IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF THE REHABILITATION OF INSURANCE CORPORATION, RRG	)	No. 621, 2013
	)	On Appeal from C.A. No. 8601-VCL in the Court of Chancery of the State of Delaware

ANSWERING BRIEF OF APPELLEE, INSURANCE COMMISSIONER OF THE STATE OF DELAWARE

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I. STATEMENT OF THE NATURE OF PROCEEDINGS

On May 30, 2013, the Court of Chancery ("the Trial Court") granted a Petition for the Entry of a Confidential Seizure and Injunction Order with regard to Indemnity Insurance Corporation, RRG ("IICRRG") ("the "Seizure Order") (A53). The Petition was filed by the Insurance Commissioner ("Commissioner") pursuant to 18 *Del. C.* §§5905, 5906 and 5943 and was prompted by the Delaware Department of Insurance's ("the DOI") receipt of a fraudulent bank confirmation and prior concern over the financial condition of IICRRG. (B1). Based on the DOI's post-seizure investigation, which confirmed its prior concerns and uncovered further fraudulent conduct by Jeffrey B. Cohen ("Cohen"), president and chairman of the Board of IICRRG, the Commissioner filed a Petition for Liquidation on July 26, 2013. (B144).

On August 14, 2013, RB Entertainment Ventures, LLC ("RBE"), the purported 99% shareholder of IICRRG, filed a motion for intervention, which was fully briefed and argued. (A99-322). The Trial Court denied general intervention without prejudice to re-seek intervention where specific interests of RBE were affected. (A309-11 [37:18 - 39:8]).

Cohen's harassing conduct and interference have been the subject of three contempt hearings resulting in progressively greater sanctions designed to deter this conduct. (*See, generally* B565-65, 659-66). On November 1, 2013, the Trial

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Court entered an Order Imposing Additional Sanctions ("the Nov. 1 Sanctions Order") (Ex. "A" to Appellants' Brief) (hereinafter ("App. Br.")) which required Cohen to return automobiles owned by IICRRG, forfeit $100,000 previously posted as security and post $500,000 as additional security. On November 6, 2013, the Commissioner filed a Petition for Rehabilitation and Injunction Order By Consent (A1681). On that date, RBE filed a letter with the Trial Court in which it again sought intervention, and the Commissioner opposed such intervention. [A1854-1863]. On November 7, 2013, the Trial Court entered a Rehabilitation and Injunction Order ("Rehabilitation Order") (App. Br., Ex. "A") which, *inter alia*, denied intervention and appointed the Commissioner as the Receiver of IICRRG ("the Receiver").

After discovering that IICRRG's liabilities and reserves were grossly understated and a plan of rehabilitation would not be possible, on January 16, 2014, the Commissioner filed a Petition for Entry of Liquidation Order pursuant to 18 *Del. C.* § 5910. (B681).

This appeal concerns two Orders of the Trial Court: (1) the appeal by RBE, a non-party, to the Trial Court's November 7, 2013 granting of the Rehabilitation Order without allowing briefing on the issue of intervention by RBE (App. Br., Ex. "B"); and (2) an appeal by Cohen to the Nov. 1 Sanctions Order. This is the Receiver's Answering Brief.

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II. SUMMARY OF ARGUMENT

1. Appellants' first argument is DENIED. The Trial Court's entry of the Rehabilitation Order did not violate due process. RBE does not have standing either to intervene or appeal. Further, RBE had previously participated in a full hearing on intervention in the liquidation process. The terms of the Rehabilitation Order and Delaware law give RBE or other interested parties the ability to later be heard on specific issues which directly implicate their rights. Finally, the consent of IICRRG's Board of Directors was an independent and sufficient basis for the granting of the Rehabilitation Order.

2. Appellant's second argument is DENIED. There was no procedural due process violation, nor did the Trial Court err in sanctioning Cohen for his deliberate and knowing violations of previous orders.[1]

[1] Certain filings made in the proceeding below, or portions thereof, remain sealed in the Trial Court below. Given the continued confidential treatment of certain documents, this Answering Brief and the Appendix are filed under seal. Appellee will file a public version of the Answering Brief in accordance with Court rules.

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III. STATEMENT OF FACTS

Although the salient facts to all appellate issues share some common ground they ultimately arise from two separate sets of facts. They are presented here in chronological order but those salient solely to RBE's appeal are presented in subparts C, D, I and J, and Cohen's appeal are presented in subparts E through H.

A. Cohen's Fraud Causes the Seizure of IICRRG

This action arose from Cohen's attempts to mislead the DOI and IICRRG's auditors about the true financial condition of IICRRG and to obstruct the DOI's well-founded efforts to regulate IICRRG.

In the spring of 2013, Cohen submitted a fraudulent bank confirmation, purportedly from Susquehanna Bank, to the DOI in response to a routine regulatory inquiry. (B10-22). This fraud, coupled with the DOI's existing concerns about IICRRG's financial strength and apparent violations of Delaware insurance statutes prompted the DOI to file a Confidential Seizure Petition pursuant to 18 *Del. C.* §5943. (B27-30).

B. Discovery of Additional Frauds Leads to the Liquidation Petition

After entry of the Seizure Order, the DOI's targeted financial examination of IICRRG and investigation into the conduct of Cohen and others in the operation of IICRRG revealed more frauds by Cohen, some of which, like the Susquehanna Bank fraud, used phony financial confirmations sent to and from email addresses

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controlled by Cohen to aid him in providing false and misleading financial information to auditors. (B184-190). As a result, on July 26, 2013, the Commissioner filed a Liquidation Petition pursuant to 18 *Del. C.* ch 59. (B681).

