MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

In the Matter of the Rehabilitation of
Executive Life Insurance Company of New York,

HON. JOHN M. GALASSO
J.S.C.
Decision Reserved: 03/29/12
Index No. 8023/1991
Part 35

Decision Date: 04/16/12

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This decision follows an 11 day hearing pursuant to two pending orders to show cause (motion sequence numbers 109 and 111) and is based upon the credible testimony and evidence in addition to the several Court exhibits plus all motion and opposition papers submitted.

The Court also considered the statements made on the record by counsel and by individual objectors without counsel. The undersigned has read the objections, correspondence and e-mails sent directly to chambers and reviewed the 20-year litigation history as maintained in the office of the Nassau County Clerk. *

In making this determination, objections made by attorneys on behalf of certain individuals were taken into account as if made on behalf of all objectors, including those without counsel or who did not appear in person as well as on behalf of all those persons similarly situated.

The original petitioner in this proceeding was the former Superintendent of Insurance of the State of New York in his capacity as receiver of distressed insurance companies, now upon the restructuring of certain State agencies designated the Superintendent of Financial Services. Over 20 years ago, Executive Life Insurance Company of New York (ELNY) ** began experiencing financial difficulties. In order to protect its payees, creditors and other obligees, the Superintendent petitioned to have ELNY declared to be subject to rehabilitation, appointing the Superintendent (and his successors in office) to be ELNY's Rehabilitator. The New York Liquidation Bureau (NYLB) was charged in carrying out the Superintendent's duties to direct the affairs of ELNY, such as paying annuity claims out of ELNY's assets (see Insurance Law Article 74).

* With the extensive evidence, papers and law available to assist the Court in reaching a decision, the undersigned concluded that post-hearing memoranda were unnecessary.

** ELNY is not to be confused with its parent Executive Life Insurance Company or other companies that may come under the auspices of sister state regulations.

In accordance with the law, the Superintendent's rehabilitation plan was approved to maximize the potential benefits for ELNY's structured settlement and other annuitants. This resulted in NYLB paying the annuitants as permitted under the rehabilitation plan and order at a 100% return rate, which continues to the present time.

Recently, due to the severe economic downturn affecting ELNY's assets as well as other companies that might have otherwise invest in ELNY, the Superintendent as Rehabilitator determined that rehabilitation of ELNY was no longer a viable option. The value of ELNY's assets had plummeted and would continue to drop; therefore the 100% returns could no longer be maintained indefinitely. The sooner an order of liquidation was obtained, the better it would be for ELNY's payees to receive the highest possible present value for their annuity benefits.

Consequently, 16 months ago the Superintendent, the only person with such authority under the law, submitted an application for an order of liquidation pursuant to Sections 7403 (c), 7404 and 7405 (a) of the Insurance Law, thereby converting this proceeding from one for rehabilitation to one for liquidation.

Originally it was hoped that a stipulation of settlement could be reached for the benefit of ELNY's payees and creditors. Since that did not occur, the Court directed the Superintendent to form a liquidation plan to go into effect upon the declaration of ELNY's insolvency.

The resulting Plan (later slightly amended by the Superintendent) was submitted for the Court's approval and a hearing scheduled.

It is important to note that in a liquidation proceeding, the Court's only authority by law is to approve or disapprove the plan. A court cannot amend or supplement a plan or allow objectors to submit a proposed plan.* As noted above, the New York State Superintendent of Financial Services has the sole authority to formulate a plan under the laws of New York and the participating states within the statutory structure.

This means, the scope of the hearing before the undersigned 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.

For example, certain objectors attempted to call witnesses, including the prior CEO of the now defunct ELNY as well as former Governor Elliot Spitzer, in an attempt to establish under circumstances existing years ago during that administration why the State did not seek liquidation, believing this might result in all ELNY's policyholders recouping 100% of the value of their annuities. However, contrary to a premature press release issued during that time, any purported agreement was not confirmed through the appropriate legal process.

* Similar to a federal bankruptcy proceeding, a liquidation regulated by state law is the means employed to gather and distribute the remaining assets of an insurance company. In bankruptcy, the Trustee submits a plan for the Bankruptcy Court's approval.

