

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 04-60573 CIV-MORENO/GARBER

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

MUTUAL BENEFITS CORP.,
JOEL STEINGER a/k/a JOEL STEINER,
LESLIE STEINGER a/k/a LESLIE STEINER
and PETER LOMBARDI,

Defendants,

VIATICAL BENEFACTORS, LLC,
VIATICAL SERVICES, INC.,
KENSINGTON MANAGEMENT, INC.
RAINY CONSULTING CORP.,
TWIN GROVES INVESTMENTS, INC.,
P.J.L. CONSULTING, INC.,
SKS CONSULTING, INC., and
CAMDEN CONSULTING, INC.

Relief Defendants.

**MOTION TO AUTHORIZE PUBLIC RELEASE OF
MILLIMAN MEMORANDUM
AND MEMORANDUM IN SUPPORT**

(Filed Under Seal)

Roberto Martinez, Esq., Court-Appointed Receiver of Mutual Benefits Corporation, Viatical Benefactors, LLC and Viatical Services, Inc. moves this Court to allow him to publicly release a memorandum prepared by Milliman USA, a copy of which is attached to this motion, thereby waiving any privilege which may attach to the memorandum, and to utilize that memorandum as he

Colson Hicks Eidson

255 Aragon Avenue, 2nd Floor, Coral Gables, Florida 33134-5006 Telephone: (305) 476-7400 Fax: (305) 476-7444

deems appropriate in the best interests of the Receivership. The Receiver states as grounds:

1. The purpose of this motion is to authorize the Receiver to make public and utilize a memorandum prepared by Milliman USA [the "Milliman Memorandum"], which may be subject to a work-product privilege. The motion, with the Milliman Memorandum attached, has been filed under seal pursuant to Local Rule 5.4 to give the Court an opportunity to address these issues without publicly disclosing the contents of the Milliman Memorandum.

2. **The Memorandum.** Milliman USA ["Milliman"] is a nationally-renowned firm which provides actuarial and consulting services to the insurance industry. *See* www.milliman.com. Prior to the receivership, Milliman was retained by counsel for MBC to analyze certain contentions made by the Florida Department of Insurance ["DOI"] as a result of its audit of MBC. The DOI was informed by counsel for MBC that it intended to retain Milliman; the DOI respected Milliman's expertise and was therefore glad to hear that it had been retained.

3. Among other things, Milliman was asked to analyze life expectancies ["LE"] on insurance policies purchased and sold by MBC. It was also asked to provide cash flow projections based on its LE determinations.

4. The results of the first part of this undertaking – the analysis of LEs on insurance policies purchased and sold by MBC – is contained in an April 19, 2004 Memorandum from Daniel Theodore, the partner at Milliman heading the engagement, to Steve Ecenia, Esq., counsel for MBC. As reflected in the Memorandum, two Milliman employees (Rick Bergstrom and Anna Hart, both of who were described by Mr. Theodore as actuaries) traveled to MBC's offices and reviewed the medical records for a sample group of 30 insurance policies, sold by MBC between October 10, 1998

and August 20, 2003. All of the policies analyzed were "non-HIV" or "life settlement" policies. A chart detailing the results of their underwriting review is attached to the Memorandum.

5. The results of Milliman's underwriting review is striking. On each of the 30 policies, Milliman's LE was greater than MBC's LE. On 22 of the 30 policies, Milliman's LE was more than 50% greater than that of MBC. On 13 of the 30 policies, Milliman's LE was more than double that of MBC. On 7 of the 30 policies, Milliman's LE was more than 2.5 times that of MBC. On 4 of the 30 policies, Milliman's LE was more than 3 times that of MBC.^{1/} On one policy, Milliman's LE was more than 4 times that of MBC. On average, Milliman's LE was almost twice that of MBC.^{2/} Milliman's LEs were on average 2.5 to 3.5 years longer than MBC's.

