NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6419-06T3

IN THE MATTER OF THE
REHABILITATION OF
EAGLE INSURANCE COMPANY.

Argued March 12, 2008 - Decided July 31, 2008

Before Judges Axelrad, Payne and Messano.

On appeal from Superior Court of New Jersey, Chancery Division - General Equity Part, Mercer County, C-84-06.

William S. Greenberg argued the cause for appellants Eagle Insurance Company and The Robert Plan Corporation (McCarter & English, LLP, attorneys; Mr. Greenberg, Gerard G. Brew, and Andrew O. Bunn, of counsel, Mr. Brew, Mr. Bunn, Stephanie Cohen and Alison C. O'Sullivan, on the brief).

Emerald Erickson Kuepper, Deputy Attorney General, argued the cause for Steven M. Goldman, New Jersey Commissioner of Banking and Insurance (Anne Milgram, Attorney General, attorney; Patrick DeAlmeida, Assistant Attorney General, of counsel, Ms. Kuepper, Deputy Attorney General, on the brief).

PER CURIAM

Defendants Eagle Insurance Company and its parent, The Robert Plan Corporation (RPC), appeal from an order of liquidation entered by Chancery Judge Shuster upon the application of the Commissioner of the New Jersey Department of Banking and Insurance (DOBI). Defendants argue that the judge erred by deferring to the Commissioner's determination that liquidation was warranted and by not holding a plenary hearing to resolve alleged factual disputes concerning Eagle's status. Defendants contend further that the court should have enforced the terms of a prior consent order in which defendants agreed to rehabilitation in exchange for the Commissioner's promise to use "best efforts" to effectuate a sale of two of Eagle's subsidiaries. Finally, defendants argue that the Commissioner rushed to liquidation without attempting to collect debts owed to Eagle. We affirm.

This matter has a lengthy factual background and procedural history of relevance to the present appeal. RPC, a Delaware corporation, is Eagle's sole shareholder. RPC is not an insurance company; it controls a number of non-insurance subsidiaries that provide underwriting, policy and claims administrative services. Eagle is a New Jersey domiciled property/casualty insurance company that has been licensed to transact insurance business in this State since 1913. Eagle owns several subsidiary insurers domiciled in New York, New Jersey and Pennsylvania. Its New Jersey subsidiaries, Newark Insurance Company, GSA Insurance Company and National Consumer

Insurance Company (NCIC), primarily write policies of private passenger automobile insurance. Eagle, Newark and GSA have been under consensual administrative supervision by DOBI since 2001; NCIC has been under consensual administrative supervision since 1998. All are in runoff status, and none has any in-force policies.

In 1998 and 1999, having experienced financial difficulties, Eagle entered into reinsurance treaties with affiliates of AIG. However, a dispute soon arose between Eagle and AIG that resulted in AIG's unilateral termination of the treaties, thereby worsening Eagle's financial condition.

On June 20, 2001, Eagle consented to being placed in confidential administrative supervision by the Commissioner. Alexander T. Farley, President of American Insurance Management, was appointed to serve as administrative supervisor. While these steps were occurring, arbitration proceedings were being conducted between Eagle and an AIG affiliate, the American International Insurance Company (for simplicity, AIG), regarding the cancelled reinsurance treaties. On December 31, 2001, Eagle and AIG executed two commutation and release agreements that required AIG to make commutation payments of $124,643,000 to Eagle and $24,315,000 to Newark, for a total of $148,958,000 in exchange for a release by Eagle and Newark of present and future payment obligations under the reinsurance treaties. These commutation agreements were executed in conjunction with a master agreement between RPC and AIG, intended to permit the solvent runoff of the Eagle entities in the year 2013 with a $5 million surplus. The master agreement gave AIG control over certain RPC affiliates in exchange for AIG's promise to purchase up to $150 million in surplus notes from Eagle, fund Eagle's loss adjustment expenses, and guarantee a $19 million promissory note from RPC to Eagle. RPC, in turn, guaranteed payment of up to $7.9 million if needed to ensure Eagle's solvency. The consolidated transaction between RPC and AIG was approved by the Commissioner on February 1, 2002 as a "product of arm's length bargaining" between the two entities. However, in his approval order, the Commissioner reserved the right to "require a special deposit or deposits from AIG in the future until such time as the liabilities of the RPC insurance subsidiaries no longer exist" if AIG failed to perform in accordance with its agreements. Administrative supervision of Eagle and its subsidiaries was continued.

