IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT OF SECURITIES, *ex rel.*, IRVING L. FAUGHT, ADMINISTRATOR,	)	
Plaintiff/Appellee,	)	
v.	)	
	)	Case No. 98854
ACCELERATED BENEFITS CORPORATION; and AMERICAN TITLE COMPANY OF ORLANDO,	)	Oklahoma County Case No. CJ-99-2500-66
Defendants/Appellants	)	Honorable Daniel L. Owens
v.	)	Action for Violations of the Oklahoma Securities Act
TOM MORAN,	)	
Court-Appointed Conservator/Appellee	)	

BRIEF OF AMICUS CURIAE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. ("NASAA") IN SUPPORT OF APPELLEES OKLAHOMA DEPARTMENT OF SECURITIES AND CONSERVATOR TOM MORAN

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INTRODUCTION

The North American Securities Administrators Association, Inc. ("NASAA") is a nonprofit association of the state, provincial, and territorial securities regulators in the United States and Canada, and of the Mexican national government. Formed in 1919, it is the oldest international organization devoted to the protection of investors in securities.

State securities regulators are responsible for ensuring that securities are offered and sold only in accordance with state securities laws and regulations, which have been adopted in some form in every state to protect investors from fraud and abuse. NASAA seeks to enhance investor protection, increase uniformity in the interpretation of securities laws, and preserve the stability of capital markets.

Defendant/Appellant Accelerated Benefits Corporation ("ABC") is an unlikely champion of the rights of public investors in this proceeding. The District Judge on March 13, 2001 made findings of fact that ABC had defrauded public investors by making misrepresentations of material fact in the sale of unregistered securities in the State of Oklahoma. The District Judge further found that ABC had omitted to state, among other things, that its sales agent, William W. Romine, had been convicted of a felony for misapplication of fiduciary property and that C. Keith LaMonda, the principal officer of its management company LaMonda Management Family Limited Partnership, was the subject of a Florida federal injunction and a negative consent order with the Florida Department of

Insurance. Furthermore, it appears from the public records that the Florida Department of Insurance has revoked ABC's license to operate as a viatical settlement provider for failure to report alleged insurance fraud in the obtaining of life insurance by viators, *see Accelerated Benefits Corp. v. Department of Insurance*, 813 So. 2d 117 (Fla. Dist. Ct. Appl. 2001).

Nevertheless, the issues raised before this Court as to the rights of public investors in a proceeding by a state securities administrator are important to the proper administration of the securities laws, and with the permission of the Court NASAA wishes to express its views with respect to those issues. It is NASAA's view that insisting that state securities administrators make all defrauded investors party to an enforcement proceeding is not required by law and as a practical matter would severely impede if not make impossible the enforcement of state securities laws and the protection of the investing public. It is further NASAA's view that all public investors were given proper notice and an adequate opportunity to be heard in this action.

I. THE DISTRICT COURT HAD JURISDICTION OVER ALL NECESSARY PARTIES AND THERE IS NO REQUIREMENT TO JOIN INVESTORS AS PARTIES TO AN ENFORCEMENT ACTION BY THE ADMINISTRATOR

This action was properly brought by the Administrator of the Oklahoma Department of Securities against the Defendants/Appellants Accelerated Benefits Corporation and American Title Company of Orlando pursuant to the Administrator's statutory authority under 71 O.S. Sec. 406.1. The statutory provision is self-contained, and the only necessary parties to this action are the Administrator and the persons alleged to have violated the

statute. There is no authority for the proposition that defrauded investors must be made parties to an enforcement action.

This Court has previously held under the Oklahoma Securities Act, 71 O.S. Sec 1 *et seq.* (the "Act" or the "Oklahoma Act"), that the Administrator's statutory powers of enforcement are plenary even when he is seeking disgorgement of unlawful profits for distribution to defrauded investors since the Administrator is acting on his own authority, not that of the individual investors, *State* ex rel. *Day v. Southwest Mineral Energy, Inc.*, 1980 OK 118, 617 P.2d 1334, 1339. *See also*, *State* ex rel. *Day v. Petco Oil & Gas, Inc.*, 1977 OK 4, 558 P.2d 1163 (administrator has right under statute to sue for injunction against offer and sale of unregistered securities); *Oklahoma Securities Commission* ex rel. *Day v. CFR International, Inc.*, 1980 OK CIV APP 60, 622 P.2d 293 (administrator has authority to sue for temporary and permanent injunction and disgorgement).

