

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

Oklahoma Department of Securities, )  
ex rel. Irving L. Faight, Administrator, )  
 )  
Plaintiff, )  
 )

v.

Case No. CJ-99-2500-66

Accelerated Benefits Corporation,  
a Florida corporation, et al.,

FILED IN THE DISTRICT COURT  
OKLAHOMA COUNTY, OKLA.

JAN - 9 2003

Defendants.

PATRICIA PRESLEY, COURT CLERK  
by

HINKLES' REPLY TO CONSERVATOR'S RESPONSE TO MOTION TO COMPEL

ABC Investors John C. Hinkle and Wanda B. Hinkle (collectively referred to herein as the "Hinkles"), for their reply to the Conservator's response to their Motion to Compel Production, state as follows:

1. The Conservator's Motion for Order Approving Sale of Conservatorship Assets ("Conservator's Motion") was originally set for hearing on December 13, 2002.<sup>1</sup> The Hinkles retained the undersigned counsel shortly before that hearing. Although the proper time to receive the information the Hinkles need would have been prior to that hearing, there was not enough time to issue formal discovery requests to which responses would likely be received prior to the hearing. The Hinkles' counsel therefore attempted to work out production issues with the Conservator's counsel informally.

2. On December 9, 2002, the Hinkles filed their Motion for Right of First Refusal and for Access to Certain Information. The Motion for Right of First Refusal was addressed in part at

<sup>1</sup>The hearing was continued to December 16, 2002 and then December 20, 2002, with a decision made on December 23, 2002.

the hearing on December 16, 2002. The Hinkles' counsel did not raise the conjunctive Motion for Access to Certain Information at said hearing because (1) immediately prior to the hearing, the Conservator's counsel told the Hinkles' counsel that he thought an agreement could be reached after the hearing, and (2) with at least a dozen attorneys circled around the Bench for the hearing on the Conservator's Motion, it did not seem appropriate at that time to address the Motion for Access to Certain Information, especially in light of the Conservator's counsel's statement made immediately before the hearing.

3. The Conservator's counsel has refused to produce any information to the Hinkles absent a Court order.

4. Upon the continuance of the December 16, 2002 hearing to December 20, 2002 for evidence, the Hinkles' counsel felt that it would be most expeditious to reach some agreement with the Conservator's counsel in hopes of receiving as much information as the Conservator's counsel would willingly produce prior to the December 20, 2002 hearing.

5. The Hinkles' counsel faxed a proposed order to the Conservator's counsel after the hearing on December 16, 2002 and a revised proposed order on December 17, 2002.

6. The Conservator's counsel finally signed off on the Order and returned it to the Hinkles' counsel on the afternoon of December 18, 2002. The Order was then presented to the Court for signature and filed immediately.

7. Although ordering the production of far less information than the Hinkles wanted, the Order was drafted the way it was based on statements made by the Conservator's counsel, in order to secure **some** information (as much as the Conservator would agree to produce) prior to the Court's final hearing on the Conservator's Motion.

8. Late in the afternoon of December 19, 2002, the Hinkles filed their Motion for Removal of Policies Upon Receipt of Information Requested from the Conservator because they had still received no information.

9. About an hour before the December 20, 2002 hearing, some very cursory information was e-mailed to the Hinkles' counsel pursuant to the December 18, 2002 Order which revealed that two (2) of the Hinkles' three (3) policies have not been a burden to the Conservatorship with respect to premiums. Therefore, at the hearing on December 20, 2002, the Court agreed that those two (2) policies should not have to be sold with the Conservatorship assets.

10. The Conservator's counsel has refused to produce the policies, claiming that such is prohibited by the Gramm-Leach-Bliley Financial Modernization Act, 15 U.S.C. § 6701 et seq. and 12 U.S.C. § 1811 et seq. (the "Act"). The Conservator's counsel told the Hinkles' counsel that although it is unclear whether the Act would apply in this case, and although this Court has made no finding that it does, out of an abundance of caution, no such documents would be produced absent a Court order.

11. After the hearing on December 20, 2002, the Hinkles' counsel offered to draft a protective order for the parties to agree upon. The Conservator's counsel stated that it would be best to go ahead and file a motion with the Court first to protect the record.