Soon thereafter, RPC raised concerns regarding the accuracy of AIG's accounting during the settlement process, asserting that AIG's commutation reserves were considerably greater than the $148 million set forth in the agreements. Farley was directed by the Commissioner to investigate these allegations.

On July 9, 2004, Farley issued a draft report finding that AIG had understated its commutation balances by $56.5 million. However, Farley concluded the discrepancy had little impact on Eagle, since any amount added to the commutation payment would have resulted in a corresponding reduction in the amount of surplus notes to be purchased by AIG. Both AIG and RPC disputed Farley's conclusions. AIG took the position that the commutation amount set forth in the settlement was never intended to reflect AIG's exact book balance, but instead was a negotiated figure to which the parties agreed in order to settle a legal dispute. RPC argued that AIG's underreporting of its commutation reserves resulted in an unwarranted increase in Eagle's surplus note obligation that affected RPC's profit sharing potential, since Eagle was required to repay the notes, with interest, whereas the amounts paid under the commutation agreements were not subject to repayment or interest. In other words, if the commutation amounts had been correctly reported by the addition of $56.5 million, Eagle's potential debt obligation would have been reduced by a corresponding amount.

In a final report issued on September 20, 2005, Farley adhered to his prior conclusion that the commutation balances had been understated by AIG by $56.5 million. Farley explained the effect of this fact as follows:

> Should the commutation and surplus note be adjusted accordingly, the impact on Eagle would be the lost opportunity of investment income derived from the $56.5 million or about $3.6 million on investment income and the interest owed on the notes drawn down would be reduced by $8.7 million. Eagle's surplus note of $150 million would thus have been $93.5 million. The surplus note was established based on the ultimate commutation balance established such that Eagle will end with $5 million of surplus at the end of its runoff [in 2013]. It is also noted that these differences do impact RPC's profit sharing potential on 2002 and subsequent business as provided for in the Master Agreement.

Farley then noted that the difference in the surplus note obligation would affect Eagle only if a solvent runoff were successful; if not, Eagle would not be able to pay the note, regardless of its balance. He therefore concluded that the only real and present impact on Eagle was the loss of $3.6 million in investment income.

In the letter transmitting Farley's report to RPC and AIG, the Acting Commissioner observed:

> Enclosed for your information is the final report of the Department's consultant regarding the commuted balance of Reinsurance Treaties as of June 30, 2001, which has been accepted by the Department. The report concludes that the amount transferred was less than the fair and reasonable balance as of that date.

> Please further note that this deficiency would create potential claims of the Eagle and Newark Insurance Companies for lost investment income on the deficiency and impairment of the Robert Plan Corporation guaranty of the companies' surplus.

In another action of relevance to the present matter, on February 17, 2006, Eagle sold its headquarters in Bethpage, New York for a purchase price of $20 million cash. Additionally, Eagle received an earn-out note with monthly payments of $52,915 for 108 months, and a balloon payment of $5,250,000 occurring on February 15, 2015. As part of the transaction, RPC entered into a lease agreement with the purchaser, and Eagle agreed to pay a $3 million security deposit on RPC's behalf out of the sale proceeds. The transaction was approved by DOBI on February 15, 2006.

On March 9, 2006, RPC demanded that the Commissioner enforce the findings of the Farley report, either by requiring AIG to pay Eagle and Newark the $56.5 million shortfall in commutation reserves plus lost investment income on those reserves or provide Eagle and Newark with a credit offset of $56.5 million against the $150 million in surplus notes and require that AIG reimburse Eagle and Newark for lost investment income on the deficient reserves. Additionally RPC demanded that Eagle be permitted to write off the $150 million surplus note issued by Eagle and purchased by AIG as part of the consolidated transaction, claiming that

> it was never intended that Eagle repay the $150 million in surplus notes directly. Instead, as AIG and RPC earned profits as part of their go-forward business alliance (which is set forth in the Master Agreement to the Consolidated Transaction), the profits earned were to be deemed as credit offsets to the surplus notes pursuant to profit sharing and profit offset provisions contained in the Master Agreement.