In any event, permitting testimony regarding events taking place 5 years ago would result not only in speculation as to what but also would be irrelevant to the proceeding at hand: to either approve or disapprove the Plan on the facts as they exist today.

Therefore, in considering first the application for a declaration that ELNY is insolvent, there is no question that the Superintendent has established that fact (see Insurance Law section 7404 and 7402). Simply put, ELNY is unable to pay its outstanding lawful obligations as they mature in the regular course of business (Insurance Law section 1309 (a)). This was demonstrated by the testimony of Jonathan L. Bing, the Special Deputy Superintendent of the NYLB and the audited statutory balance sheets in evidence, which as of December 31, 2012 reported liabilities exceeded reported assets by 1.5 billion dollars.

Accordingly, the Court declares ELNY to be insolvent and by order converts this former rehabilitation proceeding into a liquidation proceeding. The Superintendent, formerly the Rehabilitator, is appointed to be the Liquidator.

The Court concludes that the Superintendent has complied with sections 7405, 7419 and 7432 in satisfying the framework under which the Superintendent may seek liquidation and the Court may adjudicate the insolvency of an insurer.

Having made these two determinations, the Court *sua sponte* severs those portions of the orders to show cause concerning them, leaving the approval or disapproval of the Plan as the remaining issue.

The Plan as proposed must be clear concerning how ELNY's remaining assets will be allocated among its policyholders in accordance with the law. The priority of distribution of claims on what is called ELNY's estate assets can be found in Insurance Law section 7435.

As relevant to this proceeding, all claims under insurance policies, annuity contracts and funding agreements plus all claims of the Life Insurance Company Guaranty Corporation of New York created under Article 77 of the New York Insurance Law or any other guaranty corporation or association of this state or another jurisdiction are claims submitted by a group denominated Class 4 as described in the statute.

Guaranty associations or corporations of sister states enacted through the laws of their local legislatures were created to provide their respective residents with coverage for policies such as the ones at bar when an insurance company is liquidated. The coverage is subject to limits called caps. The National Organization of Life and Health Insurance Guaranty Associations (NOLHGA) is the umbrella organization for those associations choosing to participate jointly in structuring a liquidation plan which would include payees from member states. *

Since the objectors as well as the non-objectors to the proposed plan reside in multiple states, it is critical to understand that the contributions from their respective state guarantee associations are limited by the state cap enacted. This is true for all insurance companies under similar circumstances that do businesses in that state.

* Not all states have a corresponding guaranty association or have a similar corporation that belongs to NOLHGA.

In formulating the proposed plan over many months of consulting together, the Liquidation Bureau along with NOLHGA and other industry participants set forth the mathematical formula that must be applied to everyone in the same statutory class, objectors and non-objectors alike. Simply stated as testified to by LBNY's witnesses, ELNY's remaining estate assets would be allocated equally to each person on a *pro rata* basis, meaning the same percentage of the present value of their annuity benefits.

That way, whether one's claim or policy was big or small, the same objective computation would apply, each payee getting the same percentage in accordance with the value of their annuity benefits. *

To distribute the estate in any other manner, such as allowing the same dollar amount to be distributed to each payee alike or by favoring one person's need over another's, would not be an objective calculation made in accordance with the statutes and case law, but rather a subjective one favoring certain section of Class 4 payees over another. This is both illegal and discriminatory.

Therefore, as calculated by the current value of ELNY's estate,** approximately one-third (1/3) of the current value of their annuity benefits will be allocated to each payee. From there the 40 participating state guaranty associations will cover the difference between the 1/3 estate asset allocation and its state's cap for residents of that jurisdiction.

In applying these cap contributions to each individual payee, the Superintendent calculated which of the approximately 10,000 payees were to receive 100% of the present value of their annuity benefits. That number amounted to 85% of the total policyholders. Also as calculated, the remaining 15% annuitants would receive varying amounts of less than full present value.

Since money from one state's fund cannot by law be allocated to another jurisdiction to be applied to its residents nor is there a national guarantee fund to assist in coverage, there are no other resources from which funding could be mandated by the Court.

However, the Plan also provides for additional contributions entitled "negotiated enhancements," as opposed to those required by law. An enhancement provides additional monies to add to the "pot" made available to the 15% loss-payees.

