

Mixed Messages

There were two recent, seemingly unrelated events involving NY's superintendent of financial services – one in his capacity as the chief financial services regulator and one in his separate role as receiver of an insolvent insurer – that send strikingly opposite messages. First there was the very public castigation

to fire four employees who played central roles in the bank's improper conduct, a partner of a prominent National law firm is cited in the article as commenting that the New York regulators, more than any other agency, "put their money where their mouth is" on holding individuals liable.

Contrast the action against

turing plan slashing the benefits of the shortfall victims, and after all appeals for reconsideration of the plan were rejected, certain of the shortfall victims urged the superintendent as regulator to, at the very least, investigate the mismanagement of the estate and hold those determined to be responsible accountable for their misconduct. When the superintendent ignored these requests, the shortfall victims attempted to do so on their own by bringing a Federal lawsuit – not to overturn the restructuring plan approved by the courts, but to pursue those parties responsible for ELNY's colossal failure while in state rehabilitation.

What was the superintendent's response? He went back to the State court that approved the liquidation plan and got it to hold the lawyers for these shortfall victims in civil contempt and fined. The basis for the contempt? Violation of the broad immunity provisions inserted into the liquidation order as insisted on by the superintendent for anyone who had anything to do with the rehabilitation of ELNY and the restructuring plan. Rather than risking ongoing contempt fines, the lawyers withdrew the Federal action. The current filing is an attempt to have this contempt determination reversed.

The contrast with Commerzbank is striking. On one hand, the superintendent pursued and took action against Commerzbank for its misconduct, including action against individual employees of the bank directly involved in the misconduct. On the other, the same superintendent refused to investigate the mismanagement of the ELNY estate, sought and obtained immunity for all involved, and sought and obtained civil sanctions against the lawyers for their audacity in attempting to do what the superintendent refused to do.

The actions by the superintendent in the ELNY matter were not simply passive. They were intentional. Because there is no provision for statutory immunity for the receiver or his agents in the Insurance Law, the superintendent had to proactively seek inclusion of immunity in the order,

Contrast the action against Commerzbank and certain of its employees with the failure of the same New York regulator in his capacity as receiver of ELNY to take any action to hold anyone accountable for ELNY's \$2 billion failure under the supervision of his predecessors or, possibly more troubling, his extraordinary efforts to shield those responsible and thwarting any and all efforts by the shortfall victims to independently seek redress for the mishandling of the ELNY estate.



Peter H. Bickford

of the New York branch of Commerzbank AG held accountable to the tune of \$1.45 billion in fines (\$610 million of which went to the DFS) for "Banking Law violations in connection with transactions on behalf of Iran, Sudan, and a Japanese corporation that engaged in accounting fraud." In addition to the monetary fines, Commerzbank was forced to terminate employees found to have engaged in improper conduct, and to install an independent monitor to ensure future compliance with anti-money-laundering laws.

The other event was the recent filing by representatives of the shortfall victims of the failed rehabilitation of Executive Life Insurance Company of New York (ELNY) of a petition to New York's Court of Appeals in a last-ditch effort to get the contempt order against them reversed.

What could these two events possibly have to do with each other?

A Dow Jones News Service article on the Commerzbank settlement emphasized that the "weight of responsibility for potential unlawful conduct is increasingly being borne by individuals . . ." Referring to the settlement terms requiring Commerzbank

Commerzbank and certain of its employees with the failure of the same New York regulator in his capacity as receiver of ELNY to take any action to hold anyone accountable for ELNY's \$2 billion failure under the supervision of his predecessors or, possibly more troubling, his extraordinary efforts to shield those responsible and thwarting any and all efforts by the shortfall victims to independently seek redress for the mishandling of the ELNY estate.

(Refresher course: 20 plus years after having been placed in rehabilitation as a solvent company to "protect" its assets from its insolvent parent, ELNY was determined to be insolvent by almost \$2 billion. In 2012 the court approved the receiver's liquidation plan that addressed the shortfall through contributions from state guaranty funds and by slashing about \$900 million in policyholder benefits. The bulk of these cuts were visited on 1500 of the 10,000 or so policyholders, mostly structured settlement annuitants, many of whom were victims of accidents or other traumas deeply dependent on the payments – the so-called shortfall victims.)

After the court approved the liquidation of ELNY and the receiver's restruc-

continued on page 10

continued from page 8

and he did so on the broadest possible basis without regard for the claims of mismanagement.

Why, some ask, do I keep harping on the failure of Executive Life? The answer is simple: the superintendent has publicly and repeatedly preached about the need for aggressive action to ensure that the consumer is protected from improper actions by regulated companies. He keeps making headline after headline about his

aggressive actions against wrongdoing, failure to comply with the law and protection of the consumer of financial services. And now, with the Commerzbank settlement, he is also pursuing individual employees involved in improper acts as well as the licensed company.

There is no quarrel with these actions when pursued for the right reasons and against proven wrongdoing. However, the superintendent's motive and sincerity must be questioned in view of his lack of pursuit of wrongdoing and mismanagement under

There is no quarrel with these actions when pursued for the right reasons and against proven wrongdoing. However, the superintendent's motive and sincerity must be questioned in view of his lack of pursuit of wrongdoing and mismanagement under his own roof.

his own roof. In ELNY, the superintendent as receiver not only failed to protect those policyholders most seriously affected by the decades-long mismanagement of the estate while in rehabilitation, he purposely cut off any and all attempts by those victims to seek their own recourse.

Until the superintendent provides a plausible explanation for his failure to follow his own preaching by pursuing those responsible for a \$2 billion loss, and why he intentionally prevented those most affected by that loss from filling the void, I will continue to ask the questions. Without answers, his white-knight legacy against the evil wrongdoers in the banking and insurance worlds must come with a very large asterisk.^[A]

Peter Bickford has over four decades of experience in the insurance and reinsurance business, with particular focus on regulatory, solvency, agency, alternative market and dispute resolution issues. In addition to his experience as a practicing attorney, he has been an executive officer of both a life insurance company and of a property/casualty insurance and reinsurance facility. A complete biography for Mr. Bickford may be accessed at www.pbnylaw.com.

**INSURANCE
ADVOCATE**[®]
www.insurance-advocate.com

SIMPLIFYING IT

www.maple-tech.com

Custom Configured Solutions

Our award-winning Aspire Information System is real-time... web-based... a complete end-to-end scalable solution custom configured to address all of your business requirements for Policy, Claims and Reinsurance Transactional Administration.



Information Technology Solutions
THAT WORK FOR YOUR BUSINESS

SYSTEM FEATURES

- Software as a Service
- Rating Engine
- Forms Generation Engine
- Automated Batch Processing
- Bulk Payment Processing
- Accounting (Premium & Loss)
- Financial Analytics
- 3rd Party Service Integrations
- Portable Data Analytics
- Agent/Broker Profiles

TRADING PORTALS

| | | |
|---------|----------|----------|
| Company | Producer | Consumer |
|---------|----------|----------|

| | |
|------------------|------------------|
| SUPPORTED | BUREAUS |
| P&C - All | ISO |
| A&H | AAIS & all other |
| AD&D | Stat Plans |

CORE MODULES

- Policy
- Claims
- Reinsurance

SUPPORTED

- Admitted
- Surplus Lines
- Risk Retention Groups
- Captives
- Self Insureds



Maple Technologies

A Limited Liability Company

...building technology solutions to grow your business...

500 Craig Road, 2nd Floor
Manalapan, NJ 07726
732-863-5523

Call us today to discuss your technology needs in more detail. At Maple Technologies we have an Aspire solution that will respond to your business requirements and fit your budget.