IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MICHAEL F. CONSEDINE, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA,	:	
Plaintiff,	:	
v.	:	**DOCKET NO. 5 M.D. 2009**
PENN TREATY NETWORK AMERICA INSURANCE COMPANY,	:	
Defendant.	:	
	:	
MICHAEL F. CONSEDINE, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA,	:	
Plaintiff,	:	
v.	:	**DOCKET NO. 4 M.D. 2009**
AMERICAN NETWORK INSURANCE COMPANY,	:	
Defendant.	:	

POST-TRIAL MOTION OF MICHAEL F. CONSEDINE, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA, IN HIS OFFICIAL CAPACITY AS REHABILITATOR OF PENN TREATY NETWORK AMERICA INSURANCE COMPANY AND AMERICAN NETWORK INSURANCE COMPANY

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Michael F. Consedine, Insurance Commissioner of the Commonwealth of Pennsylvania, in his official capacity as Rehabilitator of Penn Treaty Network America Insurance Company and American Network Insurance Company (the "Rehabilitator"), by his counsel, Cozen O'Connor, respectfully submits this Post-Trial Motion with respect to the Court's May 3, 2012 Memorandum Opinion and Order denying the Rehabilitator's Amended Petitions for Liquidation of Penn Treaty Network America Insurance Company (In Rehabilitation) ("PTNA") and American Network Insurance Company (In Rehabilitation) ("ANIC")(collectively referred to as the "Companies") following the trial of this matter. In support of this Motion, the Rehabilitator avers as follows:

RELEVANT PROCEDURAL HISTORY

1. On January 5, 2009, the Commissioner filed Petitions for Rehabilitation with this Court requesting that this Court place the Companies into Rehabilitation. This Court entered Orders on January 6, 2009 placing the Companies into rehabilitation under Article V of the Insurance Department Act of May 17, 1921, P.L. 789, as amended, 40 P.S. §§ 221.1-221.63 (the "Act").

2. The Court's January 6, 2009 Orders, among other things, directed that the Rehabilitator to (i) "rehabilitate the business" of the Companies; (ii) "take such action as are necessary to correct the condition that prompted the Board of Directors' request for and consent to the rehabilitation"; (iii) "prepare a plan of rehabilitation, which may include a consolidation, merger or other transformation" of the Companies (iv) "in his discretion, pay claims, in whole or in part, arising under [the Companies'] contracts of insurance;" (v) "in his discretion, write new and renewal policies or . . . cancel or refuse to renew existing policies, as he deems appropriate"; and (vi) "[o]n or before April 6, 2009, . . . file a preliminary plan of rehabilitation with the Court, which shall include a timeline for the preparation of a final plan of rehabilitation." The Court

also stated in connection with the treatment of rehabilitation expenses, "[i]n the event this Court should determine that a rehabilitation of [the Companies] is not feasible and a liquidation of [the Companies] is ordered . . .."

3. On April 6, 2009, the Rehabilitator filed a Preliminary Report and Rehabilitation Plan with this Court. The April 6, 2009 filing stated that the "Preliminary Plan includes . . . the general contours of a plan of rehabilitation," "[t]he Rehabilitator . . . intends to continue to review the feasibility and benefits of the plan," and "[i]f the Rehabilitator determines that rehabilitation is feasible and would be in the best interests of policyholders, he will prepare a final plan of rehabilitation . . .."

4. On October 2, 2009, the Rehabilitator filed Petitions seeking Orders of Liquidation for the Companies after determining that further attempts to rehabilitate the Companies would substantially increase the risk of loss to policyholders and would be futile. Amended Petitions for Liquidation were filed on October 23, 2009.

5. On November 2, 2009, Eugene J. Woznicki and Penn Treaty American Corporation (the "Intervenors") filed Petitions to Intervene with respect to the Petitions for Liquidation. On November 9, 2009, the Rehabilitator filed Answers to Intervenors' Petitions to Intervene. On November 16, 2009, this Court granted Intervenors' Petitions to Intervene.

6. On March 4, 2010, the Court stayed further action on the Petitions for Liquidation "while the parties continue to explore whether the [Companies] can be rehabilitated."

