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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

In the Matter of the Rehabilitation of
PROFESSIONAL LIABILITY INSURANCE COMPANY OF
AMERICA

INDEX NO. 400986/10

MOTION DATE 5/16/13

MOTION SEQ. NO. 012

The following papers, numbered 1 to 5 were read on this petition

Order to Show Cause—Affidavit—Exhibits A-J—Affidavit — Exhibits A-B—
Affidavit—Exhibit A-B _____

No(s). 1-4

Verified Answer—Exhibits _____

No(s). 5

Reply Memo of Law —Exhibit A _____

No(s). _____

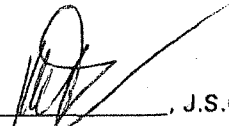
Upon the foregoing papers, this petition, by order to show cause, is
decided in accordance with the annexed memorandum decision.

Settle order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

MICHAEL D. STALLMAN
J.S.C.

Dated: 12/27/13
New York, New York


_____, J.S.C.

1. Check one:.....
2. Check if appropriate:..... PETITION IS:
3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

S/D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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In the Matter of the Rehabilitation of

Index No. 400986/2010

PROFESSIONAL LIABILITY INSURANCE COMPANY OF
AMERICA

Decision

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HON. MICHAEL D. STALLMAN, J.:

In April 2010, this Court placed Professional Liability Insurance Company of America (PLICA) in rehabilitation and appointed the Superintendent of Financial Services of the State of New York (the Superintendent) as Rehabilitator.

Brent D. Cassity, and Rhonda L. Cassity, PLICA shareholders, seek an order terminating the rehabilitation, claiming that the purposes of the rehabilitation have been fully accomplished, and that PLICA is highly solvent. (Motion Seq. No. 010) The Superintendent petitions this Court to place PLICA into liquidation. (Motion Seq. No. 012). According to the Superintendent, further efforts to rehabilitate PLICA would be futile, and PLICA now has a \$4.3 million deficit.

This decisions addresses both the Cassitys' motion and the Rehabilitator's petition. While the motion and petition were pending, the Cassitys' attorney was granted leave to withdraw as counsel, and the Cassitys themselves submitted an answer to the petition for liquidation.

BACKGROUND

PLICA is a stock insurance company incorporated in the State of New York, which issued medical malpractice insurance policies primarily in the states of Illinois, Missouri, Connecticut, and Texas.¹ According to the Superintendent, more than 80% of PLICA's business was written in Illinois; PLICA did not write any business in New York.

On March 16, 2010, the Illinois Circuit Court of Cook County, Chancery Division, placed PLICA into conservatorship and appointed the Director of Insurance of the State of Illinois as Conservator. Thereafter, by order dated April 28, 2010, this Court placed PLICA into rehabilitation and appointed the Superintendent as Rehabilitator.

Prior to PLICA's conservatorship, its president was Howard B. Nathans, and Howard Wittner served as PLICA's General Counsel and Secretary. At the time, 78% of PLICA voting shares were held by the PLICA Equity Trust (PET). The grantor of PET was James Douglas Cassity, and Wittner was its trustee; the beneficiaries of PET were Brent Douglas Cassity, Rhonda Cassity, and J. Tyler Cassity (collectively, the Cassitys).

¹In Texas, PLICA operated under the name Medical Liability Insurance Company of America.

During the pendency of this rehabilitation, the Cassitys apparently executed a modification agreement which, among other things, purportedly removed Wittner as trustee of PET. Wittner then filed a petition in the Probate Division of the Circuit Court of St. Louis County, Missouri, for a declaration disapproving the modification agreement. (Pierce-Siponen Aff., Ex C.) However, according to the Cassitys' counsel, PET terminated on September 28, 2011, and the PLICA shares are now owned directly by the Cassitys. (Higgins Aff. ¶ 5.) According to Brent D. Cassity, Wittner's counsel delivered all PLICA shares to Brent Cassity to hold for the benefit of all of the trust beneficiaries, i.e., Brent Cassity, Rhonda Cassity, and J. Tyler Cassity. (Cassity Aff. ¶ 7.)

