

AUG 9 2004

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CLERK

No. 98,854

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT OF SECURITIES *ex rel.*,
IRVING L. FAUGHT, ADMINISTRATOR,
Plaintiff/Appellee,

v.

ACCELERATED BENEFITS CORPORATION and
AMERICAN TITLE COMPANY OF ORLANDO,
Defendants/Appellants.

v.

TOM MORAN,
Court-Appointed Conservator/Appellee

**DEFENDANTS/APPELLANTS' PETITION FOR
REHEARING AND BRIEF IN SUPPORT**

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE DANIEL L. OWENS, JUDGE OF THE DISTRICT COURT
CASE NO. CJ-99-2500-66
ACTION FOR VIOLATIONS OF THE OKLAHOMA SECURITIES ACT

August 9, 2004.

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**DEFENDANTS/APPELLANTS' PETITION
FOR REHEARING, AND BRIEF IN SUPPORT**

Pursuant to Oklahoma Supreme Court Rule 1.13 Defendants/ Appellants, Accelerated Benefits Corporation ("ABC") and American Title Company of Orlando ("ATCO"; collectively "Defendants"), seek rehearing of the opinion rendered by the Court of Civil Appeals, Division IV, (the "Court") on July 20, 2004.¹ For the reasons set forth below, this Court should vacate its opinion and render a decision which is (a) in accordance with settled due process principles of federal and state law, and (b) consistent with the law of the case established by the Oklahoma Supreme Court's Writ issued in the Original Proceedings on October 3, 2002.²

I. INTRODUCTION

This Court erred in two predominant respects in affirming the district court's Sale Order. First, the Court incorrectly found that the Sale Order did not violate the purchasers' federal and state due process rights. Second, the Court

¹Unless otherwise stated, all identifications utilized in Defendants' Brief in Chief will be utilized herein. For example, the "Sale Order" shall refer to the district court's "Order Approving Sale of Conservatorship Assets" rendered on January 16, 2003. The Supreme Court's Writ of Mandamus, entered on October 3, 2002, shall be referred to as the "Writ."

²Defendants have also filed a Petition for Rehearing from an opinion rendered by the Court of Civil Appeals, Division IV, in Case No. 98,663, rendered on July 20, 2004.

improperly found, in violation of the law of the case, that the Supreme Court's Writ did not obligate the Court to find that the Sale Order was invalid. With all due respect, the Court's rulings are so far off the mark, it appears that its opinion was crafted for the sole purpose of reaching a result congruent with the Court's own "view" of justice, even though it is decidedly contrary to settled federal and state law which, for decades, delineate basic due process rights. The Court should withdraw its opinion and issue a ruling that is consistent with the law, regardless of what its own views of "fairness" may be.

II. ARGUMENT AND AUTHORITIES

A. Issuance Of The Sale Order Violated The Purchasers' Due Process Rights.

It is well-settled that "jurisdiction necessary to empower a court to render a valid judgment is of three types: (1) jurisdiction of the parties; (2) jurisdiction of the general subject matter; and (3) jurisdiction of the particular matter which the judgment professes to decide." *Read v. Read*, 2001 OK 87, ¶ 8, n.6, quoting *LaBellman v. Gleason & Sanders, Inc.*, 1966 OK 183, ¶ 8, 418 P.2d 949, 953. A judgment is effective only if the party against whom it is interposed has had a full and fair opportunity to litigate the claim or critical issue. *Read*, ¶ 15, n.17, citing *Nealis v. Baird*, 1999 OK 98, ¶ 51, 996 P.2d 438, 458. "That

opportunity must be afforded in order to meet the minimum standards of due process, *both state and federal.*” (Emphasis supplied.) *Id.*, citing *Patel v. OMH Med. Ctr. Inc.*, 1999 OK 33, ¶ 41, 987 P.2d 1185, 1201.

The valid exercise of personal jurisdiction, based on the existence of *minimum contacts* with a foreign state, “protects the defendant against the burdens of litigating at a distance or inconvenient forum[,] [a]nd it acts to ensure that the states through their courts, do not reach out beyond limits imposed on them by their status as co-equal sovereigns in a federal system.” *Basham v. Hendee*, 1980 OK CIV APP 10, ¶ 9, 614 P.2d 87, 89. These principles of United States constitutional law, which Oklahoma adopted as part of its own, springs from *Fields v. Volkswagen of Am., Inc.*, 1976 OK 106, 555 P.2d 48. “The Oklahoma statute gives the courts of Oklahoma personal jurisdiction over any non-domiciliary who can be reached constitutionally as having had sufficient state contacts measured by the jurisdictional yardstick established by the United States Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).” *Id.* A cursory review of these opinions shows that the Court’s opinion is directly contrary to long established legal principles concerning the right of a state court to impose its jurisdiction over nonresidents.