7. On June 30, 2010, the Court issued an Order setting July 16, 2010 to hear arguments on the discovery of the Milliman methodology and model used to develop morbidity

projections, August 24, 2010 to hear arguments on any remaining discovery issues and October 25, 2010 to commence the hearing on the Petitions for Liquidation.

8. On July 10, 2010, Intervenors filed a response to the Petitions for Liquidation.

9. On August 13, 2010, the Court consolidated the liquidation proceedings involving the Companies.

10. On September 23, 2010, the Court issued an Order that the hearing on the Petitions for Liquidation commence on November 15, 2010.

11. On November 5, 2010, the Court issued an Order rescheduling the hearing on the Petitions for Liquidation to commence on November 30, 2010, and ordering that the Rehabilitator file any pre-trial motions on or before November 12, 2010, with response due on or before November 16, 2010 and that oral argument commence on November 19, 2010.

12. On November 12, 2010, Intervenors filed a motion to preclude testimony of Vincent L. Bodnar and two reports he authored, one of which had been provided to Intervenors on August 5, 2010 and the other, which was in rebuttal to a report issued by Intervenors' expert Karl Volkmar, was provided to Intervenors on November 9, 2010. On November 16, 2010, the Rehabilitator filed a Memorandum in opposition to Intervenors' motion to preclude Bodnar. On November 19, 2010, the Court denied all the parties' pre-hearing motions other than the motion to exclude Bodnar, which was deferred with the request that the Rehabilitator place this proof at the end of his case.

13. On November 24, 2010, the Court continued the scheduled hearing on the Petitions for Liquidation, and on December 17, 2010, the Court again rescheduled the date for the commencement of the hearing to January 31, 2011.

14. The hearing on the Petitions for Liquidation commenced on January 31, 2011 and continued intermittently until April 12, 2011, at which time the hearing was recessed until a later date.

15. On August 31, 2011, the Rehabilitator, while the proceedings were in recess, filed a motion to, among other things, introduce at trial more up to date financial and claims data that had become available since the commencement of the hearing and updated projections based on that data. On September 14, 2011, the Court denied the Rehabilitator's August 31, 2011 motion.

16. On September 14, 2011, the Court granted the Intervenors' motion to exclude the testimony of Vincent Bodnar and the two reports he authored.

17. On September 19, 2011 the hearing recommenced and continued intermittently until concluding on November 2, 2011 after twenty-nine days of hearings over a period of approximately nine months.

18. On November 3, 2011, the Court issued an Order directing the parties to file post-hearing briefs with proposed findings of fact and conclusions of law and proposed orders. The parties thereafter submitted voluminous post-hearing briefs and proposed findings of fact and conclusions of law and proposed orders.

19. On February 21 and 22, 2012, the Court heard closing arguments.

20. On May 3, 2012, the Court issued a lengthy Memorandum Opinion and accompanying Order, denying the Petitions for Liquidation and setting forth specific requirements and a deadline for preparation of a rehabilitation plan.

THE COURT EXCEEDED ITS AUTHORITY BY IMPOSING REQUIREMENTS ON THE REHABILITATOR WITH RESPECT TO THE FILING OF A REHABILITATION PLAN, THE PROCESS FOR DEVELOPING THE PLAN AND THE CONTENTS OF THE PLAN

21. The May 3, 2012 Order exceeds the scope of this Court's authority and improperly infringes on the authority of the Rehabilitator as provided in the Act.

22. Although the Act does give the Court the ability to modify a rehabilitation plan that has been presented to it, it does not give the Court the authority to direct, in advance of a plan being presented, the terms of that plan, the manner in which it must be prepared or the time in which it must be submitted. See 40 P.S. § 221.16. See also Foster v. Mut. Fire, Marine & Inland Ins. Co., 531 Pa. 598, 610 (Pa. 1992).

23. In the May 3, 2012 Order, the Court directed the Rehabilitator to "develop a plan of rehabilitation of the Companies, in consultation with Intervenors, and ... submit a plan no later than ninety (90) days following the date of this Order."

24. Section 221.16 of the Act grants the Rehabilitator broad powers:

> (b) The rehabilitator may take such action as he deems necessary or expedient to correct the condition or conditions which constituted the grounds for the order of the court to rehabilitate the insurer. He shall have all the powers of the directors, officers and managers, whose authority shall be suspended, except as they are redelegated by the rehabilitator. He shall have full power to direct and manage, to hire and discharge employees subject to any contract rights they may have, and to deal with the property and business of the insurer.

