

No. 98,663

OCT 26 2004

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA **MICHAEL S. RICHIE**
CLERK

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

**ANSWER OF THE OKLAHOMA DEPARTMENT OF SECURITIES
TO PETITION FOR CERTIORARI OF DEFENDANTS/APPELLANTS**

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

October 26, 2004

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ANSWER OF THE OKLAHOMA DEPARTMENT OF SECURITIES

INTRODUCTION

Plaintiff/Appellee, the Oklahoma Department of Securities ("Department"), hereby submits its answer in opposition to Defendants/Appellants' Petition for Certiorari ("Petition for Certiorari"). On July 20, 2004, the Court of Civil Appeals ("COCA") affirmed two journal entries issued by the Oklahoma County District Court ("District Court") on November 20, 2002 ("November Orders"), that assessed Conservatorship costs against Defendants/Appellants arising from a securities regulatory action. On September 20, 2004, the COCA denied the Petition for Rehearing of Defendants/Appellants. Defendants/Appellants now seek to vacate the opinion of the COCA. The Department asserts that the decisions of the COCA affirming the November Orders and denying the Petition for Rehearing of Defendants/Appellants were in accord with applicable decisions of this Court.

SUMMARY OF THE RECORD

Background Facts

The Originating District Court Action

At all times material hereto, the Administrator of the Department was charged by statute with administering the Oklahoma Securities Act ("Act"), Okla. Stat. tit. 71, §§1-413, 501, 701-703, (2001 & Supp. 2003). The Act authorized the Administrator to bring an action in district court whenever any person violated or was about to violate the Act. Section 406.1 of the Act lists remedies that the district court may impose including injunctive relief, monetary civil penalties, restitution, the appointment of a conservator for the defendant's assets, and any other relief the court deems just.

The Administrator filed a Petition for Permanent Injunction and Other Equitable Relief ("Petition") in the District Court against Defendant/Appellant Accelerated Benefits Corporation ("ABC") and three ABC agents residing in Oklahoma. The case arose in connection with the fraudulent sale by ABC of investment opportunities evidenced by "Purchase Request Agreements." Through the Purchase Request Agreements, investors ("Investors") contracted with ABC for the right to receive proceeds from the life insurance policies of terminally ill persons. Title to the policies was held by Defendant/Appellant American Title Company of Orlando as escrow agent for ABC. The policies were owned by Defendants/Appellants; Investors acquired no title thereto. In the Purchase Request Agreement, ABC guaranteed the payment of premiums on the life insurance policies underlying the Viatical Investments.¹ ABC also promised that investors will have no cash outlay beyond their initial investment.²

On March 13, 2001, after a trial in the District Court, the court issued a judgment against ABC for violations of the Act, including fraudulent misrepresentations and omissions. ABC never appealed the District Court's decision. On June 1, 2001, the District Court issued an Order of Permanent Injunction against ABC but deferred a ruling on additional remedies while the parties negotiated a resolution. ABC never appealed the Order of Permanent Injunction.

Meanwhile, in May, 2001, the Department learned ABC was notifying Investors that the ABC premium account had been depleted, and that it was necessary for Investors to begin to pay the premiums on the policies. The premium shortfall crisis caused the Department to

¹ The Purchase Request Agreement provided: "Trustee [American Title] maintains policy(ies) premiums until maturity from a Special Bonded Premium Trust Account."

² The Purchase Request Agreement provided: "... **Purchaser will not incur costs of any type beyond the amount Purchaser tenders as the policy purchase deposit.**" (Emphasis in original.)

expedite negotiations with ABC for a remedy from which Investors could receive some return of their money before all was lost. Indeed, prior to the completion of the negotiations, Defendants/Appellants allowed certain policies to lapse, including one policy with a face value of Nine Million Five Hundred Thousand Dollars (\$9,500,000). The Department proposed a receivership or conservatorship to salvage the remaining policies.

The Need for a Conservator

On February 6, 2002, an Order Appointing Conservator and Transferring Assets ("Conservatorship Order") was issued by the District Court. The Conservatorship Order was issued upon joint application of the Department and ABC and by agreement of the parties. The order was entered with the knowledge and consent of Defendants/Appellants, who signed the Conservatorship Order in their capacity as officers or directors of ABC below the statement: "Approved as to form and substance." As stated in the order, the Conservatorship was ordered "in lieu of a judgment for restitution and in order to prevent potential irreparable loss, damage or injury to purchasers of interests in the right to receive the proceeds from the viatical and/or life settlement policies effectuated by ABC Purchase Request Agreements." The restitution amount for Oklahoma Investors would have been close to Two Million Dollars (\$2,000,000).

