

36  
At IAS Part 36 of the Supreme Court of the State of New York, County of New York, at the Courthouse, 60 Centre Street, in the County, City and State of New York, on the 22 day of ~~May~~ June, 2012.

PRESENT:

**DORIS LING-COHAN**  
HON. RICHARD B. LOWE III, J.S.C.

**FILED**

In the Matter of

Index No.: 403176/97

JUL 06 2012

the Liquidation of

ORDER

*Mot. Sec 002*

COUNTY CLERK'S OFFICE  
NEW YORK

U.S. CAPITAL INSURANCE COMPANY.

Jonathan L. Bing, Special Deputy Superintendent and agent of the Superintendent of Financial Services of the State of New York ("Superintendent") as liquidator ("Liquidator") of U.S. Capital Insurance Company ("U.S. Capital"), having moved this Court, pursuant to Article 74 of the New York Insurance Law ("Insurance Law"), for an order: (i) approving the Liquidator's initial report on the status of the liquidation of U.S. Capital ("Initial Report") and the financial transactions delineated therein; (ii) authorizing the continued payment of administrative costs and expenses; (iii) authorizing the Liquidator to distribute U.S. Capital's assets, consistent with this Court's orders and the priorities set forth in Insurance Law Section 7434, to those creditors of U.S. Capital with allowed claims, to the extent that, in the Liquidator's discretion, sufficient funds are available; (iv) extending immunity to the Superintendent in his capacity as Liquidator of U.S. Capital, and his successors in office and their agents and employees, for any cause of action of any nature against them, individually or jointly, for any act or omission when acting in good faith, in accordance with the orders of this Court, or in the performance of their duties pursuant to Insurance Law Article 74; and (v) granting such other and further relief as this Court deems appropriate and just.

NOW, upon reading the Amended Verified Petition, dated March 6, 2012, due proof of service thereof upon all parties interested in U.S. Capital, and due deliberation having been had thereon, and upon the decision of this Court;

*and this court's decision dated*

NOW, on application of John Pearson Kelly, attorney for the Liquidator, it is

ORDERED, that the application is granted; and it is further

ORDERED, that the Initial Report and financial transactions delineated therein are approved; and it is further

ORDERED, that the Liquidator is authorized to continue paying administrative costs and expenses; and it is further

ORDERED, that the Liquidator is authorized to distribute U.S. Capital's assets, consistent with this Court's orders and the priorities set forth in Insurance Law Section 7434, to those creditors of U.S. Capital with allowed claims to the extent that, in the Liquidator's discretion, sufficient funds are available; and it is further

ORDERED, that immunity is extended to the Superintendent in his capacity as Liquidator of U.S. Capital, and his successors in office and their agents and employees, for any cause of action of any nature against them, individually or jointly, for any act or omission when acting in good faith, in accordance with the orders of this Court, or in the performance of their duties pursuant to Insurance Law Article 74.

**FILED**  
JUL 06 2012  
NEW YORK ENTER  
COUNTY CLERK'S OFFICE  
*JOSEPH LING-COHAN*  
J.S.C.  
\_\_\_\_\_  
J.S.C.

No.: 403176/97

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

In the Matter of

the Liquidation of

U.S. CAPITAL INSURANCE COMPANY.

**ORDER**

**JOHN PEARSON KELLY**

Attorney for the Superintendent of Financial Services of the State of New York as Liquidator

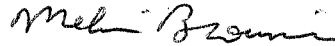
*Office and Post Office Address, Telephone*

New York Liquidation Bureau  
110 William Street  
New York, NY 10038  
(212) 341-6755  
Fax (212) 608-3398

**ATTORNEY CERTIFICATION**

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information, belief and reasonable inquiry, the contentions in the above referenced document(s) are not frivolous.

Dated: March 8, 2012  
New York, New York



Melvin Browning

NOTICE OF ENTRY

that the within is a (*certified*) true copy of a  
duly entered in the office of the clerk of the within named court on the      day of      20

NOTICE OF SETTLEMENT

that an order      of which the within is a true copy will be presented for  
settlement to the HON.      one of the judges of the within named court, at

Dated:      , on      20      at

Yours, etc.