A number of remedies are available to the Administrator under the Act, including an investigation under 71 O.S. Sec. 405 and an administrative proceeding under 71 O.S. Sec. 406. In the case of a judicial proceeding such as this under 71 O.S. Sec. 406.1, the Administrator may seek a temporary restraining order or injunction, civil penalties, a declaratory judgment, restitution to investors, the appointment of a receiver or conservator for the defendant or the defendant's assets, and other relief the court deems just. In all of this, the Administrator acts alone without any necessity to join public investors as parties to the proceeding. The Administrator may also refer evidence to the Oklahoma Attorney General or the appropriate county district attorney for criminal prosecution under 71 O.S. Sec. 407.

While public investors are not necessary parties to actions by the Administrator, they have their own remedies under the civil liability provisions of 71 O.S. Sec. 408. Under Sec. 408, purchasers of securities sold in violation of the Act may sue the seller and aiders and abetters of the seller for return of the consideration paid, with interest at ten percent per annum, costs, and reasonable attorneys' fees, less any income received on the security, or for damages if the security is no longer owned. *See South Western Oklahoma Development Authority v. Sullivan Engine Works, Inc.*, 1996 OK 9, 910 P.2d 1052.

The Act was based on the Uniform Securities Act (1956), 7C U.L.A. 248 (2000) (the "Uniform Act"), the provisions of which have been substantially adopted by thirty-four states and the Commonwealth of Puerto Rico. The judicial enforcement provisions of Sec. 406.1 of the Oklahoma Act are based on Sec. 408 of the Uniform Act, which in turn was modeled on former Secs. 21(e) and 21(f)[1] of the Securities Exchange Act of 1934, *see* Official Comment to Sec. 408 of the Uniform Act. Sec. 21 of the federal statute grants jurisdiction to the federal district courts in enforcement actions by the Securities and Exchange Commission. No state or federal securities administrator is required to join public investors as parties in an enforcement proceeding. *See generally,* 2 A. A. SOMMER, JR., BLUE SKY REGULATION Sec. 10.07 (Judicial Enforcement Actions) (2003); 3 THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION Secs. 16.2[2]-16.2[4] (2002).

[1]In 1975, Secs. 21(e) and 21(f) were redesignated as Secs. 21(d) and 21(e), respectively, 15 U.S.C. Secs. 78u(d) and 78u(e) (2000).

The power of a state court to appoint a receiver for the assets of the defendants upon the application of a securities administrator comes from the statute and does not depend upon the presence as parties to the suit of public investors or other creditors of the defendants. *See State* ex rel. *Higbie v. Porter Circuit Court*, 428 N.E.2d 782 (Ind. 1981) (judgment creditors of defendants may not object to statutory receiver obtained by state securities commissioner). The use of court-appointed receivers has been a staple of state and federal securities enforcement actions since the earliest days of the securities laws. *See State* ex rel. *Day v. Petco Oil & Gas, Inc.*, 1977 OK 4, 558 P.2d 1163, 1165 (trial court ordered receiver for assets of defendant); *Tower Credit Corp. v. State* by *Dickinson*, 187 So.2d 923 (Fla. Dist. Ct. App. 1966); *Stevens v. Assoc. Mortgage Co. of New Jersey*, 152 A. 461 (N.J. Ch. 1930), *aff'd*, 158 A. 343 (N.J. 1932); *People v. Walker*, 82 N.Y.S. 2d 307 (N.Y. Sup. Ct. 1948); *Kirk v. State*, 611 S.W. 2d 148 (Tex. Civ. App. 1981); *S.E.C. v. United Financial Group, Inc.*, 474 F.2d 354 (9th Cir. 1973).