C. RBE Seeks to Intervene in the Liquidation and is Denied

On August 14, 2013, RBE filed a Motion to Intervene in the liquidation. (A99). IICRRG and the Commissioner filed responses (A206 and A108). The Commissioner contended that an insurer's shareholder, such as RBE, generally lack standing to intervene in delinquency actions. (A120-121). RBE filed a reply. (A224). On August 24, 2013, the Trial Court heard argument on the motion. (A222) and afterward denied general intervention without prejudice to re-seek intervention if specific interests of RBE were affected. (A309-11 [37:18 - 39:8]). The Trial Court specifically held that intervention was improper on issues of IICRRG's solvency, valuation or business viability, and litigation strategy. (A310-11 [38:19-39:8]). RBE did not seek reconsideration of the denial of intervention, appeal the denial, or accept the Trial Court's invitation to file a motion to intervene based on RBE's specific interests.

D. Neither Cohen nor RBE Contest the Fraud Alleged in the Liquidation Petition

RBE's Motion to Intervene did not attach a responsive pleading addressing

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the allegations of fraud in the liquidation petition,[2] nor did RBE's motion allege that they were untrue. (A122-23; A304 [23:13-24]). When asked by the Trial Court: "Do you want the opportunity to seek to intervene to oppose the fraud issues?", RBE's counsel responded merely, "I think that's something to be discussed." (A305 [33:10-14]). To date, RBE and Cohen still have not sought intervention to dispute the allegations of fraud, nor have they sought to contest, or substantively dispute, them when given the opportunity.[3]

E. Cohen's Behavior Gives Rise to the Motion to Amend Seizure Order and Rule to Show Cause

From this subpart, through subpart H, the facts are pertinent to Cohen's argument that he, in his individual capacity, was denied due process regarding his having been sanctioned by the Trial Court.

Paragraph 9 of the Seizure Order provides:

> All persons or entities having notice of these proceedings or of this Seizure and Injunction Order, are hereby prohibited from interfering with the Commissioner and her authorized agents either in their possession and control of the Assets or in the discharge of their duties hereunder. (A60).

Cohen resigned from IICRRG's board on August 5, 2013 and was subsequently terminated as President and CEO. (A623 at ¶¶ 6-7). Nonetheless,

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[2] *See* Ch. Ct. R. 24(c), requiring the attachment of a proposed pleadings setting forth claims or defenses.

[3] In a later-filed Answer in response to IICRRG's Verified Petition against Cohen asserting, inter alia, breach of fiduciary duty, Cohen's response to the specific allegations of fraud was: "Cohen asserts a[n unidentified] privilege not to respond to the allegations contained in this paragraph." (B531-33, 535, 539, 541, ¶¶ 17-19, 21, 23, 29-30, 41, 52-53).

[redacted]

Cohen continued to interfere with IICRRG's operations, causing IICRRG to file its Expedited Motion to Amend Confidential Seizure Order and Injunction Order (A323). The Trial Court granted the motion after finding that Cohen was monitoring IICRRG's employees' email, had attempted to limit the Commissioner's access to IICRRG's IT systems, and had improper contact with IICRRG employees and its business relationships. (B657-59). The Court did not sanction Cohen at that time, but issued a Rule to Show Cause to Cohen to show why his conduct was not in contempt of paragraphs 7 and 9 of the existing Seizure Order. (A360).

F. Cohen's Further Actions Violate the Seizure Order and Amended Seizure Order and Give Rise to Another Motion

Immediately after the Amended Seizure Order and Rule to Show Cause were issued, Cohen, directly or through others, recorded meetings at IICRRG, leading to the filing by IICRRG of an Expedited Motion for Sanctions. (A363). During the pendency of the motion, and prior to the hearing, further actions of Cohen came to light, such as cancelling the telephone services of IICRRG (A644-45) and seeking to convert deferred compensation accounts of IICRRG employees into cash. (A642-43; A834-837 [30:20 - 33:8]).

G. The Trial Court Holds a Hearing Which Cohen Fails to Attend

On September 24, 2013, the Trial Court held an evidentiary hearing. (A805). Although it was noticed as an evidentiary hearing on Cohen's contempt (A381),

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he chose not to attend. (A807-08 [3:24 -4:10]). After the hearing, in an effort to establish a coercive civil sanction that would cause Cohen to comply with the Trial Court's orders, Cohen was required to post security in the amount of $100,000. (A985). In setting that amount, the Trial Court took into account that Cohen had received an annual salary from IICRRG of more than $1 million and that his total compensation was as much as twice that amount. The court further directed that all communications between Cohen and IICRRG, its employees, and its officers and directors take place through counsel. (A986).

H. The October 21 Motion for Sanctions

On October 21, 2013, IICRRG filed a new motion for sanctions to obtain Cohen's compliance with the court's orders. (A1211). First, although the Seizure Order required that anyone holding assets belonging to IICRRG return them, Cohen refused to return three luxury vehicles, titled in IICRRG's name (A1213-1216), unless IICRRG paid $30,000,000 that he claimed was due under his employment agreement. (A1256). Additionally, Cohen caused companies he controlled to file suit against IICRRG and certain of its employees. (A1328), and he filed suit *pro se* against similar defendants. (A1277). Both lawsuits were filed in Maryland state courts. Each filing contravened paragraph 10 of the Seizure Order, which required that all legal issues related to the seizure be litigated in the Court of Chancery. (A60).

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On November 1, 2013, the Trial Court held a hearing on the October 21, Motion for Sanctions. (A1605). That hearing lasted over three hours and Cohen testified. He admitted that he: had not returned the vehicles, even though they were titled in IICRRG's name (A1725 [121:15-10]); filed the Maryland actions despite knowing of the restrictions in the Seizure Order (A1693 [89:10-13]); and had contact with IICRRG employees, even though he knew that he was forbidden from doing so under the Seizure Order and the Amended Seizure Order. (A1686 [82:14-19]). Cohen testified before the lunch recess and did not return. [A1751 [147:16-22]. The Trial Court made factual findings and oral rulings (A1751-68 [147:23 - 164:19) which it implemented in the Nov. 1 Sanction Order.

