

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

Oklahoma Department of Securities)
ex rel. Irving L. Faught, Administrator,)
)
Plaintiff,)
)
v.)
)
Accelerated Benefits Corporation, *et al.*,)
)
Defendants.)

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

Case No. CJ-99-2500-66 AUG 21 2006

PATRICIA PRESLEY, COURT CLERK
by _____
DEPUTY

**OKLAHOMA DEPARTMENT OF SECURITIES' OBJECTION TO MOTION FOR
LEAVE TO SUE CONSERVATOR AND SUPPORTING MEMORANDUM**

Plaintiff, Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator (Department), objects to the Motion for Leave to Sue Conservator and Supporting Memorandum (Motion) filed by Texas Life Insurance Company (Texas Life), and states as follows:

Background

In 1999, the Administrator of the Department ("Administrator") filed a Petition for Permanent Injunction and Other Equitable Relief ("Petition") in this Court against Defendant 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 viatical settlement investments in violation of the Oklahoma Securities Act ("Predecessor Act"), Okla. Stat. tit. 71, §§ 1-413, 501, 701-703 (2001 and Supp. 2002). On March 13, 2001, after a trial of the case against ABC, the court issued a judgment against ABC for violations of the Predecessor Act, including fraudulent misrepresentations and omissions.

On June 1, 2001, this Court issued an Order of Permanent Injunction against ABC that 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 Predecessor 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 ABC investors (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 Predecessor Act.

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 life insurance policies involved in the life settlement investments (Policies). When selling the investments, ABC misrepresented to Investors that ABC “guaranteed payment of premiums” on the Policies from funds escrowed by ABC. The premium shortfall crisis caused the Department to expedite negotiations with ABC for a remedy through which Investors could receive some return of their money before all was lost. Indeed, prior to the completion of the negotiations, Defendants 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 Policies through a receivership or conservatorship. The Policies were valued at approximately One Hundred Forty Million Dollars (\$140,000,000).

Conservatorship Order

On February 6, 2002, an order appointing a conservator (“Conservatorship Order”) was filed in this Court. As stated in the Conservatorship 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.” Tom Moran was appointed Conservator of the following assets of ABC or its agents (“Conservatorship Assets”):

1. all life insurance policies owned or held beneficially, directly or 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 30, 2000)...;

2. all assets of ABC necessary to accomplish the objectives of the Conservatorship listed below including, but not limited to, computer hardware, databases, software, ABC Investor and viator files relating to the Policies, accounting and financial records pertaining to premium payments and receipt and distribution of proceeds on the Policies, any deposit of cash, bond or guarantee, filing cabinets, office supplies, the lease to office space at 105 East Robinson Street, Suite 320, Orlando, Florida 32801, and telephone systems;

3. all premium reserve accounts and bank accounts into which ABC Investor funds or proceeds from Policies have been deposited; and

4. the right to recoup from the proceeds of the Policies all funds advanced by ABC to finance the payment of premiums on the Policies.

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[.]”

The Conservatorship Order also included the following prohibition:

“IT IS FURTHER ORDERED that except by leave of Court during the pendency of this Conservatorship, all creditors and other persons seeking money, damages or other relief from ABC or its agents, including American Title Company of Orlando and David Piercefield, and all others acting on behalf of any such creditor or other persons, including sheriffs, marshals, and other officers and their deputies, and their respective attorneys, servants, agents, and employees, are hereby stayed and restrained from doing any act or thing whatsoever to interfere with ABC or its agents, including American Title Company of Orlando and David Piercefield, in the orderly transfer of the Conservatorship assets or the Conservator or to the possession of or management by the Conservator of the Conservatorship Assets, or to interfere in any manner during the pendency of this proceeding with the exclusive jurisdiction of this Court over ABC. This Conservatorship Order shall not stay or restrain any pending or future action whatsoever by any government agency or any representative on behalf of any government.”

The Conservatorship Order concluded as follows:

“IT IS FURTHER ORDERED that the Court shall retain jurisdiction over this matter and ABC for all purposes.”

Current Status of Assets

Since early in 2003, when this Court issued an order approving the sale of the Policies, institutional buyers have been responsible for the payment of all premiums and administrative expenses for the Policies. The sale was necessary to avoid the imminent lapse of the Policies that required annual premiums of approximately Two Million Two Hundred Dollars (\$2,200,000). Adequate funds to maintain premium payments and keep the Policies in effect were not available. The sale will result in a return of approximately Fifty-Nine Million Dollars (\$59,000,000) to the Investors. Periodic distributions of Policy maturities to Investors have been and are being made.

