





prepared a Rebuttal Report, after it was determined that certain allegations leveled against him by the Intervenor were baseless.

Specifically, since being timely identified as an expert Bodnar has been:

1. accused of ethical improprieties;
2. accused of engaging in an impermissible conflict of interest. (See Exhibit A);
3. advised that he maybe sued if he testifies, (See Exhibit A);  
and
4. accused of providing false testimony as he did not reveal that he was going to prepare a rebuttal report.

In addition to the foregoing, the Intervenors re-assert their baseless allegations to the effect that the Commissioner deliberately failed to “correct the condition” of the Company, which prompted them to consent to the rehabilitation process. Only by failing to detail for the Court’s consideration the relevant facts have the Intervenors been able to paint a less than flattering picture of Bodnar and the Commissioner. However, an examination of the underlying facts and relevant procedural history prove this “picture” to be a gross mischaracterization.

First, the allegations of “conflict” have been proven baseless. Although such claims have allegedly served as the basis for the objection to Bodnar’s testimony not a word is directed to these issues in the present application. The reason for this stunning omission is simple. There is no such conflict and the allegations leveled were simply an inappropriate attempt at witness intimidation.

In fact, Bodnar was never employed by either Intervenor in this case, nor PTNA or ANIC. Instead, his company was employed, at one time, by “BDO,” the accounting firm which previously audited PTNA and PTAC. Bodnar’s retention agreement with BDO clearly

established that Bodnar had no relationship with either of the companies—in fact it states he is independent of both enterprises. (See Bodnar Rebuttal Report, Exhibit 8).<sup>1</sup>

Second, having failed in their initial intimidation efforts, the Intervenors now appear before this Court and continue to manufacture an utterly incomprehensible story. At the crux of the Intervenors' Motion is the suggestion that the Rehabilitator acted in defiance of a Court Order and did not "correct the condition of the company." The Intervenors are fully aware, and were before the institution of this proceeding, that the "condition of the company" was anything but what had been portrayed to the Commissioner. At the time that the Intervenor sought the Commissioner's assistance, express representations were made that the actuarial assumptions utilized by the company were sound and could not be modified without having a significant negative impact on the enterprise. A copy of counsel's letter dated December 5, 2008 was submitted in support of the Rehabilitator's Motions In Limine and was annexed as Exhibit 5. Specifically, counsel for the PTNA and ANIC wrote as follows:

With respect tot actuarial assumptions, future claim assumptions used for establishing reserves and in pursuing premium rate increases must be linked. Inappropriate claim assumptions for reserving that are inconsistent with future claim projections, and thus requested rate increases, will jeopardize policyholders and will unnecessarily extend the life of the rehabilitation by creating unreasonably large margins within established reserves.

However, the Intervenors knew the foregoing representations were untrue. Testimony will be presented by the long time actuaries for PTNA and ANIC that their principal officers and Board of Directors have been well aware that actual claims were deviating significantly from the key assumptions used to project necessary reserves prior to the institution of this "rehabilitation" process. Only after the necessary analysis was completed did the true and dire picture of PTNA and ANIC emerge. In truth, their true combined liabilities exceeded \$2 billion dollars.

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<sup>1</sup> All numbered Exhibits refer to Exhibits annexed to the Rehabilitators Exhibit Appendix filed in support of its Motions In Limine.

Nonetheless, every possible effort was made to confirm the accuracy of this information and to determine what alternatives were available to salvage the company—to no avail. The Commissioner has presented hundreds of thousands of records which clearly show the extraordinary efforts made to correct prior managements gross mismanagement. Thus, for the Intervenors to cry that no legitimate effort was made in that respect is incomprehensible and will be demonstrably proven to be false.

Third, what makes matters worse is that Bodnar's Rebuttal Report further proves the inconsistency of the Intervenors' representations. In this case Intervenors retained Karl Volkmar ("Volkmar") the principle of United Health Actuarial Services, Inc. as their actuarial expert. Among his many suggestions Volkmar recommended that the Commissioner:

- (i) Retain an independent actuary to review Milliman's work--which he did hiring Ernst & Young ; and
- (ii) Retain an independent expert to review the financial condition of PTNA and ANIC – which is exactly what Bodnar did. Although he did so at a third parties request.

(See Exhibit 1, p. 18-19).

Moreover, both Bodnar and Milliman note in their rebuttal reports that Volkmar's unprecedented rate increases were based upon the fact that the "condition of the company" was not what the Commissioner had been told. Instead, Volkmar projects a negative surplus exceeding \$800 million, if not close to a billion. (See e.g., Exhibit 8, p. 24). This was not the "condition of the company" represented to the Rehabilitator, directly and through counsel, as specifically set forth in their letter of December 5, 2009. Rather than openly admitting to the Court that that their own expert cannot justify the initial representations made to the Rehabilitator, they have instead repeatedly attacked without justification or basis.