Meanwhile, in November 2010, the United States Attorney for the Eastern District of Missouri filed a Second Superseding Indictment against, among others, James Douglas Cassity, Brent Douglas Cassity, Wittner, and others, alleging a massive fraud to misappropriate the proceeds of the sales of prearranged funeral services (the Funeral Scheme) by three Texas companies owned and managed by Cassity-controlled entities. (See Pierce-Siponen Aff., Ex I [the Indictment].) The Indictment alleges that PLICA was purchased using the proceeds of the Funeral Scheme, and seeks forfeiture of all PLICA shares of stock, and any surplus, along with all of PET. (*Id.*)

In addition, the Texas Special Deputy Receiver of the three Texas companies involved in the Funeral Scheme, along with the guaranty associations of seven states, and an organization representing guaranty associations of 28 additional states brought a RICO action against all the Cassitys, and others, in the United States District Court for the Eastern District of Missouri (the RICO Action). (Pierce-Siponen Aff., Ex J.) The plaintiffs in the RICO Action allege a massive scheme to loot the three Texas companies of over \$600 million and seek a constructive trust on the Cassitys' property, which would include PLICA's equity, for the benefit the creditors of the three Texas companies.

I.

Insurance Law § 7403 (c) provides, "if at any time the superintendent deems further efforts to rehabilitate such insurer would be futile, he may apply to the court under this article for an order of liquidation." The Superintendent has concluded that further rehabilitation efforts would be futile because the hazardous conditions that warranted PLICA placement into rehabilitation are not capable of being eliminated.

Insurance Law § 7404 states that the superintendent may seek the liquidation of a domestic insurer under any of the grounds specified in Insurance § 7402, which sets forth the grounds for which rehabilitation of an insurer may be sought. However, Insurance Law § 2343 (c) does not permit the liquidation of a medical malpractice

insurer such as PLICA on the grounds of either insolvency, or the failure to cure impairment of capital.² Here, PLICA's liquidation is sought on three grounds: (1) that PLICA "has been the subject of an application for appointment of a receiver, trustee, custodian, or sequestrator" of its property (Insurance Law § 7402 [k]); (2) that PLICA was found, after examination, "to be in such condition that its further transaction of business will be hazardous to its policyholders, creditors or the public" (Insurance Law § 7402 [e]); and (3) that PLICA "has wilfully violated its charter or any law of the state."³ (Insurance Law § 7402 [f].)

As the Superintendent indicates, PLICA was placed into conservatorship by the Illinois Department of Insurance. (Miller Aff. ¶ 5.) The Conservator has indicated that he intends to keep the conservation in effect as an additional protection to PLICA policyholders located in Illinois, that he does not consider PLICA capable of safely

² Insurance Law § 2343 (c) was part of the New York Medical and Dental Malpractice and Professional Conduct Act of 1986, enacted "in response to the ever-worsening medical malpractice crisis" and "in an attempt to reduce the cost of medical malpractice insurance and the number and amount of malpractice claims." (*Alliance of American Insurers v Cuomo*, 854 F2d 591, 594 [2d Cir 1988].) Insurance Law § 2343(c) "imposes a moratorium on medical malpractice insolvencies by suspending the Superintendent's authority to order the liquidation or rehabilitation of any medical malpractice insurer." (*Id.*) The Legislature has extended the moratorium several times, and the moratorium now continues until June 30, 2014.

³ "The term 'willful' is not defined in the Insurance Law or regulations, but we find some guidance as to its unremarkable meaning in a civil regulatory context as 'no more than intentional and deliberate.'" (*Matter of American Transit Ins. Co. v Corcoran*, 76 NY2d 977, 979-980 [1990].)

operating outside of the receivership, and that he has no objection to its liquidation.

(Miller Aff. ¶¶ 6-7.)