See also Vickodil v. Com., Ins. Dept., 559 A.2d 1010, 1012-13 (Pa. Commw. Ct. 1989)("Once ordered, the Insurance Commissioner is appointed rehabilitator by the Court and has broad discretion to structure a plan of rehabilitation. The rehabilitator is required to take possession of the insurer's assets, and has all the powers of its directors and officers to direct, manage, and deal with the property and business of the insurer.").

25. The Act does not require a rehabilitator to file a plan of rehabilitation at all if the rehabilitator does not believe that such a plan is viable or appropriate, let alone require a filing within any particular time period. See 40 P.S. § 221.16(b) & (d).

26. The Court has imposed requirements on the Rehabilitator beyond those imposed by the Legislature, and has effectively stripped the Rehabilitator of his authority and discretion in following the course of action that the Rehabilitator has reasonable cause to believe is appropriate for the policyholders, creditors and the public. As evidenced by the filing of the Petitions to Liquidate, as well as the financial data entered into evidence and testimony at trial, the condition of the Companies continues to deteriorate, and the Rehabilitator has reasonable cause to believe further efforts at rehabilitation are futile and would substantially increase the risk of loss to policyholders, creditors and the public and it is in the best interests of policyholders and the public that they be liquidated.

27. Furthermore, even if a rehabilitation plan could be crafted, it is not possible to do so in the ninety day window permitted by the Court. The completion of a plan requires development and analysis of up-to-date financial data, and the undertaking would be lengthy. Ninety days is simply not a realistic time-frame to prepare a thoughtful rehabilitation plan considering and incorporating the most recent information available and up-to-date actuarial analysis. The Rehabilitator needs to have the discretion to complete these substantial activities in an orderly fashion within a more reasonable time frame.

28. Likewise the Court's directive that the Rehabilitator include Intervenors in the development of the rehabilitation plan is inconsistent with the Act. The Act expressly provides that a rehabilitator supplants the directors and officers of the insurer, and has full authority without their involvement in the management of the insurer. There is no statutory

authority that gives Intervenors in this case any right to input into any rehabilitation plan that may be filed by the Rehabilitator.

29. This Court has previously recognized the absolute authority of the Rehabilitator in this regard, and has made clear that directors and officers have no authority over management of the insurer. Koken v. Legion Ins. Co., 831 A.2d 1196, 1227-28 (Pa. Commw. Ct. 2003), aff'd sub nom., Koken v. Villanova Ins. Co., 583 Pa. 400, 878 A.2d 51 (2005)(per curium). The Court noted in Legion that taking away a rehabilitator's ultimate authority would cause "the rehabilitation ...[to] devolve into a contest between the commissioner and the insurer's management." Id. at 1227. Thus, in "any dispute on management of the business, the insurance commissioner trumps the board of directors." Id. at 1228.

30. The Court's requirement that the Rehabilitator include Intervenors in the development of a rehabilitation plan is directly at odds with both the statutory powers granted by the Legislature to the Rehabilitator and with this Court's reasoning in the Legion case.

31. The Court ordered that "[t]he plan of rehabilitation must address and eliminate the inadequate and unfairly discriminatory premium rates for the OldCo business." While the Rehabilitator is cognizant that the premium rates would need to be addressed in any rehabilitation plan, with due respect, it is the Rehabilitator who is has the authority to determine the "necessary and expedient" action to correct the Companies' financial condition. 40 P.S. § 221.16(b).

32. The May 3, 2012 Order would require the Rehabilitator to seek rate increases from other states that, even if implemented incrementally, would, as stated in the Court's Opinion, be 300% or more. There was no evidence that such increases are achievable.

If the Rehabilitator prepares a rehabilitation plan, the Rehabilitator needs to have flexibility and discretion to address this and similar issues in order to maximize the possibility of success.