In the Conservatorship Order, ABC agreed to pay all costs of the Conservatorship until ownership of 75% of the Conservatorship assets were transferred to the Conservator. The reason this provision was necessary was that the Conservator would initially have no money with which to fund the substantial premium payments or any expenses of the Conservatorship and the insurance policies had to be kept in full force and effect pending the transfer. All parties estimated this process would take a period of ninety (90) days and the

Conservatorship Order so provided. To impose the responsibility to fund premium payments or expenses on a Conservator who had no money available to him would have created as serious a situation for ABC's innocent Investors as existed prior to the Conservatorship. Only when ownership of substantially all of the insurance policies was transferred to the Conservator, did the Department intend, and the Conservatorship Order provide, that the responsibility for funding expenses would move to the Conservator.

The language agreed to in the Conservatorship Order specifically states:

IT IS FURTHER ORDERED that ABC pay and maintain all office expenses, salaries, and other costs of the Conservatorship until at least seventy-five percent (75%) of all Conservatorship Assets have been transferred to the Conservator.

By the terms of the Conservatorship Order, Defendants/Appellants agreed that ABC would fund all costs of the Conservatorship until ownership of 75% of the assets was transferred to the Conservator. Defendants/Appellants never appealed the Conservatorship Order and never offered evidence to the District Court that 75% of the assets were transferred.

November Orders

On April 17, 2002, the District Court approved the first application for fees filed by the Conservator pursuant to the language of the Conservatorship Order. One application was for Conservatorship expenses and one for attorneys fees. No objections were filed by Defendants/Appellants. No appeals were filed to challenge these orders.

On June 21, 2002, the District Court approved applications for fees filed by the Conservator pursuant to the language of the Conservatorship Order. Two applications sought approval of Conservatorship expenses and two sought approval of attorneys fees. No objections were filed by Defendants/Appellants. No appeals were filed to challenge the orders.

By October 31, 2002, the District Court had issued orders approving \$396,610.54 in Conservator fees and expenses and attorney fees pursuant to several applications filed by the Conservator. However, despite the lack of an objection to or appeal from any of those orders, Defendants/Appellants did not make the court-ordered payments to the Conservator. In addition, Defendants/Appellants did not cover the premium shortfalls after June, 2002.

The Conservator was then forced to file the Conservator's Motion for Order Assessing Conservator's Expenses against Defendants and Compelling Defendants to Comply with the Conservatorship Order in an attempt to collect the amounts previously ordered by the District Court to be paid by Defendants/Appellants. Defendants/Appellants also filed a Motion to Enforce or, Alternatively Construe the Court's Order Appointing Conservator and Transferring Assets. It was from these motions that the November Orders were issued.

On November 20, 2002, the District Court issued the November Orders directing ABC to pay all of the previously approved Conservator fees and expenses and attorney fees. The District Court found no need to modify the Conservatorship Order but found:

- (a) The Order Appointing Conservator and Transferring Asset (sic) dated February 6, 2002 (the "Conservatorship Order") is clear and unambiguous;
- (b) ABC participated in the drafting and agreed to the terms of the Conservatorship Order in lieu of restitution;
- (c) Under the Conservatorship Order, ABC is obligated to pay all costs and expenses of the Conservatorship, including premium shortfalls, Conservator's fees and expenses, and attorney's fees, until seventy-five percent (75%) of the Conservatorship Assets, as defined by the Conservatorship Order, are transferred to the Conservator;

(d) To date there has been no determination that seventy-five percent (75%) of the Conservatorship Assets, as defined by the Conservatorship Order, have been transferred to the Conservator[.]³

A large part of Defendants/Appellants' Petition for Certiorari attempts to contradict the District Court's determination that an insurance policy would be transferred to the Conservator upon the receipt by the Conservator of confirmation from the insurer. However, the COCA properly found that such a determination seemed prudent given the fraud committed by ABC and the precarious nature of the investments.

The November Orders are Consistent with the Conservatorship Order

The November Orders issued by the District Court are consistent with the plain language of the Conservatorship Order - that ABC pay all costs of the Conservatorship until 75% of the Conservatorship Assets were transferred to the Conservator. Defendants/Appellants now take the position that, although they acted consistently with the language of the Conservatorship Order initially, they were not expected to pay all such costs as stated in the Conservatorship Order. The argument that Defendants/Appellants signed the Conservatorship Order but did not mean to approve of or consent to its plain language is inconsistent with the document itself.