6. The information contained in the April 19, 2004 Memorandum is critically important to the ongoing operations of the receivership. As reflected in the Second Receiver's Report, there are 802 non-HIV policies with a face value of \$1,010,804,046. As also reflected in the Second Receiver's Report, approximately \$100 million has been placed in escrow accounts, ostensibly to pay premiums on these policies. The question of immediate concern to the Receiver is whether the \$100 million is sufficient to pay premiums on these 802 non-HIV policies through their actual LE, not just the LE assigned by MBC. Because of the significant discrepancy between MBC's LEs and Milliman's LEs, it cannot be assumed that these escrow accounts, which are based in part on MBC's LEs, are sufficient.

^{1/}On one such policy, Milliman's LE was 78 months, MBC's LE was 24 months. On another, Milliman's LE was 64 months, MBC's LE was 18 months. On a third, Milliman's LE was 158 months, MBC's was 36 months. On another, Milliman's LE was 81 months, MBC's was 24 months.

^{2/}On average, Milliman's LEs were 1.966 times MBC's LEs.

7. **The Receiver's Duties.** This Court's Order Appointing Receiver directed the Receiver to "[i]nvestigate the manner in which the affairs of MBC, VBLLC and VSI were conducted . . ." and to "[p]resent to this Court a report reflecting the existence and value of the assets of MBC, VBLLC and VSI and of the extent of liabilities, both those claimed to exist by others and those which the Receiver believes to be legal obligations of MBC, VBLLC and VSI." Order Appointing Receiver at 3. In undertaking these duties, this Court recognized that the Receiver's was responsible not only to MBC, but to MBC's investors and creditors as well. Indeed, in addition to directing the Receiver to "manage the business affairs . . . of MBC," this Court's Order Appointing Receiver directed the Receiver to "take whatever actions are necessary for the protection of the investors . . ." Order Appointing Receiver at 2.

8. This Court's order is consistent with the Receiver's position as an officer of the court. As summarized in *Securities and Exchange Commission v. Elfindepan, S.A.*, 169 F.Supp.2d 420, 424 (M.D.N.C. 2001):

Generally, a receiver is "viewed as an officer of the court occupying a position of a custodian of the property in receivership and owing to all persons interested in such property a discharge of h[er] duties in good faith and impartially insofar as they are concerned." 65 Am.Jur.2d Receivers § 135 (1972). As such, the receiver "is not the exclusive agent or representative of either party to the suit in which [s]he is appointed, and [s]he is not appointed for the benefit of either party, nor does [s]he derive h[er] authority from either one." 65 Am.Jur.2d Receivers § 138 (1972). *See also Lowder v. All Star Mills, Inc.*, 91 N.C.App. 621, 624, 372 S.E. 739, 741 (1988)(recognizing that although the appointment of a receiver suspends the authority of the officers and directors of the company, the receiver maintains representation of both the owners and the creditors of the company). Rather, a receiver receives h[er] power and authority directly from the court and therefore is "subject to the court's directions and orders in the discharge of h[er] duties." 66 Am.Jur.2d § 185 (1973).

9. Here, as detailed more fully below, the Receiver believes that it is in the best interests of the Court, the investors and MBC's creditors to have all information available regarding whether monies held in escrow are sufficient to pay premiums on non-HIV policies through their anticipated LE. And, as more fully detailed below, such information is critical to the Receiver in his ongoing management of MBC, because the Receiver needs to make business decisions regarding whether to pay all premiums on all non-HIV policies or, instead, whether to begin analysis of premium decisions on a policy-by-policy basis.

10. In considering whether the Memorandum should be made public, the Receiver has considered several different issues: (1) is the document an incomplete draft; (2) is the document subject to the attorney-client privilege; (3) is the document subject to the work-product privilege, and, if so, should that privilege be waived.

11. **The Memorandum is not an incomplete draft.** The Memorandum is titled "Initial Comments on Underwriting Review - DRAFT." However, the undersigned has spoken with Mr. Theodore, author of the Memorandum. Mr. Theodore explained that the underwriting review of the 30 policies described in the Memorandum was complete; all necessary steps for review and analysis of those policies had been completed. The only work which had not been completed was the next step to follow this analysis. As the Memorandum explains:

The next step, should you decide to pursue it, will be for us to provide our own cash flow projections using our life expectancy calculations and premium estimates (and comparing them to the company's life expectancies).

