

No. 98,854

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

FILED
SUPREME COURT
STATE OF OKLAHOMA
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**ANSWER BRIEF OF THE
OKLAHOMA DEPARTMENT OF SECURITIES**

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 14, 2003

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ANSWER BRIEF OF THE OKLAHOMA DEPARTMENT OF SECURITIES

INTRODUCTION

This appeal seeks to overturn the sale by a conservator, of 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 was ordered by the Oklahoma County District Court ("District Court"), in resolution of a securities regulatory action.

Plaintiff/Appellee, the Oklahoma Department of Securities ("Department"), hereby submits its answer brief, in opposition to the appeal by Defendants/Appellants of the *Order Approving Sale of Conservatorship Assets* filed in the District Court on January 16, 2003, and the *Order Modifying the Court's Order Approving Sale of Conservatorship Assets* issued on January 24, 2003 (collectively, "Sale Order").

SUMMARY OF THE RECORD

On January 16, 2003, the Sale Order was 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. See *Motion for Order Approving Sale of Conservatorship Assets* (the "Motion to Sell"). The Sale Order was 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 Order will result in a return of approximately Fifty-Nine Million Dollars (\$59,000,000) to Investors.

The Originating District Court Action

The Administrator ("Administrator") of the Department is charged by statute with administering and enforcing the Oklahoma Securities Act ("Act"), Okla. Stat. *tit.* 71, §§ 1-413, 501, 701-703 (2001 and Supp. 2002). The Act authorizes the Administrator to bring an action in district court whenever any person has violated the Act or is about to violate the Act. Section 406.1 of the Act lists specific legal or equitable remedies that the district court may grant or impose including injunctive relief, monetary civil penalties, restitution, the appointment of a receiver or conservator for the defendant or the defendant's assets, and any other relief the court deems just. § 406.1.

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. See *Motion to Sell*. 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. See *Motion to Sell*. 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. See *Motion to Sell*. ABC never appealed the District Court's decision.

On June 1, 2001, the District Court issued an Order of Permanent Injunction against ABC. See *Motion to Sell*. The District Court permanently enjoined ABC from offering and selling unregistered securities; from transacting business in the State of Oklahoma without

benefit of registration as a broker-dealer; and from violating the anti-fraud provisions of the Act by making misrepresentations and omissions of material fact in connection with the offer and sale of securities. The Department had also sought restitution to the Investors and a civil monetary penalty against ABC, but asked the Court to delay ruling on this additional relief while the parties explored other remedies under Section 406.1 of the Act. 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. When selling the investments, ABC misrepresented to Investors that ABC “guaranteed payment of premiums” on the life insurance policies from funds escrowed by ABC. See *Motion to Sell*. 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 initiated negotiations with ABC to salvage the portfolio of policies through a receivership or conservatorship.

Parties Agreed to a Conservatorship

On February 6, 2002, an Order Appointing Conservator and Transferring Assets (“Conservatorship Order”), was filed in the District Court. The Conservatorship Order was issued upon the joint application and agreement of the parties. See *Motion to Sell*. It was entered with the knowledge and consent of the principals 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 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. See *Motion to Sell*.

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 in six months.

See *Motion to Sell*. To make the situation more critical, Defendants/Appellants refused to pay the administrative expenses they agreed in the Conservatorship Order to pay even after being ordered to pay by the District Court.

Left with no viable alternative, the Conservator sought bids to determine the best value for the portfolio. See *Motion to Sell*. On October 25, 2002, the Conservator filed the Motion to Sell in the District Court. The Motion to Sell and a Notice to Investors was mailed by certified mail to all 4,477 Investors who were asked to state their preference regarding the sale. Returns were recorded from 4,331 Investors. The majority of those responding favored the sale of the portfolio. Since the Sale Order, no Investor has filed an appeal or sought any other relief.

A hearing on the Motion to Sell was held on December 20, 2002. One of the sobering pieces of evidence from the hearing was the report from Lewis & Ellis, Inc., the actuarial firm retained by the Conservator to review the bids submitted from potential buyers. The report concluded that in twenty (20) years, approximately twelve percent (12%) of the policies will not have matured. See *Transcript of Hearing dated December 20, 2002*. On December 23, 2002, the Court entered its ruling approving the sale of Conservatorship assets to Infinity. The order approving the sale was entered by the District Court on January 16, 2003, and was subsequently modified on January 24, 2003. See *Sale Orders*.