The Trial Court directed that: (1) the $100,000 Cohen had deposited as security be turned over to IICRRG; (2) Cohen would arrange for the vehicles to be returned by November 4, 2013; and (3) Cohen post security of $500,000 based on evidence of Cohen's net worth[4] and the fact that a deposit of $100,000 had been shown ineffective in convincing Cohen to obey the court's orders. (B666). As before, if Cohen complied with the court's orders going forward, he would receive back the entire amount. If not, he would forfeit some or all of it. *Id.*

I. The Rehabilitation Petition

[4] Cohen received over $1 million in salaries for multiple years; his total compensation was as much as $2 million; and his personal financial statement represented net assets in excess of $43

On November 6, 2013, the Commissioner filed a Rehabilitation Petition supported by extensive documentary evidence. (A1781). The petition asserted three independent, statutory grounds for rehabilitation: (1) IICRRG's further transaction of insurance was hazardous to its policyholders, creditors and the public (18 *Del. C.* §§ 5905(1), 5906); (2) IICRRG was impaired or insolvent (18 *Del. C.* § 5905(1)); and (3) the board of directors consented to the rehabilitation. (18 *Del. C.* § 5905(9)). (A1792-95). Rehabilitation may be granted on any one of these bases. 18 *Del. C.* 5905.

J. RBE's Request for Briefing on Intervention

On November 6, 2013, RBE "request[ed] the opportunity to brief a formal motion to intervene" based solely on the unsupported assertion that the remedy sought would deprive RBE "of its voting rights or other[wise] affect its unique rights as shareholder." (A1855). The Commissioner responded, consistent with paragraph 28 of the Rehabilitation Petition, that RBE's arguments had been rejected previously. (A1861-63). On November 7, 2013, the Trial Court denied RBE's request to intervene, but said: "To the extent [RBE] has a claim against the IICRRG estate, [RBE] may give notice of its claim... in the manner contemplated in the Rehabilitation and Injunction Order." (App. Br., Ex. B ¶28).

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million, including over $13 million in cash and $2 million net equity in real estate. (A1648-49; 1738-39 [45:19 - 46:20]; 134:10 - 135:15]) (B665).

[redacted]

IV. ARGUMENT

A. PROCEDURAL DUE PROCESS WAS NOT VIOLATED WHERE THE APPELLANT LACKED STANDING TO INTERVENE, HAD PREVIOUSLY LITIGATED STANDING AND WAS GIVEN THE OPPORTUNITY TO BE HEARD ON SPECIFIC ISSUES

Question Presented

Whether procedural due process was violated where the Appellant lacked standing to intervene, had previously litigated standing, and was provided the opportunity to be heard on specific issues as they arose? (No.)

Scope and Standard of Review

This Court's standard of review of issues of constitutional law is *de novo*. *Cooke v. State,* 977 A.2d 803 (Del. 2009).

Merits of Argument

1. Overview of Statutory Framework of Insurance Insolvency

The insurance industry has always been of paramount importance to the states due to the absence of the same type of comprehensive federal regulation that governs other industries such as banking, securities and commodities. Insurance companies are also excluded from federal bankruptcy law. After the adoption of the Uniform Insurers Liquidation Act ("UILA"), and mindful of the states' paramount interest in the business of insurance, Congress enacted the McCarron-Ferguson Act in 1945 to 'give support to existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin,*

[redacted]

328 U.S. 408, 429 (1946).

Delaware recognizes the importance of the regulation of insurance and a uniform, orderly and equitable scheme for making and processing claims against financially troubled insurers. This is reflected in Delaware's adoption of the Uniform Insurers Liquidation Act, codified at 18 *Del. C.* §5901 *et seq.* ("DUILA"). DUILA confers broad powers on the Commissioner and Chancery Court. The Commissioner is solely authorized to institute a delinquency proceeding to seize, rehabilitate, liquidate, conserve or reorganize an insurer. 18 *Del. C.* §§ 5902-5905, 5910 and 5943. Upon application of the receiver for rehabilitation, the court may enter an order directing the receiver to manage the insurer's property and vesting the receiver with title to all of the insurer's property and rights to all of the insurer's contracts and rights of action. 18 *Del. C.* §5910. The court's ability to issue orders of injunctions against interference with the receiver or the insolvency proceeding, dissipating estate assets, or commencing or prosecuting any actions against the insurer is integral to the uniform, reciprocal scheme in which the DUILA is a part. 18 *Del. C.* §5904.

2. RBE Lacks Standing for this Appeal

RBE, even assuming it is actually a shareholder,[5] does not have standing to

[5] *See, e.g.*. Decision of Trial Court on Motion to Stay Rehabilitation Order. (B648) (noting that it is not clear that RBE qualifies as a statutory owner of IICRRG under the Delaware Risk Retention Act).

[redacted]

intervene or appeal. Although Delaware courts have not specifically determined the standing of a shareholder to oppose a delinquency petition, caselaw from other jurisdictions provides guidance that RBE, as a shareholder, lacks standing to intervene in the rehabilitation of IICRRG because shareholders have no standing to oppose delinquency proceedings. *See, e.g., State ex. rel. Holland v. Heritage Nat. Ins. Co.*, 184 P.3d 1093, 1097 (Okla. Civ. App. 2008) ("Shareholders do not have standing to intervene in a receivership proceeding"); *Metcalf v. Investors Equity Life Ins. Co. of Hawai'i, Ltd.*, 910 P.2d 110, 111 (Haw. 1996)(shareholders do not have standing to oppose a liquidation petition), *cert. denied*, 518 U.S. 1018 (1996); *Hartnett v. Southern American Fire Ins. Co.*, 495 So.2d 902, 903 (Fla. Dist. Ct. App. 1986)(no shareholder standing to participate in delinquency proceeding).

Indeed, RBE acknowledged that "shareholders are not typically granted intervention in cases of this nature," but argued this was not a "typical" case. (A275 [3:13-17]). The general rule denying shareholders general intervention in delinquency proceedings is important to the orderly administration of the proceeding. Permitting shareholders to generally intervene would interfere with the statutory framework and thwart the purposes of the DUILA. Under the DUILA, the only parties expressly entitled to fully participate in a delinquency proceeding are the Commissioner and the insurer. 18 *Del. C.* §5903. In Delaware, the representation of IICRRG and the decisions regarding its operation rest with the

board of directors. *Spiegel v. Buntrock*, 571 A.2d 767, 772-73 (Del. 1990). Furthermore, shareholders do not have a specific interest in the assets of a corporation. *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1265 (Del. 2012).

