*Nassau County Clerk's Index No. 8023/91*
*Appellate Division, Second Department Docket No. 2012-05969*

# Court of Appeals

STATE OF NEW YORK

In the Matter of the Rehabilitation of
EXECUTIVE LIFE INSURANCE COMPANY OF NEW YORK

THE SUPERINTENDENT OF FINANCIAL SERVICES,
formerly known as THE SUPERINTENDENT OF
INSURANCE OF THE STATE OF NEW YORK,

*Petitioner-Respondent,*

*against*

JENNIFER ARACIL APPLING, JEANICE DOLAN, DANA ESTES, RICHARD ESTES, JANET GIBSON, TERRI JONES, REGGIE KELLY, SANDRA FOREMAN KENIK, DANIEL MALIN, CURTIS MOORE, JOSEPH MOORE, ERIC RABINOWITZ, HECTOR SANCHEZ, KEITH VINCENT, JAMES DZIAK, BRETT KOSHEL, DEANA SANDOR and DENISE SANDOR,

*Objectors-Appellants.*

## MOTION FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

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*Date Completed: March 8, 2013*

COURT OF APPEALS
STATE OF NEW YORK

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| IN THE MATTER OF THE LIQUIDATION OF EXECUTIVE LIFE INSURANCE COMPANY OF NEW YORK | Nassau County Clerk's |
| THE SUPERINTENDENT OF FINANCIAL SERVICES, formerly known as THE SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK,<br>Petitioner – Respondent,<br>-against-<br>JENNIFER ARACIL APPLING, JEANICE DOLAN, DANA ESTES, RICHARD ESTES, JANET GIBSON, TERRI JONES, REGGIE KELLY, SANDRA FOREMAN KENIK, DANIEL MALIN, CURTIS MOORE, JOSEPH MOORE, ERIC RABINOWITZ, HECTOR SANCHEZ, KEITH VINCENT, JAMES DZIAK, BRETT KOSHEL, DEANA SANDOR and DENISE SANDOR,<br>Objectors-Appellants. | Index No.: 8023/91<br><br>Appellate Division<br>Second Department<br>Docket No. 2012-05969 |

## NOTICE OF MOTION FOR LEAVE TO APPEAL

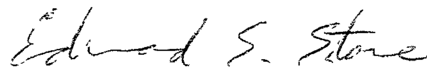
PLEASE TAKE NOTICE THAT upon the accompanying (1) Memorandum in Support of Objector-Appellants' Motion for Leave to Appeal, (2) Order of the Appellate Division Second Department (with Notice of Entry), (3) Order of the Supreme Court, (4) Record in the Appellate Division Second Department, and (5) Briefs in the Appellate Division Second Department, Objector-Appellants move

this Court, at the Court of Appeals Hall, Albany, NY, on March 25, for an order, pursuant to C.P.L.R. 5602 (a)(1) and 22 N.Y.C.R.R. 500.22 granting it leave to appeal to this Court the order of the Appellate Division Second Department, dated February 6, 2013, and for any other or further relief it deems just, proper and necessary.

PLEASE TAKE FURTHER NOTICE THAT answering papers, if any, must be served and filed in the Court of Appeals with proof of service by the return date of this motion.

Dated: New York, New York
March 8, 2013

Respectfully Submitted,



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COURT OF APPEALS
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Pursuant to C.P.L.R 5602(a)(1) and 22 N.Y.C.R.R. 500.22, Objector-Appellants respectfully submit this memorandum in support of their motion for leave to appeal.

## PRELIMINARY STATEMENT

In 1991, the New York Superintendent of Insurance took over the day-to-day operation of a solvent life insurance company, Executive Life Insurance Company of New York ("ELNY"). In his capacity as "rehabilitator" (Receiver), the Superintendent undertook fiduciary obligations toward thousands of persons on whose behalf ELNY had issued annuity contracts in the 1980s.

Most of the contracts remaining with ELNY at the time had been issued in conjunction with structured settlements in personal injury and death cases. Others were purchased to provide long-term care for disabled loved ones. Others had been purchased to fund retirement and pensions.

About 15 years or so into the takeover, the Receiver claims to have suddenly realized that ELNY's assets had deteriorated such that its fixed liabilities now exceeded the assets by more than a half billion dollars. The Receiver did not tell his beneficiaries (annuitants) of this discovery, or that their long-term income might be in jeopardy until December 2011. He did, however, tell others who might have a stake if ELNY were liquidated.

In the event of a shortfall, state insurance guaranty associations are generally required to step in, up to the amount of their statutory liability. By 2006, the Receiver was actively seeking input from the Insurance Company Guaranty

Corporation of New York, and a multistate organization known as the National Organization of Life and Health Guaranty Associations ("NOLHGA").

The guaranty associations had an inherent conflict of interest with payees: The associations' interest was in limiting their contributions, and the payees' interest was in maximizing them. Nonetheless, the Receiver gave NOLHGA – and not payees – extensive input into drafting a proposed plan of liquidation.

This cooperation extended to the execution of confidentiality agreements – citing "shared interests" – allowing the Receiver to provide NOLHGA with documents that he refused to his own beneficiaries, the annuitants. Likewise, the Receiver did not retain an independent expert to assess solvency and put together a plan; instead, he simply adopted the report of an expert who had been working for NOLHGA for three years.

The Receiver and NOLHGA insisted that the Supreme Court had no authority to even consider alternatives to the Receiver's proposed plan. The Supreme Court reluctantly agreed.

Faced with that limited framework, affected annuitants who were able to submit objections – *see* below – asked to at least see the documentation supporting the Receiver's claim of insolvency, the amount of that insolvency, and the future viability of the Receiver's plan. These documents had, after all, been freely shared

with NOLHGA and others in the insurance industry, and the Receiver's own expert agreed that his assumptions and conclusions could not be verified without them.

An expert retained by one set of objectors said the same thing; to evaluate the extent of ELNY's assets and liabilities and craft an alternate plan for comparison, he would need "everything that was available to the folks that put together this plan."

The Receiver (and the court) said no. The Receiver successfully argued that, although the court required *payees* to produce copies of their own supporting documentation, the Receiver should have no reciprocal obligation. The Receiver further successfully argued that the only way for payees to receive documents from their own fiduciary was through formal discovery requests, even though this was not supposed to be an adversarial proceeding, the payees were not parties to the proceeding, and no notice of this requirement was ever given to the payees prior to the liquidation hearing.

In response to the position taken by the Receiver, motions to produce the documents were made during the liquidation hearing. The court denied all oral and written requests. That effectively prevented payees from challenging the fairness or equity of the Receiver's plan: Without the documents that everyone else had, the few attorneys who were at the hearing were left with the Herculean task of

trying to cross-examine expert witnesses and others with no preparatory or impeachment material.

The court's denial of a reciprocal document exchange was just the latest burden imposed on payees. As discussed below, the affected payees contend that the original court-approved notice did not apprise them of the issues or their rights, or afford a meaningful opportunity to be heard before approval of the plan, under which their benefits are to be cut by more than $920 million (*after* contributions from guaranty associations).

The payees contend that the notice – which arrived during the December holidays and gave payees only a few weeks to file objections – was designed to appear as junk mail, contained misleading content, and failed to meaningfully apprise payees of what was about to happen to them.

The payees further contend that the Supreme Court's inconsistent application of the Civil Practice Law and Rules – sometimes enforcing them, sometimes declaring them inapplicable to an order to show cause hearing – severely prejudiced payees on material issues. Overall, the court procedure was so flawed as to deprive payees of their right to due process, requiring reversal of the liquidation order in its entirety.

At the order to show cause proceeding, the Payees also sought to call witnesses to explore the Receiver's bad faith conduct and mismanagement of

article 74 assets, but the court denied their requests. The Receiver successfully argued the only issue before the court was the approval of the liquidation plan and that the issues that the Payees raised were for another day and another court.

Payees expressed concern that the Receiver's request for immunity and injunctive relief meant that the Receiver could never be held liable for breaching his duties to policyholders. During the proceeding, however, the Receiver assured Payees that the immunity and injunction order sought was nothing more than a restatement of New York Law. But the order submitted and approved by the Supreme Court was much broader and effectively bars any suit against the Receiver, including suits against the Receiver in his personal capacity for, among other things, bad faith conduct and violating the court's orders. The Payees appealed.

On appeal, the Second Department, without any explanation, held that the Supreme Court's broad grant of immunity and injunction was appropriate. The Second Department also held that the proceeding below was fair and therefore comported with due process. The payees contend that this Court should grant leave to appeal the Second Department's decision because the decision involves a novel issue of public importance and is contrary to this Court and other Appellate Division decisions.

*Timeliness of the Motion for Leave to Appeal*

Notice of Entry of the Appellate Division Second Department decision was served on February 7, 2013 by overnight mail. This motion for leave to appeal is timely made within 30 days of that service. *See* C.P.L.R. 5513(b).

## JURISDICTIONAL STATEMENT

This Court has jurisdiction over this motion and the proposed appeal because the Supreme Court's immunity and injunction order, affirmed by the Appellate Second Department, constitutes a final order within the meaning of C.P.L.R. 5602(a)(1).

## QUESTIONS PRESENTED FOR REVIEW

1. Did the Supreme Court exceed its subject matter jurisdiction or otherwise err in granting immunity to the Receiver and others in their personal capacities, where such immunity is not provided for by statute, is inconsistent with the common law, and is unsupported by evidence?

The Second Department answered this question "No."

2. Did the Supreme Court exceed its jurisdiction or otherwise err in permanently enjoining claims against the Receiver and others in their personal capacities, where such injunction is not provided for by statute or the common law, and no evidence was adduced at the hearing?

The Second Department answered this question "No."

3. Did inadequate notice and the denial of information to Objectors, along with the selective application of the Civil Practice Law and Rules, deny Objectors a fair hearing as required by principles of due process?

The Second Department answered no.

## PROCEDURAL HISTORY AND TIMELINESS

### *Background*

Executive Life Insurance Company of New York ("ELNY") is a life insurance company that was incorporated under the laws of New York on October 24, 1935, and licensed in 1937. ELNY issued structured settlement and retirement annuities on behalf of the appellants during the 1980s. A204-205, A1816.

On April 23, 1991, the New York Superintendent of Insurance of the State of New York (now Superintendent of Financial Services) obtained an Order of Rehabilitation appointing him as the Rehabilitor of ELNY. The Order of Rehabilitation was not due to claimed insolvency of ELNY; rather, the Superintendent was concerned about a "run" on ELNY's assets by policyholders concerned with the stability of ELNY's parent company. A1825 at ¶¶ I.A, I.D.(b)); *also* A204 at ¶ 2.

Through his agents, the New York Liquidation Bureau ("NYLB") and the Special Deputy Superintendent of the Liquidation Bureau, the Superintendent exercised exclusive day-to-day control over ELNY and ELNY's assets for the next

two decades. A204-205 at ¶¶ 1, 4. (The Superintendent, Special Deputy Superintendent, and the NYLB are collectively referred to herein as "the Receiver.") Twenty years later, the Receiver sought, and received, an order converting the rehabilitation of ELNY into a liquidation.

The Objectors-Appellants ("Shortfall Payees") are approximately 1,456 payees of annuities issued by ELNY whose benefits will be cut under the order of liquidation. After taking into account all contributions to the plan, the Shortfall Payees collectively will incur a $920 million reduction in benefits. A466, A817, A959; A1589.[1]

***The liquidation proceeding, and (lack of) notice and an opportunity for affected payees to be heard***

For 20 years, the Receiver regularly paid benefits to the Shortfall Payees and others. A183 at ¶ 7, A205-206. While maintaining this outward appearance of stability, the Receiver knew by at least 2006 that ELNY's assets had deteriorated to a level significantly below its liabilities. A469-474, A1184; *see also* A426 (liabilities exceeded assets by $1.2 billion).

