FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

JUL 18 2006

PATRICIA PRESLEY, COURT CLERK
by_____
Deputy

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT OF SECURITIES, ex rel. IRVING L. FRAUGHT, ADMINISTRATOR,	)	
Plaintiff	)	
v.	)	CIVIL ACTION FILE NO. CJ-99-2500-66
ACCELERATED BENEFITS CORPORATION, et al.,	)	
Defendants	)	

AMENDED MOTION FOR LEAVE TO SUE CONSERVATOR AND SUPPORTING MEMORANDUM

Now comes TEXAS LIFE INSURANCE COMPANY ("Texas Life"), and moves the Court for entry of an Order authorizing Texas Life to bring an action against HTM Conservator, LLC in another jurisdiction. In support of its motion, Texas Life shows the Court the following:

1.

HTM Conservator, LLC ("HTM") is an Oklahoma limited liability company created by H. Thomas Moran, II.

2.

By Order dated February 6, 2002, this Court appointed Mr. Moran the Conservator, in the above-entitled proceeding, of certain assets of defendant Accelerated Benefits Corporation ("ABC"), and its agents, including American Title Company of Orlando.

3.

Among the asserts transferred to the custody, possession and control of Mr. Moran as a result of the Order were "all life insurance policies owned or held beneficially, directly or

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indirectly, by or for the benefit of ABC and/or the ABC Investors, that were purchased from the date of inception of ABC through September 20, 2000."

4.

Mr. Moran moved to establish HTM Conservator, LLC to hold title to the approximately 1,500 life insurance policies issued by various insurance companies which became part of the Conservatorship Assets. By Order dated February 20, 2002, this Court authorized the establishment of HTM Conservator, LLC for such purposes.

5.

In June 1995, Texas Life issued a life insurance policy, Policy No. UL0793792 ("the policy"), to Frank Hammond English ("English"), a Georgia resident, and, in October 1997, English ownership of that policy was transferred to ABC and its agent, American Title Company of Orlando. In November 2002, ownership of the policy was transferred to HTM by ABC and American Title Company of Orlando.

6.

On May 11, 2001, Criminal Information No. 1:01-CR-378 was filed by United States Attorney Richard H. Deane, Jr., and Assistant United States Attorney Barbara E. Nelan in the United States District Court for the Northern District of Georgia, Atlanta Division, against English for felony mail fraud pursuant to 18 U.S.C. § 1341.

7.

In the Criminal Information, English was accused of devising and engaging in a scheme to "defraud numerous companies engaged in writing life insurance by obtaining and attempting to obtain by fraud life insurance policies and thereafter selling or assigning the life insurance policies obtained in exchange for a portion of the death benefits in cash."

8.

As part of this scheme, the Criminal Information alleged that English "made materially false misrepresentations about his then current state of health, medical history, and circumstances surrounding the application for life insurance on numerous applications for life insurance in order to conceal" a medical condition that he "tested positively for and had been diagnosed" "no later than April of 1995."

9.

On June 7, 2001, English entered a guilty plea on this charge before Judge Richard W. Story of the United States District Court for the Northern District of Georgia, Atlanta Division.

10.

English was sentenced to a prison term of twenty-one months on December 18, 2001, and was ordered to pay restitution to numerous life insurance companies including Texas Life.

11.

Based on the information in the Criminal Information, and English's guilty plea, Texas Life learned that English's health and medical history was not as represented in the application for insurance. In fact, Texas Life was not aware of English's true medical history at the time of issuance and delivery of the policy.

12.

In December 2005, Texas Life filed a lawsuit in the United States District Court for the Middle District of Georgia, Athens Division, against English and HTM. A copy of the complaint and amended complaint are attached as Exhibits 1 and 2.

13.

In that action, Texas Life seeks to rescind Policy No. ULO793792, based on English's failure to disclose his true medical and health history in response to questions in the application for insurance, based O.C.G.A. §33-24-7, a Georgia statute.

14.

Alternatively, Texas Life seeks to have Policy No. ULO793792 declared to have never been in force or effect due to English's failure to satisfy the conditions precedent in the application for insurance, namely that the representations concerning his health and medical conditions, as disclosed in the application, were not "complete, true and correctly recorded" and that those same representations were not "correct" at the time the policy was delivered.

15.

At the time of filing that action, Texas Life was not aware of this action, this Court's involvement with ABC or the policy, the appointment of a conservator, or the February 6, 2002 Order of this Court.