RBE has cited no case where stockholders have been allowed to generally intervene in a delinquency proceeding, but instead attempts to attack the authorities cited by the Receiver by raising distinctions that do not exist in this case.

RBE first observes that *Metcalf* relied upon the decision in *Hartnett* that the purpose of the Hawaii (*Metcalf*) and Florida (*Hartnett*) delinquency statutes specifically did not mandate the protection of the shareholders of a company in delinquency proceedings. *Metcalf*, 910 P.2d at 111 (citing *Hartnett*, 495 So.2d at 903).[6]

RBE asserts that unlike the above jurisdictions, the DUILA *does* have the protection of stockholders of an insolvent insurer as a purpose, and thus the statute mandates stockholder standing for all purposes. RBE quotes 18 *Del. C.* §5903 ("Commencement of delinquency proceedings"), which provides:

> The Commissioner shall commence any such proceedings by application to the court for an order directing the insurer to show cause why the Commissioner should not have the relief prayed for. On the return of such order to show cause and after a full hearing, the court shall either deny the application or grant the application,

[6] The Trial Court, in denying the Motion to Intervene in the Liquidation, expressly relied upon *Metcalf* and *Hartnett*. (A306-07 [34:22 - 35:11]). As discussed in Section IV(A)(3), below, RBE neither sought reconsideration of this Order, nor did it assert that the Court's reliance on *Metcalf* and *Hartnett* was improper in its letter seeking leave to brief intervention in the Rehabilitation. (A1851-57).

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> together with such other relief as the nature of the case **and the interests of the policyholders, creditors, stockholders, members, subscribers or the public may require.**

(App. Br. at pp. 22-23) (emphasis added by RBE).

As RBE acknowledged, this argument necessarily leads to the conclusion that standing is likewise provided to each of the other named constituencies--including "the public." (B594).

In making this argument, RBE wrongly conflates Section 5903, which authorizes broad injunctive relief to protect the interests of various corporate constituencies, with a grant of standing. That Section 5903 does ***not*** act to confer standing on those constituencies, including stockholders, is confirmed by *Hartnett* and *Metcalf*. The laws considered in both *Hartnett* and *Metcalf* contained language identical or substantially similar to Section 5903. At the time *Hartnett* was decided,[7] Florida law contained the identical provision:

> The department shall commence any such proceeding by application to the court for an order directing the insurer to show cause why the department should not have the relief prayed for. On the return of such order to show cause, and after a full hearing, the court shall either deny the application or grant the application, together with such other relief as the nature of the case **and the interests of the policyholders, creditors, stockholders, members, subscribers, or public may require.**

[7] Although amended shortly after the decision in *Hartnett* to make clear that a delinquency petition could be granted by a consent, the relevant provision was retained and the highlighted language remained identical. *See* 1988 Fla. Sess. Law Serv. 88-166, Sec. 38 (showing amendments to FSA § 631.031).

FSA 631.031 (emphasis added).

While Hawaii's statute is not *identical*, it is equivalent to the Delaware and Florida statutes, stating that a receiver may be granted an injunction to prevent: "Any other threatened or contemplated action that might . . . **prejudice the rights of policyholders, creditors, or shareholders**, or the administration of any proceeding under this article." HRS § 431:15-105(a)(11) (emphasis added). RBE's attempt to distinguish *Hartnett* and *Metcalf* relies on the purported absence of the language of 18 *Del. C.* § 5903. That premise is incorrect; thus, RBE's attempt to distinguish *Hartnett* and *Metcalf* also fails.

RBE next attempts to distinguish *Holland*, which held that shareholders do not have standing to intervene generally in a rehabilitation, 184 P.3d at 1097, and the case *Holland* cited, *State, ex rel. Crawford v. American Standard Life and Acc. Ins. Co.*, 37 P.3d 971 (Okla. Civ. App. 2001). (App. Br. at p. 26). RBE states that *Holland,* though a rehabilitation, relied on *Crawford* without further explanation, and asserts that because *Crawford* was a liquidation, neither should be given weight. (App. Br. at p. 26). RBE characterizes *Crawford's* holding as "[s]ince the *Crawford* court determined that the shareholder was limited to its claim under the distribution scheme, the court determined that shareholder did not have standing." (App. Br. at p. 26) (citing *Crawford,* 37 P.3d at 973-74).

However, *Crawford* actually held:

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> General creditors in the receivership do not have the direct interest in any single asset of the receivership to justify intervention in the Receiver's action to administer the assets. If a Class 10 creditor was held to have such a direct interest, then all claimants would have a sufficient interest to support intervention in practically every action by the Receiver. ***This would thwart the purposes of [36 Okla. St.] § 1914.***

37 P.3d at 974 (emphasis added). The provision cited by the *Crawford* court, like that in Delaware[8], relates to all "delinquency proceedings" whether rehabilitations or liquidations. 36 Okla. Stat. § 1914; 18 *Del. C.* § 5913.

The *Crawford* court denied intervention because it followed from the shareholders' arguments that all claimants would have sufficient interest to support intervention in every action by a receiver. This concern is doubly at issue here. As discussed above, RBE's argument that ***all*** policyholders, creditors, stockholders ***and even the public*** may intervene is substantially broader than the argument rejected by the *Crawford* Court as thwarting the purpose of Oklahoma's version of of 18 *Del. C.* § 5913. *Crawford* also relied on the fact that numerous other states had the same or similar statutes and had disallowed intervention. 37 P.3d at 974. This fact is significant. Oklahoma and Delaware have enacted the UILA, which provides "The [UILA] shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it." *See* 36 Okla. Stat. § 1921; 18 *Del. C. §* 5920.