33. A court "must restrain itself from interference with the more political branches of government in the absence of compelling evidence, and must be particularly wary of imposing broad solutions which remove responsibility from those to whom our statutes have entrusted it, no matter how desirable or efficient that solution may seem." Larson v. Pennsylvania Turnpike Comm'n, 490 A.2d 827, 830 (Pa. 1985). See also Grode v. Mut. Fire, Marine & Inland Ins. Co., 572 A.2d 798, 804 (Pa. Commw. Ct. 1990) ("We are aware, however, of the well-settled principle that judicial discretion may not be substituted for administrative discretion.") (discussing 40 P.S. § 221.16(a)), aff'd in relevant part sub nom. Foster v. Mut. Fire, Marine & Inland Ins. Co., 531 Pa. 598, 614 A.2d 1086 (1992).

34. The Court's Order directs the Rehabilitator to prepare a rehabilitation plan in accordance with the Court's view of the best way to rehabilitate the Companies based on the Court's view of the interests of policyholders, creditors and the public, including the involvement of the Intervenors, the terms of the plan and the time in which to file a plan. By doing so, the Court has infringed on the province of the Rehabilitator.

THE COURT ERRED IN FAILING TO AFFORD THE PROPER LEVEL OF DEFERENCE TO THE DETERMINATIONS OF THE REHABILITATOR

35. In rejecting the Rehabilitator's request to convert this rehabilitation case to a liquidation case, the Court did not afford the proper level of deference to the determinations of the Rehabilitator.

36. As set forth above, the Rehabilitator is entitled to exercise his discretion, and the Court should not substitute its judgment for the judgment of the Rehabilitator.

37. The Court has exceeded its authority by not deferring to the Rehabilitator's determinations that rate increases and policy modifications should not be implemented under these circumstances.

THE COURT ERRED AS A MATTER OF LAW BY IMPOSING THE INCORRECT LEGAL STANDARD AND BURDEN WITH RESPECT TO THE PROOF NECESSARY TO LIQUIDATE THE COMPANIES

38. The Rehabilitator is only required to prove under 40 P.S. § 221.18 that he has reasonable cause to believe that further attempts to rehabilitate the Companies would substantially increase the risk of loss to creditors, policy and certificate holders or the public or that further attempts to rehabilitate would be futile. The Court should have used this standard in analyzing the evidence from the trial.

39. Rather than limit the inquiry to whether the Rehabilitator has a reasonable cause to believe that liquidation is proper, the Court expanded the legislatively-imposed standard to require the Rehabilitator to show that there is an actual risk of loss and actual futility. This additional requirement is beyond the scope of the Act, and by imposing this additional requirement, the Court has usurped the role of the Legislature and essentially rewritten the Act to add an additional standard beyond that which was imposed by the Legislature.

40. While the Rehabilitator recognizes that this standard was also imposed by the Court in the Legion case, 831 A.2d at 1230, it has never been adopted by the Pennsylvania Supreme Court.

41. The Rehabilitator proved that he had reasonable cause to believe that that further attempts to rehabilitate the Companies would substantially increase the risk of loss to creditors, policy and certificate holders or the public or that further attempts to rehabilitate would be futile. Once that burden was met, it became the burden of the Intervenors to prove that a plan of rehabilitation would neither increase the risk of loss to creditors, policy and certificate holders

and the public nor be futile. The Intervenors never came forward with evidence that this was not so and that there was a viable manner to rehabilitate the Companies, other than by seeking to obtain rate increases in excess of 300% that they could not prove were attainable. The Court must take an "adverse inference" to the effect that Intervenors were unable to present a plan that provided for a successful rehabilitation of PTNA or ANIC. Legion, 831 A.2d at 1224; Merling v. Commonwealth Dep't of Transp., 79 Pa. Commw. 121, 126-27, 468 A.2d 894, 896-97 (1983); Traina v. Univ. of Pa. Health Sys., 2008 WL 4176747 (C.P. Phila. Co. 2008). The Court should therefore have ordered the liquidation of the Companies.

