

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

FEB 26 2021

Clerk of the Superior Court

By

DEPUTY CLERK

INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA,

Applicant,

v.

CALIFORNIA INSURANCE COMPANY, a
California corporation,

Respondent.

Case No.: 19-CIV-06531

Assigned for All Purposes to Hon. Danny Y. Chou

**ORDER DENYING RESPONDENT'S
SPECIAL ANTI-SLAPP MOTION TO
STRIKE**

On November 4, 2019, this Court appointed Applicant the Insurance Commissioner of California (Commissioner) the Conservator of Respondent California Insurance Company (CIC) pursuant to Insurance Code section 1011. (See Order Appointing Ins. Comr. as Conservator and Restraining Orders.) On October 19, 2020, the Commissioner filed an Application for Order Approving Rehabilitation Plan (Rehabilitation Application). In response CIC filed this motion to strike the Rehabilitation Application (Motion or Anti-SLAPP Motion) pursuant to Code of Civil Procedure section 425.16 (section 425.16).¹

The Court heard CIC's Motion on February 25, 2021. Michael Strumwasser and Cynthia Larsen appeared on behalf of the Commissioner. Shand Stephens appeared on behalf of CIC. Having considered all papers filed in support of and in opposition to the Motion, oral arguments of the parties, all testimony and evidence presented at the hearing, and all other pleadings and papers on file herein, the Court denies the Anti-SLAPP Motion.

BACKGROUND

On November 4, 2019, the Commissioner filed a Verified Ex Parte Application for Order Appointing Insurance Commissioner as Conservator (Conservator Application). In the Conservator

¹ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

1 Application, the Commissioner sought to be appointed as the conservator of CIC under Insurance Code
2 section 1011, subdivision (c). (Conservator Appl., ¶¶ 1-2, 19.) In support, the Commissioner alleged
3 that: (1) CIC had taken actions to “merge CIC into” “California Insurance Company, Inc. II” (CIC II), a
4 newly created New Mexico Company, that “is not admitted or licensed to transact the business of
5 insurance in California” (*id.*, ¶ 9); (2) CIC did so “without having filed and obtained written approval of
6 the Commissioner” (*id.*, ¶ 18); and (3) CIC’s failure to obtain the Commissioner’s approval “is ground
7 for conservation” under Insurance Code section 1011 (*ibid.*). The Commissioner further alleged that,
8 because CIC II cannot transact business in California, the merger “would place CIC’s current
9 policyholders, beneficiaries, and the California public in immediate jeopardy unless the Commissioner
10 promptly acts to protect them.” (*Id.*, ¶ 14.) The Commissioner therefore sought “to conserve CIC’s
11 property and business so that he can act promptly as conservator to avoid the completion of CIC’s
12 merger into an unlicensed foreign insurer that is not subject to the authority or control of the
13 Commissioner.” (*Id.*, ¶ 19.)

14 The Court granted the Conservator Application and appointed the Commissioner the conservator
15 of CIC pursuant to Insurance Code section 1011, subdivision (c). (Order Appointing Insurance
16 Commissioner as Conservator and Restraining Order (Appointment Order), p. 1.) As part of the
17 Appointment Order, the Court gave the Commissioner the power “to pay or defer payment of all proper
18 claims and obligations against CIC accruing prior to or subsequent to his appointment as Conservator,
19 and to act in all ways and exercise all powers necessary or appropriate for the purpose of carrying out”
20 the Order. (*Id.*, ¶ 1.)

21 On August 11, 2020, the Court denied Respondents’ Verified Application to Vacate the
22 November 4 Order Appointing the Commissioner as Conservator. (Order Denying Resp.’s Verified
23 App. To Vacate the Nov. 4 Order Appointing the Comr. as Conservator, ex. A.) In its order, the Court
24 explained that the conservatorship was ordered because “Respondents attempted to take CIC and its
25 assets out of California via a merger without adequate protection of policyholders and the public”
26 (*Ibid.*)

27 On October 19, 2020, the Commissioner filed the Rehabilitation Application pursuant to
28 Insurance Code section 1043. Section 2.6 of the Commissioner’s proposed California Insurance