RPC claimed that the credit offset sought by it, together with the ultimate profits earned by AIG pursuant to the Master Agreement would be more than sufficient to retire the notes. AIG declared RPC's position to be "baseless" arguing that RPC was asking the Commissioner to rewrite private contracts.

On March 21, 2006, RPC sought an extension of time to file Eagle's 2005 annual statement and its 2006 first quarter statement. DOBI agreed to extend the filing deadline, but only if several conditions were met, including that Eagle and Newark consent to the entry of an order of rehabilitation. RPC declined to accept DOBI's conditions, and on July 26, 2006, Eagle and Newark submitted the required financial statements. However, on August 2, 2006, DOBI notified Eagle that it would not accept the statements because certain items were not reported in accordance with statutory accounting practices established by the National Association of Insurance

Commissioners (NAIC). Specifically, DOBI challenged the reporting of the alleged $60.1 million commutation loss as an admitted asset, because the sum represented an unrealized gain. It also stated that including $11 million (the combined value of the security deposit and earn-out note from the sale of Eagle's Bethpage property) as an admitted asset also violated NAIC standard practices because both were being held by a third party and were not available for Eagle's use.

Following additional correspondence, DOBI filed an amended verified complaint for an order of rehabilitation. In a certification accompanying the complaint, Assistant Commissioner Ray Conover stated that an examination of Eagle's finances disclosed that it had a negative surplus with regard to policyholders of $6,020,509 according to its 2005 annual financial statement and $5,449,593 according to its 2006 first quarter financial statement. The ratio of Eagle's liquid assets to adjusted liabilities was greater than 300%, vastly exceeding the NAIC's benchmark of 105%, and indicating liquidity problems. Conover stated that "the Commissioner has determined that Eagle does not possess the minimum capital and surplus required by statute and that Eagle is in a hazardous financial condition pursuant to N.J.A.C. 11:2-27.3(a)18." Additionally, Conover noted among other things that Eagle's risk-based capital was a negative number and that the company had been slow in filing its 2005 annual financial report, and had failed to file a 2005 annual audited financial report.

RPC opposed DOBI's action by submission of a certification from its general counsel, Jasper J. Jackson, who asserted that DOBI had the right and obligation to recover $60.1 million from AIG (the $56.6 million plus interest), which should be treated as an asset, as should the $11 million from the Bethpage property sale. It also submitted a certification from James P. Corcoran, a former New York Insurance Department Commissioner, to similar effect. In response, Conover noted that litigation was pending in New York that addressed many of the claims and issues arising from the consolidated transaction. He stated additionally that the $60.1 million was a "gain contingency" that could not readily be converted to known amounts of cash -- a conclusion emphasized by Farley, who found that potential issues existed regarding the accuracy of AIGs commutation balances and whether Eagle could effect a successful runoff. Additionally, Conover stated that even if the $56.5 million commutation deficit were accurate and credited to Eagle, its financial situation would not be improved, because it would simply be applied to reduce the balance owed under the surplus note, and that AIG would not receive any recovery under that note unless a solvent runoff could be achieved. Given the low priority of surplus notes, the only party who could benefit from a reduction in the surplus note balance would be Eagle's shareholder, RPC. The $56.5 million would not be available to meet the interests of policyholders.

Conover additionally stated that Eagle was able to credit $17 million in cash to its liquid assets as the result of the sale of its Bethpage property ($20 million minus the $3 million security deposit given on RPC's behalf). He explained that the remaining $11 million could not be considered an admitted asset because the earn-out note was an unsecured asset payable over nine years, the balloon payment of $5.25 million was not due until 2015, and the $3 million security deposit was being held by a third party and would not be returned until the end of the lease. In explaining the need for rehabilitation, Conover asserted that RPC management had been unable to improve Eagle's financial condition, and there was no reason to believe that this would change in the future. He also expressed concern regarding a series of transactions in which RPC caused two New York domestic insurance subsidiaries of Eagle, Colonial Indemnity Insurance Company and Lion Insurance Company, to make loans to RPC totaling $3.7 million so that RPC could meet its payroll obligations. Those loans, made in March and June 2006, violated both New York insurance law and an order issued by the New York Insurance Department prohibiting such transactions. Moreover, because Colonial and Lion were wholly-owned subsidiaries of Eagle, the loans served to reduce Eagle's net assets by more than $3 million. "[T]he fact that the administrative supervisor [Farley] was unaware of these transactions indicates an attempt by RPC to do an 'end run' around the requirements and restrictions of administrative supervision." Moreover, Conover attested, the fact that these loans were made to meet RPC's payroll expenses, one of the most basic expenses of a business operation, "exacerbat[ed] existing concerns as to the financial condition of RPC" and raised further concern that RPC would engage or had engaged in other improper conduct that served to reduce Eagle's assets.

