

STATE OF NEW YORK
SUPREME COURT
COMMERCIAL DIVISION

COUNTY OF ALBANY

In the Matter of the Rehabilitation of
FRONTIER INSURANCE COMPANY

COPY

DECISION
AND
ORDER

Application of

STEVEN POIZNER, INSURANCE
COMMISSION OF THE STATE OF
CALIFORNIA IN HIS CAPACITY AS
LIQUIDATOR OF FRONTIER PACIFIC
INSURANCE COMPANY,

Petitioner.

Index No. 97-06

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

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Hon. Richard M. Platkin, A.J.S.C.

Steven Poizner, the Insurance Commissioner of the State of California (“the Commissioner”), brings this petition in his capacity as liquidator of Frontier Pacific Insurance Company, seeking an order compelling the immediate liquidation of Frontier Insurance Company (“Frontier”) and for such other relief as may be just, proper and equitable.

Respondent James Wrynn, the Superintendent of Insurance of the State of New York (“the Superintendent”), in his capacity as Rehabilitator of Frontier (“the Rehabilitator”), moves to dismiss the petition.

BACKGROUND

On October 10, 2001, Supreme Court, New York County (Lehner, J.) issued an Order of Rehabilitation pursuant to Article 74 of the Insurance Law. Based on a finding of insolvency, Frontier was placed in rehabilitation, and the Superintendent was appointed as Rehabilitator. Venue in the rehabilitation proceeding was transferred from New York County to Sullivan County, the principal place of business of Frontier, and ultimately to Albany County.

Frontier Pacific Insurance Company (“FPIC”) is a California-domiciled subsidiary of Frontier. Upon Frontier’s insolvency, the Commissioner determined that FPIC also was insolvent, and it was placed into receivership under California law.

By the instant petition, the Commissioner, in his role as liquidator of FPIC (“FPIC Liquidator”), seeks an order declaring that the Superintendent’s eight year effort to rehabilitate Frontier has failed, that further attempts at rehabilitation would be futile, and that the Court should compel the immediate liquidation of Frontier pursuant to Insurance Law § 7404 in order to protect policyholders and other creditors from ongoing injury.

In the petition and supporting papers, the FPIC Liquidator alleges that Frontier's remaining insolvency of \$90 million after almost nine years rehabilitation is prima facie proof of the need to shift the focus of this proceeding from rehabilitation to liquidation. The FPIC Liquidator further alleges that respondent has failed to establish a plan of rehabilitation that would restore Frontier to solvency and bring the rehabilitation proceeding to a conclusion within a reasonable time period. Petitioner further complains that the Rehabilitator has failed to conduct the rehabilitation in an open and transparent manner, thereby depriving interested parties of the opportunity to be heard with respect to the conduct of the rehabilitation. Finally, the FPIC Liquidator alleges that under the management of the Rehabilitator, Frontier has engaged in a pattern and practice of acting arbitrarily and capriciously towards its policyholders, creditors, business associates, reinsurers, affiliates and subsidiaries, including FPIC, and allegedly has made illegal preferential payments in the course of the rehabilitation.

The Rehabilitator moves to dismiss the petition, raising a variety of procedural and substantive objections. The Rehabilitator's principal contention is that under the statutory framework established in Article 74, only the Superintendent in his official capacity as regulator may apply to the court for an order of liquidation. Thus, the Rehabilitator contends that the FPIC Liquidator, as a putative creditor, lacks standing to obtain the relief that it seeks. Relatedly, the Rehabilitator argues that any proceeding seeking to compel the Superintendent to apply for an order of liquidation must be brought against the Superintendent in his official, public capacity as regulator, not in his private capacity as Rehabilitator.

Following receipt of the parties' written submissions, oral argument was held on May 12, 2010. This Decision and Order follows.

DISCUSSION

Pursuant to Insurance Law § 7402 (a), “[t]he superintendent may apply . . . for an order directing him to rehabilitate [an insolvent] domestic insurer.” Similarly, Insurance Law § 7404, entitled “Grounds for Liquidation”, provides that “[t]he superintendent may apply under this article for an order directing the superintendent to liquidate the business of a domestic insurer . . . , whether or not there has been a prior order directing the superintendent to rehabilitate such insurer.” Further, with respect to an insurer in rehabilitation, Insurance Law § 7403 (c) states that “[i]f at any time the superintendent deems further efforts to rehabilitate such insurer would be futile, he may apply to the court . . . for an order of liquidation.” By way of contrast, Insurance § 7403 (d) authorizes “[t]he rehabilitator or any interested person upon due notice to the superintendent” to apply for an order terminating the rehabilitation where the “purposes of the proceeding have been fully accomplished.”

