

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

**FILED**  
SUPREME COURT  
STATE OF OKLAHOMA

JUN 3 2003

OKLAHOMA DEPARTMENT OF SECURITIES, )  
*ex rel.*, IRVING L. FAUGHT, ADMINISTRATOR, )

**MICHAEL S. RICHIE**  
**CLERK**

Plaintiff/Appellee, )

v. )

No. 98663  
Case No. CJ-99-2500-66  
D.C. Oklahoma County  
The Honorable  
Daniel L. Owens  
Action for Violations of  
Oklahoma Securities Act

ACCELERATED BENEFITS CORPORATION, )  
C. KEITH LAMONDA, AMERICAN TITLE )  
COMPANY OF ORLANDO, AND DAVID )  
PIERCEFIELD, )

Defendants/Appellants, )

v. )

TOM MORAN, )

Court-Appointed Conservator/Appellee. )

---

**ANSWER BRIEF OF THE**  
**OKLAHOMA DEPARTMENT OF SECURITIES**

---

Patricia A. Labarthe, OBA #10391  
Melanie Hall, OBA # 1209  
Oklahoma Department of Securities  
120 North Robinson, Suite 860  
Oklahoma City, Oklahoma 73102  
Telephone: (405) 280-7700  
Facsimile: (405) 280-7742

Attorneys for the Oklahoma Department of  
Securities

**INDEX**

INTRODUCTION.....1

SUMMARY OF THE RECORD.....1

    The Originating District Court Action.....2

    Parties Agree to Relief Following the District Court’s Judgment Against ABC .....4

    Defendants/Appellants’ Issues on Appeal are Moot or Not Addressed by District Court.....6

    Any Argument Regarding the Authority of the District Court to Issue the Conservatorship Order is Moot .....7

    Any Argument Regarding the Originating District Court Judgment is Moot .....8

    Joy LaMonda Affidavit Not a Part of the Record.....9

    November Orders.....10

    The District Court’s November Orders are Consistent with the Intent of the Department.....11

    No Evidence That ABC Left Certain Assets With Conservatorship.....12

    ABC Legally Responsible for Premium Payments.....12

ARGUMENTS.....13

    A. The Conservatorship Order Is Clear and Unambiguous.....13

    B. The November Orders Are Clearly Not Against The Weight Of The Evidence.....15

    C. Defendants/Appellants Never Demonstrated That 75% Of The Policies Were Transferred To The Conservator .....16

    D. The Issue of Whether Conservatorship Assets May Be Used To Satisfy ABC’s Obligations To Pay Expenses Is Not Before This Court .....17

    E. The Issue Of Premium Reimbursement Is Not Before This Court .....17

CONCLUSION.....18

CASES

*Adams v. Unterkircher*, 1985 OK 96, 714 P.2d 193, 196 ..... 6

*Carpenter v. Carpenter*, 1982 OK 38, 645 P.2d 476 ..... 15

*Chandler v. Denton*, 1987 OK 38, 741 P.2d 855 ..... 15

*Decker v. Mutual Benefits Corp.*, Cas. No. 00-0541-CA-17 (Fla. Cir. Ct., 19th Jud. Circuit, May 17, 2001)..... 9

*Department of Banking and Finance v. Denton*, 2002 WL 31936480 (Fla. Div. Sec. & Fin., Final Order, Dec. 23, 2002), affing DOAH Case No. 01-1284 (Recommended Order, Nov. 20, 2002) ..... 9

*Dickason v. Dickason*, 1980 OK 24, 607 P.2d 674..... 13

*General Creditors of the Estate of Harris v. Cornett*, 1966 OK 64, 416 P.2d 398 ..... 13

*Glick v. Sokol*, 149 Ohio App. 3d 344, 2002-Ohio-4731, 777 N.E. 2d 315 (2002); appeal allowed, 98 Ohio St. 3d 1460, 2003-Ohio-644, 783 N.E.2d, 519 (2003)..... 9

*Griffitts v. Life Partners, Inc.*, Cause No. 2000-3235 (Tex. Dist. Ct., McLennan County, July 31, 2001) (appeal append.) ..... 9

*Hicks v. Hicks*, 1966 OK 91, 417 P.2d 830..... 13

*Hill v. Dedicated Resources, Inc.*, Case No. 99-C-1714 (Kan. Dist. Ct., Shawnee County, July 12, 2001) ..... 9