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[1]The shorthand term "Shortfall Payees," used during the Order to Show Cause hearings, was coined by objectors' counsel Edward Stone. While the Receiver did not accede to the appropriateness of the term, it is both accurate and objective. The objectors and others similarly situated are "payees," and there is a "shortfall" in the benefits they are to be paid. Counsel eschewed a more inflammatory designation such as "injured persons" or "victims."

The Receiver did not disclose to his payees that their long-term source of income was in jeopardy. He did, however, tell others who might be financially impacted by liquidation of ELNY. For example, by at least 2008, the Receiver had informed the National Organization of Life and Health Guaranty Associations, the New York guaranty association, and various insurance companies that a liquidation would be occurring. A26 at ¶ 25, A410-411, A426-430, A1184.

According to the Receiver, he worked with those entities for "several years" to develop a potential plan of liquidation. A426-430, A448-450, A26. No disclosure was made to payees during that period. No payees were consulted. No payees had any input into the plan. A458-459, A527-528, A531-532, A1110.

On December 17, 2010, the Superintendent filed an *ex parte* motion "for an Order to Show Cause why an order of liquidation should not be granted pursuant to Article 74 of the New York Insurance Law with respect to ELNY." A191. The requested Order was signed on December 17, 2010. *Id.*

The Order was not served on payees. It gave the Receiver until July 1, 2011, "to confer with the Life Insurance Company Guaranty Corporation of New York and other interested parties in order to present the Court with a proposed order and plan of liquidation ('Proposed Plan') for ELNY, together with an order to show cause[.]" A191. The Receiver was later granted an extension until August 10, 2011, to file his proposed plan of liquidation, and another extension until August

26, 2011. A16, A202. In total, the Receiver was allowed nearly nine months to submit a proposed plan from the date of the order to show cause, the timing of which had been entirely within the Receiver's control in the first instance.

On September 1, 2011, the Receiver filed a Verified Petition for Order of Liquidation and Approval of Restructuring Agreement. The Receiver also filed a proposed order of liquidation, the proposed plan of liquidation ("restructuring agreement"), and a memorandum of law in support thereof. A18-43, A44-150, A151-161, A162-190. None of these filings was served on payees. Nor were the payees parties to the court proceeding.

***Effect of the Plan on the Shortfall Payees***

Under the Plan, annuitants with smaller amounts presently owing will receive all of their benefits. A484-486. Annuitants with larger balances – for example, those with the most severe injuries, or those who elected long-term payouts rather than large initial payments – will not. *Id.* The Shortfall Payees comprise approximately 15 percent of the ELNY policyholders. A466.

Under the liquidation plan, ELNY's assets are to be transferred to a newly created captive insurance company (GABC) domiciled in the District of Columbia. The president of GABC will be Peter G. Gallanis, who is also the president of NOLHGA. A1070-1089.

The Shortfall Payees will be issued new contracts by GABC. Under the new contracts, their benefits will be reduced by up to 66 percent, with an average reduction of approximately $632,310. A1589, A410-415. The net benefit reduction triggered by approval of the plan is $920,642,947. A817,A1589.

Examples of persons whose benefits are reduced under the plan include:

- Jeanice Dolan. When Ms. Dolan was 11 years old, a car in which she was riding was struck by a drunk driver. Her femur was shattered, requiring six or seven reconstructive surgeries. A701-707. She was left with a severe leg discrepancy, limited mobility, and continuous and excruciating hip pain. She had one hip replacement at age 20, another hip surgery at age 30, and will require more surgeries throughout her life. A703-704.

To accommodate her limited mobility, Ms. Dolan and her husband decided they needed to build a home with an elevator. Three months after construction workers broke ground on the home, the Receiver informed Ms. Dolan for the first time that her annuity payments were in jeopardy. Ms. Dolan testified, "I don't know how I'm going to pay for my future medical expenses which is what it was deliberately set out to pay for." *Id.* Under the plan, her annuity is cut 53 percent.

- Joyce Miller. Ms. Miller's annuity was for the care of her daughter, who has microcephaly and temporal epilepsy. A671. Her daughter has an IQ of about 57 and limited mobility. The medication used to treat her daughter's

condition costs $8,000 more than Medicare covers per year. And "she is in a program that costs about $30,000 a year. If her annuity is cut by 44 percent, that will pay for her program but nothing else." *Id.*

- Daniel Malin. Mr. Malin was run over by a car when he was two years old. The car crushed his abdomen and parts of his chest. As a result, his blood pressure spiked, scarring his retina in both eyes and leaving him legally blind. A687-688. He cannot drive a car, and relies on adaptive technology in all aspects of his life. *Id.* Mr. Malin's annuity is being cut by 60 percent.

- Daniel Harris. Mr. Harris was 15 when a tractor he was driving caught fire. He suffered burns over 60 percent of his body, 30 percent of which were third-degree burns. Now 47, after multiple skin grafts, Mr. Harris cannot raise his arms above his shoulders, cannot be out in the sun, and is self-conscious about being in public because of the stares he gets. A1299-1280. His annuity is being cut 42 percent.

- The Hon. Richard Aldrich, California Court of Appeal. In 1984, Judge Aldrich took his life savings – $814,000 – and purchased an annuity to take care of his family and himself in his retirement. A547-548, A558. He is 74 years old now. He bought the annuities "trying to plan ahead for my family and my future and my old age, which I never thought—well it's here now." *Id.* Under the plan, his annuity is cut by 44 percent.

Many objections were sealed, sua sponte, by Judge Galasso and their content is not known to the Appellants. However, it may be surmised that they are along the same lines. Judge Galasso reported that his law secretary had not slept for two days after reading them. A562. *See also* A1035 (Judge Galasso: "There are human beings going to be suffering if this plan goes through."), A1153 (people are "panicking"); and A485-486, A580, A671, A687-688, A701-705, A1297-1308, A1314-1317 (objectors' stories).

***Timing, Content, and Service of Notice to Payees***

As noted, neither the petition nor either of the orders to show cause were ever served on payees. Rather, the Receiver was permitted to send out non-legal "notices" regarding the proposed liquidation plan ("Restructuring Agreement"). *See* A1851. The notices were to be sent out within 30 days of submission to the court of Schedule 1.15, a summary of individual contract reductions. *Id.*

The petition asked that objectors be required to serve their objections on the Receiver by January 16, 2012, that the Receiver serve his response by March 1, 2012. A1852. A hearing was set for March 15, 2012. *Id.*, p. 1.

The Receiver claims not to have completed the schedule 1.15 until more than two months later, November 7, 2011. The Receiver then waited 30 days to

send notices of the impending liquidation to payees. A505-506. Payees thus began receiving notices around the December holidays. *Id.*[2]

Appellants contend that the notices were designed, or likely, to induce inaction by affected payees. The letters were inexplicably sent from a Minnesota address, with an outward appearance of junk mail even for sophisticated recipients. A574, A688-689, A704. As one payee testified, he was "on [his] way to the wood stove to burn the junk mail" when he happened to look at the envelope again. A1316.

The return address was that of the National Association of Life and Health Guaranty Associations, not ELNY. A487. The Receiver's records were in such condition that hundreds of notices were returned undelivered. A445.

Payees who did receive and open the envelopes faced the significant challenge of trying to understand what they were being told. As the Receiver stated, the issues involving ELNY are "complex and require careful consideration," A206, ¶ 8. Midway through the Order to Show Cause hearing, the court itself expressed confusion as to the operation of the plan. *See* A1103 ("I'm

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[2] No explanation was provided for why the schedule was not filed until more than a month after the original estimate, or why the Receiver waited until (literally) the last possible day to mail the notices. One cynical interpretation is that the Receiver counted backward from the objection deadline and waited the longest permissible time for each event in order to limit the number of objections. The Receiver then argued an allegedly low number of objections as evidence that his plan was fair and equitable. *E.g.*, A189, ¶ 23, A518-519.

trying to find out what's happening here. I've been saying that for the last four or five days.").

Unlike the more reader-friendly letter sent to payees whose benefits were unaffected by the plan, Shortfall Payees had to wade through extended legalese and high-level vocabulary before receiving any hint of the letter's import. (In letters to unaffected payees, the very second sentence declared, "**We are writing to inform you that the amount and timing of the benefit payments you are entitled to receive under your ELNY Annuity are <u>not</u> expected to change as a result of the recent events involving ELNY described below.**" A1600; bold and underlining in original). No explanation was given for why similar plain language was not included in letters to Shortfall Payees.)

Ms. Denise Arias stated in her objection, "On December 22, 2011, just nearly three days from Christmas, . . . I received documentation from ELNY notifying me of a restructuring plan in which I had to read approximately ten times to understand the legal terms and that some of my structured annuity was going to be reduced from one hundred percent to 73 percent." A1303. Joyce Miller read her letter and thought her daughter would be fine, until an attorney translated it for her. (Susan Miller is taking a 44 percent cut.) A672-673.

Not all payees could find legal help, especially lawyers who were knowledgeable in New York Liquidation law, or who were not out on holiday or

vacation, or who were willing to essentially drop everything and take on a complicated, billion dollar emergency. A575, A690, A704, A1081. Two objectors mentioned that they had trouble finding attorneys even though they are themselves lawyers. A575, A690.

The Receiver's notice also conveyed the impression that objecting would be pointless because the benefit reduction was already a *fait accompli*; the letter never actually explains that the reduction will not occur unless the court approves the Restructuring Agreement. A1600.

The letter further represented that a $100 million fund "has [been] created" by a consortium of life insurance companies to assist Shortfall Payees, unrelated to the liquidation plan. A1604. The notice did not disclose that this was only 10 percent of the claimed shortfall, and thus would alleviate very little of the reductions triggered by approval of the plan. To unsuspecting Payees, a reassuring-sounding $100 million had been contributed to take care of any shortfalls.

The notice provided that policyholders would waive all objections if they were not in the Receiver's hands by Monday, January 16, 2012. A1611-1612. (The 16th was a federal holiday, Martin Luther King Day, with no mail service. Consequently, the real deadline was Friday the 13th.) Notwithstanding the impediments in the objection process, more than 130 objections (out of 1,456

affected payees) were received. A few were from insurance companies, A467, A518-519, but there is no dispute that the vast majority of objections were from Shortfall Payees.

***The Receiver's Response and Refusal to Provide Documents***

Six weeks after the objection deadline, and two weeks before the scheduled Order to Show Cause hearing, the Receiver filed a 56-page "omnibus" response. A241. The Receiver also filed for the first time a report from an expert witness, Jack Gibson. A595, A1701-1790. These documents were mailed to persons who had filed objections.

Payees had been required to provide the Receiver not only with their objections, but also "all supporting documentation." A443, A1611-1612. However, the Receiver's response to these objections, and the accompanying expert report, did not include his own supporting documentation. For example, the Receiver did not produce the documents upon which his expert witness relied in concluding that ELNY was insolvent, the extent of the insolvency, and the viability of the plan. *E.g.,* A632-633 (individual payee contracts), A634-635 (ELNY's historical mortality data), A660-661 (asset data from ELNY investment managers), A709-711 (benefits paid out).

The Receiver likewise refused to produce documents that had been specifically mentioned in his notice as affecting the payment of future benefits:

> The Receiver and NOLHGA, along with their financial advisors, will continue to monitor economic conditions and ELNY's estate assets, and, therefore, it is possible that prior to implementation of the Restructuring Agreement *the assumptions used to calculate your expected GABC benefits could change. Furthermore, ELNY's records used in preparing this information remain subject to updating and correction, which could also affect your expected GABC benefits.*

A1601 (emphasis added).

When the order to show cause hearing began two weeks later, the Receiver took the position that the requirement of providing supporting documentation was not mutual, and that he had no obligation to provide documentation to his beneficiaries unless they submitted formal discovery requests. A780-784[3]

Objectors at the hearing made several oral motions and filed a written motion to produce the documents. A404, A713, A774-779, A787. The Receiver successfully resisted such motions on the grounds that they were untimely. A780-784.