This is not to say that public investors may not be persons very interested in enforcement proceedings by a securities administrator. Public investors have even on occasion sought to intervene as parties in state and federal securities enforcement proceedings. The Supreme Court of Colorado had the opportunity recently to consider the position of public investors seeking intervention in an state enforcement action, *Feigin v. Alexa Group, Ltd.*, 19 P.3d 23 (Colo. 2001) (en banc). In *Feigin*, the Colorado Securities Commissioner brought a civil enforcement action seeking an injunction and damages against individuals allegedly running a Ponzi scheme in violation of the Colorado Securities Act. Individual investors who had filed a class action against the same defendants sought to

intervene in the Commissioner's suit. The Supreme Court of Colorado held that although the investors had a sufficient interest in the Commissioner's action, they could not intervene as a matter of right since their interest would not be impaired nor impeded, nor was it inadequately represented in the action, 19 P.3d at 32.

The court in *S.E.C. v. Everest Management Corp.*, 475 F.2d 1236 (2d Cir. 1972) held that victims of the alleged securities fraud were not entitled to intervene in an S.E.C. enforcement action since they could bring their own action for money damages and they were adequately represented in the enforcement proceeding by the Commission. *See also*, *S.E.C. v. TLC Investments and Trade Co.*, 147 F.Supp. 2d 1031 (C.D. Calif. 2001) (investors not entitled to intervene as of right and could not permissively intervene). Other courts have on occasion allowed intervention by defrauded investors in an S.E.C. enforcement action, *S.E.C. v. Navin*, 166 F.R.D. 435 (N.D. Calif. 1995); *S.E.C. v. Credit Bancorp, Ltd.*, 194 F.R.D. 457, *reconsideration and certification denied*, 103 F.Supp.2d 223 (S.D.N.Y. 2000). *See generally*, Eunice A. Eichelberger, Annot., *What Constitutes Impairment of Proposed Intervenor's Interest to Support Intervention as Matter of Right Under Rule 24(A)(2) of Federal Rules of Civil Procedure in Actions Relating to Securities and Commodities Laws*, 75 A.L.R. Fed 426 (1985).

If public investors are not always entitled to intervene as of right in enforcement actions, *a fortiori*, they are not necessary parties to such actions. Defendants/Appellants cite no authority for their assertion that all investors in this case should have been made parties through service of a summons and petition (Brief-In-Chief, p. 14). This Court did not say in its order filed October 3, 2002 that the investors must be made parties; the Court merely

recited that the investors "are not made parties" and then held that "Their due-process rights were violated by failure to get proper notice and a meaningful opportunity to appear."

As argued above, no court has required the joinder of all public investors in an enforcement proceeding. As a practical matter, this would be impossible. When an enforcement proceeding is begun, the Administrator does not know who all of the public investors are. In fact, the identity of such persons may be very difficult to discover, since there is frequently not any central or organized list of such persons. Finally, quite apart from the expense and delay of finding all defrauded investors, out-of-state investors could not be made parties in any event due to constitutional limitations on the exercise of jurisdiction by state courts. *See Asahi Metal Ind. Co., Ltd. v. Superior Court of Calif., Solano Co.*, 480 U.S. 102 (1987). In a case where the State of New York had established a procedure for settling the accounts of trustees of joint trust funds, many of the beneficiaries of which were non state residents, the Court held that since requiring personal service of process would be impossible, mail service would suffice to satisfy due process concerns, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-314 (1950). The Court stated, "A construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified." *Id.*

II. THE CONSTITUTIONAL DUE PROCESS RIGHTS OF PUBLIC INVESTORS WERE DULY OBSERVED BY THE DISTRICT COURT IN ITS ORDER APPROVING THE SALE OF CONSERVATORSHIP ASSETS IN THIS PROCEEDING

In its Order filed October 3, 2002 in Case No. 98083, this Court issued its writ of mandamus directing the Judge of the District Court to vacate the order filed June 21, 2002

titled "Order Authorizing Conservator to Retain Percentage of Matured Policies to Cover Fees and Expenses of Conservatorship." Citing *Cate v. Archon Oil Co.*, 1985 OK 15, 695 P.2d 1352, this Court held that the due process rights of the public investors were violated by failure to get proper notice and a meaningful opportunity to appear and that the order was therefore jurisdictionally defective. In *Cate*, this Court held at 695 P.2d 1352, 1356:

> Notice is a jurisdictional requirement as well as a fundamental element of due process. Due process requires adequate notice, a realistic opportunity to appear at a hearing or judicial sale, and the right to participate in a meaningful manner before one's rights are irretrievably altered. The right to be heard is of little value unless adequate notice is given. Due process is violated by the mere act of exercising judicial power upon process not reasonably calculated to apprise interested parties of the pendency of an action, and lack of notice constitutes a jurisdictional infirmity. (Footnotes omitted).