16.

The failure of Texas Life to obtain leave from this Court to sue HTM "is not jurisdictional, and failure to obtain [leave] is an irregularity which may be cured at any stage of the proceedings." Vitug v. Griffin, 214 Cal. App. 3d 488, 494 (1989). Accord Larson v. Baird, 236 N.W. 634, 635 (N.D. 1931). "When the court gives permission to sue, it may grant such permission as of the time of the commencement of the action." Id.[1]

[1]"The receiver is not in a position to object to the act of the court that appoints him. He is a servant of the court." Larson v. Baird, 236 N.W. 634, 625 (N.D. 1931).

17.

Texas Life seeks leave of court nunc pro tunc to bring the action against HTM in Georgia.

18.

"Leave to sue is usually granted as a matter of course, unless it is clear that there is no foundation for the claim." Dunscombe v. Loftin, 154 F.2d 963, 966 (5th Cir. 1946) (quoting 45 Am. Jur., Receivers, § 460). Indeed, "permission to sue, unless upon strong considerations, is practically never refused." Id. An independent suit is usually allowed "when the issues can be more conveniently tried in a separate suit." Martin v. Forrey, 193 N.E. 679, 681 (Ind. Ct. App. 1935).

19.

Texas Life has a substantial foundation for its claim against English and the owner of the policy, HTM. The basis for Texas Life's action in Georgia arises from the actions of English, a Georgia resident, who would not be subject to suit in Oklahoma, and those actions arose in Georgia and were the subject of English's guilty plea in a federal court in Georgia. Additionally, Texas Life's action can be most conveniently tried in Georgia, because English applied for the policy in Georgia, the policy insured the life of a Georgia resident and was delivered in the state of Georgia, the policy was transferred to ABC and its agent American Title Company of Orlando in Georgia, and ABC was authorized to do and did business in Georgia. Additionally, English received medical attention in Georgia that he failed to disclose in his application for insurance, and his medical records, which will be the subject of discovery, are located in Georgia. Finally, the causes of action arise from Georgia's statutes and jurisprudence.

20.

The appointment of HTM, as a conservator, "does not divest valid pre-existing rights," but HTM "takes the property subject to the same equities and rights as existed against it in the hands of the person or corporation out of whose possession it was taken." Martin, 193 N.E. at 680.

21.

"While some discretion rests in the court in deciding motions for leave to sue a receiver, leave to sue cannot arbitrarily be refused." Driver-Harris Co. v. Industrial Furnace Corp., 12 F. Supp. 918, 919 (W.D.N.Y. 1935). The "court may not refuse permission where the effect would be to cut off [Texas Life's] rights." Vitug, 214 Cal. App.3d at 493. "If the court cannot afford [Texas Life] the same relief in intervention as he is entitled to in an independent action, refusal to permit the lawsuit to proceed will constitute an abuse of discretion." Id.

22.

As more fully explained in the affidavit of Elizabeth J. Bondurant, attached as Exhibit 3, Texas Life's claim for rescission of Policy No. ULO793792 or a declaration that the policy was not in force or effect is not "without foundation." Dunscombe, 154 F.2d at 966.

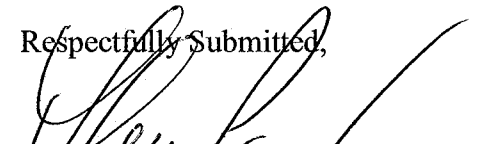
23.

Therefore, leave should be granted where "a cause of action is stated upon which it can be said there is a reasonable probability of recovery." Driver-Harris Co., 12 F. Supp. at 919.

24.

This motion is based on the attached exhibits, and on all of the pleadings, papers, records, and files in this action.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that on the 18th day of July, 2006, the following individuals were served via first class mail with adequate postage thereon addressed to:

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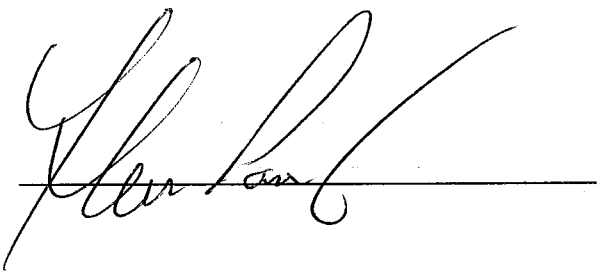
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