Reaching “out beyond the limits imposed on [Oklahoma courts] by their status as co-equal sovereigns in a federal system” is the gist of this appeal.” *Basham v. Hendee*, 1980 OK CIV APP 10, ¶ 9, 614 P.2d 87, 89. This Court effectively held that giving the purchasers 45 days notice to appear and defend themselves in an abbreviated hearing was sufficient under Oklahoma law. This conclusion is incorrect. Since when do Oklahoma courts (or any other court of competent jurisdiction) adjudicate claims within such a short time period without ever giving the defendant time to even file an answer, let alone assert the myriad of other procedural rights accorded under Oklahoma law? The purchasers were never served with summons pursuant to Okla. Stat. tit. 12, § 2004; they were never given an opportunity to file an answer or raise various affirmative defenses; and they were never afforded the chance to develop any of the affirmative defenses unique to their respective situations, including *forum non conveniens*, lack of minimum contacts, and a whole host of other defenses. They may have wished to assert counter or cross claims, or any other recourse available under Oklahoma law, or under the laws of their own respective states for that matter. At a minimum, the purchasers should have been allowed the normal procedural due process accorded to any Oklahoma litigant, including the opportunity to litigate the case to a full and fair final conclusion.

The only so-called “notice” of impending judicial action given to the purchasers was an incomprehensible questionnaire which asked them to choose among various options regarding the liquidation of their investments. The form, which is of record in this Court, did not state anything further of substance and nothing regarding their legal rights. The form did not even state that the failure to submit a completed form might result in a judgment against it, as all Oklahoma summons generally provide.³ It is beyond any sort of reasonable comprehension that this Court could find that a person living outside the borders of Oklahoma was accorded due process. In the space of just 45 days, each purchaser lost tens or hundreds of thousands of dollars based on their failure and/or compliance with a simple questionnaire that had no information informing the purchasers on how to protect their legal rights. This is the essence of legal notice that is embodied by a summons and petition, both of which were non-existent in this case.

At a minimum, the purchasers should have been served with summons and a petition along with a reasonable opportunity to conduct a defense in accordance with Oklahoma procedure. This does not even touch upon other

³A copy of a typical summons is attached hereto as Ex. “A.” Note that it contains explicit language regarding the actions which the defendant must undertake and, more importantly, the consequences of not responding to the summons.

rights that the purchasers would have been able to assert successfully, *i.e.*, the lack of minimum contacts and *forum non conveniens*.

The idea that the Purchasers were properly accorded due process is rendered inconceivable by a simple example. John Doe, who resides in Anchorage, Alaska, and who was contractually entitled to receive \$100,000 according to the terms of his contract, will now receive only \$50,000 when the policy in which he invested matures. He was given roughly 45 days notice to hire counsel, or appear *pro se* in Oklahoma, and mount a defense. He would have been entitled to assert numerous defenses, including availing himself of the right to transfer the case to a more convenient forum, seeking removal of the case to federal court, and a host of other procedural and substantive defenses. Clearly, Mr. Doe had no chance of doing any of these things, and no doubt there are other Purchasers, with *more and less* at stake, that simply did not have a meaningful opportunity to take such actions. (Defendants' Response to Petitions for Rehearing filed by the Department and the Conservator, filed in the Original Proceeding on January 6, 2003, at 5.)

This Court obviously overlooked the Department's and the Conservator's tacit admissions that *they could not find a jurisdictional basis for*

the district court's use of nonexistent extra-territorial jurisdictional powers. Surely this Court recalls that the Department and the Conservator asked the Supreme Court, in the Original proceedings, just how the district court could enter the Sale Order without violating the purchasers' due process rights. (*See* Defendants' Brief-in-Chief at 17-21.) Defendants argued the Supreme Court was not in the business of issuing advisory opinions, and also suggested that even if this Court were inclined to suggest the proper vehicle by which a court may resolve numerous contractual claims among citizens of different states, it need only point to the vast body of federal law that provides a forum for litigation of nationwide disputes that cross state lines.

