To Be Argued By:
Edward S. Stone
Time Requested: 15 Minutes

New York Supreme Court

APPELLATE DIVISION — SECOND DEPARTMENT

Docket No. 2012-05969

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.

BRIEF FOR OBJECTORS-APPELLANTS

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Nassau County Clerk's Index No. 8023/91

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Objectors-Appellants.

Statement Pursuant to CPLR 5531

Docket No. 2011-04258

1. The index number of the case in the Court below is 8023/91.
2. The full names of the parties are set forth above. Individual objectors represented by counsel in this appeal are: 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 (Attorney Edward S. Stone, Esq); Brett Koshel (Attorneys Edward S. Stone, Esq. and Sari Gabay-Rafiy, Esq.), and Deana Sandor and Denise Sandor (Attorney Jeffrey S. Stephens, Esq.)[1]

   The names of most of the other individual objectors are not known as their objections were sealed. R. (Hrg 313-316). By ruling of the Supreme Court, relief granted to these objectors will extend to all other objectors and persons similarly situated. R. (Mem Dec. 4/16).
3. The action was commenced in the Supreme Court, Nassau County.
4. The underlying action was commenced by the Superintendent of Insurance as a rehabilitation proceeding on April 23, 1991, by the filing of an Order to Show Cause. On December 17, 2010, the Superintendent began the process of converting the action into a liquidation proceeding by the filing of another Order to Show Cause.
5. The nature and object of the action: Liquidation of a life insurance company following a 21-year "rehabilitation."
6. The appeal is from the liquidation order of the Honorable John M. Galasso dated April 16, 2012.
7. This appeal is being perfected with the use of a stipulated appendix.

[1] Jennifer Aracil Appling and Daniel Malin were represented by Kobre & Kim in the underlying proceeding.

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BRIEF OF APPELLANTS-OBJECTORS

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 in jeopardy. 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.

The payees alternatively object to two specific provisions in the order, which purport to grant unlimited immunity and injunctive relief to the Receiver and his agents in their personal capacities. The payees contend that the Supreme Court lacks subject matter jurisdiction to enter such provisions, which are inequitable and legally insupportable.

QUESTIONS PRESENTED

1. 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 Supreme Court answered no.

2. 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 Supreme Court did not address its subject matter jurisdiction. The court answered no to the remainder of the question.[2]

3. 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 Supreme Court did not address its subject matter jurisdiction with respect to this issue. It implicitly answered the remainder of the question no.

RELEVANT FACTS

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

[2] The parties below did not expressly address the lack of subject matter jurisdiction for a liquidation court to grant immunity and injunctive relief to persons and entities other than the Estate over which the liquidation court has jurisdiction. However, subject matter jurisdiction is nonwaivable, and must be addressed at any stage of the proceeding. *See* Financial Industry Regulatory Authority, Inc., v. Fiero, 10 N.Y.3d 12, 17 (2008).

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.[3]

[3] 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 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).

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 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, 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*.[4]

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.

[4] 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.

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 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. Shortfall Payee Joyce Miller read her letter and thought she was fine, until an attorney translated it for her. (She 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[5]

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 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),

[5] 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, any party may serve" a document request or subpoena) (emphasis added).

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. Payees were allowed to call one expert witness, who could not offer much without access to the same documentation as the Receiver’s expert. The court denied Payees’ request to call an actuary and two other witnesses, 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.

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. 33-35, *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. 43-44, *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. 38, *infra*.)

POINT I

THE LACK OF REASONABLE NOTICE, NECESSARY INFORMATION, AND THE SELECTIVE APPLICATION OF CIVIL PRACTICE LAW AND RULES DENIED OBJECTORS THEIR DUE PROCESS RIGHT TO A FAIR HEARING

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). In the expedited proceeding below, neither requirement was met.

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 Supreme Court's order 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 Order 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 NOLHGA 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 was 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 was 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 Supreme Court, the procedures utilized below were unfair, unreasonable, and violated basic due process principles.

POINT II

THE LIQUIDATION COURT LACKED SUBJECT MATTER JURISDICTION AND OTHERWISE ERRED IN GRANTING JUDICIAL IMMUNITY TO THE RECEIVER AND OTHERS IN THEIR PERSONAL CAPACITIES.

A. The Liquidation Court Lacked Jurisdiction Under Article 74 to Order Prospective Personal Immunity for the Receiver's Bad Faith and Imprudent Conduct

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).

In this case, 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).

The Supreme Court, as a liquidation court, does not have 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).

Indeed, as the Receiver successfully pointed out to the Court of Appeals, the Liquidation Bureau maintains its own liability insurance. *See* Dinallo at 103 (citing fact that NYLB has its own Errors and Omissions insurance as evidence of its private status).