1 Company Rehabilitation Plan (Rehabilitation Plan) requires that all "Claimants . . . be offered by CIC
2 the opportunity to settle Pending Litigation and Subsequent Litigation" in accordance with Schedule 2.6.
3 (Decl. of J. Holloway ISO Conservator's App. for Approval of Rehab. Plan, ex. A.) "Claimants" are
4 defined in Schedule 2.6 as "a Party to Pending Litigation or Subsequent Litigation who is asserting or
5 may assert an interest in that Proceeding contrary to the interest of the Company, its Affiliates, or its
6 Successors." (*Ibid.*) "Pending Litigation" is defined as a "Proceeding pending on the Conservation
7 Date." (*Ibid.*) "Subsequent Litigation" is defined as "a Proceeding brought after the Conservation Date
8 by the Company, its Affiliate, or a Successor or a claim asserted by a Policyholder deemed eligible to be
9 a Claimant" (*Ibid.*) And a "Proceeding" is defined as "a matter brought in any state or federal court,
10 before the Commissioner, or in an arbitration, in which a Claimant is a Party and is asserting a claim
11 against, or defending against a claim by, the Company, its Affiliate, or a Successor regarding a Policy or
12 RPA." (*Ibid.*) Finally, a "Policy" is defined as "a workers' compensation insurance policy written to
13 cover, in whole or in part, employees in California and issued on or before June 28, 2018," and "RPA"
14 is defined as "a Reinsurance Participation Agreement issued by an Affiliate in connection with a Policy
15 covering California employees." (*Ibid.*)

16 In response, CIC filed this Anti-SLAPP Motion. Focusing solely on Section 2.6 and Schedule 2.6
17 of the Rehabilitation Plan governing the settlement of pending and future claims involving CIC, CIC
18 moves to strike the Rehabilitation Application filed by the Commissioner pursuant to section 425.16.
19 (Not. of Mot. and Special Anti-SLAPP Mot. to Strike Compl. of Resp. Cal. Ins. Co., Through Pre-
20 Conservation Management; MPA, pp. 2, 9 ["The relevant provisions are contained in Schedule 2.6 of
21 the Rehabilitation Plan"], 14-17.)

22 DISCUSSION

23 As a threshold matter, the Court must determine whether an anti-SLAPP motion under Code of
24 Civil Procedure section 425.16 may be brought in a conservatorship proceeding under the Insurance
25 Code. The Court concludes that it may not and therefore denies CIC's Motion.²

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27 ² Because the Court concludes that section 425.16 does not apply in conservatorship proceedings under
28 Insurance Code sections 1010 to 1062, the Court does not address whether CIC has established the two
prongs for relief under section 425.16.

1 “The provisions of Part 2 of the Code of Civil Procedure specially apply to special proceedings
2 of a civil nature [that are identified] in Part 3, Title 1 (Writs of Review, Mandamus, and Prohibition)
3 unless either inconsistent with those proceedings or the special proceeding statutes indicate otherwise.”
4 (*Bagration v. Superior Court* (2003) 110 Cal.App.4th 1677, 1685 (*Bagration*), internal citations omitted;
5 see also § 1109 [“the provisions of Part II of this Code are applicable to and constitute the rules of
6 practice in the proceedings mentioned in” the Code of Civil Procedure].) But for any *other* special
7 proceeding – i.e., a special proceeding other than a writ proceeding brought under Part 3 of the Code of
8 Civil Procedure – the California Supreme Court concluded long ago “that the Legislature’s failure to
9 make Code of Civil Procedure Part 2 expressly applicable to” that proceeding “ ‘must be held to have
10 been intentional.’ ” (*Bagration*, at p. 1685.) Thus, the state high court has consistently “held that Part 2
11 of the Code of Civil Procedure extends generally only to civil ‘actions,’ and not to” those *other* “special
12 proceedings.” (*Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc.* (1987) 43 Cal.3d
13 696, 707 (*Tex-Cal Land Management*)). “[U]nless the statutes establishing the special proceeding
14 expressly incorporate Code of Civil Procedure Part 2 provisions” (*Bagration*, at p. 1685), those
15 provisions “are inapplicable” (*Tex-Cal Land Management*, at p. 707).