Eagle contested Conover's statements in a reply certification from Jackson that stated that RPC had withdrawn its counterclaim for fraud against AIG in the New York litigation, and it had settled its dispute with the New York Insurance Department regarding the loans. Jackson stated further that Eagle had never disclosed to DOBI the loans by Colonial and Lion, because neither was under New Jersey administrative supervision, and Farley had never inquired regarding Eagle's New York subsidiaries.

Following a hearing before Judge Shuster, the parties entered into a consent agreement dated January 29, 2007, which provided:

> 1. Eagle consents to the entry of the Order of Rehabilitation which has been previously submitted to the Court. . . .
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> 2. The Department agrees to use its best efforts to effectuate, by April 16, 2007, the sale of two of Eagle's wholly owned subsidiaries, Newark and GSA, to [AIG] under terms reasonably anticipated (taking into account potential adverse loss development) to achieve a solvent runoff of Eagle and its subsidiaries.
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> 3. During the pendency of negotiations with AIG, the Department will forbear from making any claim against RPC under the $7.9 million corporate guarantee. . . .
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> 4. During the pendency of negotiations with AIG, the Department will forbear from any sale, transfer or other liquidation of Eagle's rights under the terms of (a) the "earn-out" note received as a portion of the purchase price from the sale of the company headquarters . . . or (b) the $3 million promissory note from RPC to Eagle given in consideration of Eagle's payment of the $3 million security deposit. . . .
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> 5. RPC shall remain free to pursue any claims of any nature against AIG which RPC believes it may possess, it being understood that this Paragraph shall not impair RPC's claims regarding the $56.5 million described in the Farley Report.
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> 6. All directors, officers, and employees of Eagle, its subsidiaries, and RPC shall provide their full cooperation to

> the Department as may be deemed necessary by the Department.
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> 7. In the event that the Department is unsuccessful in effectuating the sale of Newark and GSA as contemplated in Paragraph 2 above, the Department shall proceed to take such actions as the Department shall determine in its discretion shall best accomplish the statutory objectives and requirements of rehabilitation.

The anticipated sale of Newark and GSA to AIG did not occur. In a certification, Farley stated that he had contacted AIG's then-president, Ernie Hansen, to inquire about AIG's continued interest in the purchase. Based upon information suggesting Eagle's impairment was $10.7 million, Hansen expressed interest, but requested more current financial statements. On February 16, 2007, Farley received Eagle's 2006 annual financial statement, which served as the basis for an estimate by Farley that it would take $24,763,488 to effectuate a solvent runoff of Eagle and Newark. Nonetheless, Farley developed a presentation that estimated a net funding cost to AIG of $9,458,231, which he concluded AIG could recoup from the premium tax advantage AIG would receive pursuant to N.J.S.A. 54:18A-6 from purchasing the New Jersey domiciliary insurers. On March 1, 2007, Farley provided his cost-benefit analysis to Hansen, and later met with him at Hansen's home. However, Hansen expressed disinterest in the transaction, based upon the amount of Eagle's and Newark's impairment, the insufficiency of premium tax savings, the cost of transferring business to Newark or GSA, and a concern that the premium tax advantage could be reduced or eliminated by the New Jersey Legislature. A definite rejection of the deal was transmitted to DOBI later that day.