*In re Beneficial Assurance, Ltd.*, Case No. XY 02-CD-04 (Colo. Sec. Comm'r Nov. 6, 2002)9

*In re Foster*, 2001 Wa. Sec. LEXIS 61 (Wash. Sec. Div, Final Order, Nov. 1, 2001)..... 9

*In re Martin*, OAH No. OAG-SD-50-020010003 (Md. Office of Admin. Hearings, Proposed Order on Motion for Summary Judgment, Feb. 15, 2002) ..... 9

*Jackson v. Jackson*, 2002 OK 25, 45 P.3d 418, 428 ..... 16

*Joseph v. Viatica Management, LLC*, 55 P.3d 264 (Colo. App. 2002)..... 9

<i>Life Partners, Inc. v. SEC</i> , 87 F.3d 536 (D.C. Cir. 1996), <i>rehearing denied</i> , 102 F.3d 587 (1996).....	8, 9
<i>Melton v. Keisling</i> , Cas. No. M:99-CA-145(W.D. Tex. May 15, 2000).....	9
<i>Michelson v. Voisin</i> , 2003 WL 103273 ( <i>Mich. App. Jan. 10, 2003</i> ) .....	9
<i>Oklahoma Department of Securities v. Accelerated Benefits Corp.</i> , Case No. CJ-99-2500-66 (Okla. Dist. Ct., Oklahoma County, Mar. 13, 2001) .....	9
<i>Poyser v. Flora</i> , 780 N.E. 2d 1191 (Ind. App. 2003).....	9
<i>SEC v. Tyler</i> , 2002 U.S. Dist. LEXIS 2952 (N.D. Tex. Feb. 22, 2002).....	9
<i>Siporin v. Carrington</i> , 200 Ariz. 97, 23 P. 3d 92 (App. 2001) .....	9
<i>U.S. V. Howey</i> , 328 U.S. 293 (1946).....	8
<i>Wolf v. McQuire</i> , Cas. No.99-B-2006 (D. Colo. Sept. 24, 2000) .....	9

**CITATION**

Oklahoma Securities Act (“Act”), Okla. Stat. <i>tit.</i> 71, §§ 1-413, 501, 701-703 (2001 and Supp. 2002) .....	2, 4, 7
--	---------

**Rules**

Rule 1.65 of the Supreme Court Rules.....	1
---	---

## **ANSWER BRIEF OF THE OKLAHOMA DEPARTMENT OF SECURITIES**

Plaintiff/Appellee, the Oklahoma Department of Securities (“Department”), hereby submits its answer brief, in opposition to the appeal by Defendants/Appellants of two journal entries filed in the Oklahoma County District Court (“District Court”) on November 20, 2002 (“November Orders”).

### **INTRODUCTION**

On December 20, 2002, Defendants/ Appellants filed a Petition in Error stating that their appeal was brought from an “Interlocutory Order Appealable by Right.” On February 3, 2003, the Notice of Completion of Record was filed with this Court, but by March 3, 2003, the date Defendants/Appellants were required to file their brief pursuant to Rule 1.65 of the Supreme Court Rules, no brief had been filed by Defendants/Appellants. Then, on March 27, 2003, almost one month after their filing deadline, Defendants/Appellants filed an application for extension of time to file their brief, stating to this Court that their brief was due on April 4, 2003, and asking for an additional twenty (20) days to so file. The application was granted on March 31, 2003. To gain more time, Defendants/Appellants have shifted the basis for their appeal as originally stated to this Court in their Petition in Error. Defendants/Appellants now state that the basis for this appeal is from two final orders of the District Court. Defendants/Appellants brief should be stricken and the appeal dismissed.

### **SUMMARY OF THE RECORD**

The Department refutes the Summary of the Record presented by Defendants/Appellants. Defendants/Appellants blatantly misstate the actual record of this case relating to the stated issues to be considered on appeal and attempt to bring under consideration issues that are completely irrelevant to the November Orders.

