

No. 98,854

OCT 26 2004

MICHAEL S. RICHIE
IN THE SUPREME COURT 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

**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 the *Order Approving Sale of Conservatorship Assets* and the *Order Modifying the Court's Order Approving Sale of Conservatorship Assets* (collectively, "Sale Orders") issued by the Oklahoma County District Court ("District Court"), in 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 Sale Orders and denying the Petition for Rehearing of Defendants/Appellants were in accord with applicable decisions of this Court and the Supreme Court of the United States.

SUMMARY OF THE RECORD

On January 16, 2003 and January 24, 2003, the Sale Orders were issued by the District Court after notice and a meaningful opportunity to be heard was given to all interested persons, primarily those who had invested money ("Investors") with Defendants/Appellants. The Sale Orders were issued to allow a court appointed conservator to sell a portfolio of insurance policies previously owned by Accelerated Benefits Corporation and/or American Title Company of Orlando (collectively, "Defendants/Appellants") to an institutional buyer, Infinity Capital Services, Inc. ("Infinity"). The Sale Orders were necessary to avoid the imminent lapse of the policies that required annual premium payments of approximately Two Million Two Hundred Thousand

Dollars (\$2,200,000). Adequate funds to maintain premium payments and keep the policies in effect were not available. The Sale Orders will result in a return of approximately Fifty-Nine Million Dollars (\$59,000,000) to Investors.

Background Facts

The Originating District Court Action

At all times relevant 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 authorizes the Administrator to bring an action in district court whenever any person has violated or is 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 ABC and three ABC agents residing in Oklahoma. The case arose in connection with the unlawful and fraudulent sale by ABC of investment opportunities evidenced by "Purchase Request Agreements." Through the Purchase Request Agreements, 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 American Title Company of Orlando as escrow agent for ABC. The policies were owned by Defendants/Appellants and 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 would 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 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 the joint application and agreement of the parties. It was entered with the knowledge and consent of the principals of Defendants/Appellants, who signed the

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.)

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 Conservatorship Order provided that the Conservator would perform a number of functions including the following:

“...to manage all Conservatorship Assets pending further action by the Court including, but not limited to, the evaluation of the Policies, and to take necessary steps to protect the ABC Investors’ interests including, but not limited to, **the liquidation or sale of the Policies to institutional buyers** and the assessment to ABC Investors of the future premium payments[.]”
(Emphasis added.)

By agreeing to the terms of the Conservatorship Order, Defendants/Appellants intended that the Conservator perform the specified functions, including liquidation or sale of the policies. Defendants/Appellants never appealed the Conservatorship Order.

The Sale of the Portfolio

The portfolio of life insurance policies that the parties agreed to put into the Conservatorship was valued at approximately One Hundred Forty-One Million Dollars (\$141,000,000.) ABC Investors paid approximately One Hundred Seven Million Five Hundred Fourteen Thousand Seven Hundred Forty-Two Dollars (\$107,514,742) to Defendants/Appellants.

In the months following his appointment, the Conservator determined that annual premiums on the policies were approximately Two Million Two Hundred Thousand Dollars (\$2,200,000), and that funds available to pay the premiums would be depleted within six months. To make the situation more critical, Defendants/Appellants refused to pay the

administrative expenses as they agreed in the Conservatorship Order to pay even after subsequent orders were issued by the District Court.

Left with no viable alternative, the Conservator sought bids to determine the best sales price for the portfolio. On October 25, 2002, the Conservator filed the Motion to Sell in the District Court. The Motion to Sell and a detailed Notice to Investors was mailed by certified mail, return receipt requested, to all 4,700 Investors. The Notice gave detailed information to Investors about the offers to purchase, asked them to complete an enclosed claim form stating their preference regarding the sale, advised them of the hearing date, and informed them of their right to object to the sale in writing or by their appearance at the hearing. Returns were recorded from 97% of the Investors. The vast majority who submitted claim forms favored the sale of the portfolio. Since the Sale Orders, no Investor has filed an appeal or sought any other relief.

A hearing on the Motion to Sell was held on December 20, 2002. On December 23, 2002, the Court entered its ruling approving the sale of the Conservatorship assets to Infinity. As stated above, the Sale Orders were entered by the District Court on January 16, 2003, and on January 24, 2003.