The Receiver's expert acknowledged that his assumptions and conclusions – upon which the entire liquidation plan and order were based – could not be tested without the withheld documents. A901; *see also id.* A905 ("Q. So if somebody

[3] The notice did not advise payees of any such requirement, or any other prerequisite to requesting documents from their fiduciary. Nor did the notice address the fact that the Payees were not parties to the court proceeding. *See, e.g.*, CPLR 3120 ("After commencement of an action, <u>any party</u> may serve" a document request or subpoena) (emphasis added).

else wanted to complete their analysis, they would need those same materials, correct? A. Yes.").)

The Payees also needed the Receiver's supporting documentation to be reviewed by their own expert. For most laypeople (and attorneys, for that matter), the plan might as well have been written in Greek. A witness with extensive experience in insurance receiverships said that even he could not understand some of the schedules in the Receiver's liquidation plan. He opined that laypersons "would have extreme difficulty in understanding all these equations." A1252.61-1252.62.

The same expert testified that, without the withheld documents, he could not attempt to prepare an alternative plan for comparison. The expert testified that he would "have to know where potential recoveries could be made, you'd have to know what the payment streams are actually going to be on each of the contracts, what the benefit contingencies are, what causes benefits to drop off . . . , everything that was available to the folks that put together this plan." A1252.64-1252.65.

At the hearing, the Shortfall Payees asked that the Receiver produce those documents, which it had voluntarily shared with other interested parties, such as NOLHGA, the state guaranty association, and insurance companies. A775-779. The payees also asked to see the objections submitted by others Shortfall Payees.

*Id.* The Payees requested 30 days for their expert to examine the documents and put together an alternative plan. A1273-1274.

In response, the Receiver argued that he "share[d] common interests" with NOLHGA and other industry representatives, but not with his own beneficiaries. A781. Similarly, with respect to objections from other Shortfall Payees, the Receiver argued, "These annuitants have no legitimate interest in seeing these objections." *Id.*

On or about March 6, 2012, the Receiver filed a revised plan. A432-433. The evidentiary hearing began March 15, 2012. On the first day of the hearing, the Receiver handed the few attorneys there representing objectors a binder full of documents not previously served on the payees. A403. None of these were the financial and other documents upon which the Receiver's expert was relying.

Over the next 11 days, the Receiver called two witnesses, the Special Deputy Superintendent of the Liquidation Bureau, and his expert. Several Shortfall Payees testified, in person or by written objection. A representative from NOLHGA testified. During the hearing, counsel for objectors established that most of the data relied upon by the Superintendent's expert Jack Gibson, FSA, CERA, MAAA, in the creation of his Expert Report Relating to the Agreement of Restructuring in Connection with the Liquidation of ELNY came from Metropolitan Life in the form of administrative record detail reports all of which were produced by

Metropolitan Life during calendar year 2011 and given to Gibson by the NYLB's actuaries, Milliman. A733, A734, A745. These reports were relied upon by Gibson to support all of the assumptions in the proposed restructuring plan. A733. Counsel also established that for at least 11 years, Metropolitan Life failed to maintain credible mortality data pertaining to the SSA's. A 732, A740. Counsel made numerous requests for the documents and materials relied upon by Gibson and all requests were denied. At one point during the hearing, the Court instructed Counsel for the objectors to make a formal motion to compel disclosure and then later insisted that the motion be brought on by Order to Show Cause. The Order to Show Cause was filed, argued and summarily denied the same day despite the fact that Counsel clearly established that the materials were "material and necessary" to establish whether or not the proposed plan is in the best interests of the public and the annuitants. CPLR 3101. As this Court has held: "[t]he words, 'material and necessary', are. . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." *Allen v. Crowell-Collier Publ. Co.,* 21 N.Y. 2d 403, 406 (1968). The *Allen* standard applies with equal force in order to show cause proceedings. *See Lipp v. Zigman*, 856 N.Y.S.2d 498, 498 (N.Y. Sup. 2008) (in a proceeding for an order to show cause seeking judicial dissolution of a business,

the court ordered disclosure of tax return documents under CPLR 3101 and *Allen*); *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650, 652 (N.Y. Sup. 2010) (granting motion for access to plaintiff's social network accounts on an order to show cause under CPLR 3101 and under *Allen*).

The Court also denied Payees' request to call witnesses, including representatives of the NYLB who presided over the purported "rehabilitation" of ELNY and other witnesses who could testify regarding the Receivers management of the estate, ruling that their testimony would be irrelevant because the only issue before him was whether to approve or reject the Receiver's plan. A1252.209-1252.210, A1254. Payees were allowed to call one expert witness, who could not offer much without access to the same documentation as the Receiver's expert.

During the hearing, the Supreme Court applied the Civil Practice Law and Rules inconsistently, alternating between invoking the CPLR and stating that the CPLR were inapplicable because it was an "order to show cause hearing." *See examples at* pp. 20-24, *infra*. The payees contend that this selective application of the CPLR materially prejudiced them. *Id.*

On April 16, 2012, Judge Galasso issued a memorandum decision approving the Receiver's proposed plan of liquidation and signed the Receiver's proposed Order of Liquidation. A4, A10.

***The Immunity Provision***

In addition to approval of his proposed liquidation plan, the Receiver asked the Supreme Court to grant him and others immunity from all prospective claims, including claims made against them in their personal capacities. A285-295, A8 at ¶ 12.

At the Order to Show Cause hearing, the Receiver represented that the requested immunity was not intended to apply to bad faith conduct: "[T]he only relief that the Receiver seeks here is judicial immunity for acts taken in this court with good faith. How can that possibly be questioned that if the Superintendent has taken actions in good faith that he should be immune." A491.

Similarly, the only evidence adduced by the Receiver regarding immunity was the following single exchange with a witness:

> Q: And it's your opinion that a Receiver who acts in good faith in fulfilling the orders of the Court in which he is appointed should be entitled to immunity for such decisions, right?
>
> A: Yes.

A1252.180.

Notwithstanding these representations, the immunity provision submitted by the Receiver, and signed by the Supreme Court, was much broader, purporting to immunize the Receiver and his agents "when acting in good faith, in accordance with this Order, *or* in the performance of their duties pursuant to Insurance Law Article 74." (Emphasis added.). It reads:

> Judicial immunity is extended to the Receiver and his successors in office, the New York Liquidation Bureau, and their respective attorneys, agents, and employees, and such immunity is extended to them for any cause of action of any nature against them, individually or jointly, for any action or omission by any one or more of them when acting in good faith, in accordance with this Order, or in the performance of their duties pursuant to Insurance Law Article 74

A8 ¶ 12.

This wording appears to be a boiler plate provision frequently inserted by the Receiver into proposed orders. *See In re Liquidation of U.S. Capital Ins. Co.*, ___N.Y.S.2d___, 2012 WL 2369451, *2-3 & n.1 (citing other orders containing similar language); A286 n.21.

Article 74 of the Insurance Law contains no immunity provision. The scope of immunity granted by the Order is far broader than that afforded to any other private court-appointed Receiver. *See* pp. 35-37, *infra*.

***The Injunction Provision***

The Receiver also proposed, and the Supreme Court granted, a permanent injunction against any and all claims against the Receiver and others, including in their personal capacities. The provision states:

> All persons, other than the Receiver (as defined in the Restructuring Agreement) and his agents, are enjoined and restrained from: (i) dealing with, disposing of, or doing or permitting any act or thing that might waste ELNY's assets; (ii) transacting ELNY's business; (iii) interfering with this proceeding or with the Receiver in his possession, control, and management of ELNY's property, or in the discharge of his

> duties under Insurance Law Article 74; and (iv) obtaining any preferences, judgments, attachments, or other liens, and from making any levy against ELNY, its assets, or any part thereof;
>
> All persons are enjoined and restrained from commencing or further prosecuting any actions at law or other proceedings against ELNY or its assets, the Receiver or the New York Liquidation Bureau, or their present or former employees, attorneys, or agents, with respect to this proceeding or the discharge of their duties under Insurance Law Article 74.

A6 at ¶¶ 5, 6.

The Receiver adduced no evidence at the Order to Show Cause Hearing in support of such an injunction. Rather, the Receiver theorized as to the effects of an injunction on ELNY assets and the distribution of those assets, A285-286, A295-297, which is immaterial to claims against parties in their personal capacities. (*See* p. 40-42, *infra*.)

***Proceedings in the Appellate Second Department***

The Shortfall Payees appealed the Supreme Court decision to the Appellate Second Division, Second Department, arguing that the lack of reasonable notice, necessary information, and the selective application of Civil Practice Law and Rules denied Shortfall Payees their due process right to a fair hearing.

Shortfall Payees further argued that the Supreme Court was without subject matter jurisdiction to enjoin suits against and immunize the Receiver in his personal capacity and that the immunity and injunction order were contrary to the language and purpose of article 74. Additionally, Shortfall Payees argued that this

Court's decision in *Dinallo v. DiNapoli,* 9 N.Y.3d 94 (2007) confirmed that Article 74 Receivers are no different than any other private-court appointed Receiver. Therefore, just like a private Receiver, an Article 74 Receiver is subject to personal liability for breaching his fiduciary obligations of good faith and appropriate care and prudence to policyholders.

The Second Department held that the "notice mailed to the last known addresses of the ELNY annuity payees was reasonably calculated to apprise [Shortfall Payees] of the pendency of the liquidation proceeding and the execution of the proposed agreement, and to afford them an opportunity to be heard, and, thus, satisfied due process." It further found that the proceeding was fair. In regards to the injunction and immunity order, without any explanation, the Appellate Second Department rejected the Shortfall Payees' arguments, simply holding that the injunction and immunity orders were appropriate.

## ARGUMENT

### I. THIS COURT SHOULD GRANT LEAVE TO APPEAL BECAUSE THE SECOND DEPARTMENT'S DECISION REGARDING THE IMMUNITY AND INJUNCTION ORDER INVOLVES A NOVEL ISSUE OF PUBLIC IMPORTANCE AND CONFLICTS WITH THIS COURT'S AND OTHER DEPARTMENT'S PRECEDENT

Review should be granted because the decision below presents a novel issue of public importance. The distribution and protection of Article 74 assets is a

matter of public importance. *See Dinallo v. DiNapoli,* 9 N.Y.3d 94, 97 (2007) ("This statutory scheme was devised for the protection of creditors, policyholders and the general public by furnishing a comprehensive mechanism for collecting the assets of a distressed insurer and paying its creditors."); *see also Corcoran v. Ardra Insurance Co.*, 77 NY 2d 225, 232 (1990) (holding that the statutory authority granted to the liquidator under article 74 is a matter of public concern).

Here, the Second Department's decision warrants leave to appeal for several reasons. First, the Second Department's decision to authorize immunity and enjoin suits against the Receiver in his personal capacity undermines the public's interest in protecting policyholders and receivership assets. Second, the Second Department's decision is inconsistent with *Dinallo*, 9 N.Y.3d 94, which implicitly recognized that an Article 74 Receiver is no different than any other court appointed private Receiver. Finally, review is appropriate because the immunity and injunction provisions exceed the subject matter jurisdiction conferred upon the Supreme Court and is inconsistent with the provisions of Article 74.

**A. The injunction decision undermines the purpose of Article 74, conflicts with this Court and other Department's precedent, and is contrary to the language and scope of Article 74.**

1. The Second Department's Decision Authorizing Immunity for Any Conduct Related to Receivership Duties Undermines the Policy Underlying Article 74 to Protect Receivership Assets.

