

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

ORDER

AND NOW, this _____ day of November, 2010, upon consideration of
Intervenors' Motion In Limine To Preclude The Expert Report and Testimony Of Thomas W.
Johnson, and the Rehabilitator's response thereto, it is hereby **ORDERED** and **DECREED** that
said Motion is **DENIED**.

BY THE COURT:

MARY HANNAH LEAVITT

(collectively “Intervenors”) titled Motion in Limine to Exclude the Expert Report and Testimony of Thomas W. Johnson (“Intervenors’ Motion”).

Intervenors’ Motion seeks an order excluding the expert report dated August 9, 2010 (“Johnson’s August 2009 Report”) and testimony of Thomas W. Johnson on the purported basis that Johnson offers an opinion without providing factual detail and analysis to support his opinion. The Intervenors’ representations to the Court on this front are woefully incomplete and disingenuous.

As is demonstrated below, this Motion is without basis and should therefore be denied *in toto*.

ARGUMENT

1. The Opinions And Anticipated Testimony of Thomas W. Johnson At Trial And His Extensive Factual Basis In Support Thereof Are Well-Documented.

The Rehabilitator intends to offer Johnson’s testimony and opinions at trial to establish the inability of the Rehabilitator to rehabilitate the Companies by (1) selling the Companies or portions thereof, (2) obtaining reinsurance; or (3) obtaining an infusion of capital into the Companies (collectively “Transactional Alternatives”). Each of these Transactional Alternatives was examined and analyzed in detail by Johnson and set forth in his April 6, 2009 Report which the Rehabilitator submitted in support of his Preliminary Report and Plan of Rehabilitation dated April 6, 2009 (“Johnson’s April 2009 Report”). Johnson revisited the Johnson’s April 2009 Report when provided with updated financial information and projections about the Companies. Johnson issued the Johnson’s August 2009 Report with his updated conclusions and opinions concerning the Transactional Alternatives. Intervenors deposed Johnson for three (3) hours, yet during that time, never bothered to inquire about the opinion he intends to offer at trial or his analyses which led to the Johnson’s April 2009 Report or the Johnson’s August 2009 Report. (Exhibit B to Intervenors’ Motion, *see generally* Johnson Tr.)

a. Johnson's April 2009 Opinions and Conclusions Are Well-Supported By Facts and a Detailed Analysis.

Notably, Intervenor's do not contest Johnson's expertise as an investment banker and consultant. But tellingly, the Intervenor's Motion is devoid of any mention of Johnson's extensive analysis of the issues of sale, reinsurance, and capital infusion alternatives in his April 2009 Report. (A true and correct copy of the portions of the Johnson's April 2009 Report addressing these issues is attached hereto as Exhibit A.) Therein Johnson sets forth in painstaking detail his opinions on potential Transactional Alternatives, including the possible sale of the Companies collectively, the sale of ANIC and its New York subsidiary AINIC, and the possible sale of isolated blocks of the Companies' business. (See Johnson's April 2009 Report, Tab 7 at 105-106.) Johnson also analyzed and offered opinions about whether the Companies might obtain reinsurance and their ability to raise third party capital, debt or equity to recapitalize the business and possibly re-commence selling new long term care insurance policies, as other Transactional Alternatives. (Johnson's April 2009 Report, Tab 7 at 105-117.) Johnson's April 2009 conclusions were based upon, among other things, financial data of the Companies and the actuarial projections of the Rehabilitator's actuary, Milliman. In April 2009, Johnson concluded that, at that time, there was a low likelihood that the Rehabilitator could succeed in pursuing any of these Transactional Alternatives in formulating a Plan for Rehabilitation for the Companies, given the dire financial condition of the Companies. (Id.)

b. Johnson's August 2010 Report Is An Update Of Johnson's April 2009 Report, Based Upon Newly Available Updated Financial Information And Projections About The Companies.

In April 2009, Milliman had projected a negative capital and surplus of nearly \$225 million for PTNA and total capital and surplus of \$4.8 million for ANIC. (See Rehabilitator's Preliminary Report and Plan of Rehabilitation of PTNA and ANIC ("April 2009 Rehabilitator's Report"), Tab 2 at 40.) With this information, and even in light of the Rehabilitator's optimism

of his ability to formulate a successful plan for Rehabilitation of the Companies, Johnson concluded that the likelihood of the above-mentioned Transactional Alternatives that he had evaluated seemed unlikely options for the Companies at that time. Johnson recommended however that if certain conditions of the Companies improved, the Transactional Alternatives be revisited. (*See e.g.*, Johnson's April 2009 Report, Tab 7 at 106, 107 and 109.)