16 “[F]or purposes of applicability of Part 2 of the Code of Civil Procedure,” the definitions of the
17 terms “actions” and “special proceedings” “are those set forth in” sections 22 and 23. (*Tex-Cal Land*
18 *Management, supra*, 43 Cal.3d at p. 707.) Thus, “[a]n action is an ordinary proceeding in a court of
19 justice by which one party prosecutes another for the declaration, enforcement, or protection of a right,
20 the redress or prevention of a wrong, or the punishment of a public offense.” (§ 22.) And “[e]very other
21 remedy is a special proceeding.” (§ 23.)

22 Applying these definitions, the California Supreme Court, over 80 years ago, held that a
23 conservatorship proceeding under Insurance Code sections 1010 to 1062 is a special proceeding that is
24 *not* subject to the provisions of Part 2 of the Code of Civil Procedure. (See *Carpenter v. Pacific Mutual*
25 *Life Ins. Co. of Cal.* (1937) 10 Cal.2d 307, 328 (*Carpenter I*); see also *Carpenter v. Pacific Mutual Life*
26 *Ins. Co. of Cal.* (1939) 13 Cal.2d 306, 311-312 (*Carpenter II*)). This is because that conservatorship
27 “proceeding is not one in which another party is prosecuting another party at all. It is simply a
28 proceeding in which the state is invoking its power over a corporate entity permitted by the state to

1 engage in a business activity vitally affected with the public interest upon condition of continuing
2 compliance with the requirements provided by the state. It is not a controversy between private parties
3 but a proceeding by the state in the interest of the public.” (*Carpenter I*, at p. 327.) Thus, California
4 courts have regularly held that the provisions found in Part 2 of the Code of Civil Procedure do not
5 apply in conservatorship proceedings under the Insurance Code.³

6 Code of Civil Procedure section 425.16 – the statute providing for an anti-SLAPP motion – is
7 located in Part 2 of the Code of Civil Procedure. CIC points to nothing in the Insurance Code that
8 expressly renders section 425.16 applicable to this conservatorship proceeding, and the Court could find
9 none. Indeed, the Legislature knew how to make particular Code of Civil Procedure Part 2 provisions
10 applicable to conservatorship proceedings (see, e.g., Ins. Code, § 1038 [“Any application under section
11 1011 or 1016 shall be served upon the person named in such application *in the manner prescribed by*
12 *law for personal service*,” emphasis added]; Code Civ. Proc., § 1109 [“Except as otherwise provided in
13 this Title, the provisions of Part II of the Code are applicable to and constitute the rules of practice in the
14 proceedings mentioned in this Title”]), but chose not to do so for Code of Civil Procedure section
15 425.16. This omission is telling. (See *People v. Sinohui* (2002) 28 Cal.4th 205, 213 [holding that where
16 the Legislature knows how to include a provision but declines to do so, there is a presumption that the
17 omission was intentional].) Consistent with the many decisions holding that various provisions of Code
18 of Civil Procedure Part 2 are inapplicable to conservatorship proceedings under the Insurance Code, this
19 Court finds that Code of Civil Procedure section 425.16 does not apply to those proceedings either. (See,
20 e.g., *Carpenter II*, *supra*, 13 Cal.2d at pp. 311-312; *Carpenter I*, *supra*, 10 Cal.2d at pp. 327-328;
21 *Abraugh*, *supra*, 203 Cal.App.3d at p. 468.)

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24 ³ (See, e.g., *Carpenter II*, at pp. 311-312 [holding that former Code of Civil Procedure sections 946 and
25 949 governing automatic stays pending appeal do not apply in conservatorship proceedings under the
26 Insurance Code]; *Carpenter I*, at pp. 327-328 [holding that Code of Civil Procedure sections 632 and
27 633 governing statements of decision do not apply to conservatorship proceedings under the Insurance
28 Code]; *Abraugh v. Gillespie* (1988) 203 Cal.App.3d 462, 468 (*Abraugh*) [holding that Code of Civil
Procedure section 473 governing relief for “mistake, inadvertence, surprise or excusable neglect” does
not apply to conservatorship proceedings under the Insurance Code]; *Caminetti v. Guaranty Union Life*
Ins. Co. (1943) 22 Cal.2d 759, 765 [reiterating that former Code of Civil Procedure sections 946 and
949 of do not apply in conservatorship proceedings under the Insurance Code].)