The Second Department's decision undermines the public's interest in protecting Article 74 assets. The Second Department's decision authorizes immunity for virtually every act or omission ever undertaken by an Article 74 Receiver, whether in an official or personal capacity, or whether in bad faith or violation of a court order. Specifically, the immunity order affirmed by the Second Department provides that

> Judicial immunity is extended to the Receiver and his successors in office, the New York Liquidation Bureau, and their respective attorneys, agents, and employees, and such immunity is extended to them for any cause of action of any nature against them, individually or jointly, for any action or omission by any one or more of them when acting in good faith, in accordance with this Order, or in the performance of their duties pursuant to Insurance Law Article 74.

The Shortfall Payees have no problem with immunity for acts taken "in good faith" ("and with appropriate care and prudence," an additional requirement under New York law, *see* p. 36, *infra*). Nor do they object to immunity for acts specifically authorized by a court order.

However, any limitations on immunity inherent in those clauses are eliminated, by the final disjunctive phrase, "or in the performance of their duties pursuant to Insurance Law Article 74." Like those of private Receivers, the Receiver's Article 74 duties are broad and general and include, among other things, "conduct[ing] the business of the insurer." N.Y. Ins. Law § 7409(c).

The Second Department however affirmed this broad grant of immunity, holding that such immunity was appropriate. As a consequence, literally any act or omission related to the management of ELNY or its assets is immunized, including acts not undertaken in good faith and acts that violate a court order.

The latter example is not theoretical: The 1992 Rehabilitation Order expressly prohibits the wasting of ELNY's assets by anyone, including the Receiver. A1819. Under the immunity provision as worded, however, the Receiver could claim immunity for the violation of that order, because any such waste would have occurred during the performance of the Receiver's duties under Article 74.

Similarly, the Receiver could immunize himself for overcompensating himself and his agents, fraudulently concealing ELNY's financial condition, managing ELNY assets for his benefit or that of vendors, incompetently investing ELNY assets in risky ventures, *etc.*, all of which could occur only through the exercise of the Receiver's exclusive day-to-day control under Article 74. In other words, the immunity order affirmed by the Second Department sanctions a wide range of breaches of the Receiver's fiduciary duties to payees.

In this case, the broad grant of immunity authorized by the Second Department protects neither the assets of the insurer, the interests of policyholders, nor the public. Rather, it obviates the Receiver's fiduciary responsibilities to those

policyholders, and disincentives him from having to meet even the basic Receiver duties to which all other private Receivers are subject.

Moreover, the Second Department decision has an impact far beyond this specific case. The immunity and injunction orders appear to be a boiler plate provision frequently inserted by the Receiver into proposed orders. *See In reLiquidation of U.S. Capital Ins. Co.*, ___N.Y.S.2d___, 2012 WL 2369451, *2-3 & n.1 (citing other orders containing similar language); A286 n.21. The issues that this appeal presents therefore are likely to come up again on review.

2. The Second Department's Decision Is Inconsistent with This Court's Decision in *Danallo* and the Decisions of other Departments.

The Court of Appeals should grant review for the additional reason that the Second Department's holding is inconsistent with this Court's ruling in *Dinallo*, 9 N.Y.3d 94 (2007), and the decisions of other Departments. In *Dinallo* this Court implicitly recognized that the Insurance Law was not intended to change the common law with respect to the Superintendent's role as Receiver. Prior to 1909, the liquidation of impaired insurance companies was performed by private individuals acting as court-appointed Receivers. *See, e.g.,* Matter of Consolidated Edison Co., 532 N.Y.S.2d 186, 188 (Sup. Ct. N.Y. Cty. 1988).

Finding this system to be "dilatory and wasteful" because of the multiplicity of Receivers, the Legislature in 1909 assigned the role of Receiver of impaired insurance companies to the Superintendent, but did not otherwise change the role

of the Receiver or the nature of the Receivership process. *See* Matter of Casualty Co. of Am., 244 N.Y. 443, 447-49 (1927).

The Legislature did not intend the Superintendent to replace the courts in overseeing insurance company Receiverships. Rather, its purpose was simply to "deprive the court of the power to appoint persons other than the Superintendent of Insurance as Receiver of such insurers, at the same time continuing the previously existing inherent general jurisdiction of the court." Matter of Lawyers Mortgage Co., 9 N.Y.S.2d 127, 150 (Sup. Ct. N.Y. Cty. 1938), *aff'd without opinion*, 256 A.D. 974 (1st Dep't 1939).

Consistent with this intent, the Receiver successfully argued in *Dinallo* that it is not a governmental agency, but instead is akin to any other court-appointed private Receiver. *Dinallo*, *supra*, 9 N.Y.3d at 103-04. Consequently, there is no basis for any greater immunity than that of any other private court-appointed Receiver. The Second Departments decision does just that, however.

As discussed above, the Second Department's decision authorizes a Receivership court to confer immunity for virtually every act or omission ever undertaken by the Receiver. This broad grant of immunity is wholly insupportable under New York law.

Under the common law, judges are immune from liability for acts taken pursuant to their judicial power and authority. Mosher-Simons v. County of

Allegany, 99 N.Y.2d 214, 220 (2002). The rationale "is to discourage inappropriate collateral attacks on court rulings and fosters judicial independence by protecting courts and judges from vexatious litigation." *Id.*

New York extends judicial immunity beyond judges to neutrally positioned government officials "whose actions are an integral part of the judicial process" when the claims at issue "arise from the performance of the specific judicially delegated function." *Id.* The policy underlying derived judicial immunity is that those "who are delegated judicial or quasi-judicial functions should . . . not be shackled with the fear of civil retribution for their acts." *Id.* (internal quotation marks omitted).

Generally, Receivers are considered an arm of the court and are entitled to assert immunity for conduct related to their Receivership duties. *See* Bankers Fed. Savings FSB v. Off W. Broadway Developers, 227A.D.2d 306, 306 (1st Dep't 1996). Under the common law, judicial immunity applies only when a Receiver acts "in good faith and with appropriate care and prudence." *See* Ocean Side Institutional Ind., Inc. v. United Presbyterian Residence, 254 A.D.2d 337, 338 (2d Dep't 1998); Acevedo v. Cypress Hills Cemetery, 258 A.D.2d 546, 546 (2d Dep't 1999) (noting that the standard for judicial immunity is whether the Receiver was "negligent or derelict in carrying out his duties as set forth in the order and amended order appointing him temporary Receiver."); Luciano v. Cypress Hills

Cemetery, 258 A.D.2d 565, 565 (2d Dep't 1999) (same). The Second Department provided no explanation for abandoning this precedent.

Not only is the Second Department's decision inconsistent with *Dinallo* but it is inconsistent with the decisions of the First and Fourth Department, which recognize that a Receiver is subject to personal liability if he does not "act in good faith, with care and prudence commensurate with the situations as it existed at the time." 149 Clinton Avenue, 51 A.D.2d at 507; Jacynicz v. 73 Seaman Assocs., 270 A.D.2d 83 (1st Dep't 2000) (slip opinion).

In 149 Clinton Avenue, for example, the lower court authorized but did not require that a Receiver maintain fire insurance for the property. The property was subsequently damaged by fire, and the property owner sued for breach of fiduciary duty. The Receiver asserted as an affirmative defense "that at all times mentioned in the complaint he acted as an officer of the court in obedience to its orders and he [was] therefore immune from liability for the claims asserted in the complaint." *Id.* at 505.

The Fourth Appellate Department disagreed, holding that Receivers can be personally liable for breaching their fiduciary obligations if under "the authority conferred upon him," he did not "act in good faith, with care and prudence commensurate with the situations as it existed at the time."*Id.* at 506. The court

held that, because a question of fact existed as to the Receiver's good faith and diligence, personal immunity could not be decided as a matter of law.

Similarly, in Jacynicz v. 73 Seaman Assocs., 270 A.D.2d 83 (1st Dep't 2000) (slip opinion), to determine whether a Receiver was personally liable to a fiduciary for waste associated with allegedly making unnecessary repairs on the property, the First Department held that the question is whether "the Receiver acted in good faith under the circumstances." *Id.* at 86.

3. The Second Department's Decision Is Inconsistent with the Language of and Subject Matter Jurisdiction of Article 74

The Second Department's decision also conflicts with the language and purpose of Article 74. Nothing in the language of Article 74 suggests that the legislature intended to abrogate the common law immunity provided to insurance Receivers. Indeed, notably absent from Article 74 is an immunity provision.

The Second Department's decision is also inconsistent with the subject matter jurisdiction bestowed upon Receivership Courts under article 74. Under the New York Constitution, the Supreme Court has general "unlimited and unqualified jurisdiction." Morrison v. Budget Rent a Car Sys. Inc., 230 A.D.2d 253, 258 (2d Dep't 1997) (internal quotation marks omitted). However, a court cannot entertain actions in which it lacks subject matter jurisdiction. *Id.* Subject matter jurisdiction is "the authority of the courts to adjudicate classes of cases." *Id.*

Subject matter jurisdiction may be limited by statute. *See, e.g.,* Nominee Realty v. State, 233 A.D.2d 426, 427 (2d Dep't 1996) (holding the Court of Claims has exclusive jurisdiction over money claims against the State). It is also limited to cases that are justiciable. *See, e.g.*, Matter of Callwood v. Cabrera, 49 A.D.3d 394, 394 (1st Dep't 2008) (slip opinion).

Under Article 74, the Liquidation Court had before it the ELNY estate – and only the ELNY estate. By statute, subject matter jurisdiction in a liquidation proceeding is limited to the collection and disposition of the insurer's assets. Article 74 provides that "[t]he superintendent may apply under this article for an order directing the superintendent to liquidate the business of a[n] . . . insurer . . . ." N.Y. Ins. Law § 7404. An order of liquidation vests the superintendent of insurance "with the title to all property, contracts and rights of action of such insurer." *Id.* § 7405. "He has the discretionary authority to dispose of assets and compromise claims of a distressed insurer, pursuant to statutory claim priorities." Matter of Dinallo v. DiNapoli, 9 N.Y.3d 94, 98 (2007) (citing N.Y. Ins. Law §§ 7428, 7434). "Any assets distributed by the superintendent to the creditors *are derived from the estate of the distressed insurer*, subject to the direction of the Supreme Court." *Id.* (emphasis added).

Article 74 does not give the Supreme Court jurisdiction to prospectively adjudicate claims or issue orders not involving the estate's assets. Claims against a

Receiver or others in their personal capacities are not claims against the estate. *See, e.g.*, Schwartz v. Kurlander, 279 A.D.2d 465, 465 (2d Dep't 2001), ("Leave of the court must be obtained to sue a Receiver in his or her representative as opposed to individual capacity. The rule is based on a concern for the protection of the assets in Receivership, from which any judgment obtained against a Receiver in his or her representative capacity would be paid." (internal citations omitted)); *see also* N.Y. Ins. Law. Ann.§ 7419 (collecting cases under Section 7419, virtually all of which involve suits against the Receiver in his representative and not personal capacity).

**B. The Interpretation of Article 74's Injunction Provision is Also a Matter of Public Concern.**

As discussed above, the protection of Article 74 assets is a matter of public concern and worthy of review. The scope of the injunction authorized by Article 74 must be interpreted consistent with its purpose to protect Article 74 assets. To this aim, the injunction provision cannot be interpreted broader than the immunity authorized by Article 74. A contrary interpretation would mean that any personal liability that attaches to the Receiver pursuant to Article 74 would be of no effect.

The Second Department affirmed the Supreme Court's order to permanently enjoin the bringing of any claims against the Receiver or others, including claims in their personal capacities. The injunction order states as follows:

> All persons are enjoined and restrained from commencing or further prosecuting any actions at law or other proceedings against ELNY or its assets, the Receiver or the New York Liquidation Bureau, or their present or former employees, attorneys, or agents, with respect to this proceeding or the discharge of their duties under Insurance Law Article 74.

The Second Department's holding in this respect is inconsistent with the subject matter jurisdiction and language of Article 74 and the public's interest in the protection of Article 74 assets.

