

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

JUN 30 2004

Oklahoma Department of Securities,)
ex rel. Irving L. Faught, Administrator,)
)
Plaintiff,)
)
vs.)
)
Accelerated Benefits Corporation, a Florida)
corporation, et al.,)
)
Defendants.)

PATRICIA PRESLEY, COURT CLERK
by _____
Deputy

Case No. CJ-99-2500-66
Judge Daniel Owens

**CONSERVATOR'S MOTION TO STRIKE DEFENDANTS'
RESPONSE TO CONSERVATOR'S MOTION TO ENFORCE
CONSERVATORSHIP ORDER AND BRIEF IN SUPPORT**

Conservator, Tom Moran ("Conservator"), hereby moves the Court to strike Defendants' Response to Conservator's Motion to Enforce Conservatorship Order and Brief in Support filed herein on June 28, 2004 ("Defendants' Response"), or, in the alternative, offers his reply to Defendants' Response. In support of his motion to strike, the Conservator offers the following:

Statement of Facts

1. The Conservator's Motion to Enforce Conservatorship Order and Brief in Support (the "Conservator's Motion") was filed on May 21, 2004.
2. Hearing on the Conservator's Motion was set by the Court on that same day for July 1, 2004.
3. Defendants' response to the Conservator's Motion was due June 8, 2004.
4. Defendants' Response was not filed until June 28, 2004.
5. As of June 30, 2004, neither Plaintiff's counsel nor Conservator's counsel had

received a copy of Defendants' Response.¹ Plaintiff's and Conservator's counsel received Defendants' Response by facsimile on June 30, 2004, after requesting same from Defendant's counsel.

6. No requests for extension of time to respond to the Conservator's Motion were ever received by Conservator's counsel or filed with the Court.

7. Defendants have also failed to comply with Rule 37, Rules for the Seventh Judicial District which requires that "[a]ll briefs shall be filed and a copy delivered to the assigned trial judge at least five (5) days prior to any hearings."

Argument and Authorities

I. Defendant's Response is Untimely Pursuant to Court Rules and Should be Stricken.

Under Rule 4(e), Rules of the District Court, Defendants' response to the Conservator's Motion was due June 8, 2004. Defendants' Response was not filed until June 28, 2004, or more than 20 days after it was due, and less than five (5) days before the scheduled hearing. No requests for extension of time to respond to the Conservator's Motion were ever received by Conservator's counsel or filed with the Court. Defendants' Response is therefore untimely and should not be considered by the Court.

Defendants' Response is also untimely as a result of Defendants' failure to comply with Rule 37, Rules for the Seventh Judicial District, which requires that "[a]ll briefs shall be filed and a copy delivered to the assigned trial judge at least five (5) days prior to any hearings." In the present case, Defendants' Response was not filed and delivered to the trial judge at least five days

¹ A copy of Defendants' Application for Continuance of Hearing, filed June 28, 2004, was received by Conservator's counsel on June 29, 2004.

prior to the scheduled hearing. Rule 37 further provides that "Any brief in violation of this rule shall not be considered by the assigned judge and shall be stricken from the record."

Wherefore, premises considered, the Court should strike Defendants' Response for failure to comply with the Court's rules. In the alternative, should the Court overrule the Conservator's Motion to Strike, the Conservator offers the following in reply to Defendants' Response.

II. The Conservatorship Order is Unambiguous and Clearly States That Any Interest in the Akin Policy Owned By, or Held For the Benefit of, ABC Became the Property of the Conservator.

In the Conservator's Motion, the Conservator does not seek to have the Court construe the Conservatorship Order, but instead, seeks to have the Court enforce its clear and unambiguous terms. The Conservatorship Order defines the Conservatorship Assets to include:

- a. All life insurance policies owned or held beneficially, directly or indirectly, by or for the benefit of ABC and/or ABC Investors, that were purchased prior to October 1, 2000 (the "Policies"); ...

The interest in the Akin Policy which was previously titled in ATCO "for the benefit of ABC," as stated in Defendants' Response, clearly falls within the scope of policies "owned or held beneficially, directly or indirectly, by or for the benefit of ABC...". Defendants' attempt to state what the intent of the order is ineffective, because as stated in Defendants' Response, "the meaning and effect of that judgment must be resolved by resorting solely to the face of the judgment roll." *Stork v. Stork*, 1995 OK 61, 898 P.2d 732, 739.

In the present case, Defendants have admitted that "ATCO holds ABC's interest in the Akin policy for the benefit of ABC." *See* Defendants' Response at p. 6. The Conservatorship Order is clear that such interest is a Conservatorship Asset, and therefore, property of the Conservator.

III. Defendants Are In Violation of the Conservatorship Order By Interfering With the Conservator's Custody and Control of Conservatorship Assets.

As noted in the Conservator's Motion, the Conservatorship Order further provides:

IT IS FURTHER ORDERED that all persons and entities, including ABC, its subsidiaries, affiliates, officers, directors, agents, servants, employees, attorneys, and all persons acting on their behalf, under their direction and control, and/or in active concert or participation with them, . . . fully cooperate with and assist the Conservator and **that they take no action, directly or indirectly, to hinder or obstruct the Conservator in the conduct of his duties or to interfere in any manner, directly or indirectly, with the custody, possession or control exercised by said Conservator.**

See Exhibit "A", Conservatorship Order, pp 5-6 (emphasis added).

In the present case, ATCO has filed pleadings in the federal interpleader action filed by Prudential disputing the Conservator's ownership of the interest in the Akin Policy previously owned by ABC. ATCO's action in disputing the Conservator's ownership of the ABC portion of the Akin Policy is a violation of the Conservatorship Order which prohibits ATCO from taking any action contrary to the exercise of custody, possession and control of the Akin Policy by the Conservator.

In the Conservator's Motion, the Conservator seeks to enforce the terms of the Conservatorship Order by having the Court enjoin ATCO from taking any further position adverse to the Conservator regarding the ownership any interest in the Akin Policy, and requiring ATCO to withdraw its claim.

WHEREFORE, premises considered, Conservator, Tom Moran, respectfully requests that the Court enter its order striking Defendants' Response for failure to comply with the Court's rules. In the alternative, should the Court overrule the Conservator's Motion to Strike, the

Conservator respectfully requests that the Court make a judicial determination of his ownership of the 16.82699896 percent beneficiary interest in the Akin Policy, or proceeds thereof, held by ATCO on behalf of ABC pursuant to the terms of the Conservatorship Order, and further requests that ABC and ATCO be ordered to disclaim and relinquish any such interest, and execute any and all documents or pleadings necessary to affect such disclaimer. The Conservator further respectfully requests this Court enter an Order enforcing the terms of the Conservatorship Order and ordering ABC and ATCO to cease and desist from taking any position adverse to the ownership of the 16.82699896 percent beneficiary interest in the Akin Policy, or proceeds thereof, by the Conservator, and in any and all efforts to further undermine the Conservatorship, or otherwise interfere with the Conservator's duties and the exercise, possession and control of the Conservatorship Assets, including, but not limited to, the Akin Policy.

Respectfully submitted,



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ATTORNEYS FOR CONSERVATOR,
TOM MORAN

CERTIFICATE OF MAILING

The undersigned certifies that on the 30th day of June, 2004, a true and correct copy of the foregoing Application was mailed, via First Class Mail, postage pre-paid, to:

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