Finally, come the last two suggestions. One is that the Bodnar's initial report is not relevant to the current proceedings; and two that Bodnar's Rebuttal Report is somehow unfair

and prejudicial. Once again, the Intervenors misstate facts in order to scream “inequitable conduct” by the Commissioner. They are able to offer such assertions because they failed to advise the Court that:

- (i) Volkmar’s work with respect to this project was completed in March or April of 2010. (See Exhibit 19, p. 128:8-24 to p. 129:10);
- (ii) Interrogatories were propounded upon them which specifically sought information relevant to their defenses. This included Volkmar’s projections, studies and other information concerning rate increases and the like. (See Exhibit B);
- (iii) Notwithstanding these interrogatories, no such information as provided. (See Exhibit B);
- (iv) Volkmar’s report was finally produced on September 17, 2010;
- (v) Volkmar’s file, however, was not made available for the Rehabilitator’s counsel to pick-up, until the day before his deposition; or on or about October 29, 2010. (See Exhibits C and D);
- (vi) Hundreds, if not thousands, of pages of documentation were produced at the last moment – a significant portion of which was contained on a corrupted disk unusable by counsel or their experts. (See Exhibits C and D);
- (vii) Volkmar’s deposition, nonetheless, was completed on October 30, 2010, one day after the relevant material was delivered;
- (viii) The corrupted disk was finally replicated and delivered on or about November 4, 2010. Truth be told, the Rehabilitator’s experts were once again denied the right to complete a full rebuttal – inexcusably. (See Exhibit D).

In the interim, counsel sought an explanation as to why Bodnar had been accused of impropriety (see Exhibit E); but no explanation was provided. Thus, Bodnar was not retained as a rebuttal expert. The retention of Bodnar was deferred until it became clear, at his deposition, that there was *no legitimate basis* for the intimidation tactics undertaken by the Intervenors. At that point, Bodnar was asked to update his report accordingly; and to rebut certain aspects of Volkmar’s report.

Only with all factual information now before it, can the Court properly address Bodnar's reports. Bodnar's report is completely independent. Bodnar did nothing more than consult with Milliman to procure information, like Volkmar. (See Bodnar Affidavit, Exhibit F ¶4-5). Because Intervenors failed to ask the appropriate questions at his deposition, they never understood when and how Bodnar reached his opinions—or what they mean.

Bodnar reached his conclusion that PTAC and ANIC were insolvent months prior to being told Milliman's conclusion. In fact, Bodnar intended to advise NOHGLA that it could not further support the Preliminary Plan of Reorganization based on his independent analysis of the company's actual claims experience versus its projections. (See Bodnar Affidavit at ¶7). In his view, the company was in much more serious financial trouble than had been expected. (See Bodnar Affidavit at ¶7). This factual testimony is directly relevant to this proceeding. Volkmar himself admits that he had to come up with "brand new" assumptions in order to rework the numbers in a manner that would allow the company to survive – but only through unprecedented and massive rate increases.

Now, why are Bodnar's reports relevant? First, the initial Bodnar report establishes to the Court the significant financial distress this company is confronting. One of the factors that the Rehabilitator has to consider is whether the policyholders will be left in no worse a position in the event of liquidation occurs; than if the company continues to operate. What Bodnar and Milliman's testimony will do is demonstrate to the Court the significant financial "hole" this company faces both pre-liquidation and post-liquidation. In both instances, the company is facing devastating losses. It further demonstrates that there is no possible alternative by which such massive losses projected can the company be cured through rate increases.<sup>2</sup>

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<sup>2</sup> Volkmar himself has admitted that his rate increase projections are unprecedented and it is the only way he can correct the massive deficit he projects.

As such, the report presents the Court with relevant “independent” evidence.

After realizing that the threats of litigation against Bodnar were no longer legitimate, Bodnar was requested to conclude a short rebuttal report. The rebuttal report directly refutes a number of critical aspects of the present motion.

One, Volkmar critiqued Bodnar for completing a post-liquidation analysis. This rebuttal offers such a calculation although the distinction is one without true merits. The pre-liquidation calculations do not vary significantly from the post-liquidation scenario. Counsel could have inquired as to these issues at the deposition – he failed to. In fact, when he asked Bodnar had he provided such a calculation Bodnar specifically told him he had not been asked to but he could easily do so and was prepared to explain it to him at deposition when counsel cut him off from testifying. (See Exhibit F).

Bodnar has further now explained to the Court why Volkmar’s report proved such an outrage and why it is so inconsistent from the Intervenor’s prior positions. Volkmar’s report, in essence, projects almost \$1 billion in negative surplus. Not once have the Intervenors acknowledged this fact. Most incredibly, the Intervenors and Volkmar do not deny this is the case in response to this motion. They have had ample opportunity to simply say the rebuttals offered by Milliman and Bodnar are wrong. They have failed to do so because it is true and it completely contradicts their prior representations.