1. The Second Department's Decision is Inconsistent With the Subject Matter Jurisdiction Authorized by Article 74.

The limitations on a liquidation court's subject matter jurisdiction have been addressed above. *See* pp. 37-39, *supra*. The enjoining of claims other than those against ELNY or its assets is beyond the court's jurisdiction and is void.

2. The Second Department's Decision Regarding the Injunction Order is Contrary to Article 74 and the Public's Interest.

Unlike immunity, Article 74 of the Insurance Law does contain a provision involving injunctions. The statute provides:

> (a) Upon application by the superintendent for an order to show cause under this article or at any time thereafter, the court in which such order is made, or any justice thereof may without notice issue an injunction restraining the insurer, its officers, directors, shareholders, members, trustees, agents, servants, employees, policyholders, attorneys, managers, and all other persons from the transaction of its business or the waste or disposition of its property until further order of the court.

> (b) Such court or justice may at any time during a proceeding under this article issue such other injunctions or orders as it deems necessary to prevent interference with the superintendent or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions, the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against the insurer, its assets or any part thereof.

Although, Section 7419 and Article 74 are concerned with enjoining actions against the assets of the insurer, not those of the Receiver, the Second Department held that the Supreme Court's order enjoining personal capacity suits (suits that do not affect Receivership assets) was appropriate.

The Second Department's holding is contrary to the purpose of article 74. The very purpose of Article 74 is to distribute the assets of the defunct insurer. Hence, Subsection (a) limits injunctions to those which prohibit persons other than the Receiver "from the transaction of its [the insurer's] business or the waste or disposition of its [the insurer's] property." Subsection (b) likewise permits injunctions as necessary to prevent "waste of the assets of the insurer, or the commencement or prosecution of any actions . . . *against the insurer, its assets* or any part thereof." (Emphasis added.) An action against the Receiver in his personal capacity is not against the insurer or the insurer's assets.

Subsection (b) does speak of enjoining "any interference with the superintendent, or the proceeding," but that phrase cannot be read in isolation. First, it is inapplicable on its face – claims seeking to hold the Receiver responsible

for malfeasance to the same extent as any other private Receiver may dismay the Receiver, but do not "interfere" with him or the proceeding. Indeed, such claims would not even be part of the proceeding.

Additionally, barring all claims against the Receiver is inconsistent with Article 74's express purpose of protecting policyholders and the public. Because a Receiver is judicially immune from liability if he acts in good faith and with appropriate care and prudence, pp. 36-37, *supra*, the only actions that are effectively enjoined by the Order are those where a Receiver breached fiduciary or other duties.

In short, the Second Department's holding authorizing the Supreme Court to prospectively enjoin personal capacity suits against the Receiver is unsupported by, and inconsistent with, the Insurance Law and contrary to the public's interest in protecting both the integrity of the Article 74 process and Article 74 assets.

## II. LEAVE TO APPEAL SHOULD BE GRANTED BECAUSE THE NOTICE AND OPPORTUNITY TO BE HEARD AFFORDED POLICYHOLDERS DURING AN ARTICLE 74 PROCEEDING IS A MATTER OF PUBLIC IMPORTANCE

New York law implicitly recognizes that constitutional issues are a matter of public importance and therefore leave to appeal is not required to appeal constitutional issues (See CPLR 5601(b)(1) stating that constitutional issues are appealable as of right.) However, even absent this express right, this Court should grant leave to appeal because whether an Article 74 proceeding, or any court proceeding, is conducted in accordance with principles of due process is a matter of public importance and concern.

Here, the Second Department's holding that the notice and opportunity afforded to Article 74 Policyholders' comported with due process under both the Federal and New York Constitution is erroneous and will have a negative impact on future Article 74 proceedings. This Court should therefore grant leave to appeal to determine whether the limited notice and the denial of information to Objectors, along with the selective application of the Civil Practice Law and Rules, provided Objectors a fair hearing as required by principles of due process.

Under both New York and Federal law, due process requires, at minimum, notice and an opportunity to be heard before a person is deprived of a property interest. Prue v. Hunt, 157 A.D.2d 160, 164 (4th Dep't 1990). Notice of a potential deprivation must be "reasonably calculated, under all the circumstances,

to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Harner v. County of Tioga, 5 N.Y.3d 136, 140 (2005) (internal quotation marks omitted); Matter of McCann v. Scaduto, 71 N.Y.2d 164, 173 (1987) ("The central meaning of procedural due process has long been clear. Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified at a reasonable time and in a reasonable manner." (internal quotation marks omitted)).

Whether due process has been afforded is determined on a case-by-case basis. Harner at 140. The type of notice and hearing required is not a "fixed concept, but rather a flexible one that depends on the particular circumstances." People v. Bowles, 89 A.D.3d 171, 179 (2d Dep't 2011). Analysis of due process under both the New York Constitution and the United States Constitution requires the balancing of: (1) "the interests of the parties to the dispute; (2) the adequacy of the contested procedures to protect those interests; and (3) the government's stake in the outcome." *Id.*

### A. The Interests of the Parties to the Dispute

#### 1. Interest of the Shortfall Payees

As noted above, the Second Department's decision cuts more than $920 million in benefits to which Shortfall Payees would otherwise be entitled under ELNY annuity contracts. The average shortfall per payee is more than $600,000.

The decision also leaves the fate of remaining payments in the hands of the same Receiver who took a solvent company in 1991 and rendered it insolvent over the next two decades. A1825, A1826 at ¶¶ I.A, I.D.(b), A694 ("[I]t is in fact the Superintendent and the Liquidation Bureau that have been overseeing ELNY for the last 20 years and it is not comforting to me in the least to know that these are the same people who will now be running GABC").

It is an understatement to call the Shortfall Payees' interest here substantial. Most of them received their annuities as part of structured settlements to compensate them for catastrophic personal injuries. These Payees rely on their annuities to pay for daily living and medical expenses for themselves or injured loved ones. Others bought annuities as retirement vehicles, and have now reached the end of their working lives only to find that the income on which they have been counting for a quarter century has been eviscerated.

The resulting cuts mean that some policyholders may not receive the medical care they need. Others will no longer be able to afford schooling or living accommodations specific to their disabilities, or those of disabled dependents. Others will face new financial uncertainty regarding their final years. As Judge Galasso stated, "this is a very serious matter and I have taken it really—this has really touched my heart and I'm really upset about this." A1040.

Additionally, because the liquidation plan does not allow an immediate payout, payees have a substantial interest in ensuring that what is left of their money is being managed responsibly and under a viable plan. This interest is enhanced because one of the stated reasons for transferring ELNY's assets to a District of Columbia corporation is because New York is "not flexible enough in terms of their standards for how the company has to do its accounting, how it has to do its investments," etc. A1095.

**2. Interest of the Receiver**

As the Receiver and Liquidation Bureau have successfully argued in court, they are not government agencies when acting in the capacity as receiver. Matter of Dinallo v. DiNapoli, 9 N.Y.3d 94, 103-04 (2007) (Liquidation Bureau did not have to submit to audits by state comptroller). Their role is essentially the same as any other court-appointed private receiver. *See id.* at 97, 103-04.

Accordingly, and by statute, their interest is limited to protecting the policyholders, creditors, and the public. N.Y. Ins. Law § 7417. They are supposed to have no stake apart from that. Indeed, the Receiver here expressly claimed to represent the interests of payees in the proceeding. A527. The Receiver's interests in a fair hearing should therefore be the same as that of his beneficiaries – extremely high.

Conversely, the burden on the Receiver to a fair proceeding would have been minimal. The Shortfall Payees merely requested more time and information to mount an adequate response. The Receiver himself had received several *ex parte* extensions to file the plan in the first place, A202-203, A16-17, greatly exceeding the amount of additional time sought by the Payees.

The Payees' need for adequate time could have been accommodated in a number of ways. The Receiver could have warned them years earlier that liquidation was likely. He could have sent them occasional financial statements. In the context of the court proceeding itself, the Receiver could have sent Payees a copy of the petition filed in December 2010, instead of proceeding *ex parte*. He could have sent notices promptly after filing the proposed plan on September 1, 2011, instead of waiting more than three months. (Indeed, a press release cited by the Receiver as evidence of notice indicated that the letters would be sent out by mid-October.) A440, A1597.

Because of the Receiver's delay in sending out notices, the previously scheduled January 16, 2012, objection deadline and March 15, 2012, hearing date could have been moved back. Additional time could have been allowed when the Receiver realized that he would not finish the report of his own expert – who had been working on ELNY matters at NOHLGA for three years (A835-836, A890) – until two weeks before the hearing.

None of these accommodations would have been unduly burdensome on the Receiver or the court, especially compared to the burden about to be imposed on innocent payees.

Nor would the Receiver have faced a material burden had the court ordered it to produce the underlying documents upon which the benefit cuts are based. The Receiver's own notice implied that such documents would be disclosed when it told Payees that these documents could directly affect the payment of their benefits. Having himself characterized this information as important, the Receiver could readily have accommodated objectors' expectations and need to see the information by simply making a copy of its expert's file.

### 3. The Government's Stake in the Outcome

The government's stake in a fair hearing is also high. The wellbeing of more than 1,400 vulnerable individuals is at stake. The sanctity of contract is at stake. The integrity of the statutory receivership system is at stake.

More pragmatically, the benefit cuts will likely result in many of these individuals becoming public charges. As the Supreme Court observed, "One of [the] things we learned in law school is that we shouldn't put people in a position where they become public charges, and by my decision I may be putting these people in the position of becoming public charges, having to be supported by welfare throughout the country." A1037-1038.

### B. The Procedure Afforded Was Unfair and Prejudicial.

As shown above, all interested parties – payees, the Receiver, and the court – had a high interest in ensuring that the Shortfall Payees received a true day in court. The final step in evaluating due process is examining the actual process employed, and whether it fairly provided notice and a meaningful opportunity to be heard. In several respects, it did not.

#### 1. The notice was inadequate and misleading.

Although aggrieved by its outcome, the Payees were not parties to this proceeding. They were never served with any petitions, orders, or any filings. Instead, the court permitted the Receiver to send a single inadequate, misleading letter likely to lull payees into inaction. As noted, the letters were inexplicably sent from a Minnesota address with an outward appearance of junk mail. The Receiver's records were outdated such that hundreds of notices were returned undelivered. Others did not receive their notices until the midst of December holidays. The notice was practically incomprehensible to a layperson, and even sophisticated payees struggled to find legal help.

The notice also conveyed the impression that objecting would be pointless because the benefit reduction was already in progress. The letter reassured payees that a $100 million fund had been created to assist with shortfalls, without disclosing that $100 million would provide little relief.

The objection period was remarkably short – three weeks for some recipients – and stated that policyholders would waive all objections not in the Receiver's hands by Monday, January 16, 2012 (or, more accurately, Friday, January 13, as the 16th was a holiday). This warning would effectively dissuade any potential objectors who concluded they were unlikely to meet the deadline.

Having imposed all of these court-endorsed impediments to the objection process, the Receiver then cited an allegedly low number of objections received – 130 objections or so out of 1,456 affected payees – as evidence that his proposed plan was fair. A189, A518-519, A1252.104-1252.105, A1252.152-1252.153.

### 2. The time allowed, and the lack of access to information, were unreasonable.

Objectors who did try to respond had only a few weeks to digest 11 pages of legalese, find an attorney, and prepare some kind of response to a plan they had never even heard of a month earlier – a plan that, according to the Receiver himself, had been years in the making. A509.

Had Payees been given those same years – or even a heads up in December 2010 – they could have begun taking steps to protect themselves. They could have sought counsel. They could have pooled resources to hire consultants, exercise rights as beneficiaries, and make appropriate demands on the Receiver.