Indeed, the Receiver agrees. Because MBC's LEs seem to be substantially understated, as compared to Milliman's, a complete cash flow projection must be conducted for all the non-HIV policies, using

accurate LEs, to determine whether funds on hand are sufficient to pay premiums through the LE of each policy. It is precisely for this purpose that the Receiver sought to retain Tillinghast (and will shortly seek to renew that request for retention). The Milliman Memorandum, far from being incomplete, demonstrates the need for a complete analysis of the non-HIV policies.

12. **The Memorandum is not protected under the attorney-client privilege.** The Memorandum on its face states: "Privileged and Confidential Attorney Client Communication." Although denominated as such, it is clearly not a protected attorney-client communication. It is not a communication between an attorney and his client, but instead is a communication from a retained expert to the attorney retaining that expert. If any privilege attaches, it is a work-product privilege, not an attorney-client privilege. *United States v. Ackert*, 169 F.3d 136 (2d Cir. 1999); *In re G-I Holdings, Inc.*, 218 F.R.D. 428 (D. N.J. 2003).

13. **The Receiver may waive any work-product privilege and make the Memorandum public.** There is no doubt that any privilege which may attach to the Memorandum belongs to the Receiver and may be waived by him. *Commodity Futures Trading Commission v. Weintraub*, 105 S.Ct. 1986 (1985)(when corporation is in bankruptcy, privilege belongs to and may be waived by trustee); *Securities and Exchange Commission v. Elfindapan, S.A.*, 169 F.Supp.2d 420 (M.D.N.C. 2001)(applying *Weintraub* to SEC Receiver).

14. Numerous considerations have led the Receiver to conclude that any work-product privilege which may exist should be waived under the unique circumstances of this case. First, it does not appear that the information contained in the Memorandum was intended to remain confidential. In particular, MBC, through its counsel, disclosed Milliman's retention to the DOI and

continually assured DOI that Milliman's report would be forthcoming shortly. The information contained in Milliman's memorandum, together with a cash flow analysis based on that information, would be contained in Milliman's final report. Moreover, other information generated by Milliman, the breakdown of the insurance portfolio into HIV and non-HIV policies, by number of policies and face amount, was conveyed to the DOI.

15. Second, defendants' own filings with this Court have recognized the need for and importance of Milliman's analysis. In their Motion To Terminate Receivership, they argued:

On October 17, 2003 Ms. Davis [OIR investigator] issued a Status Report on the Mutual Benefits' Examination. Mutual Benefits promptly rebutted the vast majority of the allegations contained in Ms. Davis' Status Report and retained an outside actuarial firm, Milliman USA, Inc. ("Milliman") to address the remaining concerns – Milliman was in the final stages of its review when the Receiver was appointed and directed it to cease all work for the company. It is uncertain whether the Receiver has allowed the review to be completed.

* * *

All parties were waiting for the conclusion of the audit and the results of Milliman's analysis before finalizing any settlement agreement. Apparently faced with the imminent possibility of settlement, the OIR referred the Mutual Benefits matter to the SEC

Motion To Terminate Receivership at 8. As defendants' own filing makes clear, (a) Milliman's work was intended to become public, by delivery to OIR; (b) its work was "in the final stages," and (c) defendants criticize the Receiver for not allowing Milliman's analysis to become public. All three reasons militate in favor of allowing Milliman's analysis to become public now.

16. Third, there is a special need for the information contained in Milliman's analysis. The Receiver previously moved this Court for leave to retain Tillinghast, another nationally-

renowned actuarial and insurance services consulting firm. As the motion to retain Tillinghast made clear, the Receiver sought to have Tillinghast perform the same type of analysis undertaken by Milliman – analysis of the LE on each of MBC’s non-HIV policies, and analysis of cash flow issues based on those independently determined LEs.