1 Contrary to CIC's assertion, the language of section 425.16 does not reveal a legislative intent to
2 render that section applicable to this conservatorship proceeding. To the contrary, the subdivisions in
3 that section governing the award of attorney fees on an anti-SLAPP motion, identifying the actions
4 excluded from its application, and staying discovery pending the resolution of an anti-SLAPP motion
5 expressly reference an "action," but do not reference a "proceeding." (See § 425.16, subs. (c)(1) & (2),
6 (d), and (g).) By omitting the terms "proceeding" or "special proceeding" from these subdivisions, the
7 Legislature actually signaled its intent to exempt conservatorship proceedings from the purview of
8 section 425.16. (See *Sinohui, supra*, 28 Cal.4th at p. 213; see also *In re Glacier General Ins. Co.* (1991)
9 234 Cal.App.3d 1549, 1554 [finding "the general appeal provisions of the Code of Civil Procedure"
10 applicable because "[t]hose statutes are expressly made applicable to any 'civil action *or proceeding*,' "
11 emphasis in original].)

12 The use of the word "proceeding" in subdivision (e) of section 425.16 does not compel a
13 contrary conclusion. As relevant here, subdivision (e) defines an "act in furtherance of a person's right
14 of petition or free speech" to include "any written or oral statement or writing made before a . . . judicial
15 proceeding" or "in connection with an issue under consideration by . . . any other official proceeding
16 authorized by law." (See § 425.16, subs. (b)(1) & (e)(1) & (2).) In using the term "proceeding," the
17 subdivision merely establishes that a "cause of action" alleged in an *action* "arising from" any statement
18 or writing made before or in connection with a special proceeding is subject to an anti-SLAPP motion.
19 (§ 425.16, subd. (b)(1).) It does not establish that section 425.16 applies to a cause of action alleged in
20 *any* special proceeding, including a conservatorship proceeding under Insurance Code section 1011.

21 Likewise, CIC's reliance on the exemption found in subdivision (d) of section 425.16 is
22 misplaced. By its terms, subdivision (d) only creates an exception to the general rule that section 425.16
23 applies to all civil *actions* as defined by section 22. (See § 425.16, subd. (d) ["This section shall not
24 apply to any enforcement *action* brought in the name of the people of the State of California by the
25 Attorney General, district attorney, or city attorney, acting as a public prosecutor," emphasis added].)
26 Because an exception, as a matter of logic, cannot extend the reach of a general rule beyond what it
27 would be without that exception, subdivision (d) cannot be construed to expand the application of
28 section 425.16 to special proceedings like this one. (See *Mountain Lion Foundation v. Fish & Game*

1 *Com.* (1997) 16 Cal.4th 105, 116 [holding that doctrine of *expressio unius est exclusion alterius* only
2 limits the exceptions to “a general rule”].)

3 At the hearing, CIC argued that section 425.16 should apply because the Rehabilitation
4 Application is a “continuation” of an earlier writ proceeding. But this argument is flawed. Although a
5 writ proceeding is subject to an anti-SLAPP motion (see Code Civ. Proc., § 1109), this is *not* a writ
6 proceeding. It is a conservatorship proceeding under Insurance Code section 1011. Even if, as CIC
7 contends, the Rehabilitation Plan seeks to undo a settlement in a prior writ proceeding, this does not
8 transform this special proceeding brought under the Insurance Code into a writ proceeding brought
9 under the Code of Civil Procedure.⁴ Indeed, the Commissioner’s authority to propose and seek court
10 approval of the Rehabilitation Plan comes from the Insurance Code – and not from Part 3 of the Code of
11 Civil Procedure.