Shortly thereafter, RPC and Eagle filed a motion to enforce the January 29, 2007 consent order, claiming that DOBI and Farley had not used their best efforts to effectuate the sale of Eagle's subsidiaries to AIG. DOBI responded with an order to show cause seeking an order of liquidation. In a certification accompanying the petition, Conover stated that, according to Eagle's 2006 annual statement, the insurer had net admitted assets of $21,405,555 and liabilities of $38,141,400, resulting in a negative surplus of $16,735,844. Newark had net admitted assets of $6,002,610 and liabilities of $10,766,300. Thus, the liabilities of the two companies exceeded their assets by $21,499,534, rendering both companies insolvent pursuant to <u>N.J.S.A.</u> 17:30C-1(a).[1] Thus, he claimed, a declaration of

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[1] That statute defines "impairment or insolvency" to mean

> when such insurer is not possessed of assets at least equal to all liabilities and required reserves together with its total issued and outstanding capital stock of a stock insurer, or the minimum surplus if a mutual insurer required by this title to be

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insolvency and petition for liquidation were appropriate under N.J.S.A. 17:30C-8 and N.J.S.A. 17:30C-6(a). Additionally, DOBI submitted the certification of the Director of the Division of Insurance, Donald Bryan, who stressed that recovery on the $56.5 million commutation balance dispute would not provide any financial benefit to Eagle's policyholders or creditors. With respect to the $3.6 million in lost investment income, Bryan stated that DOBI had considered any recovery action counterproductive while negotiations for the sale of Eagle's subsidiaries was underway, but that now a demand letter would be sent to AIG. Bryan stated further that RPC remained free "to pursue what claims it believes it may possess against AIG with respect to the $56.5 million net commutation balance difference" but that it had failed to do so.

Bryan certified that Eagle and Newark were insolvent pursuant to N.J.S.A. 17:30C-1(a), and that "there is no reasonable possibility that pursuit of any other conceivable avenue of rehabilitation would be successful" rendering further attempts "useless"[2] and likely to substantially increase the risk

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> maintained for the kind or kinds of insurance it is then authorized to transact.

[2] In addition to the attempted sale of Eagle's New Jersey subsidiaries to AIG, Farley contacted an investment banking firm (continued)

to policyholders, creditors and the public. See N.J.S.A. 17:30C-7(b) (permitting application for order of liquidation when the commissioner deems that further efforts to rehabilitate the insurer would be useless). DOBI's demand letter to AIG seeking repayment of the $3.6 million in lost investment income was rejected by AIG. It stated:

> The commutations and the Master Agreement effected the settlement of arbitration between AIG Companies and Eagle and its affiliates. Even if AIG Companies had lost every issue in the arbitration, their liability would have been very substantially less than the nearly $400 million that they committed--and have paid--pursuant to the Master Agreement. Had AIG Companies prevailed in the arbitration, Eagle would have gotten very little at all. Eagle is indisputably better off now than it would have been on any outcome of the arbitration.

In response to DOBI's submissions, defendants argued that the Department had failed to use its best efforts to sell Eagle's subsidiaries to AIG. Instead, Farley and his staff had spent minimal time in preparing the presentation to AIG, and Farley had only engaged in one face-to-face meeting with AIG's Hansen. However, defendants did not set forth what the Commissioner could have done differently to effectuate the sale

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experienced in the sale of New Jersey tax advantaged insurance companies. However, he was informed that sale at a reasonable price would not be practical.

or in any respect dispute the figures utilized by Farley in his financial presentation. Further, defendants asserted that DOBI had taken steps that were actually adverse to Eagle's interests, such as terminating much of Eagle's experienced staff and directing that it reduce claims servicing fees, thereby limiting its prospects of financial success if rehabilitated. Additionally, defendants took the position that before entering an order of liquidation, the court should compel DOBI either to enforce those portions of the Farley report suggesting that AIG had misstated its commutation balance or to enforce the special deposit provision of the approval order. As a final matter, defendants claimed that there were substantial issues of fact as to whether DOBI had utilized its best efforts to compel the purchase of Eagle's subsidiaries by AIG, as to whether further efforts at rehabilitation would be useless, and as to why DOBI had failed to enforce the conclusions of the Farley report or the approval order's special deposit provision.

In a written opinion and order dated July 26, 2007, Judge Shuster denied RPC's and Eagle's motion to enforce the settlement and granted an order of liquidation.