A good example is the *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987). The Second Circuit faced many of the same procedural issues that this Court faces. The Second Circuit concluded, however, that Congress has provided a specific means by which to adjudicate thousands of claims that transcend state lines. Despite the strong emotions involved in the *Agent Orange* litigation case, the Second Circuit precisely identified the one and only obligation which this Court has: "We are a court of law, and we must address and decide the issues raised as legal issues." *Id.* (Defendants' Response

to Petitions for Rehearing filed by the Department and the Conservator in the Original Proceeding on January 6, 2003, at 9-11.)

Among the various issues which the Second Circuit confronted was whether “the district court was barred by the due process clause of the fifth amendment from exercising personal jurisdiction over class members who lack sufficient contacts with New York as defined in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) . . . , and its progeny.” *Id.* at 163. The Second Circuit held that it did. It pointed out that “*Congress may, consistent with the due process clause, enact legislation authorizing the federal courts to exercise nationwide personal jurisdiction.*” (Emphasis supplied.) *Id.* at 163, citing, *Mississippi Publ’g Corp. v. Murphree*, 326 U.S. 438, 442 (1946) (“Congress could provide for service of process anywhere in the United States.”). The Second Circuit also noted that “[o]ne such piece of legislation is 28 U.S.C. § 1407 (1982), the multidistrict litigation statute.” *Id.* And it was upon *this* authority that the *Agent Orange* federal district court was enabled to adjudicate the tort claims of persons living in numerous states. (Defendants’ Response to Petitions for Rehearing filed by the Department and the Conservator in the Original Proceeding on January 6, 2003, at 11.)

There is obviously no such Congressional authority that has been conferred on the District Court of Oklahoma County, *and this was no doubt why the Oklahoma Supreme Court rejected the Department's invitation.* The question proffered by the Department was clearly desperate because state courts simply do not have the power to do what the district court did through the Sale Order despite the Department's (and the district court's) extraterritorial desire to "protect," or in the minds of some, "destroy" the rights of out-of-state investors. (*Id.*)

What this Court has essentially sanctioned is the ability of an Oklahoma district court to act as a federal court, akin to a bankruptcy court, with nationwide jurisdictional powers endowed only by federal law for exclusive exercise by federal courts. Apparently, this Court has lost sight of the fact that what is at issue here is a conservatorship that took control over various assets of a company and distributed them in a way the district court saw fit. That is not the function of an Oklahoma district court when it comes to out-of-state residents. Only a federal court, acting under the auspices of a federal law, can exercise such broad jurisdiction in keeping with the mandates of federal jurisdictional principles. There is no case in the United States that holds that a state court may, in effect, (a) act as a nationwide court of general jurisdiction, (b) collect the assets of a corporation, and (c) distribute them in accordance with its views on what is just

and equitable. In fact, one need only look at the multi-jurisdictional powers conferred on federal district courts and those conferred on an Oklahoma district court – there is no comparison because no statute grants Oklahoma courts the ability to adjudicate the rights of non-residents absent compliance with the federal and state due process limitations. Further, even federal courts must follow the dictates of due process and accord the defendant all of the procedural safeguards set forth under the Federal Rules of Civil Procedure, which Oklahoma adopted nearly two decades ago.

Additionally, district courts in Oklahoma have no procedural safeguards in place to adjudicate thousands of claims of out-of-state residents, even if they had the requisite jurisdictional contacts to hale these individuals into Oklahoma courts. For example, the federal bankruptcy laws provide protection not only to the debtor, but also to creditors. Numerous procedural devices are in place to coordinate claims made against the bankruptcy estate and the distribution of funds in a case where liquidation of the bankruptcy estate is prudent. To say that the district court here followed similar principles is absurd. More specifically, there are no such procedural rules; there is no statute which confers upon the district court to act like a United States Bankruptcy Court; and yet the district court, *within the space of a mere 45 days*, adjudicated the rights of over 4,500

investors, resulting in the loss of nearly \$70,000,000 – a fact which neither the Department nor the Conservator has ever contested, but one which should have shocked the conscience of this Court.

The statement on page 8 of the Court's opinion graphically reveals the impropriety of the result reached by the Court. The Court states:

Here, notice was made by certified mail, return receipt requested; it included detailed information regarding various options; it gave the investors a *considerable amount of time to respond*. (Emphasis supplied.)

