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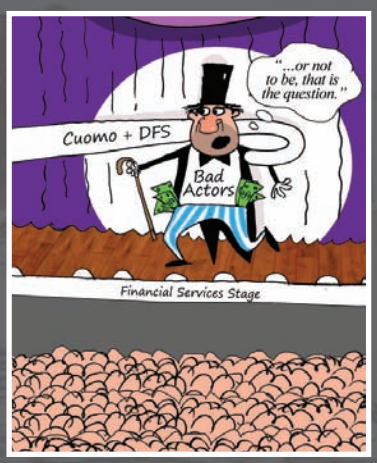

Peter Bickford

Bad Laws/Bad Actors

PART II

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Bad Laws/Bad Actors Part II

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.

When a corporation doing business across many states runs into significant financial difficulty, it has two principal courses of action available under the US bankruptcy laws: reorganize or be liquidated. In either case, the Bankruptcy Court oversees the process with all affected parties being represented. Management itself may seek reorganization, but any plan has to be fully vetted with participation by representatives of creditors and other interested parties before approval by a specialized court. In a corporate liquidation, an independent trustee is appointed by the court to manage the marshalling of assets and payment of creditors, again with all interested parties being represented and having a voice in the proceedings with ultimate approval by a knowledgeable bankruptcy judge.

Compare the federal bankruptcy process to the strange world of insurance receivership starting with the appointment of an insolvent insurer's regulator—not a specialized manager—as its receiver and purported protector of all interested parties, with oversight by a randomly selected, non-specialized judge. The inherent issues with the current insurance receivership process have been widely discussed by insurance professionals and educators for decades, and not limited to a few outliers. For instance, in 2000 a task force of the Tort and Insurance Practice Section of the American Bar Association, whose members are experts in all aspects of the receivership process, identified three significant problems with the process: (a) failure to insure that qualified persons will be administering insurance receiverships; (b) inadequate accountability for and an oversight over their performance; and (c) a lack of incentives in statutory authority and procedures to bring estates to closure. Many of the same conclusions were reached in a 2002 study by the Center for Risk Management and Insurance Research at Georgia State University, which concluded "[t]here is little transparency and accountability, and regulators and the courts do not exercise adequate oversight of receivers and receiverships."

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While some states have since introduced a semblance of accountability in their receivership process (*see*, for example, Texas), little has been accomplished nationally over the years to improve the insurance receivership process or address its well-documented deficiencies—a lack of transparency, accountability and oversight.

And then there is New York!

In addition to the same deficiencies that most other states endure, New York has also developed a superfluous undefined appendage to the process: The New York Liquidation Bureau.

At the March 2012 hearing on the liquidation of Executive Life Insurance Company of New York (ELNY), the then-head of the New York Liquidation Bureau described the Liquidation Bureau as follows:

> "As I said, we know we are not a State agency, on the basis of a Court of Appeals decision of several years ago; we are not a taxpayer-funded agency. We are a pass-through entity. But we are not specifically defined as to our legal form."

He is right: there is no statute, charter, deed, royal grant, indenture or endowment defining or empowering the New York Liquidation Bureau. Although its website states that the liquidation bureau has been carrying out the responsibilities of the superintendent as receiver since 1909, there was absolutely no mention of a liquidation bureau in the insurance law until 1993, and even today there are only two sections in the entirety of New York's Consolidated Laws mentioning a liquidation bureau—neither of which include a definition or description of its duties.[1*]

And because the NY Court of Appeals long ago determined that the liquidation bureau is not a state agency, it is not subject to audit by the attorney general's office or any other government oversight mechanism, nor is it subject to public access to records under the Freedom of Information Law (FOIL).

All of which makes the liquidation bureau an "off the books" operation ripe for abuse and a potential home for "bad actors." Not that there are any known bad actors in the bureau, but if there were, who would know?

When former Superintendent Lawsky was presented with the opportunity to unmask potential abuses, mismanagement and improper activity in the liquidation bureau with regard to the Executive Life liquidation back in 2011-12, he not only passed on the opportunity, he also blocked any attempts by others to do so. But the Lawsky administration has not been the only administration to protect the liquidation bureau from outside scrutiny. Its lack

of statutory foundation, transparency and accountability has been recognized for decades, spanning numerous administrations from all ends of the political spectrum, yet no significant action has been taken by any administration or the legislature to address these issues. It is as if the liquidation bureau was some kind of politically protected enclave.