Addressing the issue, raised by RPC's and Eagle's motion, of DOBI's compliance with the provisions of the consent order requiring it to utilize its best efforts to effectuate the sale of GSA and Newark, the judge found on the basis of the record presented that "AIG likely decided to discontinue its interest in the contemplated transaction prior to the Commissioner having the opportunity to exert to the full extent its "best efforts." Further, the judge found that, if DOBI had sought to use AIG's purported misstatements as a device to exert pressure upon AIG to effectuate the purchase of the companies, that effort would have been unsuccessful in light of AIG's consistent denial of any legal liability as the result of its settlement of claims. "To suggest that a different outcome would have resulted had the Department apprised AIG of its legal liability if it did not follow through on the contemplated transaction simply ignores the realities of the situation; that AIG has firmly entrenched its position that such monies are not owed to Eagle." As a consequence, Judge Shuster concluded that evidence did not suggest to him that "the inability to effectuate the sale of GSA and Newark to AIG was the result of a failure to put forward 'best efforts' nor does it appear to the Court that there are disputed issues of material fact pertaining to whether the Commissioner complied with its obligation under Paragraph 2 of the Consent Order."

The judge then turned to the issue of whether, after the purchase of Eagle's subsidiaries had been declined by AIG, DOBI had acted, in accordance with paragraph seven of the January 28, 2007 consent order to take whatever actions "it deems necessary" to best accomplish the statutory objectives and requirements of rehabilitation, or whether, pursuant to the consent order and N.J.S.A. 17:30C-7a,[3] the judge should compel DOBI either to enforce the Farley report or the special deposit provision of the February 1, 2002 approval order. In this regard, the judge thus considered together DOBI's compliance with the consent order and the commissioner's application for an order of liquidation pursuant to N.J.S.A. 17:30C-8.

Addressing first the issue of the special deposit provision, the judge concluded that the approval order only preserved the Commissioner's right to require a special deposit if AIG failed to pay the commutation balance of $148 million, and that it did not provide such relief with respect to the $60.1 million later claimed to be owing. Turning to the Farley report, the judge noted DOBI's apparent acceptance of the fact that the additional money was owed, as evidenced by its letter to AIG demanding the $3.6 million in lost investment income. "Therefore," the judge stated, "it could reasonably be argued that this court, consistent with its statutory requirements,

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[3] The statute requires the commissioner "to take such steps toward removal of the causes and conditions which have made rehabilitation necessary, as the court may direct."

could require the Commissioner to first attempt to enforce the Farley Report prior to entering an order of liquidation. Yet, to what end." The judge continued:

> The court is concerned over the time it would take for the Commissioner to enforce the Farley Report against AIG, as AIG has taken a steadfast position that it is not liable for the additional amounts set forth in the Farley Report. The role of the Commissioner during rehabilitation is to "step into the shoes" of the insurance company and actively manage that company and pursue any claims or rights deemed by the Commissioner to be in the best interests of the policyholders, shareholders and the public. Here, based on Eagle being in a hazardous financial condition, now insolvent, a condition that will likely not improve with the passing of time, the Commissioner has determined that pursuing such claims are not in the best interests of the policyholders, shareholders and the public.
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> The court finds the position of the Commissioner to be reasonable at this time. The Commissioner has determined, in his wisdom and with his level of expertise, that pursuing these claims at this time would not be in the best interests of preserving Eagle in its presently insolvent condition. Eagle argues that it is almost a "slam dunk" while the Commissioner clearly looks at it differently — that any litigation has its risks and the costs would be substantial. Even if the litigation (administrative or court) were successful, it is not clear that it would ultimately change Eagle's hazardous insolvent financial condition. If the litigation was unsuccessful, the shareholders would most likely be in no worse a position; however, the unsuccessful litigation could worsen the positions of the

> policyholders, creditors and the public. Where the risk to the policyholders, creditors and the public is so substantial and where it is undisputed that Eagle is presently in a hazardous and insolvent financial condition satisfying the criteria of the statute, the court does not believe it should force the Commissioner into an uncertain litigation with uncertain results.

