

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

AUG 21 2006

Oklahoma Department of Securities,)
ex rel. Irving L. Faught, Administrator,)
)
Plaintiff,)
)
v.)
)
Accelerated Benefits Corporation, a Florida)
corporation, et al.,)
)
Defendants.)

PATRICIA PRESLEY, COURT CLERK
by _____
DEPUTY

Case No. CJ-99-2500-66
Judge Daniel Owens

**THE CONSERVATOR, H. THOMAS MORAN, II'S,
OBJECTION TO TEXAS LIFE INSURANCE COMPANY'S
MOTION FOR LEAVE TO SUE CONSERVATOR**

The Conservator, H. Thomas Moran, II (the "Conservator"), hereby objects to Texas Life Insurance Company's ("Texas Life") Motion for Leave to Sue Conservator ("Motion"), and states to the Court as follows:

I. FACTS

A. THE CONSERVATORSHIP

In 1999, the Oklahoma Department of Securities (the "ODS") brought a securities fraud action against Accelerated Benefits Corporation ("ABC") arising from ABC's purchase of life insurance policies from the terminally ill and elderly (viators) and the sale of investments in the policies, or viaticals. This Court determined that the Oklahoma resident brokers had illegally sold unregistered securities in Oklahoma and that ABC had committed securities fraud ultimately entering a judgment against ABC and ordering it to pay restitution to Oklahoma investors. Subsequently, this Court entered an agreed Conservatorship Order ("Order"), on February 6, 2002 which named H. Thomas Moran, II, the Conservator of certain assets of ABC and its agents. In pertinent part, the Order defined Conservatorship Assets as all life insurance policies

owned or held by ABC and the right to recoup the proceeds of the policies. *See* Order attached as Exhibit 1 at 2. Additionally, the Order directed and authorized the Conservator:

12. to institute, prosecute, defend, intervene in or become a party to such actions or proceedings in any state court, federal court or United States bankruptcy court *as may in the Conservator's opinion* be necessary or proper for the protection, maintenance and preservation of the Conservatorship Assets, or carrying out the terms of the Conservatorship Order. . . ;
13. to exercise those powers necessary to implement his conclusions with regard to disposition of this Conservatorship pursuant to the orders and directives of this Court.

Id. at 2-4. This Court further ordered that:

. . . all persons and entities, including ABC. . . , and further including any banks or financial institutions, . . . *life insurance companies*. . . fully cooperate with and assist the Conservator and that they take no action, directly or indirectly, to hinder or obstruct the Conservator in the conduct of his duties or to interfere in any manner, directly or indirectly, with the custody, possession or control exercised by said Conservator.

Id. at 5. Additionally, the Court ordered that:

. . . *except by leave of Court* during the pendency of this Conservatorship, all creditors *and other persons seeking money, damages or other relief from ABC* or its agents. . . are hereby stayed and restrained from doing any act or thing whatsoever to interfere with. . . the possession of or management by the Conservator of the Conservatorship Assets, or to interfere in any manner during the pendency of this proceeding with the exclusive jurisdiction of this Court over ABC. . .

Id. at 6-7. Finally, the Court held that it would "retain jurisdiction over this matter and ABC for all purposes." *Id.* at 7.

On February 21, 2002, the Conservator applied to the Court for permission to form an Oklahoma limited liability company, HTM Conservator, L.L.C. ("HTM"), to hold title to the life insurance policies which constituted the majority of the Conservatorship Assets. The Court

entered an Order Authorizing Establishment of Limited Liability Company on February 21, 2002.

B. THE GEORGIA ACTION

On December 14, 2005, Texas Life Insurance Company ("Texas Life"), a Texas corporation licensed to do business in Oklahoma (*see* Texas Life License attached as Exhibit 2), filed a Complaint against Frank Hammond English ("English") and HTM, in the Middle District of Georgia ("Federal Court") to rescind a life insurance policy issued in Georgia by Texas Life to English, a Georgia resident. *See* Complaint attached as Exhibit 3. Texas Life alleges that English misrepresented material facts relating to whether he had been diagnosed with or been treated for AIDS. *Id.* On April 20, 2006, Texas Life filed an Amended Complaint against the same parties additionally seeking a declaration that, because English did not satisfy conditions precedent to the formation of a contract, the life insurance policy should be considered void *ab initio*. *See* Amended Complaint attached as Exhibit 4.

According to Texas Life, English applied for a life insurance policy on May 30, 1995. *See* Exhibit 3. Texas Life issued a life insurance policy to English on June 15, 1995. *Id.* Over two years later, on or about October 17, 1997, English sold all of his rights – including ownership and beneficiary rights – in the policy to ABC. *See* Notification of Viatical Settlement attached as Exhibit 5.