ARGUMENT

**COCA PROPERLY FOUND CONSERVATORSHIP ORDER REQUIRED
DEFENDANTS/APPELLANTS TO PAY COSTS**

The Department, in agreeing to the Conservatorship Order, sought to remedy the serious securities law violations committed by ABC by protecting the insurance policies from which ABC Investors might recoup some of their investment. The alternative was to secure a judgment for restitution against ABC, a judgment that ABC might not have the ability to

³ The District Court did find that 75% of the assets were deemed to be transferred to the Conservator upon the

satisfy. Protection of the insurance policies required that premium payments be timely made on all policies. Under the Conservatorship Order, those payments, along with other expenses of the Conservatorship, were to be made by ABC until 75% of the assets were transferred to the Conservator.

The context in which the Conservatorship Order was issued, and the circumstances surrounding the making of the order, were critical to the ABC Investors. In the months prior to entry of the Conservatorship Order, and in every month after the Conservatorship Order was issued, there was a serious shortfall of money available to ensure that premiums on ABC insurance policies could be timely paid. The agreement from Defendants/Appellants to fund costs and expenses during the time the assets were being transferred to the Conservator, decreased the risk that policies would lapse before maturity. As the COCA found, premium payments were the most important of these costs.

Further, the Conservatorship Order provided that the Conservator would be limited to taking "custody, possession and control of the Conservatorship Assets as they are transferred to the Conservator." The Conservatorship Order did not impose an obligation on the Conservator to pay expenses and premiums for policies not yet transferred to him. Instead the clear language of the Conservatorship Order imposed this obligation on the Defendants/Appellants until the transfer of 75% of the assets was effected.

To believe the argument of Defendants/Appellants that the Conservatorship expenses were not paid because they were not contemplated by the Conservatorship Order is ludicrous. This would mean that Defendants/Appellants never intended to be responsible for any expenses under the Conservatorship Order from the moment they agreed to its terms and contrary to the evidence provided by their signatures. It is clear from the provisions of the

receipt of confirmation from the insurer.

Conservatorship Order itself that this was not so. The very actions of the Defendants/Appellants indicate that they understood the clarity of the Conservatorship Order. Defendants/Appellants 1) paid premium shortfalls for a period of time; 2) did not object to the fee applications of the Conservator; 3) did not appeal orders granting such applications; 4) paid the initial \$5,508.05 of Conservator expenses; and 5) initially paid employee salaries, rent, and office expenses. Defendants/Appellants did not become concerned until the expenses became greater than they had anticipated.

Defendants/Appellants state that the "Conservatorship Order was not meant to be punitive." However, the District Court more generally discussed the purpose of the Conservatorship Order in the Transcript of Proceedings dated September 27, 2002, at page 13. The Court stated:

"The underlying essence and purpose of that order is to make sure there was no dilatory activity on the part of the folks involved in this operation in getting the assets transferred so we could gather all these assets. That's the reason for the 75 percent cutoff. And that was the reason, I think sort of a punishment type factor, to require until you do you're going to have to take care of the bills."

Beginning on February 6, 2002, and continuing until ownership of at least 75% of the assets were transferred to the Conservator, Defendants/Appellants were required to "take care of the bills." The COCA agreed.

The COCA properly found the Defendants/Appellants were responsible under the Conservatorship Order to pay all costs, including premium payments.

CONCLUSION

The reality of the situation was that on February 6, 2002, the Conservatorship had no assets. There were not "ample funds" at the Conservator's disposal at the inception of the Conservatorship the Defendants/Appellants suggest. Certainly, there is no evidence that such

“ample funds” were available to the Conservator. In addition, contrary to the Defendants/Appellants argument, the Conservator did not have “control” over the policies until ownership of each policy was transferred to him. Further, the Conservator would not know what premiums had to be paid, at what times, and in what amounts, until the assets and records were transferred to him. Only after the transfer of 75% of the assets was the Conservator to assume responsibility for funding the payment of all costs and expenses of the Conservatorship.

For the reasons set forth above, the Department respectfully requests that this Court deny the Defendants/Appellants’ Petition for Certiorari.



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CERTIFICATE OF MAILING AND FILING

I hereby certify that a true and correct copy of the foregoing was mailed by U.S. Mail, with postage prepaid thereon, this 26th day of October, 2004, to the following:

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I further certify that a copy of the foregoing was mailed to, or filed in, the office of the Oklahoma County Court Clerk this 26th day of October, 2004.