Texas Life Action

Texas Life seeks leave from this Court to sue the Conservator in federal court in Georgia. Texas Life has actually already done so. On December 14, 2005, Texas Life filed a complaint against the Conservator and Frank Hammond English (English) in the United States District Court for the Middle District of Georgia, to rescind a life insurance policy issued by Texas Life to English in June, 1995. Texas Life alleges English misrepresented facts in connection with his application to purchase the policy. English sold the policy to ABC in October, 1997, and the policy is now a Conservatorship Asset. On July 18, 2006, Texas Life sought leave from this Court to sue the Conservator in an existing independent action outside this jurisdiction, more than ten years after the policy was issued to English.

ARGUMENTS

Securities Laws Provide for Fair and Efficient Administration of Conservatorship Cases in State Courts

The Administrator is charged by statute with administering and enforcing the Predecessor Act, and the Oklahoma Uniform Securities Act of 2004 ("Act"), Okla. Stat. tit. 71, §§ 1-101 through 1-701 (Supp. 2003). The Predecessor Act and the Act (collectively, "Acts") authorize the Administrator to bring an action in district court whenever it appears that any person has engaged, is engaging, or is about to engage in a violation of the Acts. Section 406.1 of the Predecessor 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. Section 1-603 of the Act provides authority for the same relief. In this case, the Administrator sought injunctive relief, civil penalties, restitution and the appointment of a conservator for the ABC assets, primarily the portfolio of life insurance policies. The relief was sought to address violations of the Predecessor Act perpetrated by ABC against over 4,400 Investors and to protect approximately 1,500 Policies in danger of lapsing. Since the issuance of the Conservatorship Order, none of the Policies transferred to the Conservator have lapsed. This Court has administered the Conservatorship in a fair and orderly manner and, for four and a half years, has prevented irreparable loss, damage and injury to Investors.

Both federal and state courts have noted the broad equitable powers of a receivership or conservatorship court. The courts, including those in Oklahoma, recognize their broad discretion to deal with property in the hands of a receiver or conservator. In *Hunt v. Liberty Investors Life Insurance Co.*, 1975 OK 165, the Oklahoma Supreme Court held:

“[I]n an equitable proceeding such as the present receivership action, the jurisdiction of the Trial Court is based primarily upon the Res which is in the possession and control of the receivership court. A receivership court which has acquired possession of particular items of property ‘. . . is vested, while it holds possession, with the power to hear and determine all controversies relating thereto.’” *Hunt v. Liberty Investors Life Insurance Co.*, *supra*, quoting *Lion Bonding and Surety Company v. Karatz*, 262 U.S. 77, 89, 43 S. Ct. 480, 484, 67 L.Ed. 871 (1923).

Similarly, the Washington Court of Appeals, in *Ginzberg v. Katz*, 619 P.2d 995 (Wash. App. 1980), quoted Ralph E. Clark, *A Treatise on the Law and Practice of Receivers*, and stated “[a] basic premise of receivership law is that possession by the court of the res gives that court power to determine all questions concerning the ownership and disposition of property.” The Ginzberg Court also explained that a receivership is effectively administered by a trial judge “intimately familiar with the activities of the receiver.” This Court has that intimate familiarity in the case at hand. Since 1999, when the Department’s case against ABC was originally filed, through the trial and post trial proceedings, through the imposition of a conservator in February, 2002, and the years of litigation over issues therein, this Court has provided consistent legal guidance. It is elementary to consider that exclusive oversight in this Court is the only way to ensure a fair, orderly, efficient, and economical proceeding for a fair, orderly, efficient, and economical administration.

Permission to Sue Conservator Is Within Court’s Discretion

In *In re Technical Land, Inc.*, 175 B.R. 792, 792 (D.D.C. 1994), the Court discussed the rule that leave of a receivership court is necessary to resolve claims involving property in the custody of a state court receivership to allow orderly resolution of claims against property and to prevent unnecessary, complex and confusing litigation. Leave of court was likewise required in *Eller Industries, Inc. v. Indian Motorcycle Manufacturing, Inc.*, 929 F. Supp. 369, 372 (D. Colo. 1995) (“exclusive jurisdiction with respect to the administration, possession and control of [the

receivership] assets, and this control cannot be disturbed without leave of this Court”). *See also Interlake Co. v. Von Hake*, 697 P.2d 238, 239-40 (Utah 1985) (possession by the court of the res in a receivership proceeding gives the court the power to determine all questions concerning the ownership and disposition of the property); *Kluckhuhn v. Ivy Hill Association, Inc.*, 461 A.2d 16 (C.A. MD 1983, *aff’d* 472 A.2d 77 (MD 1984) (“the reason for the ‘strict rule forbidding the interference of a third party with the possession of the court’ is clear:...when a court acquires jurisdiction of goods, chattels, or money, in one case, the orderly process of the court requires that it shall be permitted to determine the rights of the parties in that case without interference or interruption of a conflicting jurisdiction or of a separate and distinct action or proceeding). Generally, permission to bring an independent action is within the sound discretion of the court that appointed the receiver or conservator. *SEC v. Lincoln Thrift Association*, 557 F. 2d 1274 (C.A. AZ 1977). Permission is generally not granted unless a party can show that the receiver has acted beyond his judicially-granted authority. *F.D.I.C. v. J.D.L. Associates*, 866 F.Supp. 76 (D.CT 1994).