Performance Under the Purchase Contract

On March 12, 2003, the Court entered an order approving the purchase contract between the Conservator and Infinity. On March 17, 2003, the sale was closed. On March 18, 2003, the Court entered orders approving the Conservator's proposed plan of distribution and overruling the Defendants' Motion to Stay Enforcement of Sale Order ("Motion to Stay"). Defendants/Appellants never appealed the Motion to Stay. Under the plan of distribution approved by the Court, disbursements paid to Investors since the sale have

totaled approximately Nine Million Seven Hundred Thousand Dollars (\$9,700,000). Premiums and servicing costs paid by Infinity since the sale have totaled approximately Four Million Seven Hundred Thousand Dollars (\$4,700,000).

The District Court's Sale Orders are Consistent with the Conservatorship Order

The Sale Orders issued by the District Court are consistent with the plain language of the Conservatorship Order - that the Conservator take necessary steps to protect the policies including the sale of the policies. Defendants/Appellants now take the position that they did not intend the Conservatorship Order, a document by their own admission extensively negotiated by them, to be binding. 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.

Defendants/Appellants' Failure to Stay Sale Renders Appeal Moot

The Defendants/Appellants appeal of the Sale Orders is moot. Defendants/Appellants failed to appeal the Conservatorship Order or obtain a stay of the sale pending appeal. The Conservator sold the portfolio of ABC policies to Infinity in March, 2003. All funds required to be paid by Infinity were advanced by Infinity in March, 2003. Since the March, 2003 closing, disbursements have been paid to Investors under the Sale Orders. Defendants/Appellants' failure to act and the parties' performance under the Sale Orders make this appeal moot.

ARGUMENTS

A. COCA PROPERLY FOUND THE SETTLED-LAW-OF-THE-CASE DOCTRINE DOES NOT CONTROL THE SALE ORDERS

Defendants/Appellants' base their request for certiorari with respect to the Sale Orders on the grounds that the COCA has decided a question of substance not in accord with

the applicable decisions of this Court and the United States Supreme Court. One of the “applicable decisions” to which they refer is the “Supreme Court’s Writ of Mandamus” entered in an appeal of an October, 2002 decision by the District Court.

The COCA thoroughly considered the settled-law-of-the-case doctrine in rendering a decision herein. It stated:

“The law of the case bars relitigation of the same issue, including those that appear to be resolved by implication. However, the issue resolved by the Supreme Court in the October 2002 decision is *different* and unlike the issue in the instant case, because the facts are different.” (Emphasis added by COCA).

The COCA properly distinguished the facts and issues of the Sale Orders from those addressed in the October, 2002 decision in the same manner as this Court did in *In re Application of Eaton Enterprises*, 2003 OK 14. There, as here, the parties took steps that addressed the problem that was the basis for the Court’s first ruling. The Eaton Court noted that the facts and issues in the second appeal were clearly different. The settled-law-of-the-case doctrine is not controlling where the facts or issues are different in subsequent proceedings. *Wilson v. Harlow*, 1993 OK 98.

Defendants/Appellants attempt to support the Petition for Certiorari by turning the Court’s attention from the differences that were critical to the COCA’s consideration of the Sale Orders. The COCA correctly found factual differences in this appeal that rendered the “settled-law-of-the-case doctrine” inapplicable. There are substantial differences in this appeal. The Motion to Sell and Notice to Investors were mailed by certified mail, return receipt requested, to all of the approximately 4,700 Investors wherein Investors were asked to state their preference regarding the sale. Investors were also notified well in advance of the date, time and location of a hearing on the proposed sale and given a meaningful opportunity

to be heard. The Conservator was notified that approximately 97% of the Investors received the certified mail. More than 55% of the Investors returned claim forms that were considered by the Conservator. The majority of those responding favored the sale of the portfolio. Some Investors actually attended the hearing on the proposed sale. Since the entry of the Sale Orders, no Investor has filed an appeal or sought any other relief.

In this appeal, the underlying Conservatorship Order, to which Defendants/Appellants consented, specifically authorized the Conservator to sell the Policies to institutional buyers.