On May 11, 2001, the Government filed an Information against English, in the United States District Court for the Northern District of Georgia, alleging that he fraudulently obtained life insurance policies from "numerous" life insurance companies and subsequently sold or assigned the policies to obtain a portion of the death benefits. *See* Information attached as Exhibit 6. English pled guilty and entered a plea agreement on June 7, 2001. *See* Plea

Agreement attached as Exhibit 7. Judgment was entered against English on June 7, 2002. *See* Judgment attached as Exhibit 8. English was ordered to serve twenty-one (21) months in prison, and to pay restitution to thirteen (13) insurance companies specifically including Texas Life. *Id.*

Meanwhile this Court had entered the Order authorizing the Conservator and later, HTM, to take control of and administer insurance policies then owned by ABC. On November 26, 2002, Texas Life acknowledged a change in ownership of the policy to HTM. *See* Request for Transfer of Ownership (Absolute Assignment of Policy) attached as Exhibit 9.

Although English had been ordered to pay it restitution in July 2002 and HTM had paid premiums since December 2002,¹ Texas Life did not seek to rescind the policy it had issued to English in 1995 until December 2005 – over ten years after it had issued the policy. HTM moved to dismiss the Texas Life's Amended Complaint on May 30, 2006 arguing, in part, that Texas Life failed to obtain this Court's permission prior to suing the Conservator. *See* Motion to Dismiss attached as Exhibit 10. Consequently, Texas Life chose to advance on two fronts. First, on July 18, 2006, it filed its Motion in this Court. Several days later, on July 24, 2006, Texas Life filed its response to the Motion to Dismiss in Federal Court in Georgia claiming it was not required to seek this Court's permission to sue the Conservator because the Order specifically authorized suits in foreign jurisdictions against the Conservator. *See* Memorandum in Opposition to HTM Conservator, LLC's Motion to Dismiss attached as Exhibit 11.

¹ Texas Life accepted premiums from HTM up through December, 2005. At that point, Texas Life began returning premium payments to HTM. HTM continues to remit scheduled premium payments although Texas Life refuses to accept them.

II. ARGUMENTS

A. THE ORDER DOES NOT RELIEVE TEXAS LIFE OF THE LEGAL REQUIREMENT OF SEEKING COURT APPROVAL TO SUE HTM IN AN INDEPENDENT ACTION

Texas Life has acknowledged that "generally, a receiver cannot be sued without leave of court." *See* Exhibit 11 at 4. According to Texas Life, however, it was not required to seek this Court's approval to sue the Conservator in Georgia because the Order permits the Conservator "to . . . defend. . . proceedings in any state court, federal court. . . as may in the Conservator's opinion be necessary or proper. . .". *Id. citing* Exhibit 1 at ¶ 12. However, Texas Life's forced interpretation of the Order belies any rational reading of it.

Orders must be interpreted according to their substance and function. *See State ex rel. Okla. Bd. of Med. Licensure and Supervision v. Pinaroc*, 2002 OK 20, 46 P.3d 114, 117. Court orders are construed according to the same rules of interpretation as used to interpret other written instruments. *See Alford v. Thornburg*, 113 S.W.3d 575, 583 (Tex. Ct. App. 2003). Therefore, "the true measure of an order . . . is not an isolated phrase appearing therein, but its effect when considered as a whole." *Concerned Citizens Coal. of Stockton v. City of Stockton*, 128 Cal.App.4th 70, 77 (Cal. Ct. App. 2005). It is not permissible to attempt to create an ambiguity by narrowly focusing on one provision so as to attain a more favorable interpretation. *See Pitco Prod. Co. v. Chaparral Energy, Inc.*, 2003 OK 5, 63 P.3d 541, 546 at fn. 34. Additionally, "existing law is a part of every contract "as if it was expressly cited or its terms incorporated in the contract." *Public Serv. Co. of Okla. v. State ex rel. Corp. Comm'n*, 2005 OK 47, 115 P.3d 861, 884. "An intent to modify applicable law by contract is not effective unless the power is expressly exercised." *Public Serv. Co. of Okla.*, 115 P.3d at 884.

Applying well-established rules of interpretation to the Order, Texas Life's argument must be rejected. First, as Texas Life acknowledges, the Oklahoma common law requires a party seeking to sue a receiver to obtain leave from the appointing court. *See Willis v. Aetna Life Ins. Co.*, 1939 OK 418, 95 P.2d 608, 610 *citing Witt v. Jones*, 1925 OK 149, 233 P. 722, 724. As a matter of law, the common law requirement was incorporated in the Order. Consequently, to support Texas Life's interpretation of the Order, this Court's intent to alter the common law must be expressly and specifically stated. Expression of such intent is glaringly absent here. A review of the entire Order demonstrates that the Court did not dispense with the common law requirement that a party seek Court permission to sue the Conservator. Although the Court declared that the Conservator has the power to defend lawsuits brought against the Conservatorship as the Conservator deems proper, the Court also set limits on the Conservator's ability to exercise that power. Specifically, the Court required the Conservator to "exercise those powers necessary to implement his conclusions with regard to disposition of this Conservatorship *pursuant to the orders and directives of this Court.*" *See Exhibit 1 at 2-4.* Reading paragraphs 12 and 13 together, the Conservator can only defend proceedings pursuant to the orders of the Court.