**JOHN PEARSON KELLY**

Attorney for the Superintendent of Financial Services  
of the State of New York as Liquidator

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY  
PRESENT: Hon. Doris Ling-Cohan, Justice

Part 36

In the Matter of

the Liquidation of

U.S. Capital Insurance Company.

INDEX NO. 403176/97  
MOTION SEQ. NO. 022

The following papers, numbered 1-4 were considered on this motion:

PAPERS

Notice of Motion/Order to Show Cause, — Affidavits — Exhibits \_\_\_\_\_ 1, 2, 3, 4  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

Cross-Motion: [ ] Yes [X] No

**FILED**  
JUL 06 2012  
COUNTY CLERK'S OFFICE  
NEW YORK

Upon the foregoing papers, it is ordered that this motion is decided as indicated below.

This court entered an order ("Liquidation Order") on November 20, 1997, pursuant to which U.S. Capital Insurance Company ("U.S. Capital") was adjudged to be insolvent and placed into liquidation. The Liquidation Order appointed the then-Superintendent of Insurance and his successors in office as Liquidator of U.S. Capital. Benjamin M. Lawskey, the Superintendent of Financial Services of the State of New York has now succeeded the Superintendent of Insurance as Liquidator of U.S. Capital. He has appointed Jonathan L. Bing as Special Deputy Superintendent and Agent of the Liquidator ("Special Deputy") to carry out the responsibilities of the Liquidator through the New York Liquidation Bureau ("NYLB")<sup>1</sup>.

The Liquidator has been discharging his responsibilities since November 20, 1997. On March 8, 2012, the Liquidator submitted his initial report on the status of the Liquidation Proceeding for approval, providing a history of U.S. Capital, a summary of the Liquidator's activities pursuant to the Liquidation Order and Insurance Law Article 74, the financial status of

<sup>1</sup> The court acknowledges the assistance of volunteer attorney Winnie Lai.

U.S. Capital and the basis for the Liquidator's recommendations. In such application, the Liquidator seeks to extend judicial immunity to the Superintendent, in his capacity as Liquidator of U.S. Capital, and his successors in office and their agents and employees, for: (1) any cause of action of any nature against them, individually or jointly; (2) for any acts or omissions when acting in good faith, in accordance with the orders of this Court; and/or (3) the performance of his duties pursuant to Insurance Law Article 74.

The issue before the court is whether it is appropriate to grant judicial immunity to the Liquidator. For the reasons discussed below, the Liquidator is entitled to judicial immunity.

The legislature did not explicitly provide judicial immunity to the Liquidator, nor does there appear to be any case law directly on point discussing this issue in detail.<sup>2</sup> However, it has long been established that judges are granted absolute immunity from liability for acts taken pursuant to their judicial power and authority. *Forrester v. White*, 484 U.S. 219, 225 (1988). The rationale for the concept of judicial immunity is to allow members of the judiciary to exercise independent judgment, that is "critical to our judicial system", without fear of legal reprisal. *Tarter v. State*, 68 N.Y.2d 511, 518 (1986). Following a similar rationale, the Supreme Court has extended judicial immunity to "certain others who perform functions closely associated with the judicial process." *Cleavinger v. Saxner*, 474 U.S. 193, 200 (1985); see *Yaselli v. Goff*, 275 U.S. 503 (1927) (extending judicial immunity to federal and state prosecutors); *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983) (extending judicial immunity to witnesses, including police officers, who testify in judicial proceedings since witnesses are "integral parts of the judicial process"); *Imbler v. Pachtman*, 424 U.S. 409, 423 (1976) (extending judicial immunity to grand jurors). In determining which persons are covered by an extension of the immunity, the Supreme

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<sup>2</sup> As reflected in liquidations orders in other cases, other courts have granted immunity to Liquidators, albeit without an opinion explaining the basis. See *In Re Atlantic Mutual Insurance Company*, Sup Ct, New York County, April 26, 2011, Rakower, J., Index No. 402424/10; *In Re Colonial Cooperative Insurance Company*, Sup Ct, New York County, September 30, 2010, Gische, J., Index No. 400236/10; *In Re The Insurance Corporation of New York*, Sup Ct, New York County, March 4, 2010, Kenney, J., Index No. 401477/09.

