

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ROBERT L. PRATTER, ACTING INSURANCE
COMMISSIONER OF THE COMMONWEALTH
OF PENNSYLVANIA,

Plaintiff,

v.

PENN TREATY NETWORK AMERICA
INSURANCE COMPANY,

Defendant.

ROBERT L. PRATTER, ACTING INSURANCE
COMMISSIONER OF THE COMMONWEALTH
OF PENNSYLVANIA,

Plaintiff,

v.

AMERICAN NETWORK
INSURANCE COMPANY,

Defendant.

DOCKET NO. 5 M.D. 2009

DOCKET NO. 4 M.D. 2009

**MEMORANDUM OF LAW OF THE REHABILITATOR IN OPPOSITION
TO INTERVENORS' MOTION TO PRECLUDE EVIDENCE REGARDING
PTNA'S AND ANIC'S MARKETING OF THEIR LONG TERM CARE POLICIES**

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 by Intervenor to Preclude Evidence Regarding the Manner in Which Insurance Policies Were Marketed. As is demonstrated below, the evidence which this Motion seeks to exclude is admissible because it is relevant to one of the central issues in this case, the achievability of the unprecedented rate

increases which even Intervenor's concede would be necessary to restore PTNA and ANIC to solvency.¹

FACTUAL BACKGROUND

A. The Issues Before The Court

There is no genuine dispute in this case that both PTNA and ANIC are severely insolvent and incapable of meeting their projected policyholder obligations in their present condition. While the Rehabilitator's and Intervenor's actuaries disagree on the precise magnitude of the insolvency, the negative surpluses in all the actuaries' projections are undeniably grim. Milliman has projected that PTNA has a negative surplus of over \$2 billion and ANIC has a negative surplus of nearly \$137 million. (Ex. 12 Milliman Report) (Citations to numbered exhibits are to exhibits in the Appendix of Exhibits to the Rehabilitator's Motions in Limine). Intervenor's expert Karl Volkmar's ("Volkmar") projections, once his hypothetical rate increases are stripped away, show a negative surplus of nearly \$900 million for PTNA and \$30 million for ANIC. (Ex. 9 Milliman Rebuttal Report at 10). DaVinci Consulting Group, LLC, an independent actuary retained by the National Organization of Life and Health Guaranty Associations ("NOLHGA"), likewise concludes the situation is desperate—finding that the negative surplus pre or post liquidation is in excess of \$2 billion dollars. (Ex. 13 at 7-9).

Intervenor's contend that these enormous surplus holes can be overcome by rate increases. The amount of rate increases which Intervenor's concede would be required to restore the companies to solvency, however, is extreme and far in excess of the rate increases which PTNA or ANIC have ever achieved. These proposed increases would amount to rates as of 2015 which would on average be three times to five times the premium at which the policyholder purchased

¹ Rate increases that even the Intervenor's expert has admitted he has never seen in his career. (Volkmar Dep. 36-38) (attached hereto as Ex. A).

their long term care insurance and rates as of 2020 which would on average be more than five times to nine times the original policy premium. (Ex. 9 Milliman Rebuttal Report Attachment D). One of the key determinations which must be made in order to evaluate whether PTNA and ANIC are capable of being rehabilitated is therefore what rate increases would have a realistic chance of being approved by state regulators.

B. PTNA's and ANIC's Marketing of Their Long Term Care Policies

The promotional materials that PTNA and ANIC gave to their agents to use in selling the companies' long term policies prominently stated as an important policy feature that: "Premiums Do Not Increase With Age." (See, e.g., Deposition Exhibits P-1 at 3, P-2 at 3 and P-3 at 1; Hunt Dep. 30-35). (Copies of Deposition Exhibits P-1, P-2 and P-3 are attached hereto as Exs. B-D. The portions of the deposition of William Hunt cited herein are attached hereto as Ex. E).

PTNA's and ANIC's long term care policies do contain language permitting the companies to increase premiums if they obtain regulatory approval from the state where the policy is issued. (See, e.g., Ex. F at 4; Ex. G at 2; Ex. H at 4; Hunt Dep. 35-36). That policy language, however, only discloses the possibility of some increase. Nothing in that policy language warns policyholders that their premiums can be doubled, quadrupled or raised by any amount remotely resembling the magnitude of Intervenor's proposed increases. To the contrary, when disclosures of possible rate increases were made by the companies, the magnitude of rate increases disclosed was 20%, a small fraction of what Intervenor's are proposing. (See, e.g., Ex. I at 1; Ex. J at 1).

State regulators consider how policies were marketed to the consumer in deciding whether to approve rate increases and are more reluctant and more unwilling to grant large increases where consumers were told at sale that the policy premiums would not increase. (Ario Dep. 231-32, 356-57) (attached hereto as Ex. K).

ARGUMENT

The fact that PTNA and ANIC marketed their long-term care policies to policyholders by assuring them that "Premiums Do Not Increase With Age" and disclosed no magnitude of possible rate increases above 20% is relevant and admissible in the liquidation hearing in this case.

Given the severely insolvent financial condition of PTNA and ANIC, one of the key issues to be addressed at the liquidation hearing is whether the level of rate increases which would be required to restore the companies to solvency can in fact be obtained. PTNA's and ANIC's representations in marketing the policies are relevant to that issue. The fact that long term care policies were sold to consumers as having premiums that would not increase and with no disclosure that the policyholder would be subject to 3-fold, 5-fold, or 9-fold increases is a factor which affects the companies' ability to obtain rate increase approvals and which supports the Rehabilitator's position that the rate increases which Intervenors propose cannot be achieved. (Ario Dep. 231-32, 356-57).

The fact that the policies are integrated contracts and that marketing materials may not be admissible to show the policies' terms does not change this. The Rehabilitator is not contending that the policies' terms prohibit rate increases or limit the magnitude of rate increases and is not seeking to admit this evidence to vary the policy terms. The issue here is regulatory willingness to approve rate increases which increase premiums to a level several times higher than the premium at which the policy was sold. Because regulators consider the representations made to policyholders concerning premiums, not just the policy terms, when they are deciding whether to approve, limit or deny rate increases, those promotional materials are relevant regardless of the policies' terms.

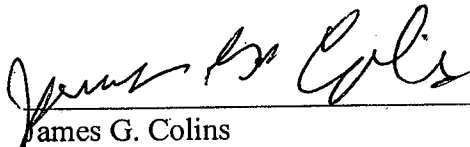
The foregoing proves particularly relevant in light of PTNA's former president's testimony and that of the Intervenors' expert. During William Hunt's testimony he admitted that

the company had not been able to procure rate increases which are far below those which Volkmar projects necessary to rehabilitate the company. (Hunt Dep. 50-55, 77-91). Volkmar concedes that he has no basis for concluding that his projected increases are achievable. (Volkmar Dep. 36-38). When coupled with the marketing information detailed above, a clear picture of the viability of what the Intervenor's claim becomes apparent. Nothing they project is realistic or feasible.

CONCLUSION

For the reasons set forth above, the Rehabilitator respectfully requests that the Motion in Limine by Intervenor to Preclude Evidence Regarding the Manner in Which Insurance Policies Were Marketed be denied.

Respectfully submitted,



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