17. Various objections were raised with respect to the retention of Tillinghast on the ground that it constituted a substantial but unnecessary receivership expense. But the Milliman Memorandum shows precisely why the retention of Tillinghast is a *necessary* receivership expense; it demonstrates that substantial problems exist in the LEs assigned by MBC on non-HIV policies and that, as a result, substantial problems may exist in the premium escrows for those policies. It establishes the need for a complete analysis of the non-HIV policies and the retention of Tillinghast for that purpose.^{3/}

18. The Receiver is aware of this Court’s prior statements suggesting that he should not, at this stage, routinely waive privileges belonging to the Receivership entities. The Receiver does not believe that the circumstances surrounding the Milliman Memorandum are routine. Moreover, the Receiver has filed this motion precisely because of the Court’s admonition, so that the defendants will have an opportunity to be heard before the Milliman Memorandum is made public and that any public release of the Milliman Memorandum is in accord with the directives of this Court.

19. Because the contents of the Milliman Memorandum are laid out in this motion, a copy of this motion has only been provided to the defendants and not been provided to the SEC; the relief

^{3/}At the outset, the Receiver had talked with Milliman about retaining it for such an analysis. However, the Receiver ultimately determined that it would be best to hire a consultant who had no previous ties to MBC.

defendants or others on the service list. The Receiver will make a copy available to the SEC and others if directed to do so by the Court.^{4/}

WHEREFORE, for the reasons stated, Roberto Martinez, Esq., Court-Appointed Receiver of Mutual Benefits Corporation, Viatical Benefactors, LLC and Viatical Services, Inc. moves this Court to allow him to publicly release a memorandum prepared by Milliman USA, a copy of which is attached to this motion, thereby waiving any privilege which may attach to the memorandum, and to utilize that memorandum as he deems appropriate in the best interests of the Receivership.

Respectfully submitted,

COLSON HICKS EIDSON
Counsel for Receiver, Roberto Martínez
255 Aragon Avenue, Second Floor
Coral Gables, Florida 33134
Telephone (305) 476-7400
Facsimile (305) 476-7444

By 

MARC COOPER
Florida Bar No. 198358


-and-

David P. Milian
Laurel M. Isicoff
KOZYAK TROPIN THROCKMORTON
Co-Counsel for the Receiver
2800 Wachovia Financial Center
200 S. Biscayne Blvd.
Miami, Florida 33131

^{4/}At the outset of the receivership, the Receiver inadvertently produced a copy of the Milliman Memorandum to the SEC. At the Receiver's request, the SEC agreed that the production was inadvertent, returned all copies of the Milliman Memorandum to the Receiver, and agreed not to use it or its contents.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 13th day of July, 2004 to counsel on the attached service list in an envelope marked "Personal & Confidential."

By 

MARC COOPER

SERVICE LIST

Laurel M. Isicoff, Esq.
David P. Milian, Esq.
KOZYAK TROPIN & THROCKMORTON
2800 Wachovia Financial Center
200 S. Biscayne Boulevard
Miami, FL 33131
Tel: (305) 372-1800
Fax: (305) 372-3508
Attorneys for Receiver

Bruce A. Zimet Esq.
BRUCE A. ZIMET, PA
100 S.E.3rd Avenue, Suite 2612
Ft. Lauderdale, FL 33394
Attorneys for Leslie Steinger
Tel: (954) 764-7081
Fax: (954) 760-4421

John Hogan, Esq.
Holland & Knight LLP
701 Brickell Ave., 30th Floor
Miami, Florida 33131
Tel: (305) 374-8500
Fax: (305) 789-7799
*Attorneys for Joel Steinger & Relief Def.
Kensington*

Jon A. Sale, Esq.
Ben Kuehne, Esq.
Sale & Kuehne, P.A.
BankAmerica Tower, Suite 3550
100 S.E. 2nd Street
Miami, FL 33131-2154
Tel: (305) 789-5989
Fax: (305) 789-5987
*Attorneys for Peter Lombardi & Relief Def. PJJ
Consulting*

Richard Ben-Veniste, Esq.
Lee Rubin, Esq.
Mayer Brown Rowe & Maw
1909 K. Street, N.W.
Washington, DC 20006
Tel: (202) 263-3000
Fax: (202) 263-3300
*Attorneys for Joel Steinger & Relief Def.
Kensington*

ATTACHMENT



A MILLIMAN GLOBAL FIRM

Milliman USA
Consultants and ActuariesOne Pennsylvania Plaza, 38th Floor
New York, NY 10119
Tel: 212-279-7166 Fax: 212-679-5657
www.milliman.com

MEMORANDUM

To: Steve Ecenia
From: Daniel Theodore
Date: April 19, 2004
Subject: Mutual Benefits Corporation Review:
Initial Comments on Underwriting Review - DRAFT

Privileged And Confidential Attorney Client Communication

On behalf of Mutual Benefits Corporation, you engaged Milliman to review the company's portfolio of life insurance policies. As part of this project, we looked at the life expectancies assigned by the company's clinicians.