It is clear from the text of article 74 that the Legislature intended to give the Superintendent the exclusive prerogative to apply to the Court for an order of liquidation. It is likewise well established that article 74 is the “exclusive mechanism” for rehabilitation and liquidation of insolvent insurers (*Matter of Frontier Ins. Co.*, 57 AD3d 1302, 1303 [3d Dept 2008]). Accordingly, the Court concludes that since the FPIC Liquidator is not authorized to pursue the relief he seeks, the petition must be dismissed for lack of standing and the failure to state a cognizable claim for relief.¹

¹ In reaching the foregoing conclusion, the Court does not and need not consider the authority of a rehabilitation court to transition from rehabilitation to liquidation on its own initiative after due notice to the Superintendent and an opportunity to be heard where it finds that the purposes of the rehabilitation cannot be accomplished and that policyholders, creditors and other interested parties are being injured as a result of continued efforts at rehabilitation.

Further, as the Rehabilitator correctly observes, insofar as the FPIC Liquidator seeks an order in the nature of mandamus compelling the Superintendent to apply for an order of liquidation or challenges the Superintendent's failure or refusal to apply for such an order as arbitrary, capricious or contrary to law, a judicial challenge under CPLR article 78 properly is directed to the Superintendent in his official capacity as regulator. As the Court of Appeals emphasized in *Matter of Dinallo v DiNapoli*, "the Superintendent as liquidator [or rehabilitator] occupies a legal status that is separate and distinct from that of Superintendent of Insurance as the public official charged with regulating the industry generally" (9 NY3d 94, 103 [2007]). As liquidator or rehabilitation under Article 74, the Superintendent acts in a "judicial and private" role, in contrast to the "administrative and public" role that he plays as "regulator" of the State's insurance industry (*id.*).

Based on the foregoing, the Court concludes that even if the petition filed by the FPIC Liquidator alleged facts sufficient for the Court to order the immediate liquidation of Frontier, the requested relief must nonetheless be denied and the petition dismissed.²

* * *

Notwithstanding the dismissal of the FPIC Liquidator's petition, the Rehabilitation Court recognizes its responsibility for overseeing the Superintendent's efforts in his "judicial and private" role as rehabilitator of Frontier. After all, *Dinallo* teaches that the Superintendent as Rehabilitator "operates as a statutory receiver who stands in the shoes of a private entity" (*id.*). In discharging that responsibility, it is necessary and appropriate for the Court to examine from time to time the current extent of judicial oversight and evaluate whether additional or different

² The Court notes that the petition is not verified and that petitioner relies solely upon an attorney affirmation to support the allegations of the petition.

measures would benefit the rehabilitation process and the policyholders, surety obligees, creditors, reinsurers and other parties with an interest in the Frontier rehabilitation proceeding (hereinafter "Interested Parties").

As this rehabilitation proceeding prepares to enter its tenth year, the Court finds that it is necessary and appropriate to: (1) examine the progress that the Rehabilitator has made in removing "the causes and conditions" that have made this rehabilitation proceeding necessary (see Insurance Law § 7403 [a]); (2) require the Rehabilitator to develop and submit to the Court for its approval a plan of rehabilitation for restoring Frontier to solvency, including an assessment of how long continued rehabilitation efforts are expected to take; and (3) give Interested Parties an opportunity to be heard regarding the Rehabilitator's prior efforts and his future plans.³

In calling for the Rehabilitator to account for his efforts to remove the causes and conditions of Frontier's insolvency and to develop a plan of rehabilitation that will guide efforts going forward, the Court emphasizes that it does not rely upon or accept the allegations of wrongdoing set forth in the FPIC Liquidator's petition. Nor does the Court accept the FPIC Liquidator's contention that an insurance rehabilitation should be limited to six months, two years or some other arbitrary time period. And the Court acknowledges that there is no extant order requiring the Rehabilitator to develop a plan of rehabilitation or to otherwise provide a greater level of disclosure or transparency than is presently being provided.