[8] 18 *Del. C.* §5913 is essentially identical to 36 Okla. Stat. § 1914.

[redacted]

As noted previously, RBE has not cited a single case where a stockholder was granted a general right to intervene in a delinquency proceeding.[9] The only delinquency case it cites, *Commonwealth ex rel. Chidsey v. Keystone Mut. Cas. Co.*, 76 A.2d 867 (Pa. 1950), granted leave to form a *policyholders' committee.* RBE argues that the *Chidsey* court held that policyholders in a mutual insurance company "were deemed analogous to shareholders." (App. Br. at p. 26). Contrary to RBE's claim, the *Chidsey* court did not allow the formation of the policyholder's committee because the mutual policyholders were "analogous to shareholders." Instead, the Court held, "Such a company is a co-operative enterprise wherein the policyholders, as members, are both insurer and insured. ***Upon insolvency of the company the policyholders, as members, are liable for their proportionate share of indebtedness.***" 76 A.2d at 870 (emphasis added). RBE has not alleged that it will be liable for 99% (or any amount) of the indebtedness of IICRRG. Thus, *Chidsey* does not aid RBE's argument.

Quite simply, RBE has offered no support to contradict its counsel's earlier acknowledgment in the hearing on the Motion to Intervene, that "shareholders are not typically granted intervention in cases of this nature." (A275 [3:13-17]). Nor has it provided any support to show why Delaware should not follow the general

[9] RBE cites bankruptcy cases discussing equity holders' committees. (App. Br. at p. 27). However, in a bankruptcy, such committees are explicitly authorized by statute. 11 U.S.C § 1102(a)(1). No such statutory authority is present here.

[redacted]

rule adopted by other states--either as a general matter or as applied to the specific facts of this case. The appeal should be dismissed for lack of standing.

3. RBE Was Accorded Due Process By Its Prior Litigation of, and Hearing on, Intervention on the Liquidation Petition

In this appeal, RBE is not asserting that the Trial Court's previous decision on intervention on the Liquidation Petition was erroneous. Instead, its sole contention relating to the Rehabilitation Order is:

> The Trial Court erred as a matter of law and in violation of the protections of due process under the Federal Constitution and the Constitution of the State of Delaware, where ***it did not allow for an opportunity to present any argument*** before entry of the Rehabilitation Order, appointing the Commissioner as receiver of IIC and vesting her with all right and title to all of the assets of Indemnity Insurance Corporation, RRG.

(App. Br. at Summary of Argument 1, pg. 2)[10] (emphasis added).

Conspicuously absent from RBE's argument[11] is the fact that it previously sought intervention on the Liquidation Petition and that the motion was fully briefed and denied after argument. Nor does RBE attempt to explain how the difference between a liquidation and a rehabilitation would have changed the analysis of the Trial Court.

Indeed, in the letter it filed seeking leave to brief a motion to intervene in the

[10] RBE also characterizes its argument in its headings and the body of its brief as being deprived of due process because the Rehabilitation Order was granted "without allowing RBE any opportunity to intervene." (App. Br. at pp. 16-17).

[redacted]

rehabilitation, no new arguments were made. RBE's request was:

> As Your Honor may recall, when [RBE] first sought to intervene in this matter, the Court denied such intervention with the following caveat:
>
> > If it turns out that that the State wants some remedy that would deprive [RBE] of its voting rights or other[wise] affect its unique rights as a stockholder, I would reconsider and I would give Mr. Cohen, or really [RBE], the ability to intervene for the purpose of litigating its own particular rights.
>
> Aug. 22 Hearing Tr. [A310] at 38:7-12. [RBE] believes that the Commissioner's proposed form of order does exactly that. Therefore, we would request from the Court an opportunity to be heard on this point so that [RBE] can seek to protect its rights as the 99 percent shareholder of Respondent.

(A1855).

Notably, RBE did not assert below (or here), that the Trial Court's earlier decision on intervention was incorrect, or that it had new evidence. Its sole basis for relitigating intervention was that the proposed rehabilitation order sought "some remedy that would deprive [RBE] of its voting rights or other[wise] affect its unique rights as a stockholder." (A1855).

However, liquidation and rehabilitation under Delaware law have the same effect on the control of the company--in both cases the Commissioner is directed to take possession of the property of the insurer and to conduct

[11] In its Statement of Facts, RBE does acknowledge that the Liquidation Intervention was briefed by the parties, and denied after a hearing, though it provides no explanation of how the analysis

the insurer's business as a receiver. *See* 18 *Del. C.* §§ 5910(a) (rehabilitation); 5911(a) (liquidation). A rehabilitation order would have no more effect on RBE's "voting rights" than a liquidation order.

In both its letter and its Brief on Appeal, RBE ignored the Trial Court's explanation of the limited basis of any allowable intervention:

> Even if I allowed RB to intervene, it would only be for that limited purpose. So it's not going to be for the purpose of arguing about valuation. It's not going to be for the purpose of arguing about solvency. It's not going to be for the purpose of arguing about business viability. Those are all issues that are now within the control of the board of Indemnity Insurance Corporation. The board gets to decide what arguments it wants to make, not Mr. Cohen. The board gets to decide what litigation strategy it wants to pursue, not Mr. Cohen. The fact that Mr. Cohen may think he knows better is not a good argument, or at least not one that this Court will accept.

(A310-11 [38:19-39:8]). Importantly, RBE did not seek reconsideration of the denial of intervention, appeal the denial, or, in its letter, seek to present argument other than that the proposed Rehabilitation Order sought "some remedy that would deprive [RBE] of its voting rights or other[wise] affect its unique rights as a stockholder." (A1855). However, in its Brief on Appeal, RBE appears to have abandoned the theory it presented to the Trial Court that the circumstances of a rehabilitation petition fit into the narrow exception to shareholder standing articulated by the Trial Court after its first Intervention Petition was denied, and instead now asserts for the first time that it would have challenged "many" of the

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for rehabilitation would be different than liquidation. (App. Br. at pp. 9-10).

allegations of the Rehabilitation Petition, but lists just three: (1) "the Commissioner's basis for asserting control over IIC"; (2) "the seizure of assets not belonging to IIC"; and (3) "the illegal process in which the Commissioner engaged a for-profit contractor."[12] (App. Br. at p. 18). As each of these contentions would be equally applicable to a liquidation, the Trial Court's determination that a hearing was not necessary does not violate due process.

