

IN THE DISTRICT COURT OF OKLAHOMA COUNTY DISTRICT COURT
STATE OF OKLAHOMA OKLAHOMA COUNTY, OKLA.

FEB 28 2003

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

RESPONSE OF OKLAHOMA DEPARTMENT OF SECURITIES
TO DEFENDANTS' MOTION FOR STAY OF
ENFORCEMENT OF SALE ORDER

Plaintiff, the Oklahoma Department of Securities ("Department"), in response to the Defendants' Motion for Stay of Enforcement of Sale Order, does hereby state:

INTRODUCTION

On January 16, 2003, this Court issued an order approving the sale of certain viated life insurance policies to an institutional buyer and modified that order on January 24, 2003 (the "Sale Order"). On February 12, 2003, Accelerated Benefits Corporation and American Title Company of Orlando (collectively "Defendants") filed an appeal of the Sale Order with the Oklahoma Supreme Court. Defendants now request that this Court stay the enforcement of the Sale Order pending the resolution of their appeal and ask that the stay be granted without the requirement that Defendants post a bond. The Department responds by urging the Court to deny both requests for the following reasons:

DEFENDANTS ARE NOT ENTITLED TO STAY OF SALE ORDER

Defendants' request a stay of the Sale Order pursuant to Okla. Stat. tit. 12, §990.4, that provides:

D. In any action not provided for in subsections A, B or C, the court may stay the enforcement of any judgment, decree or final order during the pendency of the appeal or while any post-trial motion is pending upon such terms as to bond or otherwise as it considers proper for the security of the rights of the parties. (Emphasis added.)

Discretion rests with this Court to determine whether the Sale Order shall be stayed. The Department asserts that any delay in consummating the approved portfolio sale could result in a loss of the \$58 million in sale proceeds. The \$58 million is the hope for recovery for the thousands of ABC Investors who were defrauded by ABC, Keith LaMonda and Jess LaMonda. A stay of the Sale Order will not stay the efforts of insurance companies all over the country from demanding the Conservator pay premiums to keep the \$140 million portfolio of the ABC life insurance policies in force. Premium dollars will have to be made available or the policies will lapse.

Bids were taken on the portfolio because the Conservator determined that the premium payments could not be paid indefinitely from a shrinking pool of funds. The Conservator derived his authority to entertain bids from the Order Appointing Conservator and Transferring Assets (the "Conservatorship Order") issued by this Court on February 6, 2002. The Conservatorship Order was signed and agreed to in form and substance by Defendants and provides that the Conservator will perform the following function:

2. 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[.]

Defendants never appealed the Conservatorship Order and the time for such appeal has passed.

Even the ABC Investors who agreed to pay premiums, despite being told initially by Defendants that they would not have to do so, are now running out of patience as well as the additional money needed to continue to keep the policies in effect. Therefore, that resource will continue to diminish and the shortfalls that have to be made up will increase. For most of the ABC Investors, many of whom are elderly, an attempt to force relief from Keith LaMonda or Jess LaMonda or any other person is unlikely. It will be devastating to these innocent people to suffer further loss from this scheme if the Sale Order is stayed and the buyer gets cold feet.

DEFENDANTS MUST POST BOND IF STAY IS GRANTED

If this Court is inclined to grant the stay pending the appeal, the Department asks that the Court order Defendants' to post a bond that will properly secure the rights of the Department in its efforts to remedy the violations of the Oklahoma Securities Act. Pursuant to Okla. Stat. tit. 12, §990.4(D), this Court also has discretion to order a bond that it "considers proper for the security of the rights of the parties." Defendants suggest that a bond should not be imposed because "that would be financially impossible given the amount of money involved" and "it is reasonably likely that the Sale Order will be set aside by the Oklahoma Supreme Court." Neither argument is persuasive. Further, to proceed with a stay without a bond would impose great risk to the investors and deny the Department's rights in its obligation to safeguard the public interest and to prevent any dissipation or loss of investor funds.

A bond that will adequately secure the rights of the Department herein would be the \$58 million that would be at risk if the Sale Order is stayed. The Department has grave concerns that any stay of the sale that results from legal entanglements designed by the Defendants to thwart a return of some portion of the investors' funds could prevent the buyer from proceeding with the

sale. If the Supreme Court affirms the Sale Order, as the Department believes it will, there is no guarantee that the buyer will still be willing to buy the portfolio.

It is also critical to this Court's consideration of the necessity for a bond to remember that the actuarial report on the bids received from potential buyers stated that in twenty years, twelve percent (12%) of the policies owned by ABC would not have matured. If the Sale Order is stayed and the buyer departs, who will pay the premiums on these policies? Defendants' represented to this Court earlier in the week that ABC has no money. The buyer has already deposited \$2.5 Million for the payment of premiums.

**THE SETTLED-LAW-OF-THE-CASE DOCTRINE HAS
NO APPLICATION TO THE SALE ORDER**

Defendants argue that the Sale Order violates the "settled-law-of-the-case doctrine." The doctrine states, as a general rule, that where an appellate court rules upon an issue, that ruling becomes the law of the case and is controlling upon all subsequent proceedings. *In re Application of Eaton Enterprises to Vacate*, 2003 OK 14; *Wilson v. Harlow*, 1993 OK 98. This doctrine bars relitigation of issues after they have been finally settled. *In re Application of Eaton Enterprises to Vacate*, supra; *Patel v. OMH Medical Center, Inc.*, 1999 OK 33; *Lockhart v. Loosen*, 943 P. 2d 1074 (Okla. 1997); *Nichols v. Mid-Continent Pipe Line Co.*, 933 P.2d 272, 281 (Okla. 1996); *Morrow Dev. v. American Bank and Trust*, 875 P. 2d 411, 413 (Okla. 1994). The Supreme Court has recognized that when an appeal has been decided or a party does not appeal in a timely manner, "these theories of liability are now beyond the scope of our reviewing cognizance." *Lockhart v. Loosen*, supra.

The Sale Order has never been decided in an appeal. This Court's approval of the Sale Order was based on a solid legal foundation. The facts relating to the Sale Order are completely separate from issues considered by a previous but unrelated appeal in this case. The settled-law-

of-the-case doctrine is not controlling where the facts are different in subsequent proceedings. *In re Application of Eaton Enterprises to Vacate*, 2003 OK 14; *Wilson v. Harlow*, 1993 OK 98. The facts relating to the Sale Order are different from the Defendants' previous appeal to the Oklahoma Supreme Court.

CONCLUSION

For the reasons stated herein, the Department respectfully requests that this Court deny Defendants' Motion for Stay of Enforcement of Sale Order. In the alternative, if this Court grants the Defendants' motion, the Department requests that this Court require the Defendants to post a supersedeas bond in an amount equal to the anticipated sales proceeds under the Sale Order.

Respectfully submitted,



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CERTIFICATE OF MAILING

The undersigned certifies that on the 28 day of February, 2003, a true and correct copy of the foregoing was mailed via First Class Mail, postage prepaid, to the following:

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