Finally, as there was no deadline set for rebuttals, the report is completely admissible under Pa.R.E. 702 – particularly considering the Volkmar file was just received. In light of the fact that the Intervenors withheld Volkmar’s relevant information for more than six months (because it was clearly and apparently devastating to their accusations against the Commissioner), these long-winded complaints about unfairness are absurd.



In closing, the Intervenor's view of the Commissioner is that the Rehabilitation must "save the company" at the expense of the policyholders. Attached is the recent letter of the former Chairman of PTAC, Gary Hindes. (See Exhibit G). His letter clearly spells out the Intervenor's position in this respect. One, they expect the Commissioner's office to not act in the best interest of the policyholders but to cancel their policies if rate increases are not granted. (See Exhibit G). In fact, the Intervenor's claim that in those states that will not permit such unprecedented rate increases, the Commissioner is either sue his fellow Commissioner or cancel all of the policies in that state. (See Exhibits G and 22).

The position taken by these Intervenor's is so inconsistent with the statutory scheme adopted in Pennsylvania, it can only be described as "bad faith." In short, the Intervenor's hope that through such massive rate increases, capping of benefits and cancellation of policies that not only will they be able to "rehabilitate their companies" but they will be left with an enterprise in far better shape with far fewer policyholders and a solvent enterprise that will benefit them with an extraordinary cash distribution at the end of the day. This is not the goal of rehabilitation and never has been; but it is the goal of Hindes and the Intervenor's.

## II LEGAL ARGUMENT

### A. *The Bodnar Report is Relevant*

The initial Bodnar report is directly relevant for several reasons. First, the report demonstrates the incredible financial deficit that this company confronts in the event that liquidation occurs. One of the most important analyses the Rehabilitator must undertake is whether the policyholders would be better off in liquidation than they will be in rehabilitation. In this case, the comparison is whether the rehabilitation process can be achieved logically and coherently.

Here, no plan can undo the damage which has been unfolding over the past three years. Even Volkmar, Intervenor's actuary, projects unprecedented liabilities and suggestions that rate increases never before achieved by this company would somehow salvage the companies. The Court must therefore confront what the size of the "hole" will be both in a pre-liquidation and post-liquidation scenario, in order to make a logical decision. To allow further losses to accumulate without understanding the full nature of the deficit that could accrue in a post-liquidation scenario and the impact on the policyholders, is incomprehensible. Bodnar's rebuttal further proves, if a pre-liquidation analysis is completed, this financial deficit confronting the company will be far worse as additional expenses and commissions will be paid. This report ties directly to Milliman's report and rebuttal which demonstrate that continued delay is extraordinarily prejudicial to the policyholders and will leave them in a far worse position than would be if rehabilitation continues.

Turning to the issue of the "rebuttal report," one must first examine the conduct of the accusing party in this instance. Here, Bodnar, a well respected actuary with significant long term experience has been confronted with groundless claims of conflict of interest and implied threats of litigation all designed to force him to cease testifying in this action. That alone, should point to relevance of his testimony. Bodnar is well-qualified, well-known and well-respected in the field.

Moreover, Bodnar's rebuttal report was prepared after it was determined that the "conflict" allegations were determined to be utterly baseless.<sup>3</sup> Not a single question was asked at his deposition which justified the threats and claims of impropriety. At that point, a decision was made for Bodnar to prepare a supplemental report, extremely limited in nature and scope. In his

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<sup>3</sup> Like Intervenor's baseless attacks on Dr. Rovner, there is no length to which these Intervenor will not sink.

rebuttal, Bodnar confirms the frivolity of any “conflict claims.” Second, he simply explains in his supplemental report that through minor adjustments to his report, you can use his information for both pre-liquidation and post-liquidation calculations. In fact, if one carefully reviews his report, what is learned is that many of the adjustments essential to changing the report to reflect a pre-liquidation calculation actually increase (assuming rate increases could not be achieved) the companies’ financial deficit. (See Bodnar Affidavit at ¶¶14-15). Thus, the “post-liquidation” scenario in some instances actually improves the outlook for policyholders.

With respect to the final calculation, Bodnar has noted two things. One is that Volkmar failed to note the size of the negative capital deficit which required the enormous rate increases he is suggesting are feasible. Second, he notes in his report that the one time rate increase that would be necessary totals approximately 165%. To that effect, these two calculations are simple – such a result is incomprehensible and unachievable under the circumstances.