Performance Under the Purchase Contracts

On March 12, 2003, the Court entered an order approving the purchase contracts between the Conservator and Infinity. See *Order Approving Option Purchase Contract*. 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. On

March 24, 2003, the sale was closed and Infinity tendered to the Conservator the sums of Two Million Five Hundred Thousand Dollars (\$2,500,000) and Two Hundred Thousand Dollars (\$200,000). See *Motion to Sell*. To date Infinity has paid all monthly premiums and servicing costs.

Under the plan of distribution approved by the Court, the following disbursements have been made to Investors:

\$500,567.71 on or about July 18, 2003, to reimburse advanced premiums to Investors;

\$304,145.38 on or about August 18, 2003, to reimburse advanced premiums to Investors; and

\$8,900,000.00 on or about October 14, 2003, as a distribution to Investors.

See *Conservator's Report*. Future disbursements will be made on a pro rata basis to all Investors who were matched to policies subject to the sale.

The District Court's Sale Order is Consistent with the Conservatorship Order

The Sale Order issued by the District Court is consistent with the plain language of the Conservatorship Order - that the Conservator explore all avenues to protect the assets to include liquidating or selling the policies if necessary. 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. See *Motion to Sell*. 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. More importantly, Defendants/Appellants failed to obtain a stay of the sale pending appeal.

ARGUMENTS

A. THE APPEAL OF THE SALE ORDER IS MOOT

The Defendants/Appellants appeal of the Sale Order is moot. The Conservator sold the portfolio of ABC policies to Infinity on March 24, 2003. All funds required to be paid by Infinity were advanced by Infinity in March, 2003. Since the March, 2003 closing, disbursements of \$9,704,713.09 have been paid to Investors under the Sale Order. Defendants/Appellants did not obtain a stay of the Sale Order and Infinity has performed its obligations under the purchase contract to date.

This Court considered the issue of mootness in *Westinghouse Electric Corp. v. Grand River Dam Authority*, 1986 OK 20, a case involving substantial performance and found:

“If the action sought to be enjoined has been performed and no particular relief can be afforded, the issues in this Court are abstract and hypothetical and the case becomes moot.”

Under general mootness principles, this appeal is moot. “If a person seeking injunctive relief does not take advantage of the procedures available for preserving the status quo, and the conduct which is sought to be prevented is thus permitted to take place, courts cannot provide any relief.” *Westinghouse Electric Corp. v. Grand River Dam Authority*, *supra*. Again, Defendants/Appellants did not obtain a stay of the Sale Order pending this appeal.

The Conservator has already sold the life insurance policies. Therefore, the policies no longer belong to the Defendants/Appellants. “A case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979). In addition, a controversy is moot if the reviewing court is incapable of rendering effective

relief or restoring the parties to their original position. *Osborn v. Durant Bank & Trust Co.* 24 F.3d 1199, 1203 (10th Cir. 1994). It is inconceivable to think that at this point in the process the parties and Investors could ever be restored to their original position. The finality of the sale insures the integrity of judicial mootness doctrines “that the occurrence of events which prevent an appellate court from granting effective relief renders an appeal moot.” *Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421, 1423-25 (9th Cir. 1985).

An analogous situation is addressed by bankruptcy law. Under Bankruptcy Rule 805, “unless an order approving a sale of property is stayed pending appeal, the sale to a good faith purchaser shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser knows of the pendency of the appeal.” *Matter of CADA Investments, Inc.*, 664 F.2d 1158 (9th Cir. 1981). Circuits have agreed that when this provision applies, an appellate court cannot undo the sale. *Id.* at 1160. Courts are reluctant to set aside confirmed sales unless they involve “fraud, error or similar defects which would in equity affect the validity of any private transaction.” *Id.* at 1162. Here, there is nothing in the record to suggest any defect occurred. The application to sell the portfolio of ABC assets was made almost one year ago and was a remedy to fraud found by the District Court to have been committed by Defendants/Appellants. The sale was made openly, pursuant to court order, and after Defendants/Appellants and Investors had an opportunity to be heard on the issues.

The completion of the sale and substantial performance of the purchase contract makes this appeal moot.