Additionally, nothing in the Order relieves a party seeking to sue the Conservator from asking this Court's permission. In fact, the Order expressly provides exactly the opposite:

. . . except by leave of Court during the pendency of this Conservatorship, all creditors and other persons seeking money, damages or other relief from ABC or its agents. . . are hereby stayed and restrained from doing any act or thing whatsoever to interfere with. . . the possession of or management by the Conservator of the Conservatorship Assets, or to interfere in any manner during the pendency of this proceeding with the exclusive jurisdiction of this Court over ABC. . .

See Exhibit 1 at 6-7. Texas Life is seeking relief against ABC/HTM regarding an asset of the Conservatorship – the life insurance policy at issue. Texas life is restrained from such action "except by leave of Court." Finally, the Court forbade life insurance companies from taking any action to interfere with the custody, possession or control of any life insurance policy administered by the Conservator. See Exhibit 1 at 5.

Because the Order, which incorporates Oklahoma common law, specifically requires that any party seeking to sue the Conservator must first obtain the Court's permission, Texas Life was required to file its Motion and cannot proceed further in the Federal Court without specific permission from this Court.

B. TEXAS LIFE IS NOT ENTITLED TO PURSUE AN INDEPENDENT ACTION AGAINST THE CONSERVATOR IN GEORGIA

Texas Life alleges in its Motion that it was not aware of the Conservatorship when it filed the Georgia action.² Nonetheless, Texas Life now seeks permission to continue its previously-filed suit in Georgia. Given all considerations in this case, however, the Court should deny Texas Life's Motion and, instead, allow Texas Life to file a Motion to Intervene.

Although a receivership court may, in its discretion, permit litigation against a receiver in an independent action, it is not required to do so. See *S.E.C. v. Lincoln Thrift Assoc.*, 557 F.2d 1274, 1277 (9th Cir. 1977); *M&I Marshall & Ilsley Bank v. Urquhart Cos.*, 706 N.W.2d 335, 345 (Wis. Ct. App. 2005). If the party seeking relief can obtain it in the receivership court, "the decision to refuse to grant leave to bring a separate action against the receiver does not constitute an erroneous exercise of discretion." *Urquhart Cos.* at 345. In *Lincoln Thrift Assoc.*, for

² Texas Life acknowledged its November 25, 2002 receipt of Exhibit 9 which changed ownership of the policy to HTM. The name "HTM Conservator, LLC" should have provided Texas Life with some indication that a conservatorship was involved which, in turn, should have led a reasonable insurance company to exercise due diligence to ascertain both whether a conservatorship court was involved and the steps necessary to commence a lawsuit against a conservatorship.

instance, the appellate court determined that the trial court did not abuse its discretion in refusing to allow an independent suit against the receiver. According to the court, an independent court was no more able than the receivership court to resolve the dispute since "[t]he issues . . . did not require the expertise of a specialized tribunal." *Lincoln Thrift Assoc.*, at 1277. See also *Vautrot v. West*, 613 S.E.2d 19, 24 (Ga. Ct. App. 2005)(the receivership court may, in its discretion, either permit an independent action or compel the suing party to intervene).

In *Vitug v. Griffin*, 214 Cal.App.3d 488, 493 (1989), plaintiffs filed a tort action against a receiver without seeking permission from the receivership court. Nevertheless, the receiver filed a general denial without raising the plaintiffs' failure to obtain permission. The receiver did not inform the receivership court that she had been sued. The receiver was discharged before plaintiffs sought permission to sue. After her discharge, the receiver continued to participate in the tort action. When plaintiffs discovered that receiver had been discharged, they sought permission of the receivership court to sue. The receivership court denied the request holding that the receiver's discharge had relieved her from liability. Plaintiffs further sought leave to amend their tort case to add a fraud claim against the receiver.

The *Vitug* court stated:

The rule that claimants must apply to the court before suing a receiver is founded upon notions of judicial economy. *In most cases the claimant can obtain appropriate relief in the receivership action; therefore an independent action will not be necessary.* [Cite omitted]. By refusing permission to sue, the appointing court can require a claimant to intervene in the receivership proceedings to assert his claim, thus protecting the receiver from a proliferation of lawsuits. [Cite omitted]. But the court may not refuse permission where the effect would be to cut off plaintiff's rights. If the court cannot afford plaintiff the same relief in intervention as he is entitled to in an independent action, refusal to permit the lawsuit to proceed will constitute an abuse of discretion. [Cite omitted].

Id. (Emphasis added).