Considering the context of this litigation and the fact that Volkmar’s file information was not delivered for consideration by Intervenor until November of 2010, it is incomprehensible that a rebuttal would be denied. (Exhibits C and D). By simply telling only one side of the proverbial story, they have conveniently eliminated the prejudice they have foisted upon the Commissioner’s office by failing to timely respond. The Court must keep in mind that in this process, the Commissioner’s office has been thrust into the role of having to produce tens of thousands of documents and records, many of which are irrelevant and will ultimately be addressed with the Court at the appropriate time. Volkmar’s file was deliberately served late, in fact it was withheld despite its relevance. Likewise, Intervenor’s other expert files, Volkmar’s files were withheld. Dr. Holland’s file, Intervenor’s other expert, has yet to be provided. Mr. Hager’s file, Intervenor’s final expert, was not provided until after his deposition. The audacity

of suggesting that they have been treated unfairly is incomprehensible considering this repeated pattern of inequitable behavior.

Finally, the suggestion that Bodnar's report is not independent of Milliman is a credibility issue. Pennsylvania Courts will not grant motions in limine that go to the credibility and weight of the evidence – such motions comprise the misuse of a motion in limine. (See, e.g., *Grugnale v. Tymosky*, 14 Pa. D & C.5th 48, 60 (Lacka. Cty. 2010) (citing *Kuna v. Lake Sheridan Cottagers Association*, 2 Pa. D & C.5th 290 (Lacka. Cty. 2007)). A determination of credibility of an expert witness and the weight given to his testimony, is within the power of the factfinder. See *Summers v. Certainteed Corp.*, \_\_\_ Pa. \_\_\_, 997 A.2d 1152, 1161 (2010) (refusing to decide issues of credibility in the context of a summary judgment motion); *In re Hunter's Estate*, 416 Pa. 127, 136, 205 A.2d 97, 102 (Pa. 1964) ("It is axiomatic that the credibility of witnesses, professional or lay, and the weight to be given their testimony is strictly within the proper province of the trier of fact."); see also *Reading Radio, Inc. v. Fink*, 833 A.2d 199, 208 (Pa. Super. 2003). Here, once again, Intervenors would prefer to conduct cross-examination by paper rather than before the Court. Pointing to select portions of the transcript, Intervenors pretend Milliman somehow influenced the report. The fact of the matter is more information was provided by Milliman to Bodnar than vice versa as Milliman has been the long standing actuary for the company. The same could be said for Volkmar who clearly received far more information from Milliman than he provided to Milliman. If one follows Intervenor's logic, the Court must then conclude that Volkmar likewise must not be independent. Such a contention is preposterous. Information was obtained and received by Bodnar for review independently, which he did in order to advise his client. His client NOLHGA now faces a potential liability that far exceeds any assets this company will have. Yet somehow the Intervenors conclude that NOLHGA and Bodnar are working, mischievously, to NOLHGA's benefit. (A claim that

contradicts the Intervenor's lack of independence claim). Such contentions may be examined at trial but a credibility determination in this respect is improper in a Motion In Limine.

***B. The Commissioner Did Not Engage in an "End Around"***

Intervenors complain here that they have been mistreated by the Commissioner's office by the "late production of the Bodnar report." This contention is incomprehensible considering the relevant facts. Volkmar failed to produce its file until the day before his deposition. (Exhibit C). Portions of the file were corrupted. In truth, the Commissioner's office has never had a chance to do a complete rebuttal as the latest information was received only one week ago. This production is incomprehensibly late since it was available to the Intervenors since last March as Volkmar admitted in his deposition testimony. Now, having failed to properly disclose Volkmar's information since last March, having failed to timely produce his expert file, having produced a corrupted portion of his file, having only just delivered the corrected version of the file this past week, they would now assert that the late production of a rebuttal report prejudices them. (Exhibit D).

If that is the case, then Volkmar's entire report and testimony should be barred based upon the gamesmanship that has clearly unfolded in this process. Bodnar's initial report was produced timely. Bodnar and Milliman, which the Commissioner could assert, should be permitted once again to summarize and rebut Volkmar's report in light of the fact that they just received all of his information. It is stunning that the Intervenors have taken such a tact – although one should not be surprised considering the foregoing. Again, Intervenor's allegations are baseless.

**C. The Report is a Rebuttal Report**

Bodnar has not provided a new report in this case; nor is it part of the Rehabilitator's "case in chief." Volkmar offered criticisms of Bodnar – which were outside the scope of his original opinion and Bodnar addressed them. These are not "major" adjustments to his report. He simply addressed minor and numerical changes to his draft which Volkmar can easily address in terms of his analysis. What his report does do further, however, is hoist the Intervenors and Volkmar on their own proverbial "petard" by addressing issues presented by Volkmar but not considered by Bodnar previously.

**III CONCLUSION**

For the foregoing reasons, the Bodnar testimony as to both his report and rebuttal report should be permitted.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on November 16, 2010, I served the foregoing Opposition to the Motion to Preclude Expert Testimony of DaVinci Consulting, LLC by the following means:

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