Equally important, Payees could have been prepared to offer a meaningful response at the Order to Show Cause hearing. It is true that the hearing occupied

portions of 11 days. However, most of that time was spent asking blind questions unaided by documents, information, and other customary means of preparation. *E.g.*, A713, A776. By refusing to require access to the documents allegedly supporting the benefit cuts, or to continue the hearing to permit such access, the Supreme Court deprived Shortfall Payees of anything close to a level playing field.

The Receiver offered no policy justification for withholding material information from his own beneficiaries. Nondisclosure of these documents was prejudicial because without them, there was no way to verify the assumptions or conclusions of the Receiver's expert, whose testimony was the only evidence offered by the Receiver to prove insolvency and the viability of the liquidation plan. The Receiver's expert acknowledged that these documents would be needed to test the reliability of his conclusions. A901, A905.

Adding to the unfairness is that the Payees were the only interested parties who were not given advance notice. Years before payees had any inkling that all was not well, guaranty associations and certain insurance companies not only were notified of an impending liquidation, but were also allowed input into drafting the proposed plan. A430, A1074-1075, A1184.

Similarly, the Receiver admitted providing insurance industry representatives with all of the documents that he denied to Payees – without requiring discovery requests. The Receiver considered himself to "share common

interests" with these entities, even to the point of signing a confidentiality agreement with them. A781. Indeed, the Receiver did not retain an independent expert; he simply designated NOLHGA's previously retained consultant as his "joint" expert shortly before the hearing. A597, A654, A835-836, A889-890.

The Receiver's beneficiaries, the Payees, were afforded no such courtesies. The Receiver neither consulted with, nor solicited input from, annuitants in drafting the plan. There was no sharing of experts. Payees were not given advance notice of changes to be made to the originally filed plan, as was the joint expert. A468.

And when the Payees sought their own form of input – submitting an alternative plan for comparison – they were told no, by both the Receiver and the court. A715, A1252.138-1252.139; *see also* A1254; A1252.147; A1252.201; 1252.206; A1252.209-1252.210 (court refusing to allow objectors to call three expert witnesses to discuss possible alternatives). As the court stated, "That is not before me. I can't do that [consider alternate plans]. I wish I could, but I can't." A715.

The Receiver then repeatedly cited the absence of an alternative plan as evidence that his plan was viable and fair. A451, A485, A1114, A1406-1407.

### 3. Selective application of the CPLR.

Exacerbating the unfairness of the hearing was the Liquidation Court's selective application of the CPLR. Over objection, the court permitted the Receiver to establish critical components of its case through hearsay and even patently speculative testimony. A430, A1084. For example, a key consideration was the threat that, if the Supreme Court rejected the plan, voluntary contributions from insurance companies (like the Hardship Fund that supposedly had already been created) would "go out the door." A544, A1084.

This threat – characterized by the court as a "gun to my head" – was completely unsupported by admissible evidence. A578, A676. No insurer testified at all, let alone averred that it would walk away if the plan were delayed a few weeks or even rejected. The Receiver's own witnesses admitted that such predictions were speculative. A1215-1216.

Additionally, as noted, the court allowed the superintendent to admit into evidence binders of exhibits that had never been served on the payees, along with a revised version of the restructuring plan that was not filed until March 6, 2012, well after the objection period had ended. The court's consistent refrain was, "It's an order to show cause." *E.g.*, A430, A1084.

Unfortunately, the court did not apply this same flexibility to the objectors' requests for the documents under which their payments were being cut. Although

the grounds for denying the objectors' requests for documents were not expressly stated, the court appears to have relied principally upon the objectors' alleged failure to file formal discovery requests under CPLR 3102. A776, A783-784.

While no contention is made of nefarious intent, on issues critical to the Receiver such as whether insurers would withdraw their participation, the court relaxed or disclaimed the CPLR. On documentation issues critical to the Payees, the court applied the CPLR. The result was an unfair proceeding.

There was no emergency justifying such haphazard procedures (other than generic warnings that the entire plan could unravel for unspecified reasons if the 21-year-old Rehabilitation Order remained in effect another six weeks, A1252.136-1252.137. Moreover, if any time constraints had existed, they would have been solely attributable to the Receiver, not the payees.

There was also no justification for the grossly disparate treatment of interested parties. If years of advance notice were needed for insurance companies and guaranty associations to provide meaningful input, how could a few weeks suffice for far less sophisticated payees who had more to lose?

Finally, there was no justification for allowing the Receiver to play hide the ball. The Receiver claimed to be an "advocate for the policyholders" (A431) – why would it refuse to share documents with the persons to whom he owed an

affirmative duty of disclosure, while sharing those same documents freely with others?

The Supreme Court recognized that an appeal was likely in this case, A1059, and the Shortfall Payees do not envy the position in which the Receiver placed the court. But the fact remains that nearly $1 billion dollars – and, more important, the well-being of nearly 1,500 injured, disabled, and retired persons – is at stake.

The payees had to overcome unreasonable hurdles even to be able to submit an objection. Those who made it that far were then prevented by the court from testing the premises upon which their benefits were being cut. They were unable to obtain assistance from experts on highly technical issues, unable to prepare an alternate plan for the court to at least compare to the proposed plan, and unable to mount a meaningful defense at the Order to Show Cause hearing. With due respect to the Second Department, the procedures utilized below were unfair, unreasonable, and violated basic due process principles.

## CONCLUSION

For the foregoing reasons, Shortfall Payees respectfully request that this Court grant its motion for leave to appeal.

Dated: New York, New York
March 8, 2013

Respectfully Submitted,

Edward S. Stone, Esq.
*Attorney for Objectors-Appellants*
277 Broadway, Suite 1405
New York, New York 10007
(203) 504-8425

# EXHIBIT A

**ORIGINAL**

At IAS Part 35 of the Supreme Court of the State of New York, held in and for the County of Nassau, at the Courthouse, 100 Supreme Court Drive, Mineola, New York, on the 16th day of April, 2012

PRESENT:
HON. JOHN M. GALASSO, J.S.C.

| | |
|---|---|
| In the Matter of the Rehabilitation of EXECUTIVE LIFE INSURANCE COMPANY OF NEW YORK. | Index No. 8023/91<br>Motion Sequence #s 109 and 111<br>**ORDER OF LIQUIDATION AND APPROVAL OF THE ELNY RESTRUCTURING AGREEMENT** |

The Superintendent of Financial Services (successor to the Superintendent of Insurance) of the State of New York (the "Superintendent"), through Eric T. Schneiderman, Attorney General of the State of New York, having moved this Court by order to show cause ("Order to Show Cause") for an order to convert the rehabilitation proceeding of Executive Life Insurance Company of New York ("ELNY") to a liquidation proceeding and having sought approval of the Agreement of Restructuring in Connection with the Liquidation of ELNY, and the Superintendent having provided ELNY claimants, creditors, policyholders, and other interested parties with notice of the relief sought, and upon reading the Superintendent's Verified Petition, duly verified on August 31, 2011 (the "Liquidation Petition"); the Memorandum of Law in Support of the Liquidation Petition; the Affidavit of Ivy Chang, sworn to on August 30, 2011, and the exhibits attached thereto; all answering and reply papers; all prior proceedings and papers in this proceeding; and said Liquidation Petition having duly come on to be ~~heard~~ submitted on the 29th day of March, 2012, this Court finds that:

A. ELNY was placed into rehabilitation and the Superintendent, and his successors in office, were appointed rehabilitator ("Rehabilitator") by order of this Court entered April 23, 1991 (the "Rehabilitation Order");

B. The Rehabilitation Order found that ELNY was in such condition that its further transaction of business would be hazardous to its policyholders, its creditors, and to the public;

C. ELNY is insolvent;

D. Further efforts to rehabilitate ELNY would be futile;

E. ELNY is subject to the New York Insurance Law (the "Insurance Law") and, particularly, to Article 74 thereof; and

F. It is in the best interest of all persons concerned that the Superintendent be vested with title to all of ELNY's property, contracts, and rights of action and directed to liquidate its business and affairs substantially in the manner provided in the Agreement of Restructuring in Connection with the Liquidation of ELNY, by and among the Superintendent, as Receiver of ELNY, the National Organization of Life and Health Insurance Guaranty Associations, and the Participating Guaranty Associations, and joined by NEWCO and The Life Insurance Guaranty Corporation existing under Insurance Law Article 75, and the Exhibits and Schedules attached thereto, as filed with the Court on March 6, 2012 (the "Restructuring Agreement").

NOW, THEREFORE, on motion of Eric T. Schneiderman, Attorney General of the State of New York, and after carefully considering the Restructuring Agreement, the applicable law, comments, suggestions, and/or objections to the Liquidation and the Restructuring Agreement, and the testimony, evidence, and arguments related thereto, it is hereby ORDERED as follows:

(1) The relief requested in the Liquidation Petition is granted and ELNY is found to be insolvent;

(2) The Rehabilitation of ELNY is hereby converted to a Liquidation effective as of the closing date of the Restructuring Agreement (which date shall also be the "Liquidation Date" under the Restructuring Agreement) and pending such effectiveness, the Rehabilitation Plan, as that term is defined in the Restructuring Agreement, and all prior orders of this Court remain in full force and effect;

(3) The Superintendent, and his successors in office, are hereby appointed, effective as of the Liquidation Date, liquidator ("Liquidator") of ELNY and are: (i) vested with all powers and authority expressed or implied under Insurance Law Article 74, in addition to the powers and authority set forth in this Order; (ii) vested with title to ELNY's property, contracts, rights of action and all its books and records, wherever located; (iii) authorized and permitted to conduct the business of ELNY as the Liquidator deems wise and expedient; and (iv) directed to liquidate ELNY's business and affairs in accordance with Insurance Law Article 74 and substantially in the manner provided in the Restructuring Agreement;

(4) The rights and liabilities of ELNY and of its creditors, policyholders, and all other persons interested in the estate of ELNY shall be fixed as of the Liquidation Date;

(5) All persons, other than the Receiver (as defined in the Restructuring Agreement) and his agents, are enjoined and restrained from: (i) dealing with, disposing of, or doing or permitting any act or thing that might waste ELNY's assets; (ii) transacting ELNY's business; (iii) interfering with this proceeding or with the Receiver in his possession, control, and management of ELNY's property, or in the discharge of his duties under Insurance Law Article 74; and (iv) obtaining any preferences, judgments, attachments, or other liens, and from making any levy against ELNY, its assets, or any part thereof;

(6) All persons are enjoined and restrained from commencing or further prosecuting any actions at law or other proceedings against ELNY or its assets, the Receiver or the New York Liquidation Bureau, or their present or former employees, attorneys, or agents, with respect to this proceeding or the discharge of their duties under Insurance Law Article 74;

(7) All parties to actions, lawsuits, and special or other proceedings in which ELNY is obligated to defend a party pursuant to an insurance policy, bond, contract, or otherwise are enjoined and restrained from proceeding with any discovery, court proceedings, or other litigation tasks or procedures, including, but not limited to, conferences, trials, applications for judgment, or proceedings on settlement or judgment, until further order of this Court;

(8) All persons or entities having property and/or information, including, but not limited to, insurance policies, claims files (electronic or paper), software programs, and/or bank records owned by or belonging to ELNY shall preserve such property and/or information and immediately, upon the Receiver's request and direction, assign, transfer, turn over, and deliver such property and/or information to the Receiver;