THE COURT ERRED IN RULING THAT THE REHABILITATOR MUST PROVE THAT FURTHER REHABILITATION WOULD SERVE NO USEFUL PURPOSE IN ORDER TO ESTABLISH CONTINUED REHABILITATION IS FUTILE AND IN REJECTING THE REHABILITATOR'S POSITION THAT REHABILITATION IS FUTILE IF REHABILITATION IS NOT FEASIBLE

42. Once an insurer has been shown to be insolvent, the test for whether rehabilitation would be futile is whether there is some feasible method of rehabilitating the insurer. Sheppard v. Old Heritage Mut. Ins. Co., 492 Pa. 581, 594, 425 A.2d 304, 310 (1980) (where an insurer has been shown insolvent, liquidation can be denied only if "rehabilitation is feasible"). Sheppard involved a liquidation proceeding and not conversion from a rehabilitation. The Supreme Court imposed the burden of proof on the insurer contesting liquidation to prove that rehabilitation was feasible. Id. at 594, 425 A.2d at 310.

43. Imposition of an entirely different test in order to convert a rehabilitation into a liquidation would not only be inconsistent with the Supreme Court's decision in Sheppard, but could also have detrimental effects on future receiverships. There is no requirement that attempts be made to rehabilitate an insurer that is insolvent or in a hazardous financial condition before liquidation is sought and granted. 40 P.S. § 221.19. Any rule that makes conversion to liquidation more restricted than obtaining a liquidation order in the first instance could have the

perverse effect of deterring future attempts to rehabilitate insurers and promoting immediate liquidation as a first resort, defeating the public policy noted by this Court in Legion, 831 A.2d at 1230, of encouraging the flexibility and benefits of rehabilitation.

44. Moreover, the Court's definition of "futile" to mean "no useful purpose" coupled with its conclusions that any rate increases would serve a useful purpose could make a finding of futility at any time under these circumstances an impossibility, an absurd result.

THE COURT ERRED AS A MATTER OF LAW BY RULING THAT A LIQUIDATION COULD NOT BE ORDERED UNLESS THE REHABILITATOR FIRST PUTS INTO PLACE A REHABILITATION PLAN THAT FAILS

45. Even if the Rehabilitator had to prove futility and not simply that he had a reasonable cause to believe further attempts to rehabilitate the Companies would be futile, the Court's suggestion that the only way to prove futility is to adopt a rehabilitation plan and then have it fail is erroneous. (Opinion at 155-56.) Section 221.18 imposes no such requirement, and such a requirement would be wasteful of resources.

46. The Companies entered into a Corrective Action Plan with the Department in 2002, pursuant to which they agreed to increase statutory reserves by $125,000,000. (P-19)

47. Over the course of the next seven years, the Companies pursued premium rate increases, among other efforts, to attempt to eliminate their capital deficit. (N.T. 1/31/11, 108-109, 122, 120:21-123:5.)

48. By 2005, regulators were becoming increasingly reluctant to grant premium rate increases and the Companies were obtaining only a third of the increase sought. (N.T. 1/31/11, 160:19-161:7.)

49. The Consent Order placing PTNA and ANIC into rehabilitation required the Rehabilitator to "correct the condition" that prompted the Board to seek relief. (P-644.)

50. In accordance with the Court's rehabilitation Orders, the Rehabilitator submitted a Preliminary Plan of Rehabilitation with respect to the Companies on April 6, 2009.

51. By the summer of 2009, the Rehabilitator discovered loss reserves against claim liabilities were drastically understated and that far more significant rate increases were required than had even been anticipated. (P-530; N.T. 2/2/11, 143:2-21.) It became apparent, therefore, that the Preliminary Plan that had been prepared could not succeed and, in effect, had already failed as a result.

52. Section 221.18 of the Act does not require the Rehabilitator to file a plan of rehabilitation as a condition to seeking conversion from rehabilitation to liquidation.

53. This Court has also recognized that a plan of rehabilitation (whether failed or not) is not a prerequisite to liquidation:

> This is not to say that futility can only be established where there is a proposed plan of rehabilitation. There will be cases where the *rehabilitator discovers that the insurer's finances are in total disarray, loss reserves against claim liabilities are drastically understated* and investments chimerical. Evidence of this type would also establish futility.

Legion, 831 A2d at 1245.

54. Intervenor's expert, Karl Volkmar ("Volkmar") admitted that the finances of the Companies are far worse than initially depicted and correction requires rate increases far in excess of what had been disclosed to the Department prior to the rehabilitation orders. (N.T. 10/27/11 Volkmar at 102-03; R-1059; R-80, R-1059 Attachment 6 and R-801.) Faced with this level of financial chaos, similar to that described in Legion, it was error for the Court to conclude that further attempts to rehabilitate would not be futile.