Rick Bergstrom and Anna Hart visited the company's offices to review the medical records for a sample group of policies and independently determine what life expectancies they might have assigned. Due to time limitations, the sample policies that were reviewed were limited to 20 male lives and 10 female lives at a wide range of issue ages. While they also had access to additional summary write-ups provided by the clinicians in the files, the information contained in them was deemed insufficient to properly assess the risks, and so are not included in this report.

The process of substandard underwriting requires the assignment of additional mortality to the standard (healthy) mortality table for each of the identified impairments. The additional mortality may be expressed as either:

- o A percentage of a standard table, or
- o A flat number of annual deaths per 1000 for a given number of years.

These mortality adjustments are based on historical insured experience for similarly impaired lives, and generally comes from one or more reinsurance manuals. Once the underwriting has been completed, a life expectancy estimate (LE) may be calculated from the annual mortality rates in the adjusted mortality table.

This process is quite different from the approach that appears to have been taken by the company's contracted clinicians who seem to have assigned a life expectancy directly from a review of the medical information without any intermediate step involving adjusting the standard tables and using annual mortality rates. This becomes clear when we attempted to determine the percentages of standard mortality needed to produce the company's life expectancies.

The results are summarized below:

Underwriting Review of Sample MBC Policies

Male Non-HIV												
1	2	3	4	5	6	7	8	9	10	11	12	
MBC Case #	Policy #	Plan Type	Current Face Amt	Date of Birth	Age at Evaluation	MBC Life Expectancy (months)	Estimated Rating (Impch in MBC LE)	Milliman Rating (Percent of Std + Flat Extra per Yr / Years)	Milliman Life Expectancy (months)	MBC LE less Milliman LE (months)	MBC LE less Milliman LE Excluding Outliers (months)	
1	99-0007183	201020505A	Op conv.	\$200,000	12/28/78	23	24	N/A	1600% + 200/10	78	-54	-54
2	99-0007948		Term	\$20,000	05/21/54	48	12	80000%	500% + 500/5	23	-11	-11
3	50-0000148		WLT	\$125,000	12/02/43	58	48	8500%	500% + 200/5	74	-26	-26
4	50-0000057	7903708	VUL	\$150,000	12/28/40	59	72	2900%	6.75	146	-74	-74
5	50-0000057	60045468	UL	\$200,000	12/08/38	60	60	8700%	14	181	-41	-41
6	10-0000588	100750213	Term	\$500,000	12/20/41	60	36	8500%	170% + 200/5	59	-23	-23
7	50-0000107	4391248	UL	\$589,000	12/16/39	61	60	3450%	925% + 75/5	84	-24	-24
8	50-0000180	6199577	UL	\$4,000,000	12/12/40	61	72	2500%	3.25	182	-110	-110
9	99-0007900	700020911	UL	\$1,000,000	03/25/37	65	60	2350%	200% + 50/10	97	-37	-37
10	99-0006902	A010160700	UL	\$300,000	12/08/34	65	36	5400%	1175% + 75/5	68	-30	-30
11	50-0000170	BU1000678	Term	\$1,000,000	07/06/35	67	60	1600%	4.25	127	-67	-67
12	99-0007695	0022257	UL	\$1,000,000	12/23/32	69	36	3500%	760% + 150/5	51	-15	-15
13	10-0000198	7051750	UL	\$741,457	05/28/28	70	24	5500%	12	61	-37	-37
14	99-0006970	V9000382	VUL / term rider	\$3,000,000	06/07/27	73	24	2500%	10	52	-28	-28
15	10-0000593	G13A001821	UL	\$1,000,000	08/26/25	74	48	1250%	5.25	81	-33	-33
16	50-0000153	600000101	UL	\$1,300,000	05/04/25	76	48	1000%	725% + 5/5	58	-10	-10
17	50-0000151	60553523	UL	\$250,000	06/08/24	77	48	900%	5	69	-21	-21
18	50-0000007	00141702	UL	\$300,000	02/02/21	77	36	1400%	11.25	42	-6	-6
19	99-0007920	U01703388	UL	\$400,000	10/02/17	84	36	590%	2.5	47	-11	-11
20	99-0007498	D0073423L	UL	\$950,000	05/12/14	88	24	460%	3	33	-8	-8
Average			\$449,823		66	43.2			78.55	-33	-29	
High			\$5,000,000		88	72			182	-110	-74	
Low			\$20,000		23	12			23	-6	-6	

