

Foster, 165 Pa. Commw. 596, 602, 645 A.2d 907, 910-911 (1994), aff'd without op., 542 Pa. 544, 668 A.2d 1113 (1995); In re Prof'l Ins. Agents Ass'n, No. C89-11-12 (Jan. 31, 1991).

If as the Rehabilitator contends, the agents' claims for the continued renewal commissions are Class E claims, the legal authority to suspend payment of the commissions and enjoin the filing of lawsuits to collect commissions is clear. Pennsylvania statutory and case law provide for injunctions against suits which would interfere with administration of rehabilitation proceedings and for orders suspending payments to Class E creditors in insurer rehabilitations. See 40 P.S. § 221.5(a); Koken v. Fidelity Mut. Life Ins. Co., 803 A.2d 807, 817 (Pa. Cmwlth. 2002); Koken v. Legion Ins. Co., No. 183 M.D. 2002 at 8 ¶¶ 21-22 (Pa. Cmwlth. March 28, 2002).

If the Court were to rule that the agents' claims are not creditor claims and that agents are entitled to preferential treatment over policyholder claims, then this Court would have to resolve the additional issue of whether placement of an insurer in rehabilitation terminates or allows termination of agents' commission rights. See, e.g., Liberty Nat'l Ins. Co. v. Reinsurance Agency, Inc., 307 F.2d 164, 167 (9th Cir. 1962) (agents have no rights to commissions against rehabilitator of insurer); D.R. Mertens, Inc. v. State Dep't of Ins., 478 So. 2d 1132, 1135-1136 (Fla. App. 1985) (same); Foster v. Mut. Fire, Marine & Inland Ins. Co., 531 Pa. 598, 614-16 & n. 4, 614 A.2d 1086, 1094-95 & n. 4 (1992) (contract rights may be overridden in insurer rehabilitation).

B. The Facts Which Need to Be Established by the Rehabilitator

The Rehabilitator is not required to establish any facts in order to allow this Court to grant the relief requested if this Court decides in the Rehabilitator's favor on the legal issues set forth above. (See cases cited above and below). If the Court decides the legal issue in the Rehabilitator's favor, that would be sufficient to establish that granting the Application is necessary and proper to protect PTNA's policyholders' rights. 40 P.S. § 221.5(a). If, however,

this Court decides that it may only grant the requested relief if it is shown that PTNA's financial condition is such that it may be unable to fully pay policyholder benefits, then the Rehabilitator submits that if he shows that there is a reasonable chance that PTNA will be unable to pay all policyholder claims in full, that standard for relief is satisfied.

Such a level of proof would be appropriate because the Rehabilitator is not seeking an elimination of agents' contract rights against PTNA, but instead only an order preserving PTNA's assets so that they will be available to pay claimants in the order of priority established under Pennsylvania's insurance statutes. Suspension of commission payments does not deprive agents of any money to which they are entitled in a receivership – if the agents are not paid the commissions because PTNA's assets prove insufficient to pay Class E creditors, the agents are not entitled to payment of the commissions; if PTNA's assets turn out to be sufficient to pay Class E creditors, the suspended commissions would be paid. Delay in payment and enjoining suit to collect are not an unreasonable burden on the agents. General creditors have no right to payment of pre-receivership debts prior to a plan of rehabilitation or reorganization. See, e.g., Koken v. Legion Ins. Co., No. 183 M.D. 2002 at 8 ¶¶ 21-22 (Pa. Cmwlth. March 28, 2002); In re Penn Central Transportation Co., 467 F.2d 100, 102 (3d Cir. 1972); In re Fontainebleau Hotel Corp., 508 F.2d 1056, 1059-60 (5th Cir. 1975); In re Berry Good, LLC, 400 B.R. 741, 745-46 (Bkcy. Ct. D. Ariz. 2008); In re United Am., Inc., 327 B.R. 776, 782 (Bkcy. Ct. E.D. Va. 2005).

Contrary to objectors' assertions, there are no factual issues relevant to this Application. The claim that PTNA agents are allegedly employees of PTNA (see August 17, 2009 submission of The LTX Exchange, Ltd.) is irrelevant to this Application. Even if agents were recharacterized as employees (and they are not employees of PTNA¹), that could not affect this

¹ The LTC Exchange Ltd's claim that the agents are "employees" is legally invalid. Not only do the agent contracts expressly state that the agents are independent contractors and not employees of PTNA (see, e.g., FMO Agency Contract attached as Exhibit C to The LTC Exchange Ltd.'s August 17, 2009 submission at 2 ¶1(E)), but no objector has asserted the factors (control over hiring and firing of agents' subordinates and control over agents' sales leads) which

Application because employees are not Class A creditors. Under the Insurance Department Act, employees are at most Class D creditors (up to \$1,000), a priority lower than Class B policyholder claims. 40 P.S. §221.44. Class A creditors are limited to persons providing services to the insurer's estate after the insurer is placed in receivership. 40 P.S. §221.44(a). The agents' commissions are not for post-receivership services to PTNA's estate; PTNA is not requesting that the agents perform further services. Instead, the agents base their claims for commissions on PTNA's pre-rehabilitation commitment to pay renewal commissions. Because the renewal commissions are not for post-receivership services, the agents cannot be Class A creditors.