(9) The provisions, terms, and conditions of the Restructuring Agreement, filed with the Court on March 6, 2012, including all Exhibits and Schedules attached thereto, are hereby approved and the Restructuring Agreement is confirmed in such form and incorporated herein by reference (provided that such approval and confirmation shall not be deemed to preclude updating, adjustment and amendment of Schedule 1.15 prior to, contemporaneously with and subsequent to closing of the Restructuring Agreement, as provided in Section 1.15 of the Restructuring Agreement), including, but not limited to:

a. ELNY's restructuring of its liabilities in respect of the ELNY Contracts, as that term is defined in the Restructuring Agreement, pursuant to the terms of the Restructuring Agreement;

b. NEWCO's assumption of the obligation to pay ELNY benefit payments in accordance with the terms of the Restructuring Agreement;

c. The delivery, transfer and assignment to NEWCO of all of ELNY's right, title and interest in and to the Transferred Assets and the retention by ELNY of the Retained Assets as provided under the Restructuring Agreement, as those terms are defined in the Restructuring Agreement;

d. The form of the Assumption Certificates in substantially the form attached as Exhibit 1.6 to the Restructuring Agreement;

e. The terms and conditions of the ELNY Restructured Contracts;

f. The preservation of Retained Liabilities and priority of distribution of the Net Proceeds Transfer, as those terms are defined in the Restructuring Agreement; and

g. The requirement that all Contracts, as that term is defined in the Restructuring Agreement, shall remain in full force pending effectiveness of the Reinsurance and Assumption Agreement, and shall upon such effectiveness be fully discharged as obligations of ELNY other than to the

extent of the value of such obligations that are included in the Retained Liabilities, as that term is defined in the Restructuring Agreement;

(10) To the extent any comment, suggestion, and/or objection that was presented regarding the Liquidation Petition or the Restructuring Agreement, and/or any related document, is inconsistent with the Restructuring Agreement and/or any related document, that comment, suggestion, and/or objection is overruled and any relief requested therein is denied;

(11) The Receiver shall continue to direct the full payment of all benefits in respect of ELNY Contracts, in accordance with the terms of each ELNY Contract, until the closing of the Restructuring Agreement;

(12) Judicial immunity is extended to the Receiver and his successors in office, the New York Liquidation Bureau, and their respective attorneys, agents, and employees, and such immunity is extended to them for any cause of action of any nature against them, individually or jointly, for any action or omission by any one or more of them when acting in good faith, in accordance with this Order, or in the performance of their duties pursuant to Insurance Law Article 74;

(13) This Court shall retain subject matter jurisdiction over the Restructuring Agreement;

(14) The Receiver may at any time make further application to this Court for such further and different relief as he sees fit;

(15) In accordance with Insurance Law Section 7432(b), all claims against ELNY must be presented to the Receiver within four months of the Liquidation Date; however, in accordance with Insurance Law Section 7433(b)(1), all policyholders and holders of Claim-Overs (as defined in the Restructuring Agreement) who appear on ELNY's books and records as of the Liquidation Date are deemed to have duly filed proofs of claim;

(16) The Receiver shall provide notice of this Order to all creditors, policyholders and other interested parties by: (i) posting this Order on the Internet webpage maintained by the New York Liquidation Bureau at http://www.elny.org within thirty (30) days after the Liquidation Date; and (ii) publishing notice of this Order in the New York Times and the Wall Street Journal, once a week for two consecutive publication weeks, commencing within two weeks after the Liquidation Date, in a form substantially similar to the one attached hereto as Exhibit 1;

a. Such notice shall inform all creditors, claimants, and other interested persons that this Order has been entered; and

b. Such notice is sufficient notice to all persons interested in ELNY;

(17) Any distribution of assets shall be in accordance with the priorities applicable to life insurance companies set forth in Section 7435(a) of Insurance Law Article 74 and substantially in accordance with the terms of the Restructuring Agreement;

(18) Notwithstanding anything to the contrary contained in this Order or the Restructuring Agreement, neither this Order nor the Restructuring Agreement shall in any way limit, impair, prejudice or adjudicate any right or claim of any owner of or payee or beneficiary under any ELNY Contract, as that term is defined in the Restructuring Agreement, with respect to any coverage or benefits provided for under any Guaranty Association Act, as that term is defined in the Restructuring Agreement, or under Article 75 of the New York Insurance Law;

(19) Except as expressly set forth in this Order and in the Restructuring Agreement approved by this Order, nothing in this Order shall limit, impair, prejudice or adjudicate any rights or obligations of the Participating Guaranty Associations, as that term is defined in the Restructuring Agreement;

(20) At least two weeks prior to the proposed closing of the Restructuring Agreement, the Receiver will file a notice of the proposed closing date with the Court, and post a copy of such notice on the Internet webpage maintained by the New York Liquidation Bureau at http://www.elny.org. Within one business day of the closing of the Restructuring Agreement the Receiver will file a notice of the closing of the Restructuring Agreement with the Court and post a copy of such notice on the webpage http://www.elny.org; and

(21) The caption to this proceeding is hereby amended, effective as of the closing date of the Restructuring Agreement, as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
------------------------------------------------------------------------X
In the Matter of
the Liquidation of

EXECUTIVE LIFE INSURANCE COMPANY OF NEW YORK.
------------------------------------------------------------------------X

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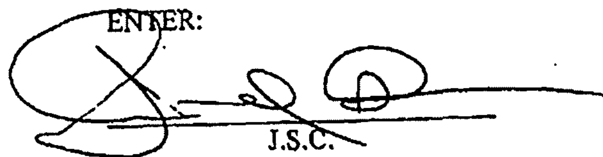

J.S.C.

ORIGINAL

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

In the Matter of the Rehabilitation of
Executive Life Insurance Company of New York,

HON. JOHN M. GALASSO
J.S.C.
Decision Reserved: 03/29/12
Index No. 8023/1991
Part 35

Decision Date: 04/16/12

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By: Ralph Pernick

This decision follows an 11 day hearing pursuant to two pending orders to show cause (motion sequence numbers 109 and 111) and is based upon the credible testimony and evidence in addition to the several Court exhibits plus all motion and opposition papers submitted.

The Court also considered the statements made on the record by counsel and by individual objectors without counsel. The undersigned has read the objections, correspondence and e-mails sent directly to chambers and reviewed the 20-year litigation history as maintained in the office of the Nassau County Clerk. *

In making this determination, objections made by attorneys on behalf of certain individuals were taken into account as if made on behalf of all objectors, including those without counsel or who did not appear in person as well as on behalf of all those persons similarly situated.

The original petitioner in this proceeding was the former Superintendent of Insurance of the State of New York in his capacity as receiver of distressed insurance companies, now upon the restructuring of certain State agencies designated the Superintendent of Financial Services. Over 20 years ago, Executive Life Insurance Company of New York (ELNY) ** began experiencing financial difficulties. In order to protect its payees, creditors and other obligees, the Superintendent petitioned to have ELNY declared to be subject to rehabilitation, appointing the Superintendent (and his successors in office) to be ELNY's Rehabilitator. The New York Liquidation Bureau (NYLB) was charged in carrying out the Superintendent's duties to direct the affairs of ELNY, such as paying annuity claims out of ELNY's assets (see Insurance Law Article 74).

* With the extensive evidence, papers and law available to assist the Court in reaching a decision, the undersigned concluded that post-hearing memoranda were unnecessary.

** ELNY is not to be confused with its parent Executive Life Insurance Company or other companies that may come under the auspices of sister state regulations.

In accordance with the law, the Superintendent's rehabilitation plan was approved to maximize the potential benefits for ELNY's structured settlement and other annuitants. This resulted in NYLB paying the annuitants as permitted under the rehabilitation plan and order at a 100% return rate, which continues to the present time.

Recently, due to the severe economic downturn affecting ELNY's assets as well as other companies that might have otherwise invest in ELNY, the Superintendent as Rehabilitator determined that rehabilitation of ELNY was no longer a viable option. The value of ELNY's assets had plummeted and would continue to drop; therefore the 100% returns could no longer be maintained indefinitely. The sooner an order of liquidation was obtained, the better it would be for ELNY's payees to receive the highest possible present value for their annuity benefits.

Consequently, 16 months ago the Superintendent, the only person with such authority under the law, submitted an application for an order of liquidation pursuant to Sections 7403 ( c), 7404 and 7405 (a) of the Insurance Law, thereby converting this proceeding from one for rehabilitation to one for liquidation.

Originally it was hoped that a stipulation of settlement could be reached for the benefit of ELNY's payees and creditors. Since that did not occur, the Court directed the Superintendent to form a liquidation plan to go into effect upon the declaration of ELNY's insolvency.

The resulting Plan (later slightly amended by the Superintendent) was submitted for the Court's approval and a hearing scheduled.

It is important to note that in a liquidation proceeding, the Court's only authority by law is to approve or disapprove the plan. A court cannot amend or supplement a plan or allow objectors to submit a proposed plan.* As noted above, the New York State Superintendent of Financial Services has the sole authority to formulate a plan under the laws of New York and the participating states within the statutory structure.

This means, the scope of the hearing before the undersigned was limited by the Insurance Law and could not include inquiries into why the insurer failed in the first instance, its investment and operation prior to failure, how the Superintendent and his agents supervised the affairs of the insurer, or why a settlement was not reached or this order to show cause brought before the Court sooner.

For example, certain objectors attempted to call witnesses, including the prior CEO of the now defunct ELNY as well as former Governor Elliot Spitzer, in an attempt to establish under circumstances existing years ago during that administration why the State did not seek liquidation, believing this might result in all ELNY's policyholders recouping 100% of the value of their annuities. However, contrary to a premature press release issued during that time, any purported agreement was not confirmed through the appropriate legal process.

* Similar to a federal bankruptcy proceeding, a liquidation regulated by state law is the means employed to gather and distribute the remaining assets of an insurance company. In bankruptcy, the Trustee submits a plan for the Bankruptcy Court's approval.

In any event, permitting testimony regarding events taking place 5 years ago would result not only in speculation as to what but also would be irrelevant to the proceeding at hand: to either approve or disapprove the Plan on the facts as they exist today.

Therefore, in considering first the application for a declaration that ELNY is insolvent, there is no question that the Superintendent has established that fact (see Insurance Law section 7404 and 7402). Simply put, ELNY is unable to pay its outstanding lawful obligations as they mature in the regular course of business (Insurance Law section 1309 (a)). This was demonstrated by the testimony of Jonathan L. Bing, the Special Deputy Superintendent of the NYLB and the audited statutory balance sheets in evidence, which as of December 31, 2012 reported liabilities exceeded reported assets by 1.5 billion dollars.

Accordingly, the Court declares ELNY to be insolvent and by order converts this former rehabilitation proceeding into a liquidation proceeding. The Superintendent, formerly the Rehabilitator, is appointed to be the Liquidator.

The Court concludes that the Superintendent has complied with sections 7405, 7419 and 7432 in satisfying the framework under which the Superintendent may seek liquidation and the Court may adjudicate the insolvency of an insurer.

Having made these two determinations, the Court *sua sponte* severs those portions of the orders to show cause concerning them, leaving the approval or disapproval of the Plan as the remaining issue.

The Plan as proposed must be clear concerning how ELNY's remaining assets will be allocated among its policyholders in accordance with the law. The priority of distribution of claims on what is called ELNY's estate assets can be found in Insurance Law section 7435.

As relevant to this proceeding, all claims under insurance policies, annuity contracts and funding agreements plus all claims of the Life Insurance Company Guaranty Corporation of New York created under Article 77 of the New York Insurance Law or any other guaranty corporation or association of this state or another jurisdiction are claims submitted by a group denominated Class 4 as described in the statute.

Guaranty associations or corporations of sister states enacted through the laws of their local legislatures were created to provide their respective residents with coverage for policies such as the ones at bar when an insurance company is liquidated. The coverage is subject to limits called caps. The National Organization of Life and Health Insurance Guaranty Associations (NOLHGA) is the umbrella organization for those associations choosing to participate jointly in structuring a liquidation plan which would include payees from member states. *

Since the objectors as well as the non-objectors to the proposed plan reside in multiple states, it is critical to understand that the contributions from their respective state guarantee associations are limited by the state cap enacted. This is true for all insurance companies under similar circumstances that do businesses in that state.

* Not all states have a corresponding guaranty association or have a similar corporation that belongs to NOLHGA.