In the court below, the Receiver suggested that all claims against him, regardless of capacity, somehow constituted claims against the estate. A288-293. That is incorrect. If the "claim against the Receiver arises by reason of some act or omission within the context of his official responsibilities as Receiver, the receivership property may be looked to for whatever damages plaintiffs may prove. However, if the plaintiffs' claims against the Receiver are occasioned by acts or omissions outside of the purview of the court's orders to the Receiver," he is "personally, as distinguished from officially" liable. 149 Clinton Avenue N. v. Grassi, 51 A.D.2d 502, 507 (4th Dep't 1976).

Further illustrating this distinction, if a receiver pursuant to his official obligations negligently maintains the property under his receivership and a customer suffers a personal injury, or the receiver breaches a contract with a vendor, the receiver is officially as opposed to personally liable. *See, e.g.*, Copeland v. Salomon, 56 N.Y.2d 222, 231-232 (1982).

The Receiver also argued that similar immunity language had been included in interim orders during the rehabilitation proceeding. That reasoning is circular: The same grounds upon which the immunity provision is void (and unauthorized by law, *see* Point II.B), in the final rehabilitation order would also invalidate such provisions in interlocutory orders.

A grant of immunity to the Receiver and others in their personal capacities extends beyond the assets of the insurer in liquidation. It therefore exceeds the Supreme Court's subject matter jurisdiction and is thereby void.

B. The grant of immunity is not provided for by statute, and exceeds the proper scope of immunity for a private court-appointed receiver.

Throughout the proceeding below, the Receiver insisted that the court could not grant relief not provided in the statute. *E.g.*, A1033, A1252.96; A1252.128-1252.130; A1378-1379; A1409. When it came to personal immunity for itself and its agents, however, he was more open minded: Immunity is provided nowhere in the statute –and, in fact, is inconsistent with the statute – yet the Receiver asked for (and got) it anyway.

In addressing the immunity provision, it is important to first recognize 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 has successfully argued 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 claiming any greater immunity than that of any other private court-appointed receiver. The Supreme Court's order does just that, however.

The scope of the Order's immunity provision is unsupported by and unprecedented under New York law: It purports to confer immunity for virtually every act or omission ever undertaken, whether in an official or personal capacity, or whether in bad faith or violation of a court order. As noted above, the order provides:

> 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. 43, *infra*). Nor do the Payees object to immunity for acts specifically authorized by a court order.

Any limitations on immunity inherent in those clauses is eliminated, however, 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).

As a consequence, granting immunity for performing duties permitted by Article 74 means that literally any act or omission related to the management of ELNY or its assets is immunized. As worded, it includes acts not undertaken in good faith. It includes 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 sanctions a wide range of breaches of the Receiver's fiduciary duties to payees.

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). However, unlike a judge, 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).

Receivers have well established fiduciary duties. *See*, *e.g.*, 149 Clinton Avenue, 51 A.D.2d at 507. Putting aside the Receiver's inherent conflict of interest in advocating for personal immunity while simultaneously purporting to act as a fiduciary, New York law recognizes that, when a receiver breaches his duties (*e.g.*, acts in bad faith), those actions are inconsistent with the authority conferred upon him, and he is subject to personal liability.

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.

In Strober v. Warren Property Co., 84 A.D.2d 834 (2d Dep't 1981), although not specifically addressing the issue of personal immunity, this Court considered whether a receiver's commissions should be withheld for breach of his fiduciary obligations for failing to deposit rent money in an interest bearing account and for failing to collect rent increases. The court concluded that if "under all the facts of this case," the receiver "in the prudent exercise of his duties" should have deposited the money in an interest bearing account or collected the rent increases, the receiver's commissions should be reduced by any corresponding damage. *Id*. at 835-36.

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 court held that the question is whether "the Receiver acted in good faith under the circumstances." *Id*. at 86; *cf.* Ocean Side Institutional, 254 A.D.2d 338, (noting that plaintiff attempts to seek personal liability on receiver for breach of fiduciary duties).

The law is consistent elsewhere. *See, e.g.,* INF Ent., Inc. v. Donnellon, 729 N.E.2d 1221, 1222 (Ohio Ct. App. 1999) ("The receiver acts in a fiduciary capacity and must use ordinary care in administering the assets of the corporation. If the receiver exceeds the authority granted by the court or fails to use ordinary care, the general rule is that he or she may be sued in a personal capacity."); Alpert v. Gerstner, 232 S.W.3d 117, 131 (Tex. Ct. App. 2006) (holding that when a receiver manages and invests the assets of the receivership property, he acts in a fiduciary rather than a judicial capacity and therefore is personally liable for actions taken in bad faith or without reasonable care); Anes v. Crown Partnership, Inc., 932 P.2d 1067, 1071 (Nev. 1997) ("Thus, a receiver authorized by the court to continue a business operation, or which is performing duties authorized by the court, is not personally liable for any losses incurred when it acts in good faith and its own misconduct or negligence did not cause the loss.")