55. The Court erred, therefore, by holding that conversion from rehabilitation to liquidation could only be accomplished after a plan of rehabilitation is filed and fails. This is

not a statutory requirement or a requirement established by case law, and in fact, this requirement is at odds with both.

THE COURT ERRED AS A MATTER OF LAW BY PRECLUDING THE TESTIMONY OF THE REHABILITATOR'S EXPERT WITNESS VINCENT BODNAR

56. The Court erroneously precluded the Rehabilitator from calling as a witness and expert Vincent Bodnar, ASA ("Bodnar") on the grounds that his testimony and reports were cumulative, irrelevant, and prejudicial as they were belatedly produced.

57. Bodnar is a principle of DaVinci Consulting, LLC and was retained by the National Organization of Life and Health Insurance Guaranty Associations ("NOLHGA") to review the financial condition of the Companies.

58. Bodnar was identified as a witness and expert by the Rehabilitator. Bodnar prepared an expert Report (the "Bodnar Report") that was provided to Intervenors on August 5, 2010 and he was subsequently deposed by Intervenors.

59. The Bodnar Report addressed certain claims leveled by the Intervenors and their expert, Volkmar.

60. In particular, Volkmar claimed in his expert report that the Rehabilitator should have:

> - Retained an independent actuary to review Milliman's work; and
>
> - Retained an independent expert to review the financial condition of PTNA and ANIC.

(R 705 pg. 19-20.)

61. Bodnar met both of these criteria. He was independent of Milliman and had reviewed the financial condition of PTNA and ANIC.

62. Following the production by Intervenors of the Volkmar expert report on September 17, 2010 and a revised report on October 20, 2010, Bodnar prepared his Rebuttal

Report (the "Bodnar Rebuttal Report"), which was provided to Intervenors on November 9, 2010.

63. Had he testified, Bodnar would have offered opinion testimony that, among other things, the negative surplus confronting the Companies exceeded $2 billion, similar to the conclusion reached by Milliman.

64. Had he been permitted to testify, Bodnar would have advised the Court that he had reached his conclusion independently and well before being told Milliman's conclusion. (See Bodnar Affidavit at ¶ 7).

65. Bodnar would further have testified that he was prepared to recommend to NOHGLA that it withhold support for the Preliminary Plan of Rehabilitation based on his independent analysis of the Companies' financial condition. (See Bodnar Affidavit at ¶ 8).

66. The Court's preclusion of Bodnar was improper because 1) Intervenors were promptly provided with the Bodnar Report and Bodnar Rebuttal Report; 2) Intervenors had the opportunity to depose Bodnar; had ample time to seek additional discovery and to prepare for his examination; and 3) Bodnar's testimony was not cumulative of Milliman's testimony; and in fact directly addressed one of the principle criticisms of Intervenor's expert, Volkmar. In his report, Volkmar claimed that an independent actuarial opinion, distinct from Milliman's report, was required before a liquidation petition could be properly considered by the Rehabilitator. Bodnar, had he been permitted, would have testified that he prepared his report independent of Milliman, and based on same data reviewed by Volkmar and that he had concluded the Companies were hopelessly insolvent with a negative surplus in excess of $2 billion. His testimony would have demonstrated that his conclusions were reached before Milliman issued any like report and that he had advised the Department of the foregoing.

67. The suggestion that Bodnar's report was not independent of Milliman was 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)).

68. 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., 997 A.2d 1152, 1161 (Pa. 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).

THE COURT ERRED AS A MATTER OF LAW IN ADMITTING THE SPECULATIVE AND UNSUPPORTED TESTIMONY OF INTERVENORS' EXPERTS STEVEN HOLLAND AND KARL VOLKMAR

69. The Court improperly allowed the speculative and unsupported testimony of Intervenors' experts Steven Holland and Karl Volkmar.

70. On November 19, 2010, prior to trial, the Court denied the Rehabilitator's Motion to Preclude the testimony of Holland and Volkmar. Volkmar and Holland's testimony, however, was inadmissible because it was entirely speculative and fraught with conjecture.