Indeed, the Court does not rely upon the petition at all. Rather, the Rehabilitation Court simply uses the occasion of this proceeding to identify and initiate additional oversight measures

³ As to the particulars of the form and content of the accounting and plan of rehabilitation, the Court leaves such matters to the Rehabilitator's sound discretion in the first instance.

that would assist it in discharging its responsibility to oversee this statutory receivership, ensure openness and transparency, allow Interested Parties a meaningful opportunity to be heard, promote public confidence in the rehabilitation process, and allow for development of a factual record that may be useful in guiding this proceeding in the future.

Finally, the Court recognizes the somewhat unusual procedural posture of the directives issued herein. Nonetheless, for the reasons stated above, the Rehabilitation Court concludes that the requirements established herein are an appropriate exercise of its discretion to oversee the Rehabilitator in his role as statutory receiver. And these issues were discussed at some length at the May 12, 2010 hearing,⁴ in which H. Neal Connolly, a long-time administrator of the Frontier Rehabilitation, was present as co-counsel and had the opportunity to be heard. Nonetheless, if the Rehabilitator believes that the directives herein should be preceded by a more formal opportunity to be heard, the Court hereby grants the Rehabilitator leave to reargue and renew any opposition it may have to this Decision and Order within thirty (30) days of its issuance. As this issue concerns the rehabilitation process generally, any such application shall be made by Order to Show Cause (“OTSC”) on notice to Interested Parties as prescribed below in the penultimate decretal paragraph.

CONCLUSION

Based on the foregoing, it is

⁴ At the hearing, the Court requested the FPIC Liquidator to provide an example of the status reports filed with the California court in that liquidation proceeding. Further, based on the Rehabilitator’s representation that a similar type of report had been filed with the New York courts in the early days of this proceeding, the Court directed that a copy of such report be submitted. On July 1, 2010, the Court eventually received the FPIC Liquidator’s submission; however, as of the date of this Decision and Order, the Rehabilitator failed to provide the requested report.

ORDERED that the Rehabilitator's motion to dismiss the petition is granted, and the petition is dismissed; and it is further

ORDERED that the Rehabilitator shall account to the Court for his progress since October 10, 2001 in removing "the causes and conditions" that have made this rehabilitation proceeding necessary;

ORDERED that the Rehabilitator shall develop and submit to the Court for its approval a detailed plan of rehabilitation for restoring Frontier to solvency and accomplishing the purposes of this proceeding, including an assessment of how long such efforts are expected to take;

ORDERED that upon the preparation of the foregoing accounting and plan of rehabilitation, the Rehabilitator shall file an application with the Court for confirmation of said accounting and approval of said plan of rehabilitation; and it is further

ORDERED that such application shall be made via Order to Show Cause, with notice to be provided to Interested Parties through publication at least once per week for three consecutive weeks in The Wall Street Journal and Business Insurance, by posting on the internet web page maintained by the Liquidation Bureau of the State Insurance Department, and by first class mail where the identity of Interested Persons or entities may be determined through a diligent search of Frontier's books and records; and it is further

ORDERED that the foregoing Order to Show Cause shall be presented to the Court on or before October 10, 2010.

This constitutes the Decision and Order of the Court. The original of this Decision and Order is being returned to counsel for the Rehabilitator; all papers are being transmitted to the Albany County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

Dated: Albany, New York
July 15, 2010



RICHARD M. PLATKIN
A.J.S.C.

Papers Considered:

Corrected Notice of Petition, dated December 4, 2009;
Corrected Petition, dated December 4, 2009, with attached exhibit A;
Corrected Declaration of Greg Hansen, Esq., dated December 4, 2009, with attached exhibits 1-8;
Notice of Motion to Dismiss Petition, dated January 29, 2010;
Affidavit of Al Escobar, sworn to January 29, 2010;
Rehabilitator's Memorandum in Support of Motion to Dismiss, dated January 29, 2010;
Petitioner's Opposition to Motion to Dismiss, dated February 19, 2010;
Affidavit of Michael S. Chung, Esq., dated February 19, 2010, with attached exhibits 1-5;
Reply Affirmation of William F. Costigan, Esq., dated March 5, 2010, with attached exhibit A;
Reply Affidavit of Al Escobar, sworn to March 5, 2010, with attached exhibit A;
Reply Memorandum in Further Support to Dismiss, dated March 5, 2010.