In the Order to Show Cause hearing, the Bureau indicated that it was merely seeking the same "good faith" immunity normally afforded to receivers. *See* p. 21, *supra*. However, as noted, the Bureau submitted, and the Supreme Court signed, far broader language, purporting to confer immunity for any action taken in conducting the business of the insurer, in both official and personal capacities, regardless of whether his actions were in good faith or with appropriate care and prudence, and even regardless of whether such actions were in violation of court orders. Such broad-sweeping immunity is not provided for in the statute and is inconsistent with the common law. The Supreme Court erred in granting it.

This conclusion is further compelled by the fact that the Order conflicts with other provisions and the purpose of the insurance law. If review of the Order is analogized to statutory interpretation, "[courts] should look to the enactment as a whole, to discern the purpose and policy underlying the statute, and [give] the words a meaning which serves, rather than defeats, the ends intended by the Legislature." Corcoran v. Frank B Hall & Co., Inc., 149 A.D.2d 165, 172 (1st Dep't 1989) (internal quotation marks omitted); *see also* Albany Law School v. New York State Office of Mental Retardation and Dev. Disabilities, 19 N.Y.3d 106, 120 (2012).

The purpose of Article 74 is to distribute the assets of a defunct insurer and to protect the interests of the policyholders and the public. In this case, the court's broad grant of immunity neither protects the assets of the insurer nor the interests of policyholders. 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.

POINT III

THE LIQUIDATION COURT LACKED JURISDICTION AND OTHERWISE ERRED IN GRANTING PERMANENT INJUNCTIVE RELIEF TO THE RECEIVER AND OTHERS IN THEIR PERSONAL CAPACITIES

Similar to its grant of immunity, the Supreme Court granted the Receiver's request 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.

A. The liquidation court lacked subject matter jurisdiction to enter an injunction unrelated to the collection or disposition of ELNY assets.

The limitations on a liquidation court's subject matter jurisdiction have been addressed above. *See* pp.36-39, *supra*. The enjoining of claims other than those against ELNY or its assets is beyond the court's jurisdiction and is void.

B. The injunction is not authorized by Article 74.

Unlike immunity, Article 74 of the Insurance Law does contain a provision involving injunctions. However, it is inapplicable to the Receiver's request. 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.

N.Y. Ins. Law § 7419 (emphasis added).

Section 7419 and Article 74 are concerned with enjoining actions against the assets of the insurer, not those of the receiver. 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. Because a receiver is judicially immune from liability if he acts in good faith and with appropriate care and prudence, pp. 43-44, *supra*, the only actions that are effectively enjoined by the Order are those where a receiver breached fiduciary or other duties. In short, the Supreme Court's broad injunction is unsupported by, and inconsistent with, the Insurance Law.

C. The injunction is not supportable on any non-statutory basis.

"A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction." <u>Merkos L'Inyonei Church, Inc. v. Sharf</u>, 59 A.D.3d 403, 408 (2d Dep't 2009). "Injunctive relief is to be invoked only to give protection for the future . . . [t]o prevent repeated violations, threatened or probable, of the [plaintiff's] property rights." *Id.* (internal quotation marks omitted) (alterations in original). The burden is on the plaintiff to demonstrate the need for the injunction. *See id*.

Here, the Receiver presented no evidence that his property rights would be affected, let alone irreparably harmed absent the injunction. Rather, without evidence or argument, the Receiver simply asked for plenary injunctive relief, and the court said yes.

Even if the Receiver had properly sought an injunction, he could not show irreparable harm. As discussed above, a suit against the Receiver in his personal capacity is not the same as a claim against ELNY or its assets. *See* p. 38, *supra* (Liquidation Bureau maintains its own liability insurance). And while the Receiver and others might be inconvenienced by claims against them in their personal capacities, mere annoyance and "litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury" sufficient to authorize an injunction. Founders Ins. Co. Limited v. Everest Nat. Ins. Co., 41 A.D.3d 350, 352 (1st Dep't 2007).[6]

[6] The Receiver also argued that interlocutory orders in the rehabilitation proceeding contained similar language. Those injunctions were by definition temporary, not permanent. Moreover, a past bar to the filing of claims by payees is immaterial where such claims did not (will not) accrue until an order of liquidation is entered resulting in a loss of benefits. In any event, prior injunctive provisions would possess the same jurisdictional and statutory defects as that in the final order.

CONCLUSION

The expedited procedure below was so flawed, and the prejudice to the Shortfall Payees so great, as to violate constitutional principles of due process. Further, no statutory or common law basis existed for the Supreme Court's extraordinarily broad grant of immunity and injunctive relief.

If the Court finds a violation of due process, the Shortfall Payees respectfully request the Court reverse the Liquidation Order in its entirety. In the alternative, the Shortfall Payees request the Court reverse paragraphs 5-6 and 12 of the Liquidation Order (injunction and immunity, respectively).

Respectfully Submitted,

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