Contrary to RBE's arguments, there has been no deprivation of due process because RBE had earlier fully litigated the issue of intervention, which was denied after hearing, and provided no basis to either the Trial Court or this Court as to why the underlying issues would differ.

4. Entry of the Rehabilitation Order Without the Opportunity to Intervene Did Not Violate Due Process

Courts in Delaware follow the test articulated in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) to evaluate what process is "due." This test requires a court to balance three factors: (1) the private interest that will be affected by the official action; (2) the risk that there will be an erroneous deprivation of the interest through the procedures used and the probable value of additional or substitute procedural safeguards; and (3) the government interest involved, including the added fiscal and administrative burdens that additional or

[12] Although not made explicit, RBE's argument on this issue appears to be that allowing non-department employees to act as examiners violates 18 *Del. C.* § 308, despite the specific

[redacted]

substitute procedures would require. *See, e.g., Waters v. Division of Family Services,* 903 A.2d 720, 725 (Del. 2006) (citing cases); *Franco v. State*, 918 A.2d 1158, 1162 n. 12 (Del. 2007) (citing *Mathews*, 424 U.S. at 334–35).

The amount of process required to safeguard an individual's due process rights varies greatly depending on the facts and issues involved in each case:

> In some cases due process does not require an evidentiary hearing. And even when required, a hearing need not be tantamount to a trial. At other times, however, in addition to notice and the opportunity to be heard, due process also may require further procedural safeguards such as the opportunity to confront and cross-examine adverse witnesses, oral argument, presentation of evidence, and the right to retain an attorney.

W.L. Gore & Associates, Inc. v. Wu, 2006 WL 905346, at *4 (Del. Ch. March 30, 2006) (footnotes and citations omitted). In the case at hand, balancing the *Eldridge* factors shows that RBE received due process.

RBE makes the conclusory statement that its interest is "directly and significantly" affected by the Rehabilitation Order because "RBE is the owner of 99 percent of the equity of [IICRRG]. Despite this ownership interest, the Commissioner, as Receiver of [IICRRG] has been vested with complete control over all 'Assets' of [IICRRG]." (App. Br. at p. 20). However, stockholders, including a majority stockholder, do not have a specific interest in the assets of a corporation. *Theriault*, 51 A.3d at 1265. The first factor weighs against RBE.

For the second factor, RBE asserts that "[w]here there is absolutely no

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allowance of such by § 308.

[redacted]

opportunity to even raise arguments, the risk of error is substantial." (App. Br. at p. 21).[13] As discussed in Section IV(A)(3), above, the question of intervention had been fully briefed and argued earlier. The request for additional briefing suggested no new or different reasons. It is clear that due process does not require a hearing in every circumstance. *W.L. Gore & Associates,* 2006 WL 905346, at *4.

In the case at hand, the Trial Court specifically found that the consent of IICRRG's board of directors was an independent ground to enter the Rehabilitation Order. (Rehabilitation Order at ¶ 1). Such consent is a statutory basis for entry of an order of rehabilitation. 18 *Del. C.* § 5905(9). In such cases, hearings are not ordered, as they are unnecessary. *See, e.g., In re Rehab. of Nat'l Heritage Life Ins. Co.*, 656 A.2d 252, 254 (Del. Ch. 1994) (entering rehabilitation order on consent one day after petition filed without notification to any third party).

RBE has not identified how it could have contested a receivership on consent. The only attempt it makes to attack the consent is the unsourced statement: "***As the Commissioner conceded***, there are sufficient assets in the company to cover the tail liabilities, a fact that the board of directors of IIC should have known and relied upon in withstanding the Commissioner's challenges to take over the company." (App. Br. at p. 28) (emphasis added). Although no cite is provided for this "concession", presumably it is a reference to paragraph 22 of the

[13] The bulk of RBE's argument on the second factor discusses the standing of RBE, which is

Petition for Rehabilitation:

> IICRRG's management has negotiated ***a potential transaction*** for the acquisition of certain assets of IICRRG and believes that ***if certain financial analytics can be confirmed***, an approved Plan of Rehabilitation ***based upon this potential transaction*** would provide a substantial likelihood that the Company's tail liabilities can be run off completely with existing assets.

(A1793) (emphasis added).

This paragraph makes clear several facts that contradict RBE's characterization: (1) that it was IICRRG's management, not the Commissioner, who believed that such a transaction was possible, and that the board of directors did, in fact, rely upon this fact in consenting to the rehabilitation;[14] and (2) the ability to do such runoff was contingent upon ***both*** confirming certain financial analytics and entering into a transaction with a third party.[15]

RBE asserts that intervention is particularly appropriate where "the principal of the equity holder is accused of fraud but not permitted an opportunity to challenge those allegations." (App. Br. at p. 27). This averment is simply false. Cohen has been provided multiple opportunities to contest the detailed allegations of fraud but has declined each one. Contrary to Ch. Ct. R. 24(c), RBE's Motion to

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addressed in Section IV(A)(2), above.

[14] The board's Resolution authorizing the consent to the Rehabilitation Order specifically discussed the offer and its general terms. (A1827 at ¶ 11).