**B. DEFENDANTS/APPELLANTS ARE NOT THE PROPER PARTIES
TO ASSERT RIGHTS OF INVESTORS**

Defendants/Appellants voluntarily assigned their rights and claims to the policies to the Conservator. Defendants/Appellants improperly attempt to assert the rights of Investors by advocating that the due process rights of the Investors have been violated. However, Defendants/Appellants lack standing to act on behalf of the Investors. In *Paoloni v. Goldstein*, 200 F.R.D 644 (D.C CO. 2001), four individual investors and a group of financial planners and financial planning firms (collectively, "Financial Planners") sued the sellers of viatical investment contracts. The Financial Planners brought the action on behalf of investors to whom they sold viatical investment contracts. Defendants (sellers) challenged the standing of the Financial Planners to bring suit on behalf of investors and claimed that the Financial Planners had no standing to assert the claims of their customers. The Court agreed and stated that standing principles generally require a plaintiff to assert his own rights, rather than those belonging to third parties, citing *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). However, the Financial Planners argued that they had obtained an assignment of claims from each of the investors to whom they sold the viatical investment contracts. The Court found that the valid assignment contracts did give standing to the Financial Planners to bring the action. *Paoloni v. Goldstein, supra*.

Defendants/Appellants have no such standing. In fact, their relationship with the Investors was established when the Defendants/Appellants illegally and fraudulently sold viatical investment contracts to them. There is no evidence in the record to demonstrate that the Investors have assigned any valid right or claim to Defendants/Appellants.

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

Defendant/Appellants' sole legal basis for this appeal is that the Sale Order violates the "settled-law-of-the-case doctrine." See *Appellants' Brief in Chief*, p. 21-25. 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*, 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*, *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). However, this Court distinguished the facts and issues of the separate proceedings in *In re Application of Eaton Enterprises*, *supra*. There, as here, the parties took steps in the second case that addressed the problem that was the basis for the Court's first ruling. Thus, 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*, *supra*.

In Defendants/Appellants previous appeal, this Court found that ABC Investors were not given legal notice and a meaningful opportunity to be heard on the 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 fee assessment. With regard to the Sale Order, all 4,477 Investors were sent notice by certified mail approximately fifty (50) days prior to the hearing and given detailed instructions to assert their preference on the sale. Many actually did

indicate their preference to sell the policies. Therefore, the facts in the instant appeal cure any defect of due process this Court determined to be a factor in the first appeal.

Finally, a decision to overrule the District Court in this appeal will be devastating to the ABC Investors. The Sale Order will yield approximately Fifty Nine Million Dollars (\$59,000,000) to the Investors and relieve Investors of paying substantial premiums to keep the policies in effect. Under the Sale Order, Infinity has already paid approximately Five Million Five Hundred Thousand Dollars (\$5,500,000) in escrow funds, premiums, and administrative fees. Investors have already received three disbursements totaling approximately Nine Million Seven Hundred Four Thousand Seven Hundred Thirteen Dollars and Nine Cents (\$9,704,713.09) under the Sale Order.

Even if this Court were inclined to find that the settled-law-of-the-case doctrine applies, the Department asserts that this appeal would cause a gross and manifest injustice and, as such, would be an exception to the settled-law-of-the-case doctrine. 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).”

Recently, this Court did find such an exception to the settled-law-of-the-case doctrine where the Court determined its failure to reverse a prior decision would have resulted in gross or manifest injustice. *Tibbetts v. Sight'n Sound Appliance Centers, Inc.*, 2003 OK 72. If the settled-law-of-the-case doctrine is found to apply here, the Department urges this Court to prevent such an injustice by upholding the Sale Order.

D. THE DISTRICT COURT IS VESTED WITH BROAD EQUITY POWERS

In *State v. Southwest Mineral Energy, Inc.*, 1980 OK 118, this Court found that the Oklahoma Legislature intended equitable remedies be available for enforcement of the Oklahoma Securities Act. This Court has also recognized that the district courts of Oklahoma are empowered to do equity in actions brought under the Act. Once the equity jurisdiction of the district court has properly been invoked, the district court possesses the necessary power to fashion appropriate remedies.