For instance, NOLHGA agreed to prefund contributions rather than paying into the fund as it become due so all monies would be available upfront for GABC to administer and invest, allowing for greater returns. The guarantee associations have also agreed to provide additional funds if the estate assets are not sufficient to cover annuity contracts requiring upfront funding of a higher amount.

* Estate assets would be transferred to the newly created Guaranty Association Benefits Company (GABC), to be distributed along with the state guarantee association contributions and additional support from certain volunteer life insurance companies. GABC would continue to be supervised by the NYLB, with New York State retaining jurisdiction.

** This will be determined as of the effective date of the order of liquidation and revised from time to time.

More importantly, a third source of funding made directly to the restructuring agreement Plan is being contributed *voluntarily* by the life insurance industry to add to the resources available to the 15% loss claimants.* Therefore, the plan's current approximate nine (9) hundred-plus million dollars of ELNY estate assets and the seven (7) hundred million dollars of the participating guarantees associations allocated according to statute (sub-totaling 1.62 billion dollars) is being enhanced by 71 million dollars to the benefit of these payees, including those parties not covered by any guarantee association (total 2.32 billion dollars).

These same (non-ELNY) life insurance companies have also through their own boards of directors agreed to establish a hardship fund of an additional100 million dollars outside of the Plan now before the Court. Since the hardship fund is not restricted by law in how contributions are distributed, applications may be honored on a subjective as-needed basis.

Therefore, as part of the restructuring Plan in addition to outside of the Plan, 171 million dollars will be voluntarily set aside only for the benefit of the shortfall payees, benefits that would not otherwise be available in a straight liquidation process. An administrator for the consortuim of life insurance companies will be appointed separately for the hardship fund, if this Plan is approved. Furthermore, certain insurance companies such as Travelers, the Fireman's Fund Companies and Hartford have assured the Court that they will make up the difference to those identified shortfall payees for any settlement obligation where they purchased an ELNY annuity on behalf of the injured party. **

It bears mentioning again that if this Plan is not approved there could be no prefunding or voluntary enhancements of any kind offered in the future. In addition, without the coordination of coverages as to individual policies everyone would, upon receiving their *pro rata* share of the ELNY estate assets, have to apply to their own states to determine how much the guarantee association contribution will be. For some, the answer may be zero (0) dollars.

The Superintendent's Plan was reached after almost one-and-a-half years of negotiation, evaluation and computation. It was made upon expert advice and input pursuant to his duty to take into consideration all those parties comprising Class 4, in accordance with the law.*** The undersigned is convinced that without the Plan and NOLHGA, left to their own devises policyholders will be worse off under any alternative proposal. Moreover, if the Court were to delay this decision for any reasons the value of ELNY's assets will most likely diminish, resulting in a reduced *pro rata* share.

* Voluntarily has its ordinary meaning: these companies did not have to contribute at all, having no obligations to ELNY or its policyholders. Consequently, the Court cannot direct the voluntary contributors to add more to the "pot."

** J. G. Wentworth/Peachtree Funding, in the business of purchasing annuities for lump sum payments, has also assured the Court that to the extent a shortfall is due to ELNY as creditor under its purchase contracts, the company will not seek restitution from ELNY's former payees that entered into a lump sum agreement.

*** Given the complexity of formulating a Plan in statutory compliance, any request for a 120-day adjournment or postponement to allow the objectors to arrive at a possible alternative plan is neither practical nor legal. As noted above, only the Superintendent may submit a plan for approval or disapproval. The disingenuous request based on a reduction to 30 days to submit a proposed plan made toward the end of the hearing was denied for the same reason.

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To those individuals who suffer because of a reduction in current value of their benefits, while the undersigned sincerely regrets their diminished financial future through no fault of their own, the Court cannot apologize for applying the law as it pertains to everyone involved. Their individual, understandable frustrations cannot be resolved in this proceeding.*

Accordingly, under the circumstances as presented in this case and by applying the law, the Plan as proposed and amended by the Superintendent of Financial Services for the State of New York is hereby approved by separate order signed this date.**

April 16, 2012

Hon. John M. Galasso, J.S.C.

ENTERED
APR 23 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE

* As noted above, some of the loss-payees, may be able to access additional funding. However, those individual procedures are not before this Court.

** Counsel for NYLB is directed to serve a copy of this decision with notice of entry upon all ELNY payees.