According to *Vitug*, concern for judicial economy governs the inquiry in this case. If the party seeking to sue the receiver can obtain relief in the receivership court, an independent action is not necessary. Here, because the Court is fully capable of affording Texas Life the same relief as the Federal Court. The ability of this Court to provide the same relief as the Federal Court coupled with this Court's familiarity with the Conservatorship and issues arising from it militates against allowing Texas Life to continue an independent action against the Conservator in Federal Court. Rather, this Court should require Texas Life to intervene in the Conservatorship case.

1. Because English is not a Necessary or Proper Party to Texas Life's Rescission Claim, this Court's Lack of Personal Jurisdiction Over Him Does not Affect this Court's Ability to Provide Texas Life Full and Appropriate Relief.

Texas Life argues that this Court must permit it to sue the Conservator in Georgia because the insured, English, cannot be sued in Oklahoma. Notwithstanding the Court's lack of personal jurisdiction over English, because he is not a proper party to Texas Life's rescission action, his amenability to suit in Oklahoma is simply a non-issue.

Even though Georgia substantive law may govern several issues here,³ Oklahoma procedure applies. According to the Restatement (Second) of Conflict of Laws § 122 (1971),⁴ "[a] court usually applies its own local rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case." *See, e.g.,*

³ The insurance policy at issue does not contain a choice of law provision. *See* Specimen Policy attached as Exhibit 12. English, a Georgia resident, applied for and Texas Life, a Texas corporation, issued the insurance policy in Georgia. Additionally, ABC, which was licensed to do business in Georgia, purchased the policy from English perhaps in Georgia. Since the dispute at issue involves transactions occurring outside of Oklahoma, the Court must address choice of law issues. Both Oklahoma and Georgia apply *lex loci contractus* to determine which states' law to apply on contract issues. *Godinger Silver Art Co., Ltd. v. Olde Atlanta Mktg, Inc.*, 604 S.E.2d 212, 215 (Ga. Ct. App. 2004); *Bohannon v. Allstate Ins. Co.*, 1991 OK 64, 820 P.2d 787, 793. Pursuant to that doctrine, because English and Texas Life executed the contract at issue in Georgia, Georgia law likely applies to its interpretation. *Id.* Despite the fact that the Court must likely apply Georgia substantive law, because there is no substantive difference between the two states' laws, Texas Life cannot argue that this Court is not qualified to interpret the insurance policy at issue.

⁴ Oklahoma applies the Restatement (Second) of Conflict of Laws under certain circumstances. *See, e.g., Beard v. Viene*, 1992 OK 28, 826 P.2d 990, 995.

Williams v. Lee Way Motor Freight, 1984 OK 64, 688 P.2d 1294, 1300 (a statute of limitation is considered an integral part of the rules relating to a suit's commencement, maintenance and prosecution and its, therefore, governed by the forum's laws); *State v. Grissom*, 840 P.2d 1142, 1185 (Kan. 1992) *superseded on other grounds by statute* (forum's evidentiary rule regarding admissibility of evidence applied); *Waddoups v. Amalgamated Sugar Co.*, 54 P.3d 1054, 1060 (Utah 2002). Because whether a party is necessary to the litigation is a procedural question, the Oklahoma Pleading Code provides the standard for determining whether a party is necessary.⁵

Pursuant to Okla. Stat. tit. 12, §2019(A), a party shall be joined if (1) "[i]n his absence complete relief cannot be accorded among those already parties" or (2) "[h]e claims an interest relating to the subject of the action" which may be impaired or may leave a party subject to multiple recoveries. It is elementary that a party must have a "justiciable interest in the subject matter of the controversy" in order to be named as a defendant. *In re. E.L.P.*, 636 S.W.2d 579, 581 (Tex. Ct. App. 1982).

Applying the plain language of §2019, if Texas Life can either obtain complete relief without suing English or if he possesses no interest in the insurance policy at issue – the subject of the action – he is not a necessary party. If English is not a necessary party, Texas Life's inability to sue him in Oklahoma does not prohibit this Court from denying Texas Life's Motion.

In this case, the insurance policy at issue specifically permitted English to assign and/or transfer the ownership of the policy. *See* Exhibit 12 at 6. As Texas Life concedes, English sold all interests in the insurance policy – both ownership and beneficiary – to ABC on October 17,

⁵ The Georgia joinder statute is, like Oklahoma's, patterned on the Federal Rules of Civil Procedure and is exactly the same as Oklahoma's. *See* Ga. Code Ann. § 9-11-19. Georgia cases hold that § 9-11-19 incorporates two tests for determining whether a party is necessary. "First, can relief be afforded to the plaintiff without the presence of the other party? And second, can the case be decided on its merits without prejudicing the rights of the other party." *See Hall v. Oliver*, 553 S.E.2d 656, 657 (Ga. Ct. App. 2001).

1997. See Exhibit 5. After the transfer, English had no right to collect the benefits of the insurance policy, and ABC became obligated to pay the premiums on the insurance policy. Correspondingly, seven years after Texas Life issued the insurance policy, all rights and liabilities pursuant to it were transferred to HTM. See Exhibit 9. HTM, therefore, bears the obligations and enjoys the rights incident to the insurance policy.