The *State v. Southwest Mineral Energy, Inc.* decision provided an analysis by this Court of the equity powers of district courts in securities enforcement actions brought by the Department. There, the issue before the Court was whether a district court had the power to issue a mandatory injunction against violators of the Act to disgorge illegally obtained profits. The Court relied on the United States Supreme Court for support for the equitable authority of district courts by quoting *Porter v. Warner Holding Company*, 328 U.S. 395, 66 S. Ct. 1086, 90 L.Ed. 1332 (1946):

"Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.... Power is thereby resident in the District Court, in exercising this jurisdiction, 'to do equity and to mould each decree to the necessities of the particular case.'"

Id., at 1336-7.

The Court went on to state:

"Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."

Id., at 1337.

The United States Supreme Court affirmed this position in *Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288, 80 S. Ct. 332, 4 L.Ed. 2d 323 (1960):

“When Congress entrusts to an equity court the enforcement of prohibitions contained in regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purpose. As this Court long ago recognized, ‘there is inherent in the Courts of Equity a jurisdiction to...give effect to the policy of the legislation.’”

By granting the Sale Order, the District Court properly and completely exercised its equitable powers by appointing the Conservator and allowing the Conservator to act within the agreed terms of the Conservatorship Order. In exercising its equitable powers under the Act, the District Court has molded the Sale Order to the necessities of this case in order to maximize the return to Investors who cling to hope for at least a partial return of the money taken from them through Defendants/Appellants’ meritless promises of extraordinary earnings.

E. THE SALE ORDER DOES NOT ABROGATE ANY RIGHTS OF INVESTORS TO PURSUE CLAIMS FOR VIOLATIONS OF THE OKLAHOMA SECURITIES ACT

The Department’s case against Defendants/Appellants does not interfere with any action that Investors may bring against ABC or its principals to redress the violations of law perpetrated against them. Section 408 of the Act provides that any person who offers or sells securities in violation of the Act will be civilly liable to Investors for damages, costs, attorneys’ fees and interest. The Investors also retain all rights and remedies they have under their contracts with ABC and are free to act against Defendants/Appellants for any wrong perpetrated against them. Section 408. A regulatory enforcement action does not foreclose these rights. In executing its enforcement role, the Department acts independently of victimized Investors. See *Feigin v. Alexa Group, Ltd.*, 19 P. 3d 23 (Co. 2001).

**F. IT IS IMPROPER THAT DEFENDANTS/APPELLANTS SHOULD
PROFIT FROM THEIR ILLEGAL ACTIVITIES**

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 agreed to and did not appeal the Conservatorship Order allowing the Conservator to sell the portfolio of policies.

Since that time, Defendants/Appellants have done nothing but obstruct any return to Investors. Defendants/Appellants have been ordered but have refused to pay premium shortfalls or Conservatorship expenses, thereby leaving the Conservatorship in a precarious position with policies in danger of lapsing. Defendants/Appellants requested an audit of the Conservatorship by an independent accounting firm to which the Department and Conservator enthusiastically agreed yet have refused to provide the information necessary for the audit's completion. Defendants/Appellants have appealed three issues decided under the Conservatorship Order to this Court as if they were themselves innocent victims of a wrongful government action. Finally, Defendants/Appellants have created substantial expense to the Conservatorship and the taxpayers of the State of Oklahoma that was not envisioned under the agreed Conservatorship Order.

This Court looked with disdain at manipulative and deceptive parties in *State v. Southwest Mineral Energy, Inc., supra*, and said:

“...we do not believe it was the intention of the Legislature to allow those guilty of manipulative practices to profit from their illegal action.”

The Department prays that this Court affirm the Sale Order and disallow these Defendants/Appellants from continuing their course of manipulation and deception before Investors lose the significant recovery under the Sale Order.

CONCLUSION

For the reasons set forth above, the Department respectfully requests this Court dismiss the appeal of the Sale Order filed by Defendants/Appellants.



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CERTIFICATE OF MAILING AND FILING

I hereby certify that a true and correct copy of the Answer Brief of the Oklahoma Department of Securities was mailed by U.S. Mail, with postage prepaid thereon, this 14th day of October, 2003, to the following:

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I further certify that a copy of the Answer Brief of the Oklahoma Department of Securities was mailed to, or filed in, the office of the Oklahoma County Court Clerk this 14th day of October, 2003.

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