Texas Life cites *Duncombe v. Loftin*, 154 F. 2d 963, 966 (5th Cir. 1946), in support of its position that leave to sue a receiver is usually granted unless it is clear that there is no foundation for the claim. Interestingly, the *Duncombe* court actually denied leave to sue the receiver in that case. It found that the request was “not seasonably presented.” There is no better example of a claim not seasonably requested than here. This case was filed in 1999, tried in 2001, and has been under the direction of a conservator and this Court since February, 2002. The life insurance policy on which Texas Life bases its claim was issued in 1995.

Texas Life also cites *Driver-Harris Co. v. Independent Furnace Corp.*, 12 F. Supp. 918 (W.D.N.Y. 1935), as authority for the position that a court cannot arbitrarily refuse to grant leave

to sue and that leave should be granted where a cause of action has a reasonable probability of success. It is important to note that the *Driver-Harris* court also required the petitioner to make a prima facie case and prove a right to recovery before leave would be granted. The Court in *Driver-Harris* did grant the leave to sue but the case was a complicated one involving an ambiguous agreement relating to the assignment of certain patents and the payment of royalties that could affect the validity of those patents. To the contrary, the Texas Life claim is very simple. It is a claim challenging the ownership of one of the hundreds of Policies in the custody of the Conservator. Texas life has pled no evidence that would entitle it to a recovery against the Conservator.

Texas Life cannot argue that the Court's refusal to grant leave to sue the Conservator would cut off its rights. The company would be able to pursue any claims involving the policy in question in this Court where the Conservator was appointed.

Court May Bar Actions That Interfere With Administration of Receivership Estate

When a receivership court takes jurisdiction of the debtor's estate in securities regulatory actions to protect the public interest, it has power to issue orders barring actions which would interfere with its administration of that estate. *SEC v. United Financial Group*, 576 F. 2d 217 (9th Cir. 1978). Other courts in securities fraud cases have supported similar stays. *See SEC v. An-Car Oil Co.*, 604 F.2d 114, 117 (1st Cir. 1979) (TRO enjoining "all creditors from commencing, prosecuting, continuing, or enforcing suit against [the entities put into receivership]"); *Lankenau v. Coggeshall & Hicks*, 350 F.2d 61, 62 (2d Cir. 1965) (staying "all persons . . . from commencing or continuing any suits against the defendant herein or his property other than suits to enforce liens . . ."); *Jordan v. Independent Energy Corp.*, 446 F.Supp. 516, 520 (N.D.Tex.1978) (staying "all persons, firms or corporations from 'commencing,

prosecuting, continuing or enforcing any suit or proceeding, or from executing or issuing or causing the execution or issuance of any court attachment . . . or other proceedings for the purpose of impounding or . . . interfering with any property owned by or in the possession of defendant . . . ' ”).

The purpose of this Conservatorship is to provide redress to defrauded Investors. To require the Conservator in this case to defend separate proceedings of multiple actions in multiple forums would result in dramatically increased litigation costs, while the value of the Conservatorship Assets would be quickly diminished. The court in *SEC v. Wencke*, 622 F. 2d 1363 (9th Cir. 1980), remarked on this precise concern by stating:

“A receiver appointed by a court in the wake of a securities fraud scheme may encounter difficulties sorting out the financial status of the defrauded entity or entities. There may be a genuine danger that some litigation against receivership entities amounts to little more than a continuation of the original fraudulent scheme. Similarly, the securities fraud may have left the finances of the receivership entities so obscure or complex that the receiver is hampered in conducting litigation. Moreover, the expense involved in defending the many lawsuits which often are filed against an entity in the wake of a securities fraud scheme may be overwhelming unless some are temporarily deferred. A stay of proceeding against receivership entities except by leave of the court may be an appropriate response to the above concerns, and the district court did not abuse its discretion in this case by entering the blanket stay.”