12. The Conservator's counsel has, on the one hand, outwardly expressed a willingness to cooperate with the Hinkles' counsel in securing the information they need to make their decisions.<sup>2</sup> However, the Hinkles' counsel has no idea what might be contained in the Conservator's

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<sup>2</sup>E.g., "Tell me what you want and I'll get it for you."

files which would aid in the Hinkles' decisions.<sup>3</sup> The one thing that is known which would be contained therein are the policies, and the Conservator has refused to produce those.

13. The Hinkles and their counsel are, frankly, stunned at how hard the Conservator, through his counsel, is fighting them in their efforts to make informed decisions in their best interests. Protecting the interest of the ABC Investors is the central purpose of the Conservatorship. Instead, the Hinkles have been forced to incur significant attorney fees simply to defend their interest with respect to the Conservator, in addition to the substantial savings that the Hinkles have already lost as a result of their agreements with ABC (consisting of most or all of Mr. Hinkle's retirement savings, and everything Mrs. Hinkle had).

14. Both viators (numbers 488V and 364V) whose policies have not been a burden to the Conservator assigned to Defendant American Title Company of Orlando "all right, title, interest, and incidents of ownership . . . relating to [their] Life Insurance".<sup>4</sup>

15. Further, viator no. 364V, whose premiums have been paid by his long-term disability for an unknown amount of time, likewise assigned "all right, title, interest, and incidents of ownership . . . relating to Total and Permanent Disability Benefits, if any. . . ."

16. Under the Purchase Request Agreements between the Hinkles and ABC, the Hinkles

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<sup>3</sup>After the hearing (or at a break during the hearing) on December 20, 2002, the Hinkles' counsel remarked to the Conservator's counsel that this feels like a "guessing game" because the Conservator's counsel will not give any "hints" as to what is in the files.

The Court should ignore the statement contained at p. 2 ¶ 5 of the Conservator's Response, disputing the Hinkles' counsel's certification as to the conferences had in an attempt to resolve these matters without Court intervention, as no basis is given or exists for the "dispute".

<sup>4</sup>The executed assignments are contained in the Closing Packages provided to the Hinkles by ABC in approximately 1996. The Hinkles have never seen any other agreements executed between the viators and ABC to see what other rights, if any, the viators may have surrendered in selling their policies.

were to be "named as absolute, irrevocable, non-transferable and direct beneficiary on all Policies Purchased hereunder". Further, the Hinkles were to receive, among other things, certified copies of "the policy(ies), reassignment of beneficiary form(s), [and] independent medical examination(s)". The Hinkles never received copies of the policies or independent medical examinations.

### ARGUMENTS AND AUTHORITIES

#### *Previous Requests by the Hinkles*

The Conservator's Response states that "the Hinkles' motion seems to seek discovery of additional information that has not been previously requested or ordered produced by the Court. Therefore, the Hinkles' Motion is not proper and has no merit." See Response at p.2, ¶ 8. The Hinkles submit that due to the unique and expedited nature of this case, or at least of that portion of the case for which the Hinkles were forced to retain counsel, normal rules of procedure could not and should not apply. Notwithstanding, the Hinkles are aware of no requirement that a motion to compel seek only information which has previously been requested or ordered produced.

As stated above, the Hinkles' counsel attempted numerous times to "guess" what information the Conservator might have that would help the Hinkles make their decision and orally requested the same. Sufficient information has not been forthcoming. As to written requests, the Hinkles' Motion for Access to Certain Information requested, among other things:

2. **Copies of the policies in which the Hinkles have invested, along with information concerning the payment of premiums on and duration of the policies.** The Hinkles seek access to this information so that they can assess whether the policies have lapsed, and/or whether purchasing<sup>5</sup> the policies separately from any

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<sup>5</sup>The Hinkles subsequently filed their Motion for Removal of Policies Upon Receipt of Information from the Conservator, with which the Court agreed. At this point, all information requested is simply for the purpose of determining whether removal of the policies would be in the Hinkles' best interest.

Court-approved sale would be practical.

3. **Medical information about the viators** who originally held the life insurance policies in which the Hinkles invested. **Specifically, the Hinkles seek current doctors' opinions** concerning the current life expectancies of these viators to assist in assessing whether purchasing the policies separately from any Court-approved sale would be practical.