Several courts have held that assignors of property are not necessary parties to claims involving the property. In *FDIC v. Huntington Towers, Ltd.*, 443 F.Supp. 316, 319-20 (E.D.N.Y. 1977), the court determined:

An assignor who has assigned all right and interest to another need not be joined in an action involving the property assigned because complete relief can be accorded in his absence and, furthermore, he has no interest to protect. See generally 7 C. Wright & A. Miller, Federal Practice and Procedure § 1613, at 128-29 (1972)(suggesting that not only is an assignor's presence unnecessary for a just adjudication of a suit brought by the assignee, but that the assignor would not even be a proper party)."

See also *Ploog v. Homeside Lending, Inc.*, 209 F.Supp.2d 863, 873 (N.D. Ill. 2002)(assignor is not indispensable party); *Walker v. Virtual Packaging, LLC*, 493 S.E.2d 551, 554 (Ga. Ct. App. 1997)("if one of the original contracting parties assigns all of its rights, title and interest in the contract at issue, the assignee is the real party in interest"); *William Iselin & Co., Inc. v. Davis*, 278 S.E.2d 442, 444 (Ga. Ct. App. 1981). As an assignor, English is not a proper party to Texas Life's rescission or declaratory judgment claims.

Although Texas Life's seeks rescission of the insurance policy because English fraudulently induced it to issue the policy, English long ago assigned, transferred and sold any rights he had in the insurance policy. Since the property is now owned by HTM, the only proper party to a suit attempting to rescind the insurance policy or to declare it void *ab initio* is HTM. English simply owns nothing which can be rescinded or declared void. As English is not a

proper party to Texas Life's claims, the fact that he cannot be haled into an Oklahoma court does not affect the Court's ability to fully and fairly adjudicate Texas Life's claims. Thus, the Court should deny Texas Life's Motion.

2. Both Oklahoma and Georgia Law Provide that a Rescission Claim Based on a Fraudulently Induced Contract is *Voidable* not Void.

An issue raised by Texas Life in response to HTM's Motion to Dismiss the Georgia litigation is that because English procured the insurance policy at issue by fraud, it was void *ab initio*. This distinction is important to Texas Life because HTM moved to dismiss the Federal Court case based on an incontestability clause in the subject insurance policy. The insurance policy provides:

We [Texas Life] will not contest the Initial Specified Amount after this policy has been in force for two years after the Issue Date while the insured is alive. We will not contest any increase in the Specified Amount after the increase has been in force for two years while the Insured is alive.

See Exhibit 12 at 7. A plain reading of the incontestability clause demonstrates that it bars a rescission claim brought more than two years after the issuance of the insurance policy here. Texas Life brought its rescission claim more than ten years after it issued the insurance policy. However, Texas Life argues that since the life insurance policy was void *ab initio*,⁶ the incontestability clause never became effective. This Court is as fully capable of adjudicating the issue as Federal Court since Georgia law is indistinguishable from Oklahoma law on this issue.

Pursuant to Georgia statutes, "[f]raud renders contracts voidable at the election of the injured party." Ga. Code Ann. § 13-5-5. Fraud does not, however, render a contract void per se. See *Phillips v. MacDougald*, 464 S.E.2d 390, (Ga. Ct. App. 1996). Oklahoma courts, too, recognize the distinction between a void and a voidable contract. See *Harkrider v. Posey*, 2000

⁶ Texas Life argues that the issuance of a valid policy was contingent on the accuracy and completeness of the representations in English's application. See Exhibit 11 at 17. According to Texas Life, because English made misrepresentations on his application for insurance, the policy never became effective.

OK 94, 24 P.3d 821, 827. In *Harkrider*, plaintiff was injured in an automobile accident with Posey, an unlicensed driver living with Pond. When plaintiff garnished Pond's liability policy, the insurer claimed that there was no coverage available due to Pond's misrepresentations on her application for insurance. A year before the accident, Pond had represented to the insurance company that no persons older than 14 years of age lived with her although Posey was then residing with her. The insurance company claimed that it would have issued a policy only with a named-driver exclusion.

As the *Harkrider* court explained, a contract procured by fraud may be void or voidable depending on the nature of the misrepresentation. *Id.* at 826. As also reflected in Georgia law, a contract procured by fraud in the inducement in Oklahoma "creates a valid contractual relationship, which subsists in contemplation of the law until the parties are relieved of their obligation by a decree of rescission." *Id.* at 827. The distinction is important because "an innocent third party can acquire no rights in a contract which is void, whereas the interests of an innocent third party are often protected where a contract is voidable." *Id.* at 828.

