

necessary, but critical, to Texas Life's claims. Discovery requests to English will need to be served as well as the deposition of English will need to be taken to prove English's knowledge at the time he applied for the policy and the falsity of his statements at that time. Yet, this Court does not have personal jurisdiction over English, as conceded by HTM. (HTM's brief, p. 9.)

Further, evidence of English's medical conditions and treatment, all of which were diagnosed and treated in Georgia, will need to be obtained from English's medical providers during discovery. This Court does not have the power to issue subpoenas or compel English or those medical providers, all of whom are located in Georgia, to produce documents, attend depositions, or appear at trial. "[N]either the Oklahoma Pleading Code § 2004.1, nor the comments thereto, extend the reach of Oklahoma discovery process beyond the state boundaries." *Craft v. Chopra, M.D.*, 1995 OK CIV APP 135, 907 P.2d 1109, 1111. The Oklahoma Court of Appeals has determined that the subpoena powers of Oklahoma courts stop at the state line." *Lovett v. Wal-Mart Stores, Inc.*, 2001 OK CIV App 9, 18 P.3d 387, 389. That is because "12 O.S. § 2004.1(A)[(2)] specifically permits service of subpoenas only 'within the state,' and the commentary to that section reinforces the 'statewide' limits of the Oklahoma state courts' subpoena powers." *Craft*, 907 P.2d at 1111.

In *Lovett*, the Court of Appeals affirmed the dismissal of the action based on forum non conveniens because all of the witnesses were located in another state and not subject to the subpoena power of the Oklahoma court. 18 P.3d at 389. Likewise, in *Blue Tee Corp. v. Payne Well Drilling, Inc.*, 2005 OK CIV APP 109, 125 P.3d 677, 679, the Court of Appeals ruled that non-resident non-party witnesses who were not served with a subpoena while in Oklahoma were not subject to a deposition in Oklahoma.

As neither English nor any of his medical providers are residents of Oklahoma and cannot be served with a subpoena in Oklahoma, Texas Life has "no legal means to compel the non-resident

witnesses to come to Oklahoma to give testimony” or to produce documents. *Id.* Thus, Texas Life’s rights to obtain discovery in support of its claims would be precluded.

Additionally, English, in a Georgia federal court, pled guilty to felony mail fraud and was ordered to pay restitution to Texas Life for English’s misrepresentations in applying for the policy at issue in Texas Life’s lawsuit. English’s plea will preclude him from denying Texas Life’s allegations under the Victim and Witness Protection Act. See 18 U.S.C.A. § 3664(l) & (m). Thus, neither ABC nor HTM, which is standing in the shoes of ABC, has any greater rights under the policy than English, as original owner and insured, did. The fact that ABC assets are subject to conservatorship does not divest Texas Life of its rights. *Martin v. Forrey*, 193 N.E.2d 679, 681 (Ind. Ct. App. 1935).

B. Texas Life should not be penalized for the failure of ABC or HTM to notify it of this Court’s order.

HTM suggests that Texas Life should have researched and discovered that the policy was subject to conservatorship and this Court’s order. Yet, neither HTM nor ABC fulfilled their obligation under this Court’s order by notifying life insurance companies, such as Texas Life, of this Court’s order. (See Order dated February 7, 2002.) Moreover, the Order states that it is binding on entities “who receive actual notice of the Conservatorship Order.” (*Id.* at p. 5.) Texas Life has stated, and HTM does not dispute, that a copy of the Order was not sent to it. The fact that ownership of the policy was changed to HTM would not and did not inform Texas Life of the conservatorship order in this Court, especially in light of the fact that HTM identified itself as a “business” to Texas Life, and the location of the business was in Florida. (See Request for change of beneficiary form, Exhibit 3.) Texas Life cannot be expected to know of the conservatorship

proceeding and this Court's order based on scant information - the word "conservator" in the name of HTM.

HTM suggests that it should only be sued in Oklahoma as that is the convenient location for it. Yet, HTM cannot divest Texas Life of its rights just to suit its preference. *Vitug v. Griffin*, 214 Cal. App.3d 488, 493 (1989). As discussed above, if Texas Life were required to bring suit in Oklahoma, it would lose its right to obtain discovery of critical information to support its claims.¹ Further, the conservator has previously defended actions in other states, such as Georgia, Florida and Texas. (See Order of this Court dated June 5, 2006; Exhibit 4; Judgments dated 2004 from Florida court, Exhibit 5; Notice of Removal filed in Georgia, Exhibit 6; and Complaint filed in Texas, Exhibit 7.) Contrary to HTM's assertion, this Court's order does not require HTM obtain permission to defend an action in Georgia. Rather, it only requires that HTM comply with the Court's order as to the objectives of the conservatorship in defending that action. For the above reasons, Texas Life's motion should be granted.

¹HTM improperly characterizes all of Texas Life's claims solely as fraud claims. Texas Life sought to have the policy declared void from its inception based on English's failure to comply with the conditions in the application. Georgia laws provide such a cause of action. See O.C.G.A. § 13-3-4; *McDuffie v. Criterion Cas. Co.*, 214 Ga. App. 818, 821, 449 S.E.2d 133, 135-36 (1994); *Transamerica Occidental Life Ins. Co. v. Miles*, 317 F. Supp.2d 1373, 1379 (N.D. Ga. 2003). See also Texas Life's opposition to HTM's motion to dismiss, Exhibit 11 to HTM's brief.

Respectfully Submitted,



THOMAS A. PARUOLO, OBA #18442
WHITTEN, NELSON, McGUIRE,
TERRY & ROSELIUS
P.O. Box 138800
Oklahoma City, Oklahoma 73113
Telephone: (405) 705-3600
Facsimile: (405) 705-2573
ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

certify that on the 28 day of August, 2006, the following individuals were served via regular mail:

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

Patricia A. Labarthe *-via hand delivery*
Oklahoma Department of Securities
First National Center, Suite 860
120 North Robinson
Oklahoma City, OK 73102

Melvin R. McVay *via hand delivery*
PHILLIPS McFALL McCAFFREY
McVAY & MURRAH, P.C.
Twelfth Floor, One Leadership Square
211 North Robinson
Oklahoma City, Oklahoma 73102

William H. Whitehall, Jr. Esq. *-via hand delivery*
Fellers, Snider, Blankenship, Bailey & Tippens
100 North Broadway Avenue, Suite 1700
Oklahoma City, OK 73102-8820