In apparent response to criticism of the lack of oversight in the receivership process, in 2008 the NY legislature added a statutory requirement for an annual audit of the liquidation bureau (again without providing any definition or authority for its existence) and each estate—regardless of size—in receivership. Rather than providing significant oversight as its proponents suggested, however, the requirement actually provides even greater cover for the liquidation bureau and unnecessary cost to the estates at the expense of claimants of each estate.

The audit reports do not have to be provided until August 1st each year, making them quite untimely to be of much use. But of use to whom? The statute requires the reports be provided to the "department and the legislature" but without any directions or authority for reviewing or questioning the audits. There is not even a requirement that the audit reports be provided to the court "overseeing" each estate. Then again, there is no requirement for any regular, periodic reporting to the court, no requirement for detailed plans of rehabilitation or liquidation, and no standard for policyholder or creditor participation in the receivership process except through the agents of the receiver, the unaccountable liquidation bureau.

Which brings us back to Health Republic Insurance Company!

The judge presiding over the Health Republic liquidation proceedings, NY Supreme Court Justice Carol Edmead, continues to require the receiver's representatives to post all proceedings on the Health Republic website, press for more details on claims processing and expenses, and hold conferences and render rulings on proposals presented to her. But with all her hands-on efforts, major issues looming over the receivership proceeding have not been fully addressed and are more and more unlikely to ever be addressed, including the failure of the DFS, the superintendent as receiver, or the receiver's agents (i.e., the liquidation bureau):

- To explain the gap between the consent to liquidation by Health Republic's board in October 2015 and the petition to liquidate in March 2016;
- To prepare or cause to be prepared complete and meaningful opening financial statements as of the date of liquidation as would be expected of any reasonable manager assuming responsibility for a business entity;
- To provide details regarding the expenses incurred and paid out of the assets of Health Republic between the consent to liquidate in October 2015 and the issuance of the order of liquidation in May 2016;
- To explain why these expenses were incurred at all before the liquidation order was entered, or why these expenses are not voidable preferences under the law;
- To address conflicts of interest of and preferential status provided to carryover third party providers of operating, claim, web, legal and other services;
- To explain paying close to $6 million in "administrative expenses" from the date of liquidation in May 2016 through year-end 2016 without obtaining court approval as required by statute;
- To provide policyholders, providers and other creditors of Health Republic and the court, with a comprehensive plan for the liquidation of Health Republic as promised by the receiver in April 2016; or
- To explain what ever happened to the purported "official investigation" announced by the DFS in November 2015, into "the causes of the inaccurate representations to NYDFS regarding the company's financial condition."

Why aren't these issues being addressed by the court? Quite simply, it's the system. Most NY judges have no idea that the liquidation bureau is not a state agency, or that the receiver is not acting as the superintendent of the DFS but as a private individual appointed to act as receiver under the court's supervision. The result is an undue deference given to the receiver's agents in proceedings like Health Republic, including a reluctance to allow third party representatives of policyholders or other creditors a seat at the table, or to hold the receiver's agents accountable for their actions.[2**]

The receiver's agents (i.e., the liquidation bureau) control the materials provided to the court, and because these agents oppose any challenge to their perceived sole and absolute authority to speak on behalf of policyholders or other creditors, the court either does not know there are unaddressed issues or the explanations provided by the receiver's agents go unchallenged. The court will likely sign orders from time to time approving actions taken on behalf of the Health Republic estate, and may even get the receiver and her agents to do some things they might not have done if left entirely to their own devices, but those actions will not come close to true oversight.

Even if a court fully understood and wanted to exert control, its ability to do so is remarkably limited. And if the court should get too close to actual, consequential oversight, the superintendent holds the ultimate wild card—the ability to disappear in the middle of the night. Under a seldom discussed provision of the insurance law (Section 7421), the superintendent, on her own motion, without notice to anyone including policyholders or other creditors, can move the liquidation proceeding to another jurisdiction anywhere in the state. She can do this on application to any supreme court justice so that the judge previously handling the case need not even know the case has been moved until it is done.

Now that's unbridled Power! (And, yes, it has been used in the past!)

If there is to be a serious dialogue about bad actors and accountability in the insurance business, the unaccountable, conflict-ridden multi-$billion receivership industry must be included in the conversation.

**One of those references is in NY's Retirement and Social Security Law underscoring the anomaly that although employees of the liquidation bureau are not state employees, they are included under the state's pension system.*

***Another example: since about the time of the ELNY fiasco, superintendents have routinely inserted a judicial immunity provision in all proposed liquidation or rehabilitation orders for them and their representatives (i.e., the liquidation bureau). Although there is no statutory basis for such broad immunity, the courts seem to accept the provision as part of a "pro forma" order.*