B. THE VACATION OF THE SALE ORDERS WOULD CAUSE A GROSS AND MANIFEST INJUSTICE AND THE APPEAL IS MOOT

The COCA did not feel compelled to consider the gross and manifest injustice exception to the “settled-law-of-the-case doctrine” or the mootness of the appeal, since the court properly found the “settled-law-of-the-case doctrine” did not apply. Nevertheless, the issue of gross and manifest injustice or the issue of mootness, both raised by the Plaintiff in the appeal of the Sale Orders, would have been adequate to support the COCA’s affirmation of the Sale Orders. If the COCA were inclined to find that the settled-law-of-the-case doctrine applied, its application to the Sale Orders would have caused a gross and manifest injustice to Investors. As such, the “gross and manifest injustice” exception to the settled-law-of-the-case doctrine applies. *Tibbetts v. Sight’n Sound Appliance Centers, Inc.*, 2003 OK 72.

Defendants/Appellants have engaged in blatant violations of the Act and have defrauded innocent, and mostly elderly, Investors. Defendants/Appellants did not appeal the judgment against them in the Department’s enforcement case, they did not appeal the order of the District Court permanently enjoining them from violating the registration and anti-

fraud violations of the Act, and they did not appeal the Conservatorship Order allowing the Conservator to sell the portfolio of policies but agreed to its terms.

As this Court held in *Wilson v. Harlow, supra*:

“[A]n appellate court may review and reverse its former decision in the same case where it is satisfied that gross or manifest injustice has been done by its former decision, or where the mischief to be cured outweighs any injury that may be done in the particular case by overruling a prior decision. *Smith v. Owens*, 397 P.2d 673 (Okla. 1963), and *Grand River Dam Authority*, 201 P.2d at 227, both quoting *Wade v. Hope & Killingsworth*, 213 P. 549, 551 (1923).”

The Department prays that this Court affirm the decision of the COCA and disallow the Defendants/Appellants from continuing their course of manipulation and deception before Investors lose the significant recovery made possible by the Sale Orders.

Finally, this appeal is moot. The sale was completed in March, 2003. Infinity has substantially performed under the purchase contract through the payment to Investors of almost Ten Million Dollars (\$10,000,000) and the payment of almost Five Million Dollars (\$5,000,000) in premiums and servicing fees.

C. THE SALE ORDERS DO NOT VIOLATE DUE PROCESS RIGHTS

Defendants/Appellants argue that the COCA incorrectly found that the Sale Orders do not violate the Investors' federal and state due process rights. The COCA found that “[d]efendants have not shown that the notice sent by the Conservator in the case under review failed to meet the Court’s due process concerns. Instead, Defendants have simply made a conclusory argument that notice did not meet the Court’s requirements of ‘legal notice and a meaningful opportunity to appear and be heard.’”

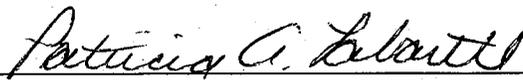
In Defendants/Appellants’ previous appeal, this Court found that ABC Investors were not given legal notice and a meaningful opportunity to be heard on a fee assessment requested by the Conservator. While investors were given thirty (30) days notice by regular

mail of a hearing, they were given no instructions on how to proceed and were not asked to express an opinion or to vote on the assessment. With regard to the proposed Sale Orders, all 4,700 Investors were sent notice by certified mail, approximately fifty (50) days prior to the hearing, and given detailed information about the sale proposals and instructions to assert their preference on the sale. Most of the responding Investors indicated their preference to sell the policies. Therefore, the COCA correctly held that the facts in the instant appeal cure any lack of notice this Court determined to be a jurisdictional deficiency in the first appeal.

This position is consistent with other viatical cases in which courts found that due process was afforded to non-party investors when notice of proceedings involving the sale of policies and an opportunity to be heard were given. *Liberte Capital Group v. Capwill*, 229 F. Supp.2d 799, 802-3 (N.D. OH. 2002); *Securities & Exchange Commission v. Tyler*, 2003 WL 21281646 slip op. *6 (N.D. Tex. 2003).

CONCLUSION

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.