Claims concerning the Insurance Department's supervision of PTNA and PTNA's pre-rehabilitation conduct are also irrelevant. Pre-receivership regulatory conduct as a matter of law is irrelevant to the rights of the Insurance Commissioner as receiver and cannot be raised as a defense against proceedings brought in the Commissioner as receiver of an insurance company. Foster v. Mousour Med. Found., 667 A.2d 18, 20 (Pa. Cmwlth. 1995); Foster v. Rockwood Holding Co., 158 Pa. Commw. 258, 261-266, 632 A.2d 335, 337-39 (1993). Issues concerning alleged conduct of PTNA are irrelevant because PTNA's conduct has no bearing on whether PTNA's agents are Class E creditors who are entitled to payment only if policyholders are paid in full and has no bearing on whether PTNA is insolvent and unable to fully pay policyholder claims.

C. The Rehabilitator's Witnesses

If this Court decides that the Rehabilitator must show that that PTNA's financial condition is such that it may be unable to fully pay policyholder benefits, the Rehabilitator's primary witnesses will be an actuarial expert, Edward P. Mohoric, FSA, MAAA, of the Milliman actuarial firm, who will testify regarding PTNA's financial condition and projections, and Robert _____ caused the court in Hopkins v. Cornerstone Am., 545 F.3d 338 (5th Cir. 2008) to treat agents as employees.

Robinson, PTNA's Chief Rehabilitation Officer, who will testify regarding the operation of PTNA post-rehabilitation. If the Court has questions concerning PTNA's financial statements and underlying financial data, the possibility of premium rate increases as a solution to PTNA's financial problems or certain assumptions underlying the financial projections, or if intervenors or other objectors raise such issues, the Rehabilitator may call the following individuals as witnesses: Larry Pfannerstill of the Milliman firm and/or Cam Waite, PTNA's Executive Vice President (on the unlikelihood of PTNA obtaining sufficient rate increases); Mark Cloutier, PTNA's Executive Vice President and Chief Financial Officer (on PTNA's financial statements); Mark Cloutier, PTNA's Executive Vice President and Chief Financial Officer and/or Robert Robinson, PTNA's Chief Rehabilitation Officer (on expense projections); and Mark Cloutier, PTNA's Executive Vice President and Chief Financial Officer, Robert Robinson, PTNA's Chief Rehabilitation Officer, and/or representatives of Hyperion Brookfield Asset Management, Inc. and/or Conning & Company (on investment projections).

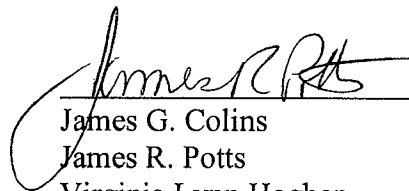
D. Additional Matters in Preparation for the Hearing

The Rehabilitator requests that any hearing on the Application, whether it be oral argument or factual, be scheduled for October 5 and 6, 2009. The Application was filed and served nearly three months ago. The Rehabilitator filed extensive financial and actuarial reports and data in April 2009 and the intervenors and other objectors have had full access to that material. In the months since the filing of the Application, no intervenor has made any request to the Rehabilitator for specific additional documents or has identified any specific additional financial or actuarial documents or data which they contend that they need. Furthermore, intervenors and other objectors are not entitled to depositions or general discovery in these proceedings. Foster v. Mut. Fire Ins. and Marine Ins. Co., 544 Pa. 387, 392-99, 676 A.2d 652, 655-58 (1996). Therefore, there is no reasonable basis to delay the hearing on account of requests by intervenors or other objectors for additional information.

To the extent that the intervenors or other objectors want to delay the hearings and resolution of this Application beyond October 6, 2009, the Rehabilitator requests that he be granted temporary interim relief allowing him to suspend commissions and enjoining lawsuits to collect commissions at this time, prior to such postponed or delayed hearings. The agent commission payments total almost \$2 million per month. Further delays without interim suspension of commissions will deplete PTNA's estate of millions of dollars of assets needed to cover PTNA's policyholders.

Because Prehearing Statements of objectors and most responses to the Rehabilitator's Supplemental Memorandum were not served on the Rehabilitator prior to the date of this filing, the Rehabilitator does not know at this time whether any legal issues will be raised by objectors beyond those addressed in the Rehabilitator's Supplemental Memorandum. If any such additional legal issues are raised, the Rehabilitator requests that he be permitted to file a short Reply Memorandum of Law limited to such additional issues on or before September 14, 2009.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, James R. Potts, hereby certify that on this date a Notice of Filing of the Prehearing Statement of the Rehabilitator on Application to Suspend Commissions was served on all parties listed on the Master Service List by electronic mail or facsimile, or by U.S. Mail where no electronic mail address or facsimile number was available. In addition, courtesy copies of the Prehearing Statement of the Rehabilitator on Application to Suspend Commissions were served on this date on the following counsel for objectors and Intervenor by email and U.S. Mail First-Class:

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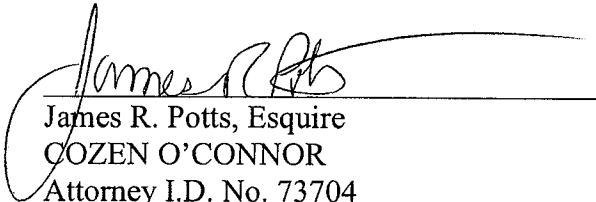
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Dated: September 4, 2009

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