Both Georgia and Oklahoma hold that a contract induced by fraud is voidable by rescission, not void *ab initio*. Therefore, the Texas Life insurance policy is a viable contract, but a contract that can, perhaps, be avoided versus a contract that never came into existence. Further, in both Georgia and Oklahoma the remedy for a party who has been fraudulently induced to execute a contract is rescission. Ga. Code Ann. § 13-4-60 provides that a contract can be rescinded by the defrauded party as long as that party promptly files a claim and restores or offers to restore all value received pursuant to the contract. Similarly, in Oklahoma, a party may rescind a contract "if the consent of the party rescinding. . . was given by. . . fraud." Okla. Stat. tit. 15, § 233.

Therefore, Texas Life's argument that the life insurance policy at issue never became effective is unavailing both in Oklahoma and Georgia. Because both Georgia and Oklahoma provide the same remedy for a fraudulently induced contract – rescission – and the law on the remedy is the same in both states, the Court should deny Texas Life's Motion because it is just as capable of applying Georgia law as the Federal Court.

3. Oklahoma and Georgia, as do the Majority of Jurisdictions, Hold that an Insurance Contract cannot be Rescinded after the Incontestability Period has Elapsed even when the Insured Fraudulently Induced the Insurer to Issue the Policy by Fraud.

Texas Life alternatively argues in response to HTM's Motion to Dismiss, that the incontestability clause does not foreclose its rescission claims. *See* Exhibit 11. This Court is fully equipped to determine whether the incontestability clause in Texas Life's insurance policy bars its rescission claims as Oklahoma and Georgia law are the same regarding the effect of incontestability clauses. Consequently, the Federal Court is in no better position to afford Texas Life relief than this Court.

Oklahoma statutes require that all life insurance policies issued in Oklahoma must include certain provisions, including:

. . . that the policy (exclusive of provisions relating to disability benefits or to additional benefits in the event of death by accident or accidental means) shall be incontestable, except for nonpayment of premiums, after it has been in force during the lifetime of the insured for a period of two (2) years from its date of issue.

Okla. Stat. tit. 36, § 4004. Correspondingly, Oklahoma courts hold that "if the fraud is discovered after the incontestable clause in a policy has run, a defense based on it will come too late." *Bankers Sec. Life Ins. Co. v. Killingsworth*, 1955 OK 166, 284 P.2d 734, 735.

Georgia statutes similarly provide:

No policy of life insurance shall be delivered or issued for delivery in this state unless it contains in substance the following provisions:

* * *

(2) INCONTESTABILITY. A provision that the policy exclusive of provisions relating to disability benefits or additional benefits in the event of death by accident or accidental means shall be incontestable, except for nonpayment of premiums, after it has been in force during the lifetime of the insured for a period of two years from the date of issue.

Ga. Code Ann. § 33-2503(a)(2). Like Oklahoma courts, Georgia courts have upheld incontestability clauses in life insurance policies. In *Riley v. Industrial Life & Health Ins. Co.*, 11 S.E.2d 20, 22 (Ga. 1940), the court held that an incontestable clause in a life insurance policy is valid "the insurer is, with exception indicated [failure to pay premiums], precluded from setting up any defense based on misrepresentations or warranties made by the insured in his application, whether fraudulent or otherwise. . ." ⁷

In fact, both Georgia and Oklahoma follow the majority view. In a case factually identical to this case, the court applied a statutorily-mandated incontestability clause to bar an insurance company's rescission claim. In *Reliastar Life Ins. Co. of N.Y. v. Leopold*, 745 N.Y.S.2d 810, 812 (N.Y. Sup. Ct. 2002), a life insurer brought an action against the insured and a viatical company to rescind a life insurance policy claiming that the insured fraudulently induced it to issue the policy and that the viatical company knew of the fraud. The insured falsely represented that he did not have AIDS when he was already being treated for the disease. New York, like Georgia and Oklahoma, requires that all life insurance policies contain two-year

⁷ Applying statutes using the same language as Ga. Code Ann. § 33-2503(a)(2), Georgia courts have upheld incontestability clauses in other kinds of insurance policies. See *Blue Cross and Blue Shield of Ga., Inc. v. Sheehan*, 450 S.E.2d 228, 229 (Ga. Ct. App. 1994)(prior to a 1998 statutory amendment, the court held that the Georgia General Assembly had "mandated" that all health policies contain a two year incontestability clause after which the insurance company cannot rely on misstatements in the application to void a policy or deny a claim); *Keaton v. Paul Revere Life Ins. Co.*, 648 F.2d 299, 301 (5th Cir. 1981)(applying Georgia statutes to a disability policy, the court determined that "Georgia follows the majority view that after the period of incontestability has run, the insurer is . . . barred from contesting the validity of the policy itself, e.g., on grounds of fraud in the procurement, etc.").

incontestability clauses.⁸ *Id.* The insurer brought action well after the two year incontestability period. *Id.* The court noted that "it is well settled that once the incontestable period has elapsed, allegations that an insured procured the policy through fraud will not support a claim to void or rescind the policy." *Id.* Moreover, the court determined that "the considerations relevant to the enforcement of incontestability clauses are no less applicable" to a policy that had been viaticated. *Id.* See also *Protective Life Ins. Co. v. Sullivan*, 682 N.E.2d 624, 634 (Mass. 1997)(an insurance company's rescission action against a viatical company was barred by an incontestability clause in the subject life insurance policy).