[15] As discussed in detail in the Petition for Liquidation filed on January 16, 2014, negotiations for the identified transactions and other transactions were fruitless, and IICRRG's investigation showed ***both*** liabilities exceeding assets by nearly $17 million and a report by IICRRG's

Intervene in the Liquidation did not (i) attach objections which it sought to file which would have addressed the allegations of fraud in the liquidation petition, or (ii) allege that the averments of fraud were untrue. (A122-23) (Commissioner's brief pointing out failure to contest fraud) (A304 [23:13-24]). When asked by the Trial Court: "Do you want the opportunity to seek to intervene to oppose the fraud issues?", RBE's counsel responded merely, "I think that's something to be discussed." (A305 [33:10-14]). Further, IICRRG filed a Verified Complaint against Cohen in the Chancery Court asserting many of the fraud allegations set forth in the Liquidation Petition. Rather than "challenge" those averments of fraud, Cohen asserted "...a privilege not to respond to the allegations contained in this paragraph." (B531-33, 535, 539, 541, ¶¶ 17-19, 21, 23, 29-30, 41, 52-53).

RBE's only acknowledgment of procedures that exist for RBE to be heard throughout the process was in a footnote:

> Additionally, while the Rehabilitation Order left open the possibility of an opportunity to be heard later in the process (see ¶ 28), the ruling ignores the irreparable harm that has already been done to [IICRRG]. Mr. Cohen and RBE fear that under the Commissioner's management bills have gone unpaid, IT systems have failed and customers and claims have been ignored.

(App. Br. at p. 28, n. 17). RBE offers no argument as to how a hearing on intervention could have addressed these issues, nor do these "fears" result in any

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actuaries that IICRRG is under-reserved by nearly $14 million based on claims information that was no longer filtered and controlled by Cohen. (B706-08 at ¶¶ 61-67).

[redacted]

denial of due process.

RBE completely ignores the other provisions, in law and in the Rehabilitation Order, which provide it an avenue to be heard on ***specific issues***. *See, e.g.,* Rehabilitation Order ¶¶ 23-25; 18 *Del. C.* §§ 5910 (c), 5915, 5917. The Trial Court also has stated that it will hear and allow claims on the issues of ownership of property. (A1773-74 [169:14 - 170:3]; B679).

The Trial Court's determination that general intervention would be denied, but intervention on specific, identified, issues would be allowed where appropriate, and its implementation of that in the Rehabilitation Order is in keeping with the practice of a number of other courts. *See, e.g., In re Rehab. of Ambac Assurance Corp.*, 2013 WL 5745944 * 24, 35, 38-39 (Wis. App. Oct. 24, 2013) (holding opportunity to object to rehabilitation plan satisfied due process, denying motion to intervene generally). *Cf. Hartnett*, 495 So.2d at 1097-98 (denying shareholders general intervention, but allowing intervention for specific purposes). Given RBE's complete failure to address why the procedures put into place are inadequate, the second *Eldridge* factor weighs in favor of affirming the Trial Court's decision.

The third *Eldridge* factor focuses on the government interest, and also includes a weighing of the added burdens caused by the additional safeguard or alternative procedures. RBE's argument on the third *Eldridge* factor ignores the

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interest of the State. (Appellants' Br. at p. 28). The DOI has a strong interest in protecting policyholders and others who may be harmed by business practices of insurers. *See, e.g., Remco Ins. Co. v. State Ins. Dept.*, 519 A.2d 633, 635 (Del. 1986).

RBE instead merely makes the conclusory averment that allowing intervention and a hearing would have resulted in "minimal cost." As discussed in Section IV(A)(2), above, RBE's argument would result in standing for all creditors, and the public, in general. The *Crawford* Court explained that such a circumstance--even limited to only creditors--would thwart the purposes of [Oklahoma's equivalent of 18 *Del. C.* §5913]." 37 P.3d at 974. The third *Eldridge* factor weighs in favor of affirmance.

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B. THERE WAS NO PROCEDURAL DUE PROCESS VIOLATION, NOR DID THE TRIAL COURT ERR IN SANCTIONING COHEN FOR DELIBERATE AND KNOWING VIOLATIONS OF PREVIOUS ORDERS.

Question Presented

Whether procedural due process was violated, or whether the Trial Court erred in sanctioning Cohen for deliberate and knowing violations of previous orders? (No.)

Scope and Standard of Review

This Court reviews mixed questions of fact and law *de novo* as to legal conclusions and for clear error as to factual determinations. *Hunter v. State,* 783 A.2d 558 (Del. 2001); *Miller v. State*, 4 A.3d 371 (Del. 2010). "To the extent a decision to impose sanctions is factually based, we accept the trial court's factual findings so long as they are sufficiently supported by the record, are the product of an orderly and logical reasoning process, and are not clearly erroneous." *Stegemeier v. Magness,* 728 A.2d 557, 561 (Del. 1999).

Merits of Argument

Due to Cohen's deliberate violation of Court Orders, the Trial Court has issued a number of sanctions orders against him. The Trial Court's Memorandum Opinion of January 16, 2014, denying Cohen's Motion to Stay the Rehabilitation Order reviews the Trial Court's efforts to have Cohen comply with various Orders, and the escalating sanctions designed to encourage compliance where previous

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sanctions proved insufficient. (B659-66). On September 24, 2013, the Trial Court made clear to Cohen's counsel[16] that further interference would not be tolerated and would result in sanctions:

> First let me make clear, Mr. Cohen will stand down. There will be no more efforts at self-help. If there are further efforts at self-help, not only will the issues that I'm discussing come into play, but I will be open to other additional consequences should those be warranted.
>
> * * *
>
> I think there's good reason to believe that Mr. Cohen has been interfering. I think there's reason to fear that he will continue to interfere. As a result, I am going to impose some consequences that are designed to be coercive in nature to ensure that he complies going forward.

(A970-71 [166:16 - 167:15]).

1. Cohen Violated the Seizure Order's Directive that All Lawsuits Be Filed in the Court of Chancery

Approximately two weeks after being told forcefully to "stand down," Cohen deliberately violated the terms of the Seizure Order by filing two lawsuits in Maryland State Court, one on behalf of his controlled entities, and a *pro se* action--both actions had as defendants not only IICRRG, but also employees of IICRRG. (A1276, 1328).