The Originating District Court Action

The Administrator (“Administrator”) of the Department is charged by statute with administering 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 its implementing regulations. The Act provides that the district court may grant or impose one or more of the legal or equitable remedies listed in Section 406.1 of the Act, including injunctive relief, monetary civil penalties, and restitution. The district court may also appoint a receiver or conservator for the defendant or the defendant’s assets and impose 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. The case arose in connection with the unlawful and fraudulent sale by ABC of investment opportunities evidenced by “Purchase Request Agreements.” Purchase Request Agreement purchasers (“Investors”) contracted for the right to receive from ABC a sum of money equal to a designated percentage of the death benefits payable from one or more life insurance policies on the life of one or more persons who have a catastrophic or life threatening illness or condition in exchange for the performance of certain services by ABC. On March 13, 2001, at the conclusion of the non-jury trial of ABC, the District Court issued Findings of Fact and Conclusions of Law (“Findings”) against ABC. ABC never appealed the District Court’s decision.

On May 7, 2001, the Department filed an Amended Motion to Settle Journal Entry requesting that the District Court order the relief requested by the Department in its Petition.

Among the sanctions prayed for in the Petition, and requested by the Department in the motion, were a permanent injunction against ABC, restitution to the ABC Investors, and a civil monetary penalty against ABC.

Meanwhile, in May, 2001, the Department learned that ABC was mailing out notices to Investors that the ABC premium account had been depleted, and that it was necessary for Investors to begin to pay the premiums. At the time of the sale of the ABC investments, ABC represented to Investors that ABC would pay premiums on the life insurance policies from funds escrowed by ABC. The Department sought an emergency order prohibiting the collection of additional funds from Investors and alleged that the extraction of these payments was a continuation of the securities fraud found by the Court to have been perpetrated by ABC on unsuspecting Investors. The Court issued an order so prohibiting ABC from further collection. In order to safeguard the life insurance policies owned by Petitioners, the Department initiated negotiations with ABC for a remedy that would maximize the return to Investors and safeguard the assets of ABC from which Investors could receive some return of their money.

With regard to the negotiations, ABC chose to go forward without counsel and the Department had no choice but to deal directly with Defendant/Appellant Keith LaMonda.<sup>1</sup> The Department would have preferred to negotiate with counsel rather than negotiating with the control person of ABC, the company found to have defrauded Oklahoma Investors in the viatical investment scheme. The Department would also have preferred to take a judgment for restitution against ABC. However, the Department found that premium reserves were inadequate to keep the ABC policies in full force and effect. The premium shortfall crisis

---

<sup>1</sup> Contrary to Appellants' representations to this Court, Keith LaMonda repeatedly advised the Department that ABC was not represented by counsel in connection with this case,

required that the ABC assets be taken from the control of ABC in an attempt to afford some relief to ABC Investors. Indeed, prior to the Conservatorship, certain policies lapsed, including one policy with a face value of Nine Million Five Hundred Thousand Dollars (\$9,500,000.00). Defendant/Appellant Keith LaMonda continually insisted that he would represent ABC in the Oklahoma case after his attorneys withdrew.

A hearing on the Amended Motion was had on June 1, 2001, and the District Court issued an Order of Permanent Injunction against ABC. 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 asked the Court to delay ruling on any restitution or civil monetary penalty while the Department and ABC explored other remedies pursuant to Section 406.1(a)(1) of the Act. ABC never appealed the Order of Permanent Injunction.

*Parties Agree to Relief Following the District Court's Judgment Against ABC*

In May or June, 2001, the Department initiated negotiations with ABC for the appointment of a receiver. Monthly premiums on the \$140 million portfolio of ABC policies were substantial and it was clear from the new solicitations of premiums from Investors that ABC did not have the money to pay the premiums. After months of negotiating with ABC, and the continued refusals of ABC to obtain counsel to assist with the settlement, an agreement was reached between ABC and the Department, which was presented to the District Court.

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 joint application of the Department and ABC and by agreement of the parties. It was entered with the knowledge and consent 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 restitution amount for Oklahoma Investors would have been close to \$2 million.

In the Conservatorship Order, ABC agreed to pay all costs of the Conservatorship until 75% of the Conservatorship assets were transferred to the Conservator. The reason this provision was necessary was that the Conservator would initially have no money with which to fund the substantial premium payments or any expenses of the Conservatorship and the insurance policies had to be kept in full force and effect pending the transfer. All parties knew this process would take a period of approximately ninety (90) days and the Conservatorship Order so provided. To impose the responsibility to fund premium payments or expenses on a Conservator who had no money available to him would have created as serious a situation for ABC’s innocent Investors as existed prior to the Conservatorship. The Department would never have considered such a dangerous option. Only when substantially all of the insurance policies were transferred, did the Department intend and the Conservatorship Order provide that the responsibility for expenses would move to the Conservator.