As to the ground that further transaction of business will be hazardous to PLICA's policyholders, creditors, and public, the Superintendent indicates that there are criminal and civil proceedings directed at PLICA's owners and putative management, and continuing corporate governance issues raised by an absence of authorized ownership and management. At the time this petition was brought, two matters were pending in the Eastern District of Missouri, i.e., the Indictment against, among others, Brent Cassity, James Douglas Cassity, and Wittner, and the RICO Action against Wittner, all the Cassitys, and other individuals.

The Cassitys contend that, as direct shareholders of the PLICA shares, they are in now in a position to form a new board of directors and choose officers to ensure the stability of PLICA's operations. (Higgins Affirm. ¶ 8.) However, the Rehabilitator persuasively argues that the Indictment and RICO Action put a cloud on the ownership and management of PLICA, making further rehabilitation efforts (such as bringing PLICA back to the marketplace, or a merger with or sale of the company to a third party) futile unless and until these matters are resolved. The forfeiture sought in the criminal proceeding places clear title to the equity of PLICA in doubt, and thus poses an obstacle to any potential merger with, or a sale or transfer

of the equity of PLICA to a third party. In addition, the potential convictions of any of the Cassitys named in the Indictment means that they are not in a position to form a board of directors and choose officers to ensure stability in PLICA's operations.

Given the unreliability of PLICA's management and shareholders, the encumbering of PLICA assets, and the large and uncertain amount of future long term liabilities (*see* Section II, *infra*), the Superintendent has demonstrated that further transaction of business "will be hazardous to its policyholders, creditors or the public" (Insurance Law § 7402 [e].)

On the ground that PLICA has wilfully violated its charter or any law of the state, the Superintendent refers to its prior petition, which sought PLICA's rehabilitation, which catalogued PLICA's violations of the Insurance Law, most of which arose out of transactions entered into by PLICA with other entities within PLICA's holding company system, which the Superintendent asserts was without notice to or prior approval of the Superintendent.

This has not been materially disputed by the Cassitys. However, in their verified answer, the Cassitys claim that "the New York Insurance Department approved Rhonda, Tyler, and Brent Cassity as sole owners of PLICA in May 2004. That ruling of control has never been revoked" (Verified Answer ¶ 9.) The Cassitys seek a hearing on any alleged violations, and they assert that, "if any

technical notice violation is found to have occurred, would never involve liquidation of PLICA.” (*Id.* ¶ 11.)

In light of the Court’s determination that the Superintendent has established other grounds for PLICA’s liquidation (Insurance Law § 7402 [e], [k]), the Court need not determine whether PLICA wilfully violated the laws of this state.

Therefore, the Superintendent’s petition for an order placing PLICA into liquidation is granted, and the Cassitys’ motion to terminate the rehabilitation is denied.

Contrary to the Cassitys’ argument, this petition to place PLICA into liquidation can be determined without an evidentiary hearing. (*See Matter of People by Conway v Landlord-Taxpayers Assn.*, 134 Misc 533 [Sup Ct, Bronx County 1929].) There is no triable factual question which would require an evidentiary hearing on the two established grounds of liquidation.

II.

Insurance Law § 7432 (a) provides that, “[i]f upon the granting of an order of liquidation . . . such insurer shall not be clearly solvent, the court shall, after such notice and hearing as it deems proper, make an order declaring such insurer to be insolvent.” An insurer is deemed insolvent

“[w]henver the superintendent finds from a financial statement or

report on examination that an authorized insurer is unable to pay its outstanding lawful obligations as they mature in the regular course of business, as shown by an excess of required reserves and other liabilities over admitted assets, or by its not having sufficient assets to reinsure all outstanding risks with other solvent authorized assuming insurers after paying all accrued claims owed.”

(Insurance Law § 1309 [a].)

As the Cassitys indicate, PLICA’s unaudited financial statements showed a surplus of \$22.8 million as of December 31, 2009. However, the balance sheet for the year ended December 31, 2011 indicates a deficit of \$4.3 million.

