PTNA rate increases.

Intervenors' attacks on Mr. Lucker's qualifications and opinions are invalid. Contrary to Intervenors' contentions, there is no lack of reasonable certainty to Mr. Lucker's opinions. Mr. Lucker testified without hesitation or qualification that it is his opinion that the rate increase levels in question are not achievable on a nationwide aggregate basis. (Lucker Dep. 157, 221-22). Intervenors' suggestion that he limited the reasonable certainty of his opinion to the states of Delaware and Iowa is not accurate. Delaware and Iowa were identified by Mr. Lucker as

states where he knew of specific limits on rate increases; he did not testify that these were the only states where in his opinion necessary rate increases would be unattainable. (Lucker Dep. 185-89).

Intervenors' contentions that Mr. Lucker's bases for his opinions are insufficient because he has only reviewed PTNA filings in Iowa, Wisconsin and Delaware ignores the extent of his experience and knowledge concerning PTNA's ability to obtain rate increases. As explained above, Mr. Lucker evaluated PTNA's rate increase history and rate increase success rates in other states throughout the country as part of his Iowa rate filing review.

The fact that Mr. Lucker has not made a determination whether the rate increases required under the Milliman and Volkmar projections are actuarially justified does not invalidate his testimony. Mr. Lucker is not testifying on the issue whether these rate increases are actuarially justified. Rather, he is testifying that state regulators do not approve all rate increases simply because they are actuarially justified and that even if they are actuarially justified, rate increases of that magnitude cannot be achieved in the real world of state rate increase approval practices.

Intervenors' criticism that Mr. Lucker lacks experience in administrative appeals, litigation and using cancelation to obtain rate increases (Intervenors' Memorandum at 26) is also beside the point. An expert witness is not required to have complete knowledge of every aspect of the field in question. Miller, 541 Pa. at 481, 664 A.2d at 528.

> It is not a necessary prerequisite that an expert be possessed of all of the knowledge of a given field, only that he possess more knowledge than is otherwise within the ordinary range of training, knowledge, intelligence or experience.

Miller, 541 Pa. at 481, 664 A.2d at 528 (citations omitted). Mr. Lucker is not offering an opinion on the possibilities of success in achieving rate increases through these means. The limits on the

amount of rate increases which can be obtained by hearings and litigation involve issues of inability to recoup past losses and statutory restrictions, which do not allow all actuarially justified rate increases, and the Rehabilitator will show through other witnesses that these standards cannot be met.[2] Cancelation of policies is not even legally permissible here. (See Memorandum of Law of the Rehabilitator in Support of His Motion to Bar Cancelation of Insurance Policies as a Method of Rehabilitation at 2-6).

Contrary to Intervenors' assertions, Mr. Lucker's consideration of the Gorman actuarial survey is permissible. The fact that a survey does not meet particular scientific and statistical standards and is hearsay does not automatically preclude an expert from considering or relying on it. Elways v. Board of Commissioners of Berks County, 717 A.2d 8, 13-14 (Pa. Cmwlth. 1998). Moreover, the Gorman survey was not an extrapolation from a small percent of the population in question; it was a collection of the views and policies of the bulk of the applicable regulators. (Lucker Dep. 172). In any event, the Gorman survey is not an essential foundation or primary basis of Mr. Lucker's opinions in this case. Rather, it is a confirmation of what Mr. Lucker knows from his communications with state regulators in his work. (Lucker Dep. 136, 149-51, 172-73).

Finally, Mr. Lucker's testimony is not cumulative and will be helpful to this Court in evaluating whether PTNA and ANIC are capable of being rehabilitated. While other witnesses, such as Milliman actuaries, Cameron Waite, who headed PTNA's and ANIC's rate increase efforts for ten years, and Mr. Hunt will testify to PTNA's and ANIC's inability to obtain these

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[2] Moreover, any illusion that rate increases can be presumed attainable through hearings and litigation is dispelled by the experience on this subject of Intervenors' own expert Karl Volkmar, who has testified that he has been unable to obtain long-term care rate increases through the hearing process in Florida. (Volkmar Dep. 6-8, attached hereto as Ex. F).

levels of rate increases, all of those witnesses' experience is from the perspective of the party seeking the rate increase. Mr. Lucker brings an additional perspective of how state regulators respond to long-term care rate increase requests even where actuarial justification is presented. The Court should have the benefit of full information in determining whether there is any realistic likelihood that PTNA and ANIC could obtain the rate increases which would be needed for any rehabilitation or whether Intervenors' contentions are a blind hope rather than a feasible rehabilitation proposal.

CONCLUSION

For the reasons set forth above, the Rehabilitator respectfully requests that the Motion in Limine of Intervenors to Exclude the Expert Report and Testimony of Arthur M. Lucker be denied.

Respectfully submitted,

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