The language agreed to in the Conservatorship Order specifically states:

IT IS FURTHER ORDERED that ABC pay and maintain all office expenses, salaries, and other costs of the Conservatorship until at least seventy-five percent (75%) of all Conservatorship Assets have been transferred to the Conservator.

It is important to note that Defendants did pay the premium shortfalls for more than six (6) months after the District Court issued the Conservatorship Order before claiming that they were not obligated to make such payments or to pay any of the described expenses.

*Defendants/Appellants' Issues on Appeal are Moot or Not Addressed by District Court*

Seven issues were cited by Defendants/Appellants in their Petition in Error. See Exhibit "C" to Petition in Error. However, only Paragraphs 1, 2 and 3 of Exhibit C state issues that were disposed of by the District Court in the November Orders. Paragraphs 1, 2 and 3 state the issues to be: (1) whether the Conservatorship Order is clear and unambiguous; (2) whether the Conservatorship Order obligated ABC to pay all costs and expenses of the Conservatorship, including premiums, Conservator fees and expenses, and attorneys fees, until 75% of the Conservatorship assets, as defined by the Conservatorship Order, are transferred to the Conservator; and (3) whether 75% of the life insurance policies, which constitute the bulk of the Conservatorship assets, are deemed transferred to the Conservator upon the preparation and submission of change of beneficiary forms or upon the insurance company's acknowledgement of receipt and change of beneficiary.

Defendants/Appellants' acceptance of the benefits of the Conservatorship Order makes this appeal of the short term duties imposed on them under the Conservatorship Order unavailable to them. *Adams v. Unterkircher*, 1985 OK 96, 714 P.2d 193, 196. Defendants/Appellants were relieved of the obligation for paying restitution to Oklahoma

ABC Investors, were relieved of the responsibility of administrating the ABC policies and dealing with ABC Investors, and were relieved of the responsibility for payment of expenses after the policies were substantially transferred to the Conservator.

The issues stated by Defendants/Appellants in Paragraphs 4 and 6 are: (4) whether the Conservatorship Order was properly construed to require payment of premiums by ABC prior to the transfer of 75% of the Conservatorship assets, and (6) whether the District Court properly construed its previous Conservatorship Order. These issues simply restate Paragraphs 1 and 2.

The issues stated by Defendants/Appellants in Paragraphs 5 and 7 are: (5) whether assets left with the Conservator at the inception of the Conservatorship, above and beyond insurance policies and premium accounts, may be used or considered to have satisfied ABC's obligations to pay the Conservatorship fees and expenses prior to transfer (sic) 75% of the Conservatorship assets; and (7) whether ABC should be reimbursed for premium payments which it advanced both prior and subsequent to the entry of the Conservatorship Order. These issues were never considered or adjudicated in the District Court and are not ripe for an appeal.

*Any Argument Regarding the Authority of the District Court to Issue the Conservatorship Order is Invalid as Well as Moot*

Despite the fact that ABC never appealed the 2001 judgment of the District Court, Defendants/Appellants argue in their brief herein the lack of authority of the District Court in issuing the Conservatorship Order. Defendants/Appellants also imply that the Department acted improperly in negotiating the Conservatorship Order. These arguments are both moot and are absolutely improper. As previously stated, Section 406.1 of the Act specifically authorized the District Court to appoint the Conservator and to grant any other equitable

relief the District Court deemed to be just upon a finding that ABC had violated the Act. As previously stated, Defendants/Appellants did not appeal the Conservatorship Order.

*Any Argument Regarding the Originating District Court Judgment is Moot*

Despite the fact that ABC never appealed the 2001 judgment of the District Court, Defendants/Appellants shamefully argue in their brief herein the error of the District Court's judgment. This judgment was based on the law established by the United States Supreme Court in *SEC v. W. J. Howey Co.*, 328 U.S. 293, (1946), as recited by the District Court in its Findings:

“Defendant ABC, places its defense in the instant case on the case of **Life Partners, Inc. v. SEC**, 87 F.3d 536 (D.C. Cir. 1996), *rehearing denied*, 102 F.3d 587 (1996). The Life Partners case places its emphasis on the managerial efforts of the seller of the investment at the point of post investment. As here, the Defendant argues that the only managerial effort by ABC after the investor's purchase is the payment of proceeds at (sic) of the viator. This analysis is inconsistent with the test set forth in **U.S. V. Howey**, 328 U.S. 293 (1946).