Georgia and Oklahoma follow the majority view that an insurance policy cannot be rescinded after the incontestability period elapses. Resultingly, the Court is able to provide Texas Life the same relief, with the same skill, as the Federal Court in applying Georgia law. The Court should, therefore, deny Texas Life's Motion.

4. Because Oklahoma Applies the Same Rules of Statutory Construction as Georgia, this Court is as Qualified as the Federal Court to Interpret Georgia Statutes.

Texas Life's last argument to the Federal Court to attempt to evade application of the incontestability clause is that the Georgia General Assembly impliedly amended Ga. Code Ann. § 33-25-3 – which requires incontestability clauses in life insurance policies – when it expressly amended Ga. Code Ann. § 22-29-3 – which requires incontestability clauses in health insurance policies.⁹ See Exhibit 11. Nonetheless, because Oklahoma applies the same rules of statutory

⁸ All life insurance policies, with stated exceptions, delivered or issued in New York must contain a provision stating that the policy shall be incontestable during the life of the insured after two years. See N.Y. Insurance Law § 3203(a)(3)(McKinney 2006).

⁹ In 1998, the Georgia General Assembly expressly amended Ga. Code Ann. § 33-29-3 to include a fraud exception to the required incontestability clause in health insurance policies. Consequently, any health insurance policy can be rescinded, even after the two year contestability period, if the insured fraudulently misrepresented his or her health status in the application for insurance.

construction as Georgia, the resolution of Texas Life's rescission claims requires no special expertise.

In interpreting statutes, the court is required to ascertain legislative intent. *See Cox v. Fowler*, 614 S.E.2d 59, 60 (Ga. 2005); *YDF, Inc. v. Schlumar, Inc.*, 2006 OK 32, 136 P.3d 656, 657. The plain language of a statute is the "sole evidence" of legislative intent. *In re. L.J.*, 630 S.E.2d 771, 773 (Ga. Ct. App. 2006); *Head v. McCracken*, 2004 OK 84, 102 P.3d 670, 677. A court must interpret a statute according to its plain and ordinary meaning. *See Hough v. State*, 620 S.E.2d 380, 385 (Ga. 2005); *Pentagon Acad., Inc. v. Independent Sch. Dist. No. 1*, 2003 OK 98, 82 P.3d 587, 591. The legislature's express mention of one thing implies the exclusion of all other things. *See Abdulkadir v. State*, 610 S.E.2d 50, 52 (Ga. 2005); *Patterson v. Beall*, 2000 OK 92, 19 P.3d 839, 845. "When 'Congress includes particular language in one section of a statute but omits it in another section of the same Act,' we have recognized, 'it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Clay v. U.S.*, 537 U.S. 522, 528 (2003).

Applying the same rules of statutory construction as would Georgia and Oklahoma courts, a Massachusetts court held that a Massachusetts statute regarding incontestability clauses in life insurance policies barred an insurance company's rescission case. In *Protective Life Ins. Co. v. Sullivan*, 682 N.E.2d 624 (Mass. 1997), the insured was first diagnosed as HIV positive in November 1990. Almost a year later, after misrepresenting his health condition on an application, the insured obtained a life insurance policy from the insurance company. In October 1993, the insured assigned his life insurance policy to a viatical company. At issue was whether Massachusetts statutes allowed the insurance company to include a fraud exception in its incontestability clause.

First, the court noted that the relevant Massachusetts statute contained three specific exceptions to the incontestability clause none of which included fraud. *Id.* at 620. The court determined that "the fact that the Legislature specified one exception. . . strengthens the inference that no other exception was intended. . . we are persuaded that the Legislature's omission of an exception for fraud. . . reflects the intent that there be no such exception." *Id.* at 620-21. Second, the Massachusetts statute relating to health insurance policies specifically allowed the insurance company to rescind a policy after the incontestability period for fraudulent misstatements in the application. *Id.* at 621. Therefore, "the Legislature has demonstrated that, when it intends to have a fraud exception to an incontestability statute, it knows how to create one." *Id.*

Finally, the court noted that the life insurance incontestability statute comported with public policy stating:

It has often been held that a provision of that kind [incontestability clause] is valid because it is in the nature of a limitation of time within which the insurer may avoid the policy for this cause. Such a provision is reasonable and proper, as it gives the insured a guaranty against possible expensive litigation to defeat his claim after the lapse of many years, and at the same time gives the company time and an opportunity for investigation, to ascertain whether the contract should remain in force. It is not against public policy as tending to put fraud on a par with honesty.

Id. at 633.