Female Non-HIV												
1	2	3	4	5	6	7	8	9	10	11	12	
MBC Case #	Policy #	Plan Type	Current Face Amt	Date of Birth	Age at Evaluation	MBC Life Expectancy (months)	Estimated Rating (Impch in MBC LE)	Milliman Rating (Percent of Std + Flat Extra per Yr / Years)	Milliman Life Expectancy (months)	MBC LE less Milliman LE (months)	MBC LE less Milliman LE Excluding Outliers (months)	
1	10-000014	603321430	Term	\$250,000	12/09/99	32	18	200000%	500% + 500/5	64	-46	-46
2	99-000686		UL	\$50,000	02/28/74	35	36	9300000%	500% + 200/10	77	-41	-41
3	99-0007987	7388001	UL	\$1,000,000	02/19/38	65	48	4600%	225% + 100/10	102	-54	-54
4	99-000606	5129728	UL	\$300,000	11/23/30	68	36	4700 / 2900%	3.25	150	-122	-122
5	99-0000193	80062800	UL	\$4,000,000	02/17/27	75	60	1150%	1.5	160	-100	-100
6	99-000587	7892017	UL	\$2,000,000	11/02/21	81	36	1100%	3	81	-45	-45
7	99-000528	ARW0000047	UL	\$1,000,000	06/12/20	82	24	N/A	4.25	81	-37	-37
8	99-0007890	50801786	UL	\$3,000,000	03/24/20	82	60	436%	250% + 5/3	82	-22	-22
9	99-0007625	U02001	UL	\$1,500,000	11/04/17	83	36	800%	2.75	73	-37	-37
10	99-0007664	52817252	UL	\$7,000,000	05/17/19	84	36	630%	3.5	57	-21	-21
Average			\$1,589,882		67	42			82	-40	-32	
High			\$7,000,000		88	72			182	11	12	
Low			\$4		6	7			10	-122	-74	

We were also told by the company that they had made the decision not to purchase policies that had LE's of longer than 72 months. While we observed that no LE's in the sample of policies reviewed exceeded 6 years, we do not know if the clinicians "capped" their mortality estimates at that, or whether they felt they were only provided policies which were deemed to not exceed that time frame.

The tables show that Milliman life expectancies were consistently longer than those anticipated in the company's records, averaging around 2.5 to 3.5 years (bottom of columns 11 and 12). Furthermore, when the MBC LE's are converted to an equivalent percentage of standard mortality, the results appear inconsistent with typical insurance mortality studies. For example, rarely would an underwriter apply a percentage greater than 1000%; a percentage plus a flat extra would be more appropriate.

This review did not include any of the AIDS policies, for which population data may provide more useful information. We will pursue this approach later.

It is important to recognize that while the life expectancies we calculated are significantly longer than those determined by the company, they are still not in the range of 20 to 40 years suggested in the Buttner Hammock report as supplied by Lewis & Ellis.

The next step, should you decide to pursue it, will be for us to provide our own cash flow projections using our life expectancy calculations and premium estimates (and comparing them to the company's life expectancies). However, this step would be best done only after we have received more detailed information regarding the Buttner Hammock report and the LE analysis by Lewis & Ellis.

We look forward to hearing from you.

cc: R. Bergstrom
A. Hart