The outcome of the investment in the instant case is totally dependent on the expertise and managerial efforts of ABC in seeking out and choosing the right viatical settlement. Investors have no input into the investment nor do they have a beneficial ownership interest in any of the viatical settlements.”

Defendants/Appellants attempt to mislead this Court by arguing the fallacy of the District Court's failure to follow *Life Partners*, a 2-1 decision of a three judge panel, issued contrary to the progeny of *SEC v. Howey*, and contrary to both Oklahoma and federal case law. The facts in the *Life Partners* case are clearly distinguishable from the Plaintiff/Appellee's case against ABC. Additionally, this basic issue of securities law was fully briefed and argued before the District Court. Defendants/Appellants never appealed the District Court's decision. The issue is moot when raised two years too late. Further, the *Life*

*Partners* decision has been widely criticized by courts across the country and by legal scholars.<sup>2</sup>

Finally, Defendants/Appellants attempt to impress this Court and bolster the value of the 1996 *Life Partners* opinion by definitively stating that the opinion was “authored by Judge Ruth Bader Ginsburg of the United States Court of Appeals for the District of Columbia (now Justice Ginsburg).” It is impossible for Justice Ginsburg to have authored the opinion or even participated in its decision as she was nominated by President Clinton to be Associate Justice of the United States Supreme Court in June, 1993, took the oath of office on August 10, 1993, and continues to serve on the United States Supreme Court today. The opinion was actually authored by Judge Douglas H. Ginsburg of the District of Columbia Circuit.

*Joy LaMonda Affidavit Not a Part of the Record*

An affidavit by Joy LaMonda is cited by the Defendants/Appellants for the idea that the Conservator did not know how to perform his assigned duties. This affidavit was stricken by the District Court and never made a part of any record or proceeding. The order striking the affidavit was never appealed.

---

<sup>2</sup> *Michelson v. Voisin*, 2003 WL 103273 (Mich. App. Jan. 10, 2003); *Poyser v. Flora*, 780 N.E. 2d 1191 (Ind. App. 2003); *Joseph v. Viatica Management, LLC*, 55 P.3d 264 (Colo. App. 2002); *Siporin v. Carrington*, 200 Ariz. 97, 23 P. 3d 92 (App. 2001); *SEC v. Tyler*, 2002 U.S. Dist. LEXIS 2952 (N.D. Tex. Feb. 22, 2002); *Melton v. Keisling*, Cas. No. M:99-CA-145(W.D. Tex. May 15, 2000); *Wolf v. McQuire*, Cas. No.99-B-2006 (D. Colo. Sept. 24, 2000); *Department of Banking and Finance v. Denton*, 2002 WL 31936480 (Fla. Div. Sec. & Fin., Final Order, Dec. 23, 2002), affing DOAH Case No. 01-1284 (Recommended Order, Nov. 20, 2002); *In re Beneficial Assurance, Ltd.*, Case No. XY 02-CD-04 (Colo. Sec. Comm'r Nov. 6, 2002); *In re Foster*, 2001 Wa. Sec. LEXIS 61 (Wash. Sec. Div, Final Order, Nov. 1, 2001); *Glick v. Sokol*, 149 Ohio App. 3d 344, 2002-Ohio-4731, 777 N.E. 2d 315 (2002); appeal allowed, 98 Ohio St. 3d 1460, 2003-Ohio-644, 783 N.E.2d, 519 (2003); *Griffitts v. Life Partners, Inc.*, Cause No. 2000-3235 (Tex. Dist. Ct., McLennan County, July 31, 2001) (appeal append.); *Decker v. Mutual Benefits Corp.*, Cas. No. 00-0541-CA-17 (Fla. Cir. Ct., 19th Jud. Circuit, May 17, 2001); *Oklahoma Department of Securities v. Accelerated Benefits Corp.*, Case No. CJ-99-2500-66 (Okla. Dist. Ct., Oklahoma County, Mar. 13, 2001); *Hill v. Dedicated Resources, Inc.*, Case No. 99-C-1714 (Kan. Dist. Ct., Shawnee County, July 12, 2001); and *In re Martin*, OAH No. OAG-SD-50-020010003 (Md. Office of Admin. Hearings, Proposed Order on Motion for Summary Judgment, Feb. 15, 2002).

