[COVER] By Peter H. Bickford

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OPINION: Ongoing ELNY Debacle Exposes Serious Problems

The New York Superintendent of Financial Services and the New York Liquidation Bureau have experienced two major victories in the past few weeks. First, they succeeded in having the lawyers for the shortfall victims of Executive Life Insurance Company of New York (lovingly referred to as ELNY) held in contempt for having the audacity to try and do what the Superintendent has failed to do – seek to hold accountable the parties responsible for the failure of ELNY; and secondly, they have succeeded in having the court's approval of the liquidation and restructuring plan affirmed on appeal, including the broad grant of immunity to the superintendent and the Bureau. Before celebrating too much, however, the superintendent should recognize the hollowness of these victories.

Even though the courts have once again come to the rescue of the Bureau, the ELNY fiasco fully exposed the Bureau for its decades-long covert mismanagement of insolvent insurance companies. The Bureau has long held itself out as the champion of the victims of these insolvencies: the policyholders and claimants. For time immemorial it has been able to operate under the radar, without any significant oversight or accountability, while all along imposing its special brand of control over insolvent estates at the expense of the very policyholders and claimants it says it is protecting.

But now, because of ELNY, the dark underside of the beast has been exposed: the Bureau is now the king without his clothes – the faux wizard behind the curtain – the deep, dark rotting swamp whose pungent bouquet can no longer be ignored! *The great ELNY disaster has dispelled any lingering doubt about the failure of the Bureau to perform its most basic fiduciary responsibility to its constituents – policyholders and claimants.*[1]

The great remaining mystery is the unwillingness of the administration, the courts, the legislature and the industry to admit the scope of the ELNY disaster and the failings of the

1 I am not alone in this assessment. See, for instance, the special November 2012 issue of National Underwriter Health & Life entitled *"The Complete ELNY Saga: Twenty-one years of Mismanagement, Corruption, Broken Promises and Shattered Lives,"* which is still available on line at http://www.lifehealthpro.com/pages/elny.php?ref=hp

insolvency process, and to take appropriate action to remedy these systemic problems. Even stranger are the lengths that the administration and the courts have gone to in order to preserve the myth of the Bureau's fiduciary role without fiduciary accountability, or to protect it from any form of meaningful external investigation or scrutiny.

The superintendent's two recent court victories are just the most current examples of the strength of this continuing partnership between the administration and the courts. In essence, they fortify the superintendent's long-standing position that he and only he has the power to take action on behalf of victims of an insolvent insurer, even if the company became insolvent on his watch and even if he refuses to take any action to seek recovery for or to protect the victims.

What do you think would happen to the management of a licensed insurance company if it sold off its best business, transferred its best assets to the purchaser, left all the worst business supported by its weakest assets in the company, allowed the company to become insolvent by more than $1.5 billion, and hid the company's insolvency from the public for over a decade? It is highly unlikely – no, totally unlikely – that management would be allowed to continue to control the company let alone be allowed to develop and implement a plan for restructuring the company's outstanding contracts and winding up its business. But this is what the Bureau, with the support of the administration and the courts, have been able to do with ELNY!

Lest anyone thinks that this is just a local NY problem only affecting a small number of claimants in one estate, you are wrong. *The ELNY debacle affects the entire industry, including the guaranty fund structure and the growing nationwide debate on State v. Federal regulation of insurance.* ELNY has exposed the deficiencies in the State insolvency process including the lack of meaningful and seamless financial standards for insolvent companies and guaranty fund coverage for its policyholders. The attacks against continued state regulation of the business of insurance is focused primarily on solvency and unless the states can show that they have appropriate standards and ability to enforce those standards the attacks could result in a sea change in regulation. The time to finally establish a responsible and responsive insolvency process is now. The recent court decisions should be the final straw dashing any lingering hope that those in charge of the process have any will to fix or interest in fixing the endemic problems. The decades long festering infection cannot be resolved with band-aids. It will require a complete overhaul of the system.

Bottom Line: It is time to shut down the New York Liquidation Bureau!

Whoa! Shut it down? Isn't that a bit drastic? Can't it simply be tweaked and made more accountable and responsive? What about all those hard-working people at the Bureau (yes, there have been many competent, conscientious people over the years at the Bureau)? The problem, however, is not the people; it is the institution – a Steinbergian contraption (As in artist

continued on page 24

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ELNY Debacle Exposed

continued from page 23

Saul Steinberg: look it up!) whose lack of accountability over the decades has made it a breeding ground for corruption and abuse. Consider the following:

- The NY Insurance law has no definition of the Liquidation Bureau.
- The New York Court of Appeals (the State's highest court) had determined that the Bureau is NOT a state agency and therefore not subject to examination by the State Comptroller or subject to the Freedom of Information Law.
- Although each estate managed by the Bureau is purportedly "court supervised," there is no requirement in the law for the Bureau to file any plan, financial or other report with the supervising court, or to issue any status report to policyholders or other creditors whatsoever. In fact, almost all of the Bureau's contacts with the courts are done ex parte – without any notice to or involvement of interested parties.
- Once an insurer is placed under control of the Bureau, it ceases to be subject to any regulatory oversight, and ceases to file any standard, periodic, regular reports or financial statements with any regulatory body or the supervising court.

Because it has been able to operate under the radar and totally unaccountable for decades, the Bureau as it exists today cannot and should not be saved. It is time for all affected parties – the regulators, legislators, guaranty funds and the industry and consumers who ultimately pay for the consequences of the failed system – to recognize this failure and to insist on a complete overhaul. The time has passed to simply kick the can down the road again.

In a future column (or two, or three), I will explore how the process should and can work efficiently and truly for the benefit of the victims of an insolvency, and what course the legislature with the support of the regulators and the industry could take to successfully and meaningfully restructure the insolvency process.