[INSIGHT] By Peter H. Bickford

Immunity For [All] Some!

Let's have a little chat about immunity. No, not immunity from retribution for squealing on Aunt Bea and her high stakes Saturday night poker game, or for giving state's evidence against the mob before disappearing into witness protection. And no, not immunity for blowing the whistle on your employer, or for acting badly as a diplomat.

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I would like to discuss whom if anyone should be entitled to immunity for acting poorly as the manager or operator of a business. If you screw up, you cannot be held liable. Absent outright fraud, your customers, suppliers, shareholders, investors, regulators or anybody else cannot sue you. You are given a free pass – immunity! I can see everyone nodding favorably for that benefit. Sure, who wouldn't want that deal? Just think of the savings on aspirin and liability premiums. Well, if that is your goal, you may want to consider a career at the New York Liquidation Bureau.

In his **Courtside** column in the August 20th issue, Lawrence Rogak reported on a NY Court's grant of judicial immunity to the liquidator and his representatives, including the Liquidation Bureau, in approving the liquidator's report in the US Capital Insurance Company matter. This grant of judicial immunity is but the latest in a string of orders over the past few years – mostly uncontested – that include a judicial immunity provision as requested by the NY superintendent of financial services (formerly the superintendent of insurance) in his non-regulatory role as liquidator or rehabilitator.

Looking solely at this recent string of orders one might get the impression that the issue of granting judicial immunity to receivers of companies in liquidation or rehabilitation is a well-settled and appropriate action. However, that conclusion might be a bit too broad, or at least should be subject to some scrutiny and discussion.

Many people are of the view that a public servant deserves to be protected for fulfilling a public service, and would find nothing remarkable about the receiver's request or the court's grant of this protection. However, whether or not receivers and their agents are acting as "public servants" or are simply private contractors appointed by the court for a limited purpose, like a court appointed guardian, is not all that clear. In New York, for example, the courts have determined that the Liquidation Bureau is not a state agency and hence is not part of the regulatory insurance department (what, then, is it a bureau of?).

Further, the Liquidation Bureau often states that it is a fiduciary for policyholders of a company in receivership. The NY insurance law is silent on whether the receiver acts as a fiduciary, but if the Liquidation Bureau believes it acts as a fiduciary, it would seem to be raising its own bar of conduct and provide even more reason for the receiver and his agents to be held responsible for their actions. Likewise, if the Bureau believes it is a fiduciary, its requests for immunity are a clear contradiction. Either way, what is so special about the job of receiver – managing assets, approving claims, etc. – to warrant immunity for screwing up?

A good example of the issue is presented by the recent order approving the liquidation of Executive Life Insurance Company of New York (ELNY) and the receiver's plan to restructure ELNY's annuity contracts (see my **Insight** column in the June 4, 2012 issue, "*A billion here, a billion there . . .*"). In the order the court included a provision requested by the rehabilitator granting him and his agents, including the Bureau, judicial immunity from "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 [the insurance law] . . ." This is the same broad language appearing in the U.S. Capital order and other recent orders.

The ELNY court's action in providing judicial immunity, however, shines a bright light on the issue of the appropriateness of the grant because of the history of ELNY. ELNY was not insolvent when taken into rehabilitation in 1991, and after 20+ years of rehabilitation it is now admittedly insolvent to the tune of more than $1.6 billion. In approving the rehabilitator's plan, the court specifically recognized that the hearing on the plan "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." If the court believed these matters to be outside the issue before him, why grant blanket immunity to those who may have been responsible for them?

An equally important consideration is whether the court should grant judicial immunity where the statute does not. The receivership process in most states is a statutory process carried out by the insurance commissioner (the superintendent of financial services in New York) under the supervision of the state courts. The rules and guidelines for the process are detailed in each state's statute, including specific injunctive authority to protect the estates in receivership. In all but a few states there

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is no statutory grant of immunity for the receiver or his or her agents (the New York and New Jersey statutes have no immunity provision and the Connecticut statute provides limited immunity for the receiver and employees, but not for professionals or other independent contractors engaged by the receiver). While a court has broad supervisory authority over an estate before it, the court is still bound by the confines and restrictions of the statute. Is it appropriate, therefore, for the court to go beyond the receivership statutes in granting judicial immunity to the receiver and his or her agents?

Several years ago the National Association of Insurance Commissioners adopted the current Insurance Receivers Model Act, which included optional immunity provisions for receivers and their agents. However, the immunity provisions were quite controversial and only a few states adopted an immunity option. But appropriate or not, shouldn't the issue be one for legislative consideration and action rather than judicial fiat on a case-by-case basis?

Isn't there a significant difference between a statutory policy determination that immunity is appropriate for all members of a particular group, and a court granting judicial immunity on a piecemeal basis simply because it is requested by the receiver?

If immunity should be applied on a case-by-case basis by the receivership court, shouldn't the court have to apply some minimal objective standards rather than to simply provide immunity upon request?

Immunity is often a touchy and controversial subject, and many observers question the logic in exempting receivers and their agents from responsibility for their actions, particularly for their gross mismanagement or worse.

What do you think? [IA]

Big "I" Presents Company Partners Best Practices Awards

ALEXANDRIA, V.a.—The Independent Insurance Agents & Brokers of America (IIABA or the Big "I") presented insurance carriers Central Insurance, Erie Insurance Group, Harleysville Insurance, Liberty Mutual Insurance, Progressive Insurance and Travelers with the prestigious Best Practices Award of Excellence at the recent education convocation held in conjunction with the Big "I" Leadership Conference this weekend in Atlanta.

The awards recognize those companies that have made imaginative, outstanding and unique contributions in advocating Best Practices philosophies that enhance the independent agency system. The Big "I" Best Practices program provides performance benchmarks and business strategies that serve as a guide to improving agency performance.

Central Insurance Companies, a Trusted Choice® and CAP company, launched their support for the Best Practices program as agents requested help from their company partner to grow their personal lines books of business. Central used the Best Practices studies to develop and implement a Best Practices plan. Central communicates the value of the resources through agent education and business consulting, its website and monthly agency newsletters and other outlets. Central uses Best Practices in their agent workshops and meetings to help them grow their book of business, regularly publish articles on Best Practices topics for their agents, actively participates in the Council for Best Practices and promotes the program on their website. Central has actively nominated agencies to participate in Best Practices studies.

The awards recognize those companies that have made imaginative, outstanding and unique contributions in advocating Best Practices philosophies that enhance the independent agency system. The Big "I" Best Practices program provides performance benchmarks and business strategies that serve as a guide to improving agency performance.

"Through numerous professional development, online and company-wide efforts, Central Insurance Companies promotes the philosophies of the Best Practices through materials in agent education, business consulting and numerous innovative efforts," continued Rusbuldt. "We applaud Central's ongoing leadership and cutting edge efforts."

Since Best Practices was launched in 2001, **Travelers**, a Trusted Choice® company, has been recognized each year and their support of the program continues to grow stronger. Travelers is committed to communicating the value of the resources and working with agents to help them grow their agencies. Working with thousands of agencies, presenting keynote ses-

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