November Orders

The Conservatorship Order provided that the transfer of the ABC policies to the Conservator was to be completed in ninety (90) days based on the estimate agreed to by all parties during the negotiations. The Conservatorship began on February 6, 2002.

Defendants/Appellants paid premium shortfalls for several months but discontinued payments in July, 2002.

On April 17, 2002, the District Court approved the first applications for fees filed by the Conservator pursuant to the language of the Conservatorship Order. One application was for Conservatorship expenses and one for attorneys fees. No objections were filed by Defendants/Appellants. No appeals were filed to challenge the orders.

On June 21, 2002, the District Court approved the applications for fees filed by the Conservator pursuant to the language of the Conservatorship Order. Two applications sought approval of Conservatorship expenses and two sought approval of attorneys fees. No objections were filed by Defendants/Appellants. No appeals were filed to challenge the orders.

By October 31, 2002, the District Court had issued orders approving \$396,610.54 in Conservator fees and expenses and attorney fees pursuant to several applications filed by the Conservator. However, despite the lack of an appeal from any of those orders, Defendants/Appellants did not make the court-ordered payments to the Conservator. Defendants/Appellants had paid premium shortfalls for several months but discontinued payments in July, 2002.

The Conservator was then forced to file the Conservator's Motion for Order Assessing Conservator's Expenses against Defendants and Compelling Defendants to

Comply with the Conservatorship Order in an attempt to collect the amounts previously ordered to be paid by Defendants/Appellants. Defendants/Appellants also filed a Motion to Enforce or, Alternatively Construe the Court's Order Appointing Conservator and Transferring Assets. It was from these motions that the November Orders were issued.

On November 20, 2002, the District Court issued the November Orders directing ABC to pay all of the previously approved Conservator fees and expenses and attorney fees.

The District Court found no need to modify the Conservatorship Order but found:

- (a) The Order Appointing Conservator and Transferring Asset (sic) dated February 6, 2002 (the "Conservatorship Order") is clear and unambiguous;
- (b) ABC participated in the drafting and agreed to the terms of the Conservatorship Order in lieu of restitution;
- (c) Under the Conservatorship Order, ABC is obligated to pay all costs and expenses of the Conservatorship, including premium shortfalls, Conservator's fees and expenses, and attorney's fees, until seventy-five percent (75%) of the Conservatorship Assets, as defined by the Conservatorship Order, are transferred to the Conservator;
- (d) To date there has been no determination that seventy-five percent (75%) of the Conservatorship Assets, as defined by the Conservatorship Order, have been transferred to the Conservator[.]

See November Orders.

*The District Court's November Orders are Consistent with the Intent of the Department*

Defendants/Appellants mistakenly argue that the Department, as a party to the Conservatorship Order, did not intend the provisions of the Conservatorship Order to require that Defendants/Appellants be responsible to pay the expenses of the Conservatorship as was confirmed by the District Court in the November Orders. The November Orders issued by the District Court were consistent with the Department's intent and the plain language of the Conservatorship Order - that ABC pay and maintain all office expenses, salaries, and other

costs of the Conservatorship, including premium shortfalls and attorneys fees, until at least seventy-five percent (75%) of all Conservatorship Assets were transferred to the Conservator.

To adopt the reasoning of Defendants/Appellants would be to adopt the position that the Defendants/Appellants did not intend the Conservatorship Order, a document by their own admission extensively negotiated by them, to be binding on them after execution. The argument that Defendants/Appellants signed the Conservatorship Order but did not mean to approve of or consent to pay Conservatorship expenses is inconsistent with the document itself.

*No Evidence That ABC Left Certain Assets With Conservatorship*

Defendants/Appellants state that “ABC presented substantial evidence that hundreds of thousands of dollars in liquid and illiquid assets had been left with the Conservatorship...that should be used to pay the Conservator’s expenses.” See p. 11, Brief-in-Chief of Defendants/Appellants. Although Defendants/Appellants agree to the use of ABC assets to pay the Conservator’s expenses, the Department has never seen the “substantial evidence” to which Defendants/Appellants refer.

*ABC Legally Responsible for Payment of Premiums*

Defendants/Appellants state that the District Court held that ABC should be “voluntarily responsible for the payment of premium shortfalls.” However, the Department is not aware of such a ruling from the District Court. On the contrary, the Department asserts that under the Conservatorship Order, and consistent with its own actions under the Conservatorship Order, ABC is legally responsible for such payment.