71. It is axiomatic that an expert's opinion may not be based on conjecture or guesswork. Commonwealth v. Galvin, 985 A.2d 783, 801 (Pa. 2009). An opinion may be found conjectural because it does not have an adequate basis in fact. Hussey v. May Dep't Stores, 357 A.2d 635, 637 (Pa. Super. Ct. 1976); see also First Methodist Episcopal Church v. Banger Gas Co., 130 A.2d 517, 525 (1957) (stating that "where there is no reasonable basis for an [expert]

opinion, it is valueless and hence inadmissible"); Betz v. Erie Ins. Exch., 957 A.2d 1244, 1258 (Pa. Super. 2008) (requiring that expert testimony be stated with "reasonable certainty . . . to avoid speculation under the rubric of 'expert opinion'"). An "opinion may be found conjectural because it does not have an adequate basis in fact." Hussey, 357 A.2d at 637.

72. An expert's testimony "is incompetent if it lacks an adequate basis in fact" and in that case is inadmissible. Helpin v. Trus. of the Univ. of Pa., 969 A.2d 601, 617 (Pa. Super. Ct. 2009). Although "an expert's opinion need not be based on absolute certainty, an opinion based on mere possibilities is not competent evidence."

73. Pennsylvania Rule of Evidence 703 "requires a greater foundation for the opinion and conclusions of an expert witness than a party's 'dreams' or aspirations for the future profitability of a business or professional practice." Id.

74. Testimony of "dreams" and "aspirations" of achieving such rate increases are inadmissible in Pennsylvania. Helpin, 969 A.2d at 617. Moreover, dreams, guesses and aspirations cannot support a conclusion that a company can be rehabilitated. "[S]omething more than blind hope is needed to continue a rehabilitation and avoid a liquidation." Legion, 831 A.2d at 1230.

75. Holland testified, over the objection of the Rehabilitator, regarding his belief that medical advances will occur with respect to certain diseases that will have a positive financial impact on the Companies.

76. Holland described a number of possible medical advances that might appear in the future. However, Holland admitted that he was unable to (i) identify a specific medical advance which would improve the Companies' financial position (N.T. 10/24/11, 73:20-

74:24); (ii) quantify any such impact on the Companies (N.T. 10/24/11, 182:6-9; 10/25/2011, 85:10-19); or (iii) advise when such advancement would incur (N.T. 10/25/11, 96:2-8, 11-23).

77. Volkmar provided actuarial testimony on behalf of Intervenors.

78. Under the model proposed by Intervenors, significant rate increases are required by the Companies in order to meet their obligations. Volkmar, however, was unable to testify with reasonable certainty, or any certainty whatsoever, as to the ability of the Companies to achieve the rate increases. (N.T. 10/27/11, 97:4-24; 90-100.)

79. By 2008, the Companies were only successful in obtaining one third of the requested rate increases. (N.T. 1/31/11, 160:19-161:7.)

80. In 2006, prior to rehabilitation, the Companies were only able to achieve rate increases of 60-70% - far less than what Volkmar projects is required now.

81. The undisputed evidence showed that in 2006 the Companies were not obtaining the premium rate increases for which they applied. William Hunt, the former Chief Executive Officer of the Companies, testified that:

> Q. Were there amounts, percentages beyond which, on the whole, on average, not isolated states, that you believed that PTNA and ANIC would be unlikely to achieve rate increases?
>
> A. I believe that the rate increases that the company was -- the companies were filing for were reasonable and should have been granted.
>
> Q. Did you conclude that there were amounts beyond which the states, in fact, would not grant them?
>
> A. The experience was such that certain states were not granting all the rate increases.

(Ex. 11, Hunt Dep. at 51:7-51:21.)

82. Hunt unequivocally testified that by 2006, he felt it was *impossible* to achieve rate increases of 60% and 70% throughout the country, and in fact, some states were denying all of the companies applications for rate increases. (Ex. 11, Hunt at 54:17-55:8.)

83. The only evidence in this case reflects that the Companies could ***not*** achieve rate increases that were considerably lower than those proposed by Volkmar. (*See* Ex. 2, Volkmar Report, Attachment 6.)

84. Volkmar's testimony that rate increases of 300% or more were achievable should not have been permitted as there is no evidentiary support that they could be achieved. As a result, Volkmar's testimony was speculative and should have been precluded by the Court.

