On November 15, 2012, the Appellate Division, Second Department heard oral argument on our appeal of Judge Galasso's order and decision dated April 16, 2012.

Karra J. Porter from Christensen & Jensen appeared on behalf of the shortfall payees. Porter's presentation, which included insightful questions from the panel, lasted approximately 20 minutes. Porter focused on aspects of the lower court proceeding that denied shortfall payees the right to verify the information that the Superintendent[1] and NOLHGA supposedly relied upon in formulating their restructuring plan. Porter also called the panel's attention to a critical issue on appeal: the scope of immunity, if any, to be accorded to the Superintendent under New York law. Here, Porter focused on controlling precedent, which makes clear that the Superintendent is a private actor when acting in his non-regulator capacity. Accordingly, Porter asked the panel to hold the Superintendent to the standard that applies to all private receivers. This standard requires the Superintendent (and his predecessors and agents) to act in good faith and with appropriate care and prudence - something that plainly has not happened with respect to ELNY over the past 21 years.

The Court seemed very interested in these arguments and appeared concerned about leaving shortfall payees without any remedy or recourse, as the order of liquidation here threatens to do.

Steve Bierman of Sidley Austin argued for the Superintendent and continued his pattern of blaming the victims and deflecting attention away from his client's misdeeds. Bierman claimed that shortfall payees were afforded a fair hearing and noted that Judge Galasso had determined that the liquidation

[1] The term "Superintendent" is used throughout to refer to the Superintendent of Insurance/Financial Services as ELNY Receiver.

of ELNY and the Superintendent's proposed plan were appropriate under the circumstances. Even assuming that was true (the lack of due process has left the shortfall payees no way to verify that this is, in fact, the case), the Superintendent requested and Judge Galasso erroneously approved a sweeping grant of immunity and what purports to be permanent injunctive relief. There is absolutely no basis for such relief, particularly given the facts. Bierman ***never even referenced***—much less tried to refute—clear evidence that demonstrates that the ELNY estate has been mismanaged by the Superintendent and his agents for years. Instead, Bierman exclaimed that it was "galling" for shortfall victims to challenge the carefully-orchestrated hearing that took place last March.

Of course, what is "galling" is the Superintendent's (and his predecessors') lack of care over decades and his current attempt to ensure that anyone responsible for the colossal failure of the ELNY "rehabilitation" is able to evade responsibility. Bear in mind, ELNY was solvent when the Superintendent placed it into rehabilitation. Moreover, the record demonstrates that the Superintendent and his predecessors repeatedly ignored the court's prior orders, wasted estate assets and actively concealed ELNY's true financial condition.

At argument, the Superintendent conceded (as he must) that a hearing is legally required here. What is "galling" is that the Superintendent essentially contends that the courts should ignore anyone other than his hand-picked representatives (and of course, NOLHGA), and prevent any meaningful verification of the Superintendent's assertions.

Yet again, Bierman reiterated the claim that the Superintendent represents all of the shortfall payees and purports to act in their best interests. Except when he

doesn't. Where have the Superintendents been over the past two decades? Why has he refused shortfall payees' requests to take action against the agents who precipitated ELNY's insolvency? Why is he proposing to move ELNY's assets to an unregulated captive insurance company in Washington, DC, a jurisdiction that has no connection to this matter other than its widely recognized lack of oversight in matters of insurance? Why is the Superintendent proposing a plan to "restructure" ELNY in a manner that gives state guaranty associations (with whom the Superintendent hatched the "restructuring" scheme) a preference over shortfall payees? Even worse, if the Superintendent has truly acted in the "best interests" of payees, why is he now attempting to ensure that he and others can permanently avoid responsibility for those very same acts – notwithstanding the unprecedented scope of the ELNY disaster that occurred under the supervision of the Superintendent's predecessors over many years?

At one point, Bierman was interrupted by one of the panel and asked what shortfall payees are supposed to do in situations where (as here) they uncover evidence of bad conduct by the Superintendent and his agents. Bierman claimed that the only potential relief for shortfall payees would be to ask Judge Galasso for relief from prior injunctions and grants of judicial immunity, the very matters under review by the Appellate Division. One of the judges openly and rightly questioned this circular answer.

As Ms. Porter noted, however, there is no basis in either New York or common law for a private receiver to grant himself or his agents such extraordinary relief. The original plan of rehabilitation was premised upon the notion that the Superintendent and his agents would protect ELNY's assets for the benefit of payees, specifically prohibiting waste. At best, it appears that the Superintendent is looking for a free pass for

conduct that constitutes waste; in other words, it appears that the Superintendent is merely perpetuating a decades long cover-up of numerous misdeeds.

As noted by Appellants in their brief and reply, the Superintendent is also looking for a "self-help" permanent injunction without ever demonstrating his entitlement to such relief. Usually, a party seeking a permanent injunction must show irreparable injury, a likelihood of success on the merits, and the equities must tip in favor of the party seeking such extraordinary relief. No such inquiry occurred here, and no finding of entitlement was ever established.

Rather, by fiat, the Superintendent is attempting to grant himself, along with his predecessors and the agents that they should have supervised, nearly absolute immunity and a permanent injunction. It would be difficult to imagine a more egregious miscarriage of justice.

And so the highly-charged ELNY saga continues. At least a dozen attorneys supporting the plan were in attendance at the oral argument, many there at the expense of the ELNY victims. In addition to the Superintendent's customarily bloated contingent of attorneys from Sidley Austin, NOLHGA had no fewer than a half-dozen attorneys in the courtroom. In addition, the New York Guaranty Association had counsel in attendance.

A decision is expected by year-end.