Texas Life's argument that the Georgia General Assembly implicitly amended Ga. Code Ann. § 33-25-3 when it amended Ga. Code Ann. § 33-29-3 is incorrect for the same reasons identified by the *Sullivan* court in interpreting Massachusetts's insurance statutes.¹⁰ Had the

¹⁰ Additionally, amendments to statutes have prospective application only unless the legislature expressly states otherwise. See *Bickford v. Yancey Dev. Co., Inc.*, 585 S.E.2d 78, 80 (Ga. 2003); *Barnhill v. Multiple Injury Trust Fund*, 2000 OK 114, 37 P.3d 890, 898. Amendments that alter substantive rights cannot apply retroactively. See *State v. Lindsay*, 566 S.E.2d 41, 45 (Ga. Ct. App. 2002); *Sudbury v. Deterding*, 2001 OK 10, 19 P.3d 856, 860. Therefore, even assuming that Texas Life's argument is correct, the 1998 amendment to Ga. Code Ann. § 33-29-3

Georgia General Assembly intended to amend § 33-25-3, it certainly would have done so contemporaneously with its express amendment of § 33-29-3. Because this Court must apply the same rules of statutory construction in interpreting an Oklahoma statute as a Georgia statute, it need not allow Texas Life to sue the Conservator in Georgia. This Court is competent to entertain Texas Life's argument regarding statutory construction. Thus, the Court should deny Texas Life's Motion.

C. THE INTERESTS OF THE CONSERVATORSHIP ARE MUCH BETTER SERVED BY DENYING TEXAS LIFE'S MOTION

As the Conservator has amply shown, the Court would be well within its discretion to deny Texas Life's Motion because Texas Life can obtain appropriate relief in the Conservatorship action. An independent action is simply unnecessary. Nothing about Texas Life's rescission claim necessitates that the Federal Court hear the case. This Court possesses the expertise to adjudicate the rescission claims. Additionally, since the substantive laws of Oklahoma and Georgia are the same regarding Texas Life's rescission claims; that this Court will likely apply Georgia substantive law to interpret the insurance policy at issue does not mitigate in favor of permitting Texas Life to sue the Conservator in Georgia.

Because the Court already exercises exclusive jurisdiction over the Conservatorship Assets – the Texas Life policy included – in the interest of judicial economy, the Court should compel Texas Life to intervene in the Conservatorship action rather than allowing it to sue the Conservator in Georgia. The Conservator can better defend the rescission action in Oklahoma

(and, therefore, the implied amendment of Ga. Code Ann. § 33-25-3) did not apply retroactively to the incontestability clause at issue. The insurance policy was issued on June 15, 1995 when § 33-29-3 did not include a fraud exception. The two-year incontestability clause in the insurance policy became effective on June 15, 1997 – a year prior to § 33-29-3 amendment's July 1, 1998 effective date. Because the amendment affected the substantive rights of both insured and insurer, the statute can only be applied prospectively. The incontestability clause in this case already prohibited Texas Life's rescission claim by the time the amendment applied.

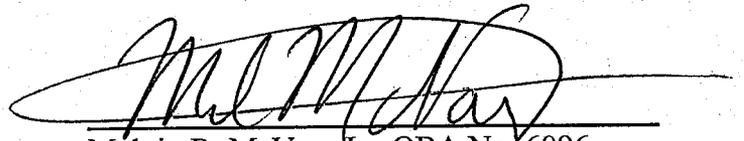
both in terms of time and money. Further, the Court is more knowledgeable about the Conservatorship and issues related to Conservatorship Assets as it has had control over the assets since 2002.

Importantly, Texas Life will not be prejudiced by being compelled to intervene. Texas Life is licensed to do business in the State of Oklahoma, and has been since 1971. *See* Exhibit 2. Therefore, intervention would not force Texas Life to litigate its claims in a jurisdiction with which it has no ties or expectation of litigation.

Because the Court can afford Texas Life the same relief as the Federal Court and because litigating in Oklahoma advances both judicial economy and the interests of the ABC Investors, the Court should deny Texas Life's Motion and compel Texas Life to intervene in the Conservatorship Action.

WHEREFORE, premises considered, the Conservator, H. Thomas Moran, II prays that this Court deny Texas Life Insurance Company's Motion for Leave to Sue Conservator.

Respectfully submitted,



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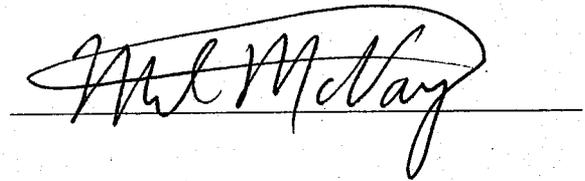
The undersigned certifies that on the 21st day of August, 2006, a true and correct copy of the foregoing was mailed via First Class Mail, postage prepaid, to the following:

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A handwritten signature in black ink, appearing to read "Mark McVay", is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.