Paragraph 10 of the Seizure Order specifically enjoins and restrains any persons having notice of the Seizure Order from asserting any claims against

[16] Although the hearing was to determine possible sanctions against him, Cohen chose not to attend that hearing.

[redacted]

IICRRG or its assets except in the seizure proceedings or any subsequent delinquency proceeding. (A60). Cohen testified that he was aware of the Seizure Order. (A1693 [89:10-13]). He testified that he was also aware of the September 25, 2013 Order's requirement that all communications between Cohen and IICRRG's employees be through counsel. (A1686 [82:14-19]).

Cohen explained his filing the *pro se* lawsuit, and delivering it to employees of IICRRG as "I interpreted the order [of September 25, 2013] to say that no communication could happen unless through counsel, and I just assumed acting as a pro se, that I am acting as my own counsel." (A1721-22 [117:23 - 118:2]).

The Court rejected this testimony as pretextual, and specifically held that the filing and service of the *pro se* complaint was a continued attempt to interfere with the Commissioner and management of IICRRG and a direct violation of the no-contact except through counsel provision of the September 25, 2013 Order. (A1722-23; 1764-65 [118:13 - 119:13; 160:15 - 161:23]).

With regard to Cohen's argument that the anti-suit injunction of the Seizure Order was somehow invalid--such an argument is specious. Even outside a delinquency context, a case Cohen cites, *Cook v. Delmarva Power & Light Co.*, 505 A.2d 447, 449 (Del. Super. 1985) makes clear this power: "Delaware Courts have recognized their power under the proper circumstances to enjoin parties in a pending proceeding from prosecuting the merits of the controversy in a Court in

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another state." Maryland courts likewise recognize that even if an out-of-state anti-suit injunction does not prevent the Maryland court from deciding a case brought there, the plaintiff "may well be in violation of the [out-of-state] injunction and subject to contempt penalties there." *Roggenkamp v. Roggenkamp*, 25 Md. App. 243, 333 A.2d 374 (1975). In an insurance delinquency case, such orders are ubiquitous. *See e.g. Checker Motors Corp. v. Exec. Life Ins. Co.*, 1992 WL 29806, at *2 (Del. Ch. Feb. 13, 1992) (central purpose of the UILA is "to avoid dissipating a distressed insurer's assets by allowing it to be sued, and requiring it to defend, litigations scattered in many jurisdictions throughout the country"). The Trial Court took pains to make clear that Cohen could, and should, dismiss the actions without prejudice, and that the Court would entertain an application to modify the Seizure Order to allow an action to be brought in Maryland if there is some matter that can only be addressed there. (A1766 [162:11-21]). In the nearly three months since the Trial Court's ruling, Cohen has declined to file such an application.

2. Cohen Articulated No Defense to the Return of the Cars

Cohen asserts:

> Mr. Cohen's counsel argued in a letter sent to IIC that the vehicles were provided to Mr. Cohen under the terms of an Employment Agreement (that is the subject of one of the lawsuits in Maryland). Rather than responding to Maryland counsel's assertions, IIC moved for sanctions, and again, the Trial Court sanctioned Mr. Cohen's failure to promptly return the vehicles without any opportunity for Mr. Cohen to defend his claim to the vehicles.

[redacted]

(App. Br. at pp. 33-34). This statement is incorrect in almost every particular.

While Cohen's counsel did indeed send a letter arguing that the cars were provided pursuant to Cohen's employment agreement [A1256-57], the letter did not argue that Cohen owned the cars, but instead demanded $30,000,000 from IICRRG in order to return the cars. [A1257].

Contrary to Cohen's contention, IICRRG's counsel responded to the letter, and stated that the demand for $30,000,000 was contrary to the terms of the Seizure Order and gave nine days to make arrangements to return the vehicles and informed Cohen's counsel that a motion for contempt of the Seizure Order would result if such arrangements were not made. [A1258-59]. Finally, Cohen did not attempt to "defend his claim" to the vehicles, as he acknowledged at the hearing that the cars were titled in the name of IICRRG, and his only claim to ownership of the cars was as "99% owner" of IICRRG. (A1725 [121:15-10]).

Cohen has offered no analysis whatsoever of why the cars should not have been turned over under the plain language of the Seizure Order, or in what way the Court erred in ordering the turn-over.

3. The Court Was Correct in Excluding Irrelevant Evidence

Cohen argues that the Court erred when it refused to hear certain evidence of matter that had already been raised at a prior hearing. The Court specifically held that it would not consider the evidence of collateral matters, but would hear

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evidence relating to matters at issue on the contempt. [A1659-61 [55:10 - 57:6]; A1718-21[114:15 - 117:13]; 1730-31 [126:14 - 127:4]). In his Brief, Cohen merely states that his "arguments were outlined in the response to the motion for sanctions filed prior to the hearing" and that "despite these arguments, the Trial Court ruled that it did not want to hear any of Mr. Cohen's evidence." (App. Br. at p. 35). In fact, the Trial Court heard substantial testimony from Cohen, but balked at irrelevant matters. Cohen's sole "analysis" of how the Trial Court erred was "This evidence had a direct impact on the determination that Mr. Cohen had violated the Seizure Order, the Amended Seizure Order, the Sept. 25 Sanctions Order and the Nov. 1 Sanctions Order. The Trial Court erred when it refused to consider this evidence." (App. Br. at p. 35).

As discussed above, Cohen admitted the facts of contempt, his knowledge of the Orders and his deliberate actions in violation. He may not defend against contempt by asserting the invalidity of the underlying order giving rise to contempt. *Rambo v. Fraczkowski*, 350 A.2d 774, 775 (Del. Super. 1975) (citing *Mayer v. Mayer*, 132 A.2d 617, 621 (Del. 1957)).

The Trial Court was correct in its finding of contempt against Cohen, and the factual findings are supported by the record, are the product of an orderly and logical reasoning process, and are not clearly erroneous.

V. CONCLUSION

For the foregoing reasons, the Court should affirm the Trial Court's Orders of November 1, 2013 and November 7, 2013.

Respectfully submitted,

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