THE COURT ERRED AS A MATTER OF LAW IN PRECLUDING EVIDENCE REGARDING THE FINANCIAL CONDITION OF THE COMPANIES IN 2010 AND 2011, AND THEN ADMITTING INTO EVIDENCE INCOMPLETE FINANCIAL DATA FOR 2010 WHEN OFFERED INTO EVIDENCE BY INTERVENORS

85. The Court erred on denying the motion filed by the Rehabilitator on August 31, 2011, during a lengthy break in the hearing, to, among other things, introduce at trial 2010 and 2011 financial and claims data that had become available since the commencement of the hearing and updated projections based on that data. This information was critical to a complete understanding of the financial condition of the Companies.

86. The Court compounded the error by allowing the Intervenors to introduce 2010 cash flow and asset data into evidence, without the related claims data. As a result, the Court relied on an incomplete picture of the current financial condition of the Companies.

THE COURT ERRED IN HOLDING THAT A REHABILITATION PLAN MAY TREAT SOME POLICYHOLDERS OR CREDITORS, INCLUDING THE GUARANTY ASSOCIATIONS, WORSE THAN THEY WOULD BE TREATED IN LIQUIDATION

87. Pennsylvania law requires that any rehabilitation treat all policyholders and other creditors at least as well as they would fare in liquidation. Foster v. Mut. Fire, Marine

& Inland Ins. Co., 531 Pa. 598, 613, 617, 614 A.2d 1086, 1093-94, 1096 (1992); Koken v. Fidelity Mut. Life Ins. Co., 803 A.2d 807, 826 (Pa. Commw. Ct. 2002); Grode v. Mut. Fire, Marine & Inland Ins. Co., 132 Pa. Commw. 196, 209-11, 572 A.2d 798, 804-05 (1990), aff'd in relevant part sub nom. Foster v. Mut. Fire, Marine & Inland Ins. Co., 531 Pa. 598, 614 A.2d 1086 (1992). As the Supreme Court held in Foster v. Mutual Fire, "a rehabilitation plan cannot impose harsher consequences than a liquidation [and] creditors must fare at least as well under a rehabilitation plan as they would under a liquidation." Foster v. Mut. Fire, 531 Pa. at 613, 614 A.2d at 1093-94.

88. Any rehabilitation proposal which would make any policyholder or creditor worse off than in liquidation cannot be considered or adopted as an alternative to liquidation. This is clear from the Mutual Fire case. In Mutual Fire, the courts held that the test which a rehabilitation plan must meet to be approved was whether the proposed rehabilitation plan "does not diminish the rights a creditor would have in liquidation," not that a rehabilitation plan was permissible unless policyholders as a whole would be harmed or creditors as a whole would be harmed. Grode v. Mut. Fire, 132 Pa. Commw. at 211, 572 A.2d at 805 (emphasis added), aff'd sub nom. Foster v. Mut. Fire, 531 Pa. at 613, 617, 614 A.2d at 1093-94, 1096. Indeed, the Mutual Fire court held that the proposed rehabilitation plan could not be approved unless modified to give particular creditors their full liquidation rights, regardless how beneficial the reduction of their rights was to policyholders as a whole or creditors.

89. The Court further failed to appreciate that the delay in liquidation would harm the public. The Guaranty Associations are funded through tax payer dollars. The Guaranty Associations will fare worse in a continued rehabilitation rather than in immediate liquidation,

and therefore the Court's determination not to liquidate at this time is contrary to the requirements of 40 P.S. § 221.18.

WHEREFORE, the Rehabilitator respectfully requests that the Court issue an order granting the Petitions for Liquidation.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Sarah E. Davies, hereby certify that on May 14, 2012, a true and correct copy of the foregoing Post-Trial Motion Of Michael F. Consedine, Insurance Commissioner Of The Commonwealth Of Pennsylvania, In His Official Capacity As Rehabilitator Of Penn Treaty Network America Insurance Company And American Network Insurance Company was served on the following persons via hand delivery and email:

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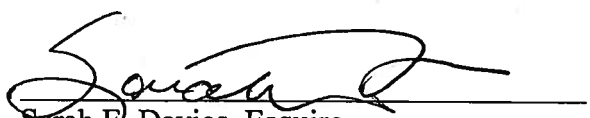

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