12 Finally, allowing anti-SLAPP motions in this proceeding would defeat the purpose behind the
13 conservatorship provisions of the Insurance Code. Those provisions contain measures “intended to
14 prevent dissipation of the company’s assets when it fails to comply with regulations adopted for” the
15 protection of “policyholders, creditors, and the public” or “when it is found by the Commissioner to be
16 in a hazardous condition.” (*Garamendi v. Executive Life Ins. Co.* (1993) 17 Cal.App.4th 504, 515
17 (*Garamendi*)). These measures include “the ‘drastic remedy’ provided by [Insurance Code] section
18 1011” (*ibid.*) and the rehabilitation and liquidation remedies found in Insurance Code section 1043 (see
19 *Carpenter I, supra*, 10 Cal.2d at p. 329 [noting that “rehabilitation and liquidation of insurance
20 companies” are “extremely important” for the public interest]). Through these measures, the Legislature
21 intended “to create a system to protect the public interest in insurance companies.” (*Financial Indem.*
22 *Co. v. Superior Court* (1955) 45 Cal.2d 395, 402 (*Financial Indem.*)).

23 To that end, the Legislature has given the Commissioner broad powers over “the assets of the
24 insurer” – including the power “to take possession of its property” and “to conduct so much of its
25 business as he or she deems appropriate” (*Commercial Natl. Bank v. Superior Court* (1993) 14
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28 ⁴ In denying this anti-SLAPP Motion, the Court does not address the merits of any challenge to the
Rehabilitation Plan or preclude CIC from raising the earlier writ proceeding and the settlement in that
proceeding in its opposition to the Rehabilitation Application.

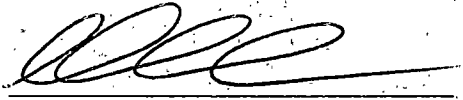
1 Cal.App.4th 393, 402) – based solely on a “good faith determination by the [C]ommissioner of the
2 existence of one of the conditions enumerated in” Insurance Code section 1011 (*Rhode Island Ins. Co. v.*
3 *Downey* (1949) 95 Cal.App.2d 220, 231). And due to “public necessity” and the need for “prompt
4 action,” the Commissioner may exercise many of these powers *before* a hearing on its legality. (*Id.*, at
5 pp. 235-236.) Subjecting every action of the Commissioner as conservator to a potential anti-SLAPP
6 motion with the attendant costs and delay would significantly hinder the ability of the Commissioner to
7 protect the public interest and “defeat the purpose” behind the conservatorship. (See *Financial Indem.*,
8 at p. 403 [holding that delay of conservatorship would defeat the purpose behind the conservatorship
9 provisions].)

10 Indeed, the actions of the Commissioner challenged by CIC in this anti-SLAPP motion illustrate
11 this very point. It is well-established that the Insurance Commissioner, when acting as the conservator of
12 an insurer, has broad powers “to settle claims against” that insurer under Insurance Code section 1037,
13 subdivision (c). (*In re Executive Life Ins. Co.* (1995) 32 Cal.App.4th 344, 370.) If, as CIC contends,
14 every action taken in court by the Commissioner to settle a claim against the insurer – such as the filing
15 of a motion to enter judgment pursuant to Code of Civil Procedure section 646.6 – subjects the
16 Commissioner to an anti-SLAPP motion and the risk of significant delay and an attorney fees award,
17 then the ability of the Commissioner to prevent the dissipation of the conserved insurer’s assets through
18 settlement would be significantly compromised, if not destroyed. This would be wholly inimical to the
19 purpose behind the conservatorship provisions of the Insurance Code. (See *Garamendi, supra*, 17
20 Cal.App.4th at p. 515.) Rather than allow such an “anomalous result,” this Court holds that anti-SLAPP
21 motions are not available in conservatorship proceedings under the Insurance Code. (*Equilon*
22 *Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 64-65, internal quotations omitted [holding
23 that “Legislature’s intent” to “broadly . . . protect the right of petition” cannot trump “fundamental rule
24 of statute construction that statutes should be construed to avoid anomalies,” internal quotations
25 omitted].) Accordingly, CIC’s Anti-SLAPP Motion is denied.
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ORDER

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2 Based on the foregoing, IT IS HEREBY ORDERED that CIC's Anti-SLAPP Motion is
3 DENIED.

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5 Dated: Feb. 26, 2021



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7 Danny Y. Chou
8 Judge of the Superior Court
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