Giving the defendants just 45 days to defend the loss of huge sums of money is farcical on its face. Yet, in the space of one sentence, this Court held it was satisfactory. True, notice was made by certified mail, return receipt requested; however, simply sending the purchasers a questionnaire detailing their "options" does not substitute for the issuance of a formal summons and the opportunity to mount a defense. At a minimum, any out of state defendant is provided 20 (or 35) days to *simply to file an answer to the petition*. After that, the defendant is supposed to receive all of the other protections provided by Oklahoma's Code of Civil Procedure, designed specifically to afford the defendant federal and state due process. There is no provision in Oklahoma's Code that permits full blown adjudication of the merits at the expiration of that period.

Further, to say that the investors had a “considerable amount of time to respond” is, under the circumstances of this case, egregiously incorrect. Nowhere in the Court’s opinion does it address the simple, basic fact that of the 4,500 investors, only approximately 30 of them were able to hire counsel to attend the hearing. Even at the hearing, they were not provided any meaningful opportunity to press the defenses normally accorded to a defendant.

In short, this case represents a travesty of justice. The Court has sanctioned the denial of due process to thousands of persons across the United States seemingly for the only reason it wants this case to “go away.” This Court is duty bound to follow the law, and it failed to do so in this case.

B. This Court Failed To Follow the Law of the Case Set Down By The Supreme Court In The Original Proceedings.

This Court correctly noted on page 8 of its opinion that “the law of the case bars re-litigation of the same issue, including those that appear to be resolved by implication.” However, in order to avoid what would otherwise have been a simple application of the doctrine, this Court found that the Supreme Court’s decision is “*different* and unlike the issue in the instant case, because the facts are different.” (*Id.*, court’s emphasis.) The only factual difference which

this Court referenced in its opinion was that “[t]he notice given in the instant case” is different than the notice given in the original proceedings. It should be obvious, however, that immaterial differences in the facts will not operate to render the law of the case doctrine inapplicable; only material differences render the doctrine inapplicable.

The only factual difference between the original proceedings and this case was that the Conservator sent out the questionnaire certified mail, return receipt requested. The only difference between this procedure and the procedure used in the Original Proceedings was that the Conservator did not issue the notice via certified mail. Aside from the fact that hundreds of purchasers never responded and some were never actually served, when the latter procedure was used, this Court incredibly found due process was given. The Court acknowledged that several purchasers never received notice at all and that nearly 40% of the investors never responded to the questionnaire. The fact that some of the purchasers were served with the questionnaire does nothing to take this case outside of the precedent established by the Oklahoma Supreme Court in the Original Proceedings.

In short, the purchasers were never granted meaningful opportunity to litigate against the district court's Sale Order, and because the Writ issued by the Supreme Court listed the very same deficiencies with respect to the Six Percent Order, the law of the case required this Court to reach the same result.

In addition, this Court misconstrued the Supreme Court's order in the Original Proceedings. There was no "lack of notice" *per se* in the Original Proceedings. It is undisputed that most of the purchasers received notice of the proceedings via regular mail. The lack of notice referenced in the Original Proceeding pertains to the basic fact that the purchasers were never given notice of the *nature* of the proceedings and notice of their legal rights to fight the Conservator's proposed sale. A summons provides a defendant legal notice that he must act within a certain time period in order to assert his defenses through an answer. The petition gives notice of the nature of the claims. In the answer, the defendant may assert various affirmative defenses, including *forums non conveniens* and lack of minimum contacts. The net effect of this Court's order violates the purchasers' state and federal due process rights, a ruling which had previously been rendered by the Supreme Court, only to be ignored by this Court.

III. CONCLUSION

For the reasons set forth above, Defendants/Appellants' Petition for Rehearing should be granted and the district court's Sale Order should be reversed and vacated.



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CERTIFICATE OF MAILING

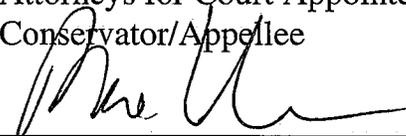
I hereby certify that a true and correct copy of the above and foregoing *Defendants/Appellants' Petition for Rehearing* was mailed, U.S. Mail, postage prepaid, this 9th day of August, 2004, to:

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