As the Court is aware, after the April 2009 Rehabilitator's Report was submitted to the Court, Milliman updated its analyses and projections based on, among other things, the Companies' new claims experience information. Milliman reported that as of December 31, 2009, PTNA had a negative surplus of approximately \$2.1 billion and ANIC had a negative surplus of nearly \$137 million. (*See Exhibit 12 to the Rehabilitator's Appendix to its Motions in Limine dated November 12, 2010, Milliman's Surplus Projections and Continuance Curve analyses, dated July 7, 2010 ("Milliman's Updated Analyses").*) The Rehabilitator retained Ernst & Young to confirm Milliman's Updated Analyses, and Ernst & Young reported no material differences in and/or objections to Milliman's actuarial work. (*See Exhibit 28 to the Rehabilitator's Appendix to its Motions in Limine dated November 12, 2010, Ernst & Young's Report.*)

In light of the Milliman's Updated Analyses and based upon his continued participation in weekly meetings of the Rehabilitation implementation Committee, and "due diligence discussions" with management of the Companies, members of the Rehabilitator's staff, Milliman and others with information concerning the financial status and prospect for the Companies, Johnson issued an update to Johnson's April 2009 Report and conclusions in light of the new financial information about the Companies. (*See Intervenors' Motion, Exhibit A, Appendix B thereto.*) Given the far worse financial conditions of the Companies than thought to be the case in April 2009, Johnson opines that the likelihood that the Rehabilitator should pursue

rehabilitation “no longer appears [a reasonable] conclusion” and consistent with the Johnson’s April 2009 Report, he opines that the Transactional Alternatives still are not viable and that the likelihood that they will become “viable in the future is remote”. (Intervenors’ Motion, Exhibit A at 3.) Intervenors’ assertions that Johnson has simply set forth a half-page opinion absent any factual detail or support is very misleading and without basis in fact. The Johnson’s August 2009 Report provides his updated perspective, given the most recent updated financial information available to him, and is not devoid of factual support or detail. Moreover, his opinions in his most recent report are materially consistent with his previous conclusions and opinions, except that where he once thought there was hope and possibility for success in pursuing the Transactional Alternatives **if the condition of the Companies improved**, given the worsening of the Companies’ financial conditions, the Transactional Alternatives are not viable options for the Rehabilitator.

c. Intervenors’ Motion is Baseless And A Mere Transparent Effort To Taint The Court’s Opinion of Johnson Prior To The Hearing.

The true motive for Intervenors’ Motion is to cast Johnson in a negative light prior to his testimony at trial. Intervenors have pointed to no evidence in the record which contradicts Johnson’s conclusions in the Johnson April 2009 Report or the Johnson August 2010 Report.¹ However, credibility attacks against expert witnesses simply are not valid bases to move to preclude expert witnesses. 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

¹ See Intervenors’ Supplemental Interrogatory Answers 4b, 5b, 6b, attached hereto as Exhibit B; see also Hunt Tr. at 179:10-186:14, 189:11-191:21, attached hereto as Exhibit C.

the power of the factfinder. *See Summers v. Certaineed 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). Intervenors' Motion goes to the credibility and the weight of the evidence that the Rehabilitator proposes to offer through Johnson's testimony at trial. Thus, this Court should not preclude Johnson's testimony and expert report at trial based upon Intervenors' Motion, so the Court can determine Johnson's credibility and the weight to be given to his testimony at trial.

Intervenors' Motion fails to advise the Court that after receiving the Johnson's August 2009 Report they obtained his complete expert files which contained all documents considered and relied upon by Johnson in connection with the April 2009 and Johnson's August 2010 Reports concerning the Transactional Alternatives. (A true and correct copy of a November 1, 2010 Email Communications between Counsel for the Rehabilitator and Intervenors is attached hereto as Exhibit D; a true and correct copy of November 1, 2010 letter regarding Johnson Expert File is attached hereto as Exhibit E.) Even so, Intervenors already had the substantive data and information relied upon by Johnson, even before it received Johnson's expert files. Nonetheless, Intervenors chose not to examine Johnson on the underlying support for the April 2009 and Johnson's August 2010 Reports. (*See generally*, Johnson Tr., Exhibit B to Intervenor's Motion.) Intervenors further elected to not question Johnson, in any level of detail, on his reconsideration of the Transactional Alternatives and the updated financial information about the Companies which formed the basis of his conclusions in the Johnson's August 2010 Report. (*Id.*) Instead, Intervenors examined Johnson on peripheral matters and issues unrelated to his

opinions, including but not limited to the compensation Johnson has received from the Rehabilitator. (See Johnson Tr., Exhibit B to Intervenor's Motion at 22:3-23:6, 25:6-26:6, 74:6-76:15, 87:1-8.) Intervenor's want this Court to believe that Johnson's compensation is weighted such that he has an incentive to make conclusions in support of liquidation. However, Intervenor's selective citation to the record hides from the Court the fact that **in the event the Companies cannot be rehabilitated, Johnson loses his opportunity to earn continued fees in accordance with that Retention agreement.** (A true and correct copy of Johnson's Retention Agreement relating to the Rehabilitation Planning is attached hereto as Exhibit F, at 2-3.)

Intervenor's motive to move in limine to preclude Johnson's opinions and testimony at trial is wholly without merit, and nothing more than an effort to "taint the well" before trial begins. The Rehabilitator urges the Court to disregard Intervenor's attacks against Johnson which are without merit and, in any event, are improper subjects for a Motion in Limine, and deny Intervenor's Motion in all respects.

CONCLUSION

For the reasons set forth above, the Rehabilitator respectfully requests that Intervenor's Motion titled Motion in Limine to Exclude Expert Report and Testimony of Thomas W. Johnson be denied.

Respectfully submitted,



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