These same principles apply to this Conservatorship. The Conservatorship Order specifically included a stay that “except by leave of Court during the pendency of this Conservatorship” no creditor or other person could seek money damages or other relief, or to interfere in any manner with this Court’s exclusive jurisdiction. Continuation of this position also prevents inconsistent rulings that could result from numerous individual actions. The Conservatorship Order allowed the Conservator to take the necessary steps to protect Investors, including the liquidation or sale of the Policies, the assessment to Investors of future premium

payments, and the payment of disbursements necessary and advisable for the preservation of the Policies.

This Court has administered this case effectively for the four and a half years since it appointed the Conservator. A favorable sale of the assets closed in 2003, and the Policies have been managed to maximize their value. To now allow claims against the Conservator to begin in various jurisdictions will jeopardize the innocent Investors who have begun to gain some trust in the system through their partial recovery.

In *First Penn-Pacific Life Insurance Company v. Evans*, 304 F.3d 345 (4th Cir. 2002), the Fourth Circuit Court of Appeals considered a case filed in federal district court against an insurance company seeking rescission of a life insurance policy and alleging fraud. The policy in question was an asset of a state securities receivership initiated by the Maryland Securities Commissioner against Answer Care, Inc. for violations of the state securities laws. Answer Care, Inc. had been involved in the sale of viatical settlement investments. The *First Penn-Pacific* court discussed the statutory authority and public policy reasons for the state court receivership proceeding and concluded: "The state has a substantial interest in preventing further harm to the public, and in providing investors with some compensation so that the scam does not leave them completely high and dry." *First Penn-Pacific Life Insurance Company v. Evans, supra*. Further, the Court stated:

"Allowing this action to continue in federal court would severely complicate the efficient dissolution of Answer Care's estate. We would be inviting litigation in fora all around the country over other Answer Care policies that may come under attack. Sprinkling these disputes all over the place constitutes an inefficient way to handle the significant public problem that Answer Care's fraud has created."

The identical risk is present in the Texas Life effort to sue the Conservator in federal court.

This Court's Equitable Powers Have Been Properly Exercised

In *State v. Southwest Mineral Energy, Inc.*, 1980 OK 118, the Oklahoma Supreme Court found that the Oklahoma Legislature intended equitable remedies be available for enforcement of the Predecessor Act. The Oklahoma Supreme Court has also recognized that the district courts of Oklahoma are empowered to do equity in actions brought under the Predecessor 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 *Southwest Mineral Energy* decision provided an analysis by the Oklahoma Supreme 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 mold 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.’”

This 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 Court has administered this Conservatorship 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 meritless investment promises.

Conclusion

The Department alleged and proved ABC violated the Predecessor Act. The Department sought and obtained injunctive relief against ABC. When it became clear that ABC would not and could not make restitution, the Department sought to protect the life insurance policies owned by ABC, in order to prevent the lapse of such policies – policies with an aggregate face value in excess of \$100 million. The Department sought to provide the defrauded Investors the greatest return possible under the existing circumstances. Eventually, ABC consented to the appointment of the Conservator for the policies. No allegation has been made that this Court or the Conservator has acted improperly. Finally, the general rule is that whether a court permits an

independent action is within the sound discretion of the court that appointed the receiver or conservator. *SEC v. Lincoln Thrift Association, supra*. The Department urges this Court to deny the Texas Life motion for leave to sue the Conservator and to require all persons to bring claims related to the Conservatorship Assets to the Oklahoma County District Court for a determination.

Respectfully submitted,



Patricia A. Labarthe, OBA # 10391
Oklahoma Department of Securities
First National Center, Suite 860
120 North Robinson
Oklahoma City, Oklahoma 73102
(405) 280-7700

CERTIFICATE OF MAILING AND DELIVERY

I hereby certify that a true and correct copy of the foregoing was mailed by U.S. Mail, with postage prepaid thereon, this 21st day of August, 2006, to the following:

Melvin R. McVay, Jr., Esq.
Thomas P. Manning
Phillips McFall McCaffrey
McVay & Murrah, P.C.
Twelfth Floor, One Leadership Square
211 North Robinson
Oklahoma City, OK 73102

William H. Whitehill
Fellers, Snider, Blankenship,
Bailey & Tippens, P.C.
100 North Broadway Avenue, Suite 1700
Oklahoma City, OK 73102

Andrew J. Hill, Jr.
Josh B. Wages
Blasingame, Burch, Garrard & Ashley, P.C.
Post Office Box 832
Athens, GA 30603

Thomas A. Paruolo
Whitten, Nelson, McGuire, Terry & Roselius
Post Office Box 13880
Oklahoma City, OK 73113

Tiffany D. Downs
Carter & Ansley, LLP
1180 West Peachtree Street, Suite 2300
Atlanta, GA 30309

I further certify that a copy of the foregoing was hand delivered to Judge Daniel L. Owens, District Court of Oklahoma County, State of Oklahoma this 21st day of August, 2006.