In conclusion, the judge recognized that, pursuant to the decision in LaVecchia v. HIP of N.J., 324 N.J. Super. 85 (Ch. Div. 1999), Eagle was entitled to a plenary hearing on any issues of fact concerning the grounds for liquidation, and thus that if defenses raising factual issues asserted raised by the insurer, the Commissioner's determination to seek liquidation could not be judged simply on the "arbitrary and capricious" standard applicable to rehabilitation proceedings. However, the judge found, "here no factual dispute has been submitted to the Commissioner's basis for seeking liquidation – that is that pursuant to N.J.S.A. 17:30C-8 Eagle is presently in an insolvent condition." Further, the judge found that Eagle's arguments that DOBI had failed to use its best interests in effecting the sale of Eagle's subsidiaries, that it had not enforced the findings of the Farley report, and it had not compelled payment of a special deposit by AIG prior to seeking liquidation "cannot be considered at this time to forestall [a] liquidation order" that was amply supported by a review of Eagle's financial status. Accordingly, Eagle's and RPC's proposed relief was denied, and an order of liquidation was entered.

On appeal, we affirm substantially for the reasons set forth by Judge Shuster in his opinion, determining that his findings of fact were supported by the evidence, Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974), and, upon plenary review, determining that his legal conclusions were likewise sound. Manalapan Realty v. Manalapan Tp. Comm., 140 N.J. 366, 378 (1995). We add only the following comments.

We reject the argument that Judge Shuster applied the wrong standard of review to DOBI's decision to seek an order of liquidation in this matter. In the context of an application for rehabilitation, we have held that the Commissioner's determination that a company's further transaction of business would be hazardous must be upheld unless clearly arbitrary or unreasonable. Fortunato v. N.J. Life Ins. Co., 254 N.J. Super. 420, 425-26 (App. Div.), certif. denied, 126 N.J. 386 (1991). In LaVecchia, supra, Judge Lintner observed that "while the Commissioner's plan for rehabilitation cannot be implemented without a court finding that it is fair and equitable, deference is given to the means the Commissioner chooses to utilize in going forward with rehabilitation." Id. 324 N.J. Super. at 91. As a consequence, Judge Shuster did not err in according deference to the Commissioner's determination that Eagle required rehabilitation and to the means that the Commissioner employed in attempting to effect that goal.

Similarly, deference is also given to the Commissioner's decision to seek a change in status of the insurer from rehabilitation to liquidation. Ibid. However, as Judge Shuster recognized, an order for liquidation is preceded by a petition setting forth the grounds for that relief and is subject to the right of the insurer to plead any defenses it may have. Once a defense is raised, any issues of fact must be resolved prior to entry of the liquidation order. Id. at 92.

Judge Shuster's written decision clearly discloses his understanding of this standard, and we find no mistake on his part in connection with its application. Contrary to the arguments of RPC and Eagle, the judge did not afford plenary discretion to the Commissioner's determination that Eagle must be placed in liquidation. Rather, he found that defendants had failed to challenge the Commissioner's factual basis for concluding that Eagle was in an insolvent condition. The judge therefore did not defer to the Commissioner's factual findings; he merely concluded, correctly, that they were unopposed, granting the relief sought by the Commissioner in the manner authorized by Rule 4:67-5. See also, Courier News v. Hunterdon

County Prosecutor's Office, 358 N.J. Super. 373, 378 (App. Div. 2003) (contrasting a summary action to summary judgment). As the judge observed, the issues that RPC and Eagle raised in opposition to liquidation were virtually identical to those raised in opposition to rehabilitation. The factual dispute pertained to the means used to effect rehabilitation, not the means used to determine insolvency, which was amply supported under standards set forth in N.J.S.A. 17:30C-6 and -8.

Even if the issues raised by RPC and Eagle had been decided in Eagle's favor, neither the recovery of $60.1 million from AIG or the recognition of the $11 million from the sale of the Bethpage property would alter the bases cited by the Commissioner for seeking liquidation. Eagle would still have a negative surplus, still be lacking requisite financial statements, still have tried to illegally deplete its assets through undisclosed loans, and still be in a hazardous financial condition.

As a final matter, we reject the argument that Judge Shuster should have rescinded the commutation agreements reached with AIG, finding that the argument does not appear to have been raised at the trial court level. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). Moreover, resurrection of this dispute between the parties would create even more complex and costly litigation than that which the Commissioner rejected, and its result would be equally uncertain.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION