THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS SUPERIOR COURT

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

FULLER-AUSTIN DEFENDANTS' MOTION TO RECONSIDER THE COURT'S ORDER ON THE COMMISSIONER'S AND LIQUIDATOR'S MOTION FOR ORDER GOVERNING CONFIDENTIALITY OF REGULATORY DOCUMENTS

Zurich Insurance Company, Zurich American Insurance Company, Zurich-American Insurance Company of Illinois, American Guarantee & Liability Insurance Company, American Zurich Insurance Company, Steadfast Insurance Company, and Orange Stone Reinsurance (the "*Fuller-Austin* Defendants") request that the New Hampshire Superior Court reconsider its Order dated February 19, 2010. In its Order, the Court granted the motion made by Roger A. Sevigny, the New Hampshire Insurance Commissioner and Liquidator of the Home Insurance Company ("Home"), for an order governing confidentiality of regulatory documents ("Motion"). The reason for the *Fuller-Austin* Defendants' Motion to Reconsider is the Court's failure to consider the argument that the documents at issue in the Motion are no longer confidential because the statutes cited in the Order do not apply to an insurer in liquidation.

ARGUMENT

The Motion is unclear as to in which capacity the Commissioner sought relief. The title of the Motion is "Commissioner and Liquidator's Motion for Order Governing Confidentiality of Regulatory Documents." Motion at 1. The first line states that an order was sought by "Roger A. Sevigny, both as Insurance Commissioner of the State of New Hampshire and as Liquidator (*collectively* "Commissioner") of the Home Insurance Company." Motion at 1 (emphasis added).

The pleading was submitted by "Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire and Liquidator of the Home Insurance Company." Motion at 17. However, the prayer for relief is styled as a request from "the Liquidator." Motion at 17.

The distinction between the Commissioner's regulatory role and his role as Liquidator of the Home is an important one because they are two separate and distinct functions. When acting as regulator, the Commissioner is charged with carrying out New Hampshire's insurance statutes and overseeing the conduct of insurers in New Hampshire. When acting as the Liquidator, however, the Commissioner steps into the shoes of an insolvent insurer for the purpose of unwinding the company in an orderly fashion. This distinction is important, not only as it relates to the respective rights and obligations of the Commissioner and the Liquidator, but also as it relates to important public policy concerns: a failure to distinguish between the Commissioner and the Liquidator could lead to an unintended bridge between the Home's liabilities and the state's treasury.

However, regardless of the capacity in which the Commissioner moved, the statutes that the court relied upon in its Order do not apply in the case of an insurer in liquidation. These statutes provide that certain information and documents that an insurer is required to provide to the New Hampshire Insurance Department ("NHID") are confidential and not subject to subpoena or other civil discovery. See RSA 400-A:37-IV-a; RSA 401-B:7; and RSA 404-F:8. For example, the examination statute provides that examination material "shall not be made public by the commissioner or any other person and shall be confidential by law and privileged, shall not be subject to [New Hampshire's Right-to-Know Law], shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action." RSA 400-A:37-IV-a. The purpose of such confidentiality provisions is to encourage regulated

insurers to cooperate with the NHID's examinations and other information-gathering efforts by placing such information beyond the reach of the insurer's competitors. However, a properly formulated discovery request to an insurer in liquidation does not implicate this legislative purpose.

With respect to his role as the Liquidator of the Home, the statutes do not apply because the Home, which has been in liquidation since 2003, does not retain any proprietary business interest in the specific information sought by the *Fuller-Austin* Defendants, in their narrow, targeted requests. The statutes provide that material disclosed to the NHID is confidential to provide assurance to insurers that their sensitive information cannot be obtained by competitors and other third parties. The statutes therefore "protect the free flow of information between the NHID and companies it is regulating." Order at 4. However, there is no need to protect a free flow of information in the instant case because the Home is not a functioning, regulated insurance company. Rather, the Liquidator, acting separately from the NHID's regulatory function, is charged with marshalling the Home's assets, distributing them to policyholders and other creditors, and ultimately dissolving the company. The Home does not write insurance and has no business advantage to gain or lose through the disclosure of examination materials of the sort sought by *Fuller-Austin* Defendants; nor does a discovery request to the Home, as opposed to the NHID, improperly involve the NHID in civil discovery.

Indeed, at least one foreign state's court has recognized this distinction between the confidentiality interests of a functioning insurer and an insurer in liquidation. In Consolidated Edison Co. of N.Y., Inc. v. Ins. Dep't. of N.Y., Consolidated Edison sought from the Superintendent of Insurance disclosure of information pertaining to Con Ed's claim against an insurer in liquidation under the New York's Liquidation Bureau. 532 N.Y.S.2d 186, 191 (N.Y.

Sup. Ct. 1988). With respect to documents in the Superintendent's possession, which he "would have received in the normal course of his duties as regulator of the insurance industry," the Superintendent argued that such documents were confidential pursuant to New York's examination statute.[1] Id. The court held that "[i]n view of the defunct status of [the insurer in liquidation], the reasons for such confidentiality no longer exist," and therefore the documents were subject to disclosure. Id. A discovery request to an insurer in liquidation for otherwise confidential material is nevertheless proper because the statutes do not apply to a defunct insurer, which lacks the confidentiality interest held by an insurer with an ongoing business.

Nor do the statutes apply to the Commissioner in his regulatory role. The Commissioner does not possess a confidentiality interest in information regarding an insurer that is independent of the insurer's own interest. Because the insurer has no confidential business information to protect, disclosure can be no impediment to the flow of information between the insurer and the regulator. The Consolidated Edison case is instructive here as well: the documents in that case were subject to disclosure, although they were in the Superintendent's possession, because the insurer was defunct and had no business secrets to protect. Id. Therefore, because the material is not protected by statute in the Home's possession, it is not protected in the Commissioner's possession either.

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[1] The confidentiality provisions of New York's examination statute are substantially similar to RSA 400-A:37: "The superintendent shall keep the contents of each report made pursuant to this article and any information obtained in connection therewith confidential and shall not make the same public without the prior written consent of the controlled insurer to which it pertains unless the superintendent after notice and an opportunity to be heard shall determine that the interests of policyholders, shareholders or the public will be served by the publication thereof. In any action or proceeding by the superintendent against the person examined or any other person within the same holding company system a report of such examination published by him shall be admissible as evidence of the facts stated therein." N.Y. INS. LAW § 1504(c) (McKinney 2006).

CONCLUSION

For all of the foregoing reasons, the *Fuller-Austin* Defendants respectfully request that the Court:

1. Grant this Motion for Reconsideration;

2. Schedule a hearing on the Motion; and

3. Grant any other relief the Court deems appropriate.

Respectfully submitted,

ZURICH INSURANCE COMPANY, AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY, AMERICAN ZURICH INSURANCE COMPANY, ZURICH-AMERICAN INSURANCE COMPANY, ZURICH AMERICAN INSURANCE COMPANY OF ILLINOIS, STEADFAST INSURANCE COMPANY, and ORANGE STONE REINSURANCE

By their attorneys,

SULLOWAY & HOLLIS, P.L.L.C.

Dated: March 1, 2010

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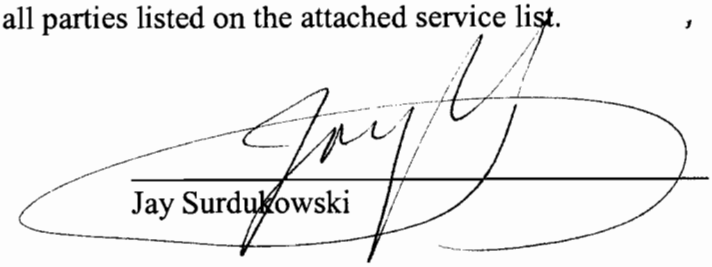
CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2010, a copy of the foregoing was sent by first-class mail postage prepaid on all parties listed on the attached service list.



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STATE OF NEW HAMPSHIRE

MERRIMACK, SS SUPERIOR COURT

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

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C

Supreme Court, New York County, New York, IAS Part 37.

Application of CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., Petitioner,
For a Judgment Pursuant to CPLR Article 78
v.
The INSURANCE DEPARTMENT OF the STATE OF NEW YORK, James P. Corcoran, Superintendent of Insurance, and Paul F. Altruda, Assistant Deputy Superintendent, Respondents.

July 15, 1988.

Insured party brought Article 78 proceedings against State Insurance Department to disclose certain documents pursuant to Freedom of Information Law. On Department's motion to dismiss, the Supreme Court, New York County, Parness, J., held that: (1) liquidation bureau of State Insurance Department, which carries out liquidation of insolvent insurers, is not "agency" of state for Freedom of Information Law purposes, and (2) documents filed by insurer with State Insurance Department were discoverable by insured under Freedom of Information Law in that alleged confidentiality of documents ended when insurer became insolvent.

Motion granted in part.

West Headnotes

[1] Records 326 ⚿50

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k50 k. In General; Freedom of Information Laws in General. Most Cited Cases
Where applicable, Freedom of Information Law relief may be had regardless of availability of discovery through some other means. McKinney's Public Officers Law § 84.

[2] Records 326 ⚿51

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k51 k. Agencies or Custodians Affected. Most Cited Cases
Liquidation bureau of State Insurance Department, which carries out liquidation of insolvent insurers, is not "agency" of state for Freedom of Information Law purposes, in that bureau functions administratively and financially independent of state, performing its function, for all practical purposes, in same manner as liquidation of any private corporation by a private receiver. McKinney's Public Officers Law § 84; McKinney's Insurance Law § 7401 et seq.

[3] Records 326 ⚿51

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k51 k. Agencies or Custodians Affected. Most Cited Cases
Superintendent of State Insurance Department acts in judicial capacity as liquidator of insolvent insurers, and thus is specifically exempted from Freedom of Information Law requests under that statute's judicial exemption; though superintendent is statutorily appointed, he remains subject to court control over all major decisions in liquidation. McKinney's Public Officers Law § 86, subd. 3; McKinney's Insurance Law § 7401 et seq.

[4] Records 326 ⚿54

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k53 Matters Subject to Disclosure; Exemptions
326k54 k. In General. Most Cited Cases
Documents filed by insurer with State Insurance Department were discoverable by insured under Freedom of Information Law in that alleged confidentiality of documents ended when insurer became insolvent. McKinney's Insurance Law § 1504.

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[5] Records 326 ⚿54

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k53 Matters Subject to Disclosure; Exemptions
326k54 k. In General. Most Cited Cases
License applications filed by various entities with State Insurance Department were "records" kept by Department in its regulatory capacity, and thus were available to insured party under Freedom of Information Law, notwithstanding fact that records were currently being held by Department Superintendent, as liquidator of insolvent insurer. McKinney's Public Officers Law § 87, subd. 2.

****186 *970** Charles E. McTiernan Jr., New York City, for petitioner Consolidated Edison Co.

Jones Hirsch Connors & Bull, New York City, for intervenor respondents.

Robert Abrams, Atty. Gen. by Asst. Atty. Gen. Hugh Weinberg, New York City, for James P. Corcoran and Paul F. Altruda.

STANLEY PARNESS, Justice.

Petitioner, Consolidated Edison, (Con Edison), by CPLR Article 78, seeks to compel ****187** respondents to comply with petitioner's ***971** request, to examine certain documents in respondent's possession relating to Northumberland Insurance Company, (Northumberland), this pursuant to the Freedom of Information Law [FOIL] [Public Officers Law 84 et seq.]. Respondents now move to dismiss the petition.

In April, 1984 Con Edison sustained certain losses which it contends were covered by Northumberland. In 1985, Northumberland U.S., a New York licensed carrier, became insolvent and was placed in liquidation pursuant to Article 74 of the Insurance Law.

Article 74 provides for a Property Casualty Insurance Fund to be maintained to pay claims upon policies insuring New York risks which are unpaid because of an insurer's insolvency. Upon the application to the Supreme Court, the Superintendent is appointed as liquidator of the insolvent carrier (7404, 7417 Insurance Law). The Liquidation Bureau has been designated as the entity which actually carries out the liquidation, handles claims, etc.

Con Edison made claim for its losses to the Liquidation Bureau which rejected same asserting that the policy covering petitioner was not with the New York licensed, Northumberland U.S. but with its Canadian parent company, Northumberland General Insurance Company (Northumberland Canada). The latter, not being licensed in New York, is not covered by the fund.

Con Edison then served a FOIL request in which it sought to inspect all documents in the possession of respondent which relate either specifically to its claim, e.g. reasons for rejection, investigatory reports etc., or generally to the manner in which all claims relating to Northumberland are handled by the fund including documents relating to the corporate structure of the two Northumberland entities. The request was served upon the Insurance Department and not upon the Liquidation Bureau. The Department produced some documents. Others were refused upon the ground that they are in the possession of the Liquidation Bureau and are not covered by FOIL.

Under FOIL § 87(2) "each agency shall ... make available for public inspection and copying all records" except records specifically exempted by FOIL.

As defined by FOIL the term agency means "any state or municipal department, board, bureau.... or other governmental entity performing a governmental or proprietary function***972** for the state.... except the judiciary or the state legislature". (§ 86[3])

[1] Where applicable FOIL relief may be had regardless of the availability of discovery through some other means. Thus, the fact that petitioner may obtain similar disclosure under the CPLR, in any plenary action it may bring against the fund on its claim, does not preclude it from seeking FOIL relief, if warranted. (*Farbman v. N.Y.C. Health & Hospital Corp.*, 62 N.Y.2d 75, 476 N.Y.S.2d 69, 464 N.E.2d 437).

Respondent's resistance to FOIL applicability in this case is however, grounded in the following asser-

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tions.

1. That the Liquidation Bureau is not an "agency" of the State or State department and as such is not subject to FOIL.

2. That the Superintendent of Insurance and the Liquidation Bureau are acting in a "judicial capacity" with respect to liquidation of Northumberland and thus fall within the judiciary exception to FOIL.

3. That certain documents submitted with the Northumberland application are exempt from disclosure pursuant to the Insurance Law.

The initial inquiry to be made, therefore, is whether the liquidation bureau is an "agency" or "bureau" of the state or department thereof and is thus subject to FOIL.

To support the position that it is, petitioner cites several factors as indicative of that fact. To wit, the official letterhead of the Liquidation Bureau reads State of New York, Insurance Department Liquidation Bureau and bears the seal of the State of ****188** New York; in addition the Bureau is listed in the "official" State of New York Red Book in the "Insurance Department" section. Petitioner also argues that the Bureau performs a governmental function in implementing the mandate given by the legislature to the Superintendent of Insurance to prevent wasting of assets of insolvent insurance companies.

In essence, petitioner's argument is that liquidation of insolvent insurers has been taken by the legislature from private receivership and been given to the Insurance Department, a State agency. (Citing *Matter of Knickerbocker Life Ins. Co.*, 199 A.D. 503, 504, 191 N.Y.S. 780)

Respondents, however, contend that in its role as liquidator, the Liquidation Bureau performs a private function. It asserts that it has simply assumed the historical function held by private individuals as receivers.

***973** Essentially, the Bureau claims that it merely takes over the assets of the company but that they in fact remain "private" and its sole function is to "run" the company as a liquidator. To bolster its claim that it is not an agent or bureau of the state, the Bureau points to the following facts:

1. The Bureau pays Federal and State and City taxes on each insurer it administers including corporate sales and occupancy taxes and files a Federal return. A State entity would be exempt from taxes.

2. Where an insurer in liquidation has a parent company, that parent continues to file a consolidated tax return with the insolvent company thus indicating that the insolvent continues to retain its "private status" when taken over by the Bureau.

3. The Bureau continues to employ officers and employees of the insolvent insurer who remain non-State employees. Indeed, it has been held that these employees, unlike other State employees, are covered by State Employment Insurance. (*Re Kinney* 257 A.D. 496, 14 N.Y.S.2d 11, aff. 281 N.Y. 840, 24 N.E.2d 494).

4. The Bureau is not represented, as a State agency would be, by the Attorney General but retains private counsel.

5. The Bureau is not included in the general budget of the State Insurance Department.

6. The assets of the insolvent are retained separate and apart from those of the State treasury and are held in fiduciary accounts solely for the benefit of policyholder, and creditors.

7. The Superintendent as liquidator and the Liquidation Bureau have no governmental immunity. Judgments against them are not obligations of the state. (*Bean v. Stoddard, Superintendent*, 207 A.D. 276, 201 N.Y.S. 827, aff. 238 N.Y. 618; *N.Y. State Thruway v. Hurd*, 29 A.D.2d 157, 286 N.Y.S.2d 436).

8. The governmental immunity which requires that suits against State agencies be brought in the Court of Claims does not apply to litigation involving the Liquidation Bureau. All court proceedings are brought in the Supreme Court.

9. The Liquidation Bureau, unlike a governmental agency, is not covered by the state for malpractice but must obtain its own errors and omissions cover-

age

Indeed, all of these circumstances cited by respondents are inconsistent with the contention that the Superintendent as liquidator or his Bureau is an "agency" of the State.

***974** To best understand the status of the Superintendent, as liquidator, consideration of the historical context within which his designation as such arose would be appropriate.

Historically, insolvent insurers, as with other insolvents were placed into receivership by order of the court and private receivers were appointed to administer the insolvent's estate. Finding the system of private receiverships to be wasteful if not subject to corruption, the legislature in 1909 designated the Superintendent of Insurance to be the receiver in all cases involving insolvent insurers. The purpose of the law "was to provide for an economical liquidation of insolvent insurance companies through the agency of a State department and to prevent the waste of assets which therefore had been occasioned ****189** through receiverships" (*Matter of Knickerbocker Life Ins. Co.* supra; *Matter of Casualty Co. of America* [Rubin], 244 N.Y. 443, 155 N.E. 735). Petitioner, Con Edison, contends that this legislative designation of the Superintendent, a public official, as receiver-liquidator of insolvent companies, implicates state action. This, Con Edison contends, is similar to the state takeover by public authorities of the subways and buses.

However, there is an essential difference between a state or municipal operating authority and the Liquidation Bureau. Such authorities operate these services for the benefit of the general public while liquidation is for the protection of private policy holders or creditors. Further, the assets of the private buses or subways become the property of the authority to be used for the public, while, as stated, the assets of the insolvent carrier are used to pay claims arising out of private insurance contracts or those of private creditors.

There is no case in New York which has analyzed or defined the term "agency" as employed in FOIL. However, several Federal cases have dealt with this issue under a comparable Federal FOIL statute. These suggest several factors to be considered in determining an entity's "agency" status. These are:

1. Whether the entity is performing a governmental function.

2. Presence of substantial governmental control over its day to day operation.

3. Nature of the government's financial involvement with the entity.

4. Status of its employees (*Forsham v. Harris*, 445 U.S. 169, 174-180, 100 S.Ct. 977, 981-84, 63 L.Ed.2d 293 [1980]; ***975***Railway Labor Executives' Assoc. v. Conrail*, 580 F.Supp. 777; *Washington Project v. HEW*, 504 F.2d 238, 248 [cert. den. 421 U.S. 963, 95 S.Ct. 1951, 44 L.Ed.2d 450]; *Lombardo v. Handler*, 397 F.Supp. 792, aff. 546 F.2d 1043). Applying these factors to the instant case we find that the Insurance Department or its Superintendent, exercises no detailed or extensive day to day supervision of the Liquidation Bureau. Further the Superintendent, as liquidator, must account and is responsible only to the court which appoints him. The process of liquidation is not subject to administrative review. The state has no financial interest in the insolvent insurer whose assets in liquidation remain separate from the State treasury.

In sum, the Bureau has none of the attributes which are ordinarily associated with a State agency or bureau.

Further, in construing the meaning of the term "agency" under FOIL, it must be assumed that the legislature intended it to be given its commonly accepted meaning i.e. an entity which acts on behalf of the State to carry out some public benefit. The Bureau does not serve such a general purpose. It functions independently, administratively and financially independent of the state. Its only identifiable connection with the state is the fact that a state public official, the Superintendent of Insurance, rather than a private receiver, is authorized to take control of the assets of the insolvent. Once he does so and its assets come under the control of the Bureau it is for all practical purposes, the same as the liquidation of any private corporation by a receiver.

[2] Accordingly, I find that the Superintendent, as liquidator or the Liquidation Bureau is not an

"agency" of the State for FOIL purposes.

As an alternate argument in opposition to this FOIL application, respondents contend that the Superintendent acts in a "judicial capacity" as a liquidator and is thus specifically exempted from FOIL under the statute's judicial exemption (POL § 86[3]). This makes FOIL applicable to any State agency which is defined as "any State or Municipal department ... *except the Judiciary or the State Legislature....*" (emphasis supplied.) Under POL § 86[1] " 'Judiciary' means the courts of the State...." (emphasis supplied).

Respondents' contention is that the Superintendent and the Bureau act in the traditional role of a "receiver" and as such he is an officer of the court and is not a "public officer". ***976** (****190***Mechanics Lumber v. Cohen,* 173 Misc. 605, 18 N.Y.S.2d 547, aff. 260 A.D. 863, 23 N.Y.S.2d 557). Thus the property received as liquidator-receiver is held by him in "custodia legis", i.e. under control of the court. (*In re Studio 54 Disco, Inc.,* 21 B.R. 308, 313 n. 7 [E.D.N.Y.1982]; *Atlantic Trust v Chapman,* 208 U.S. 360, 28 S.Ct. 406, 52 L.Ed. 528; *Copeland v. Salomon,* 56 N.Y.2d 222, 451 N.Y.S.2d 682, 436 N.E.2d 1284). Petitioners however, assert that the Superintendent is not an officer of the court citing *Matter of Lawyers Mortgage Co.,* 293 N.Y. 159, 56 N.E.2d 305. In that case the court held that the Superintendent as liquidator acts "as a statutory receiver,-not as a receiver for the court .." since he derives his appointment from the governor and legislature and his authority from the statute.

That case, however, should be interpreted within the context of the facts presented. There, the court was asked to compel the Superintendent-liquidator to approve a certain plan for reorganization of the insolvent. The lower court concluded that while it could not compel acceptance of the plan, it had the right of veto of any other actions of the Superintendent. In rejecting the power of the court to veto discretionary powers of the liquidator, the decision appears to uphold the legislature's intent to vest in the Superintendent the primary right to make decisions concerning the disposition of assets of the insolvent.

However, though the Court of Appeals in *Lawyers Mortgage Co.,* supra limited to some degree the court's power over decisions made by the Superintendent as liquidator, it did not conclude that he was not as any receiver would be, subject to court supervision.

Indeed, subsequent cases re-affirm the fact that as a receiver, albeit a statutory one, the Superintendent-liquidator remains subject to court control of over-all major decisions in liquidation. In *Superintendent v. Banker's Life,* 401 F.Supp. 640, 648 (S.D.N.Y.1975) the court stated that the Superintendent does not have unfettered "discretion over the administration of the assets of the insolvent ... but that his acts are measurably subject to the direction, supervision, and control of the court entering the order of liquidation." See also *Tolfree v. New York Title,* 2nd Cir., 72 F.2d 702, in which the court held that when the Superintendent by court order took possession of property of the insolvent he "became in effect a receiver under the supervision of the State court, and its property ... was in "custodia legis." Indeed, Supreme Court supervision and approval is required at each stage of liquidation.

***977** Under Article 74 of the Insurance Law a separate court order is needed to authorize the Superintendent to move against an insolvent company. All major decisions made by the Liquidation Bureau require court order. Where there is a disputed claim, each claimant is entitled to a hearing. The hearing is held before a referee appointed not by the agency but by the Supreme Court. After such hearing, each referee's decision must be approved (or may be disapproved) by the court. Appeals from the court's decision go to the Appellate Division (and not through some administrative appellate procedure).

All these controls exercised by the court, which are traditionally associated with court appointed receiverships are further affirmed and codified in the Insurance Law. Sections 7411, 7412, 7434, specifically preclude the Superintendent from disbursing any of the assets of the insolvent without court approval. That the Superintendent, as liquidator, is to be treated as a receiver of the assets of a private corporation rather than as a public official is demonstrated by the fact that the court may require him to post a bond (§ 7409).

Clearly the Superintendent has no real authority to act independently of the court. It would appear that for whatever its import, the 1944 decision in *Lawyers Mortgage Co.* cited by Con Edison has little prece-

dential value in defining the present legal significance of the Superintendent-Court relationship. The present operation of the Liquidation Bureau mirrors completely the traditional role of the court appointed receiver. In *National Bondholders v. Joyce,* 276 N.Y. 921, 11 N.E.2d 552 [1937] the court considered the power of ****191** the court to supervise the Superintendent's actions stating:

"The conduct of the liquidation is subject in all its phases to the supervision and control of the court, except in so far as the Legislature may have vested discretionary power in the superintendent. Save for this, the court in its discretion, may veto the acts of the superintendent as liquidator, and is vested with a discretion which may override that of the superintendent. If the present action had been brought by the superintendent, his conduct would have been subject to the supervision and discretion of the court, in accordance with the decisions of this court. In such an action the application of a stockholder to intervene would rest within the discretion of the court."

The Legislature in creating an apparatus to deal with ***978** insolvent insurers, did so utilizing the traditional concept of court receivership. Had it intended State control, it could have provided for complete State takeover of the insolvent and its assets, and complete agency processing of claims and liquidation subject only to Article 78 review. Instead, it carefully provided for segregation of the insolvent's assets, separation of administrator and processing of claims from State involvement. This, all to be subject to review not by the executive but by the judiciary.

[3] I, therefore, conclude that the Superintendent as liquidator (and the Liquidation Bureau) as with any other court appointed receiver, enjoys the judicial privilege recognized in § 86(3) of POL (FOIL).

[4] The fact that this court herein determines that the Liquidation Bureau or the **Superintendent** as liquidator is not subject to FOIL does not dispose of every item requested by Con Edison under FOIL. Several items requested (items 26-36) refer to **documents** filed by Northumberland-US with the Insurance Department pursuant to the Insurance Law. These, the **Superintendent** would have received in the normal course of his duties as regulator of the insurance industry. Respondents, however, claim that these **documents** are " **confidential**" pursuant to § 1504 of the Insurance Law. In view of the defunct status of Northumberland, the reasons for such confidentiality no longer exist. Absent some other reason to exempt them from FOIL, which is not demonstrated herein they remain subject to FOIL disclosure. (See *Washington Post v. N.Y. State Insurance Dept.,* 61 N.Y.2d 557, 475 N.Y.S.2d 263, 463 N.E.2d 604).

[5] Similarly, those items requested by petitioner which seek to examine license applications filed by various entities with the Insurance Department are "records" kept by the Superintendent in his regulatory capacity and are available to petitioner under FOIL.

Further, the fact that these records pertaining to licensing or registration of Northumberland related entities are now held by the Superintendent, as liquidator, does not change their character as Insurance department records and as such they remain subject to FOIL.

It should be noted that whether or not any of the items requested by petitioner may be additionally exempt from FOIL because of specific statutory exemption has not been examined by the court. If such exemption exists, then the burden is upon the petitioner to " 'articulate particularized ***979** and specific justification', and to establish that 'the material requested falls squarely within the ambit of [the] statutory exemptions' ", *Farbman v. N.Y.C. Health & Hosps.,* 62 N.Y.2d 75, 83, 476 N.Y.S.2d 69, 464 N.E.2d 437. This respondents have failed to do.

Accordingly, respondents' motion to dismiss is granted solely to the extent indicated.

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