*See* Motion for Access to Certain Information at p. 2 (emphasis added). The Hinkles' Motion to Compel seeks the entire files on themselves and on their viators, which should include:

- a. The insurance policies and all riders, addendums, etc., thereto;
- b. Accounting and financial records pertaining to premium payments, including statements, reasons for non-payment of premiums, and how long such non-payment is likely to continue, if known; and
- d.(sic) Periodic reports as to the medical condition of each viator.

*See* Motion to Compel Production at pp. 2-3, ¶ 8. Obviously, the Hinkles have previously requested the information sought in their Motion to Compel. To the extent necessary, the Court should treat the Hinkles' Motion to Compel Production as a motion to modify the Court's previous Order on the Motion for Access to Certain Information based on (1) the "surprise, which ordinary prudence could not have guarded against", of how little information would actually be revealed when the Conservator "complied" with the original Order and how worthless such information would be on its own; and (2) on "newly-discovered evidence, material for the [Hinkles], which could not, with reasonable diligence, have been discovered and produced at the 'trial'". *See* 12 O.S. §§ 651(3), 651(7), 1031-1031.1. The "newly-discovered evidence" is what was produced by the Conservator pursuant to the Court's previous Order, which the Hinkles could not reasonably have anticipated being so unhelpful on its own.

***Gramm-Leach-Bliley Financial Modernization Act***

The Hinkles do not believe that it is their burden to prove "that the Act does not prohibit the

release of any further information". See Conservator's Response at pp. 2-3, ¶ 8. To the contrary, it is the objecting party's burden to prove why its objection is valid. See, e.g., 12 O.S. § 3234(B).

Notwithstanding, the Hinkles submit that the Act applies only to **financial institutions**.<sup>6</sup> First and foremost, the Conservator is not a "financial institution" within the meaning of the Act. See 15 U.S.C. § 6809(9). If it were, the Conservator would have been required to issue a privacy policy to all of the viators and/or ABC Investors upon his appointment, such as those which we annually receive from our own banks and credit card companies. See 15 U.S.C. § 6803(a). Nor are the viators "consumers" to whom the Conservator owes a duty. See 15 U.S.C. § 6809(9). Even assuming *arguendo* that the viators were "consumers" to whom the Conservator owed a duty under the Act, the Act

**"shall not prohibit** the disclosure of nonpublic personal information:

"(1) as necessary to effect, administer, or enforce a transaction requested or authorized by the consumer. . . ;

"(2) with the consent or at the direction of the consumer; or

"(3)(D) to persons holding a legal or beneficial interest relating to the consumer".

15 U.S.C. § 6802(e) (emphasis added).

Most importantly, under that same statute, the Court has the power to order the disclosure of all information sought by the Hinkles. See 15 U.S.C. § 6802(e)(8).

Even assuming *arguendo* that the Act applies (which it does not), by entering into the viatical settlement agreements and selling their policies to Defendants ABC and/or American Title Company

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<sup>6</sup>The purpose of the privacy portion of the Act is "that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information". 15 U.S.C. § 6801(a).

of Orlando, the viators in essence consented to, requested and authorized any transaction that subsequently would occur with such policies. Disclosure of the information requested is necessary to effect, administer, and enforce those subsequent transactions, which include the sale or removal of the policies from the Conservatorship assets. Also, the viators assigned "all right, title, interest, and incidents of ownership . . . relating to [their] Life Insurance" to Defendant American Title Company, which would include any rights to confidentiality. Further, the Hinkles hold a beneficial interest relating to the viators, in that the Hinkles will receive death benefits when the viators pass away. Thus, the disclosure requested is in no way prohibited by the Act.

#### CONCLUSION

Clearly, the Court has the power to order the Conservator to provide the Hinkles the information they have requested, and for all of the reasons stated herein and in their Motion to Compel Production, the Hinkles respectfully request that the Court order the Conservator to do so immediately, and further, award the Hinkles their reasonable expenses incurred in obtaining such an order, including attorney fees.

Respectfully submitted,



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ATTORNEYS FOR JOHN C. HINKLE  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing instrument was hand-delivered this 9<sup>th</sup> day of January, 2003, to the following:

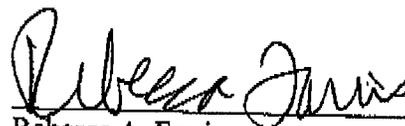
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and faxed to the following:

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