The Superintendent explains that PLICA no longer generates premium income. As discussed above, 80% of PLICA’s business was written in Illinois, where it has been suspended from writing new business to Illinois customers. The Superintendent, as Rehabilitator, imposed a moratorium on the writing of new policies and only renewed a small number of policies that could not be timely non-renewed. (Pierce-Siponen Aff. ¶ 2.) Proverbially standing in the shoes of the insurer, the Superintendent acted prudently and reasonably.

According to the Superintendent, PLICA’s surplus was substantially reduced in 2010 and 2011 due to premium payments it was required to make under a reinsurance program, which included an “experience refund” element.”⁴ According

⁴ Under the program, premiums paid to and received from reinsurers are regularly adjusted based on actual loss experience. (Giacone Aff. ¶ 3.)

to the Superintendent, PLICA was required to pay back \$3.6 million of previously received refunds, and the Superintendent estimates that an additional payback of approximately \$4 million will be required for 2012. (Giacone Aff. ¶ 5.)

The Superintendent, as Rehabilitator, also increased PLICA's claims reserves to \$23 million, because the Superintendent determined that PLICA was under-reserved. (Pierce-Siponen Aff. ¶ 5.) The Superintendent discovered that PLICA had issued policies with an extended reporting period endorsement, also known as a "Forever Tail", which allows for reporting of claims at any time (as opposed to an insurance policy issued on a "claims made" basis).⁵ (Pierce-Siponen Aff. ¶ 4.) The Superintendent reasonably chose to increase the reserves to \$23 million given the estimates of its auditor, Oliver Wyman Actuarial Consulting, Inc. (Oliver Wyman), which estimated the net unpaid claim liability within the range of \$17.7 million to \$28.3 million. (Giacone Aff., Ex B, at 2 [Table 1].) The Superintendent appropriately chose to set the reserve at the midpoint of the range. (Giacone Aff. ¶ 6.)

The Cassitys assert that the Superintendent inflated or wrongfully

⁵ As of December 31, 2011, PLICA had 124 extant policies with extended-reporting period endorsements. (Pierce Siponen Aff. ¶ 4.) According to the Rehabilitator, PLICA offered this benefit of allowing claims to be made indefinitely for either a one-time premium, or under certain circumstances, no premium. (*Id.*)

overestimated the reserves, and they ask that this matter be stayed until they receive PLICA's financial statements for the year ended December 31, 2012. (*See Verified Answer ¶¶ 3-4*). However, they do not submit an opinion from an auditor challenging the accuracy of the estimates set forth by PLICA's auditor. The Cassitys' argument that one must wait and see what more recent financial statements reveal is specious.

In reply, the Superintendent submits an actuarial report for the year ended December 31, 2012. (Reply Mem., Ex A.) In this actual report, Oliver Wyman estimated the net unpaid claim liability within the range of \$14.7 million to \$20.9 million. (*Id.* at 2 [Table 1].) That is, the estimated unpaid claim liabilities decreased since December 31, 2011.

PLICA's balance sheet for the year ended December 31, 2011 indicates a deficit of \$4.3 million, which was based on reserves set at \$23 million. For 2012, reserves set at \$23 million would now be beyond the high range of the net unpaid claims liabilities estimated by Oliver Wyman. As mentioned above, the estimated unpaid claim liabilities decreased for the year ended December 31, 2012. Nevertheless, PLICA is "not clearly solvent." (Insurance Law § 7432 [a].) Under the circumstances as demonstrated by the Superintendent, it would be futile to return PLICA to active status, resuming the writing of new policies, increasing the liability of the company, and increasing the risk that its responsibilities to existing and future

policyholders could not satisfied. Therefore, the Superintendent is entitled to a declaration that PLICA is insolvent pursuant to Insurance Law § 7432 (a).

CONCLUSION

The petition is place PLICA into liquidation is granted, and the Cassitys' motion to terminate the rehabilitation is denied. This rehabilitation proceeding is hereby converted to a liquidation proceeding.

Settle order of liquidation.

Dated: December ~~4~~⁷, 2013
New York, New York

ENTER:



J.S.C.

MICHAEL D. STALLMAN
J.S.C.