Court follows a “functional approach” under which “absolute immunity flows not from rank or title or location within the government, but from the nature of the responsibilities of the individual official.” *Cleavinger v. Saxner*, 474 U.S. at 201.

Similarly, in New York, the Court of Appeals has extended judicial immunity beyond judges. As stated by the Court of Appeals:

“A logical extension of this premise is that other neutrally positioned government officials, regardless of title, who are delegated judicial or quasi-judicial functions should also not be shackled with the fear of civil retribution for their acts. [T]he common law provide[s] absolute immunity from subsequent damages liability for all persons—governmental or otherwise—who [a]re integral parts of the judicial process...Notably, this extension of judicial immunity to those whose actions are an integral part of the judicial process is limited. It is circumscribed to claims arising from the performance of the specific judicially delegated function.”

*Mosher-Simons v. County of Allegany*, 99 N.Y.2d 214, 220 (2002) (internal citations, quotations, and emphasis omitted).

Thus, a court-appointed receiver acts as an arm of the court and is immune from liability for actions grounded in his or her conduct as receiver. *See Bankers Fed. Sav. FSB v. Off W. Broadway Developers*, 227 AD2d 306, 306 (1st Dept. 1996) (affirming dismissal of claim against the receiver for damage to property because “the receiver had no personal liability for the actions performed within his official capacity and within the scope of his authority pursuant to the receivership order.”). Judicial immunity only extends to a receiver who acts in good faith and with appropriate care and prudence. *Matter of Benedictine Hosp. v. Glessing*, 90 AD3d 1383, 1386 (3rd Dept. 2011); *see also Ocean Side Institutional Indus., Inc. v. United Presbyt. Residence*, 254 A.D.2d 337, 338 (2d Dept. 1998) (dismissing a claim because “plaintiff failed to set forth any factual allegations which would indicate...the receiver...acted in bad faith or with a lack of due care.”).

While it did not specifically address judicial immunity, the Court of Appeals has noted that, when acting as liquidator of a distressed insurer, the Superintendent operates as

a statutory receiver whose "role as liquidator is judicial." *Dinallo v. DiNapoli*, 9 N.Y.3d 94, 103 (2007). The Superintendent herein was appointed by this Court to perform, as Liquidator, a specific judicially delegated function and his role is an integral part of the judicial process. Thus, the Liquidator of U.S. Capital operates as a statutory receiver and is entitled to judicial immunity for any acts or omissions when acting in good faith, in accordance with the liquidation order issued by the Court, or in the performance of his duties pursuant to Insurance Law Article 74.

The balance of the relief sought in the Amended Verified Petition is granted.

It is hereby ordered:

- a) the Initial Report and the financial transactions delineated therein is approved;
- b) the continued payment of administrative costs and expenses is authorized;
- c) the Liquidator is authorized to distribute U.S. Capital's assets, consistent with this Court's orders and the priorities set forth in Insurance Law Section 7434, to those creditors of U.S. Capital with allowed claims, to the extent that, in the Liquidator's discretion, sufficient funds are available; and
- d) judicial immunity is extended to the Superintendent in his capacity as Liquidator of U.S. Capital, and his successors in office and their agents and employees, for any cause of action of any nature against them, individually or jointly, for any act or omission when acting in good faith, in accordance with the orders of this Court, or in the performance of their duties pursuant to Insurance Law Article 74.

All further applications shall be submitted to the clerk's office for review and assigned a motion sequence number, and file, for tracking purposes.

This is the decision and order of the court.

Dated: \_\_\_\_\_

*6/22/12*

  
DORIS LING-COHAN, J.S.C.

**FILED**

JUL 06 2012

COUNTY CLERK'S OFFICE  
NEW YORK

Check one:  FINAL DISPOSITION       NON-FINAL DISPOSITION  
Check if Appropriate:  DO NOT POST