In formulating the proposed plan over many months of consulting together, the Liquidation Bureau along with NOLHGA and other industry participants set forth the mathematical formula that must be applied to everyone in the same statutory class, objectors and non-objectors alike. Simply stated as testified to by LBNY's witnesses, ELNY's remaining estate assets would be allocated equally to each person on a *pro rata* basis, meaning the same percentage of the present value of their annuity benefits.

That way, whether one's claim or policy was big or small, the same objective computation would apply, each payee getting the same percentage in accordance with the value of their annuity benefits. *

To distribute the estate in any other manner, such as allowing the same dollar amount to be distributed to each payee alike or by favoring one person's need over another's, would not be an objective calculation made in accordance with the statutes and case law, but rather a subjective one favoring certain section of Class 4 payees over another. This is both illegal and discriminatory.

Therefore, as calculated by the current value of ELNY's estate,** approximately one-third (1/3) of the current value of their annuity benefits will be allocated to each payee. From there the 40 participating state guaranty associations will cover the difference between the 1/3 estate asset allocation and its state's cap for residents of that jurisdiction.

In applying these cap contributions to each individual payee, the Superintendent calculated which of the approximately 10,000 payees were to receive 100% of the present value of their annuity benefits. That number amounted to 85% of the total policyholders. Also as calculated, the remaining 15% annuitants would receive varying amounts of less than full present value.

Since money from one state's fund cannot by law be allocated to another jurisdiction to be applied to its residents nor is there a national guarantee fund to assist in coverage, there are no other resources from which funding could be mandated by the Court.

However, the Plan also provides for additional contributions entitled "negotiated enhancements," as opposed to those required by law. An enhancement provides additional monies to add to the "pot" made available to the 15% loss-payees.

For instance, NOLHGA agreed to prefund contributions rather than paying into the fund as it become due so all monies would be available upfront for GABC to administer and invest, allowing for greater returns. The guarantee associations have also agreed to provide additional funds if the estate assets are not sufficient to cover annuity contracts requiring upfront funding of a higher amount.

* Estate assets would be transferred to the newly created Guaranty Association Benefits Company (GABC), to be distributed along with the state guarantee association contributions and additional support from certain volunteer life insurance companies. GABC would continue to be supervised by the NYLB, with New York State retaining jurisdiction.

** This will be determined as of the effective date of the order of liquidation and revised from time to time.

More importantly, a third source of funding made directly to the restructuring agreement Plan is being contributed *voluntarily* by the life insurance industry to add to the resources available to the 15% loss claimants.* Therefore, the plan's current approximate nine (9) hundred-plus million dollars of ELNY estate assets and the seven (7) hundred million dollars of the participating guarantees associations allocated according to statute (sub-totaling 1.62 billion dollars) is being enhanced by 71 million dollars to the benefit of these payees, including those parties not covered by any guarantee association (total 2.32 billion dollars).

These same (non-ELNY) life insurance companies have also through their own boards of directors agreed to establish a hardship fund of an additional100 million dollars outside of the Plan now before the Court. Since the hardship fund is not restricted by law in how contributions are distributed, applications may be honored on a subjective as-needed basis.

Therefore, as part of the restructuring Plan in addition to outside of the Plan, 171 million dollars will be voluntarily set aside only for the benefit of the shortfall payees, benefits that would not otherwise be available in a straight liquidation process. An administrator for the consortuim of life insurance companies will be appointed separately for the hardship fund, if this Plan is approved. Furthermore, certain insurance companies such as Travelers, the Fireman's Fund Companies and Hartford have assured the Court that they will make up the difference to those identified shortfall payees for any settlement obligation where they purchased an ELNY annuity on behalf of the injured party. **

It bears mentioning again that if this Plan is not approved there could be no prefunding or voluntary enhancements of any kind offered in the future. In addition, without the coordination of coverages as to individual policies everyone would, upon receiving their *pro rata* share of the ELNY estate assets, have to apply to their own states to determine how much the guarantee association contribution will be. For some, the answer may be zero (0) dollars.

The Superintendent's Plan was reached after almost one-and-a-half years of negotiation, evaluation and computation. It was made upon expert advice and input pursuant to his duty to take into consideration all those parties comprising Class 4, in accordance with the law.*** The undersigned is convinced that without the Plan and NOLHGA, left to their own devises policyholders will be worse off under any alternative proposal. Moreover, if the Court were to delay this decision for any reasons the value of ELNY's assets will most likely diminish, resulting in a reduced *pro rata* share.

* Voluntarily has its ordinary meaning: these companies did not have to contribute at all, having no obligations to ELNY or its policyholders. Consequently, the Court cannot direct the voluntary contributors to add more to the "pot."

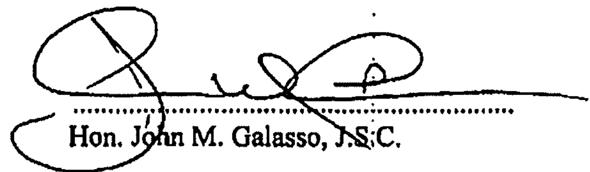
** J. G. Wentworth/Peachtree Funding, in the business of purchasing annuities for lump sum payments, has also assured the Court that to the extent a shortfall is due to ELNY as creditor under its purchase contracts, the company will not seek restitution from ELNY's former payees that entered into a lump sum agreement.

*** Given the complexity of formulating a Plan in statutory compliance, any request for a 120-day adjournment or postponement to allow the objectors to arrive at a possible alternative plan is neither practical nor legal. As noted above, only the Superintendent may submit a plan for approval or disapproval. The disingenuous request based on a reduction to 30 days to submit a proposed plan made toward the end of the hearing was denied for the same reason.

To those individuals who suffer because of a reduction in current value of their benefits, while the undersigned sincerely regrets their diminished financial future through no fault of their own, the Court cannot apologize for applying the law as it pertains to everyone involved. Their individual, understandable frustrations cannot be resolved in this proceeding.*

Accordingly, under the circumstances as presented in this case and by applying the law, the Plan as proposed and amended by the Superintendent of Financial Services for the State of New York is hereby approved by separate order signed this date.**

April 16, 2012



Hon. John M. Galasso, J.S.C.

ENTERED
APR 23 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE

* As noted above, some of the loss-payees, may be able to access additional funding. However, those individual procedures are not before this Court.

** Counsel for NYLB is directed to serve a copy of this decision with notice of entry upon all ELNY payees.

# EXHIBIT B

| **Matter of Executive Life Ins. Co. of N.Y..** |
|---|
| 2013 NY Slip Op 00738 |
| Decided on February 6, 2013 |
| Appellate Division, Second Department |
| Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. |
| This opinion is uncorrected and subject to revision before publication in the Official Reports. |

Decided on February 6, 2013

**SUPREME COURT OF THE STATE OF NEW YORK**
**APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT**

MARK C. DILLON, J.P.
CHERYL E. CHAMBERS
SANDRA L. SGROI
ROBERT J. MILLER, JJ.

2012-05969
2012-07736
(Index No. 8023/91)

**[*1]In the Matter of Executive Life Insurance Company of New York. Superintendent of Financial Services, formerly known as Superintendent of Insurance of State of New York, petitioner-respondent; Jennifer Aracil Appling, et al., appellants; National Organization of Life and Health Insurance Guaranty Associations, etc., nonparty-respondent.**

Edward S. Stone, New York, N.Y. (Roger P. Christensen, pro hac vice, Karra J. Porter, pro hac vice, and Kristen C. Kiburtz, pro hac vice, of counsel), for appellants.
Eric T. Schneiderman, Attorney General, New York, N.Y. (Ralph Pernick of counsel), and Sidney Austin LLP, New York, N.Y. (Steven M. Bierman, Jeff S. Liebman, Martin B. Jackson, and Eamon P. Joyce of counsel), for petitioner-respondent (one brief filed).

SNR Denton LLP, New York, N.Y. (Sandra D. Hauser and
Gayle P. Levy of counsel), for
nonparty-respondent.

DECISION & ORDER

In a proceeding pursuant to Insurance Law article 74 to liquidate the assets of an insolvent insurer, the objectors appeal, as limited by their brief, from (1) a decision of the Supreme Court, Nassau County (Galasso, J.), dated April 16, 2012, and (2) so much of an order of the same court, also dated April 16, 2012, as, upon the decision, granted the petition to approve a certain agreement of restructuring in connection with the liquidation of Executive Life Insurance Company of New York, and awarded the receiver for the insolvent insurer permanent injunctive relief and judicial immunity.

ORDERED that the appeal from the decision is dismissed, as no appeal lies from a decision (*see Schicchi v J.A. Green Constr. Corp.*, 100 AD2d 509); and it is further,

ORDERED that the order is affirmed insofar as appealed from; and it is further,

ORDERED that one bill of costs is awarded to the petitioner-respondent and the nonparty-respondent.

More than 20 years ago, Executive Life Insurance Company of New York (hereinafter ELNY) went into rehabilitation under the auspices of the New York State Liquidation Bureau. In 2011, the Superintendent of Insurance of New York State (hereinafter the Superintendent) filed a petition with the Supreme Court, seeking to convert the rehabilitation proceeding into a liquidation [*2]proceeding on the ground that ELNY was insolvent. The Superintendent also sought approval of an agreement of restructuring in connection with the liquidation of ELNY (hereinafter the agreement), pursuant to which ELNY's assets were to be distributed on a pro rata basis to payees of ELNY annuities, and 40 State Insurance Guaranty Association members of the National Organization of Life and Health Insurance Guaranty Associations (hereinafter the SIG Associations), were to contribute funds towards the satisfaction of ELNY's obligations to its annuity payees, up to the statutory coverage caps applicable to them. Pursuant to the agreement, the SIG Associations were also to provide certain enhancements in coverage, beyond the amounts that they are statutorily required to provide, and a consortium of life insurance companies voluntarily agreed to

provide certain guarantees of policyholder payments. While the agreement provides more coverage of benefits to payees of ELNY annuities than would have been afforded by a straight statutory liquidation proceeding, approximately 15% of payees will experience a reduction in benefits pursuant to the agreement, some by significant percentages.

ELNY annuity payees were notified, by mail sent to their last known addresses, of the pendency of the liquidation proceeding and the existence of the agreement and its estimated impact, if any, upon the benefits payable to them, and were afforded the opportunity to object to the agreement. Moreover, the Supreme Court conducted a hearing on the liquidation petition, at which some ELNY annuity payees whose benefits would be reduced under the agreement (hereinafter collectively the objectors), appeared, testified as to their objections to the agreement, and cross-examined the Superintendent's witnesses. After the hearing, the Supreme Court approved the agreement, and issued an order which included a grant of judicial immunity to the Superintendent and preliminary injunctions, enjoining and restraining, inter alia, all persons "from commencing or further prosecuting any actions at law or other proceedings against ELNY or its assets, the [Superintendent as] Receiver or the New York Liquidation Bureau, or their present or former employees, attorneys, or agents, with respect to this proceeding or the discharge of their duties under Insurance Law Article 74."

We reject the objectors' contention that they were denied due process, either in the manner in which the notice was provided to them or in the conduct of the hearing. "The fundamental requisite of due process of law is the opportunity to be heard" (*Grandis v Ordean*, 234 US 385, 394).

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v Meyer*, 311 U.S. 457; *Grandis v Ordean*, 234 U.S. 385; *Priest v Board of Trustees of Town of Las Vegas*, 232 U.S. 604; *Roller v Holly*, 176 U.S. 398. The notice must be of such nature as reasonably to convey the required information, *Grandis v Ordean*, supra, and it must afford a reasonable time for those interested to make their appearance, *Roller v Holly*, supra, and *cf. Goodrich v Ferris*, 214 U.S. 71 (*Mullane v Central Hanover Bank & Trust Co.*, 339 US 306, 314-315).

The notice mailed to the last known addresses of the ELNY annuity payees was reasonably calculated to apprise them of the pendency of the liquidation proceeding and the