## ARGUMENTS

### A. The Conservatorship Order Is Clear and Unambiguous

The terms of the Conservatorship Order are clear and unambiguous. The District Court found the Conservatorship Order to be clear and unambiguous thus the District Court did not construe it. Only if the Conservatorship Order is ambiguous on the face of the record may the court construe it. *Dickason v. Dickason*, 1980 OK 24, 607 P.2d 674. In so doing the court stands confined to the inspection of the judgment roll. It cannot extend its inquiry beyond the instruments that comprise it. The judgment roll in this case is not ambiguous. Defendants/Appellants are seeking the assistance of this Court in making a new judgment, one that is more favorable to them.

However, if the Court finds that the language of the Conservatorship Order is ambiguous, the Conservatorship Order must be construed to carry out its evident purport and intent, and the Court should consider the situation to which it was applied and the purpose sought to be accomplished. *Hicks v. Hicks*, 1966 OK 91, 417 P.2d 830. While the language should be taken in its ordinary legal meaning, the provisions of the Conservatorship Order must be considered in connection with their context and the order as a whole, and the circumstances surrounding the making of the judgment. *General Creditors of the Estate of Harris v. Cornett*, 1966 OK 64, 416 P.2d 398.

The Department, in agreeing to the Conservatorship Order, sought to remedy the serious securities law violations committed by ABC by protecting the insurance policies from which ABC Investors might recoup some of their investment. The alternative was to secure a judgment for restitution against ABC, a judgment that ABC might not have the ability to satisfy. Protection of the insurance policies required that premium payments be made on all

policies. Under the Conservatorship Order, those payments, along with other expenses of the Conservatorship, were to be made by ABC until most of the policies were transferred to the Conservator.

The context in which the Conservatorship Order was issued and the circumstances surrounding the making of the order were critical to the ABC Investors. In the months prior to the Conservatorship Order, and in every month since the Conservatorship Order was issued, there was a serious shortfall of money available to ensure that premiums on ABC insurance policies could be timely paid. Given this situation, there was a critical need for funding from the inception of the Conservatorship Order. The agreement from Defendants/Appellants to fund premium payments and expenses during the time the policies were transferred to the Conservator, decreased the risk that policies would lapse before maturity.

Further, the Conservatorship Order provided that the Conservator would be limited to taking "custody, possession and control of the Conservatorship Assets as they are transferred to the Conservator." The Conservatorship Order thus did not impose an obligation on the Conservator to pay expenses and premiums for assets not yet transferred to him. Instead the clear language of the Conservatorship Order imposed this obligation on the Defendants/Appellants until the transfer was substantially effected.

To believe the argument of Defendants/Appellants that the Conservatorship expenses were not paid because they were not contemplated by the Conservatorship Order is ludicrous. This would mean that Defendants/Appellants never intended to be responsible for any expenses under the Conservatorship Order from the moment they agreed to its terms and contrary to the evidence provided by their signatures. It is clear from the provisions of the

Conservatorship Order itself that this was not so. The very actions of the Defendants/Appellants, who paid premium shortfalls for a period of time, who did not object to the fee applications of the Conservator, who did not appeal orders granting such applications, who paid the initial \$5,508.05 of Conservator expenses, who initially paid employee salaries, rent, and office expenses, indicate that they understood the clarity of the Conservatorship Order. They did not become concerned until the expenses became greater than they had anticipated.

**B. The November Orders Are Clearly Not Against The Weight Of The Evidence**

While an appellate court may and will examine and weigh the evidence, the findings and decree of the trial court cannot be disturbed unless found to be against the clear weight of the evidence. *Carpenter v. Carpenter*, 1982 OK 38, 645 P.2d 476. In this case, the November Orders simply confirm the clear language of the Conservatorship Order in which Defendants/Appellants voluntarily undertook the obligation to pay expenses of the Conservatorship until the policies substantially transferred to the Conservator. From the face of the Conservatorship Order that Defendants/Appellants complied with for a period of time, the District Court ruling could not be against the clear weight of the evidence.

Any controversy over meaning and effect of judgment which has become final for want of appeal or in consequence of the appellate court's decision must be resolved by resort solely to the face of the judgment roll and the meaning of the judgment is divined from terms expressed in the instrument as construed with other parts of the judgment roll. *Chandler v. Denton*, 1987 OK 38, 741 P.2d 855. Defendants/Appellants never filed an appeal of the Conservatorship Order but, in fact, consented to its terms. In looking at the judgment roll, it is clear that the Department's Petition alleged that ABC and its agents perpetrated serious

violations of the Oklahoma Securities Act for which Findings and an Order of Permanent Injunction issued from the District Court. It is also clear from the judgment roll that Defendants/Appellants consented to the Conservatorship Order to escape liability for restitution and to prevent potential irreparable loss, damage or injury to Investors through the lapse of ABC policies. The Department's emergency application was filed as the depletion of the ABC escrow account for the payment of premiums became known. The judgment roll also makes clear that applications for the expenses of the Conservatorship were approved by the District Court in compliance with the Conservatorship Order and that no appeals of the orders granting the applications were filed by Defendants/Appellants.

Recitals in a journal entry of judgment are taken as true and correct and are prima facie proof of the facts stated therein where not impeached or contradicted by the record. *Jackson v. Jackson*, 2002 OK 25, 45 P.3d 418, 428. The recitals in the Conservatorship Order definitively show that Defendants/Appellants acknowledged that the Conservatorship Order was a substitute for the restitution to which the Department was entitled after prevailing in the trial on the merits of the securities fraud case. Because they now find the payment of expenses distasteful or in a larger amount than they had anticipated, there is no support for their argument in the judgment roll.

**C. Defendants/Appellants Never Demonstrated That 75% Of The Policies Were Transferred To The Conservator**

During the pendency of this case, Defendants/Appellants have never produced evidence, and the District Court has never found, that 75% of the ABC life insurance policies have been transferred to the Conservator. Defendants/Appellants argue that 75% had been transferred within the ninety day period prescribed by the Conservatorship Order. If that were true, Defendants/Appellants do not explain why the expenses for the ninety (90) day

period were not paid. Defendants/Appellants also argue that they should not be penalized for delays by the insurance companies in transferring the policies to the Conservator. The Department asserts that Defendants/Appellants who had been in the viatical business for at least six years were best positioned to know how this process works and the length of time necessary for the transfers of ownership and beneficiaries. Therefore, this issue is not before this Court.

**D. The Issue of Whether Conservatorship Assets May Be Used To Satisfy ABC's Obligations To Pay Expenses Is Not Before This Court**

The Conservatorship Order does not provide for or address whether additional assets left with the Conservator at the inception of the Conservatorship, above and beyond insurance policies and premium accounts, may be used or considered to have satisfied ABC's obligations to pay the Conservatorship fees and expenses prior to transfer of 75% of the Conservatorship assets. The November Orders do not address this issue. Thus, the issue is not before this Court.

**E. The Issue Of Premium Reimbursement Is Not Before This Court**

The Conservatorship Order does not address whether ABC should be reimbursed for premium payments which it advanced both prior and subsequent to the entry of the Conservatorship Order. The District Court ordered that it will make a future determination of amounts to be reimbursed to ABC, if any, for amounts advanced for payment of premiums for which Investor funds have been collected but for which Defendants/Appellants had not been able to account to the District Court. The Defendants/Appellants offered to fund an audit of ABC pursuant to an engagement letter approved by the District Court. The audit is ongoing and no report has been issued. The November Orders do not finally determine the

issue of reimbursement and specifically reserves such a decision. Thus, the issue is not before this Court.

### CONCLUSION

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



Patricia A. Labarthe, OBA #10391

Melanie Hall, OBA #1209

Oklahoma Department of Securities

120 North Robinson, Suite 860

Oklahoma City, Oklahoma 73102

Telephone: (405) 280-7700

Facsimile: (405) 280-7742

Attorneys for the Oklahoma Department  
of Securities

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 3rd day of June, 2003, to the following:

The Honorable Daniel L. Owens  
Judge of the District Court of Oklahoma County  
304 Courthouse  
321 Park Avenue  
Oklahoma City, OK 73102

Melvin R. McVay, Jr. OBA #6096  
Thomas P. Manning, OBA #16117  
PHILLIPS McFALL McCAFFREY McVAY & MURRAH, P.C.  
Twelfth Floor, One Leadership Square  
211 N. Robinson  
Oklahoma City, OK 73102

Dino E. Viera, OBA # 11556  
William H. Whitehill, OBA # 12038  
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS  
Bank One Tower  
100 North Broadway, Suite 1700  
Oklahoma City, OK 73102-8820

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 3rd day of June, 2003.

Patricia C. Plautt