This Court's holding was drawn from a long line of cases in this Court and in the Supreme Court of the United States establishing that before a person's property right may be adversely affected, notice and opportunity to contest must be given, *Prickett v. Moore*, 1984 OK 54, 684 P.2d 1191, 1193 n. 1 (notice of application for authority to partition joint tenancy and opportunity to be heard must be given to other joint tenant). *See also*, *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983) (actual notice of pending tax sale must be given to mortgagee of property); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (actual notice of application to settle fiduciary's accounts must be given to known beneficiaries); *Tulsa Professional Collection Services, Inc. v. Pope*, 1990 OK 125, 808 P.2d 640 (actual notice of probate proceeding to settle estate must be given to known unpaid hospital of last illness of decedent); *cf. Norman v. Trison Development Corp.*, 1992 OK 67,

832 P.2d 6 (notice of proposed discharge of receiver not required to be given to unknown or unascertainable tort plaintiff).

The issue now presented to this Court by Defendants/Appellants is whether the due process rights of the public investors were properly observed by the District Court in its approval of the Order Approving Sale of Conservatorship Assets entered January 16, 2003, as modified January 24, 2003. On October 25, 2002, the Conservator filed his Motion for Order Approving Sale of Conservatorship Assets and Brief in Support ("Motion to Sell"). The record establishes that at the same time, the Conservator sent by certified mail, return receipt requested to all public investors a copy of the Motion to Sell and a separate Notice to Investors apprising them of the hearing and the proposed sale (R. 1-26). Almost all investors expressed their wishes with respect to the sale by returning the card enclosed with the Notice to Investors, and several public investors appeared at the hearing on December 20, 2002 personally and by counsel and were heard.

There is no doubt that the service of notice in this case comported with constitutional requirements. This Court and the federal courts have consistently held that service by mail is sufficient, *see Cate v. Archon Oil Co., Inc.*, 1985 OK 15, 695 P.2d 1352, 1356; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950). Service here was by certified mail, return receipt requested. Nor can there be any doubt that the contents of the notice met constitutional standards. This Court has held in *Tulsa Professional Collection Services, Inv. v. Pope*, 1990 OK 125, 808 P.2d 640, 642 that:

> Notice must be reasonably calculated to inform interested parties of the pending action and of every critical stage so as to afford them an opportunity to defend or to

> meet the issues at a meaningful time and in a meaningful manner. (Footnotes omitted)

An examination of the twenty-six page Motion to Sell and the Notice to Investors demonstrates that together, these documents explained clearly and in great detail the nature of the proceeding, the history of the invitation for bids, the interested parties, and the proposed sale. The fact that most investors completed and returned their claim forms, that the great majority were in favor of the proposed sale, and that a number of investors appeared by counsel and were heard demonstrates the adequacy of the notice and the opportunity to be heard.

Receivership proceedings in Oklahoma are equitable in nature, and the district court's decision will not be disturbed unless it is clearly against the weight of the evidence or contrary to law or established principles of equity, *State* ex rel. *Crawford v. Indemnity Underwriters Ins. Co.*, 1997 OK CIV APP 38, 943 P.2d 1102, 1104; *State* ex rel. *Weatherford v.Senior Security Life Ins. Co.*, 1996 OK CIV APP 32, 916 P.2d 288, 290. The practice in the federal courts in reviewing equity receiverships established upon the application of the Securities and Exchange Commission is to uphold reasonable procedures taken by the district courts in the administration of the case. The court stated in *S.E.C. v. Hardy*, 803 F.2d 1034, 1037-1038 (9th Cir. 1986):

> Two basic principles emerge, however, from cases involving equitable receiverships, many of which involve SEC-initiated receiverships.
>
> First, a district court's power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad. . . . Secondly, we have acknowledged that a primary purpose of equity receiverships is to promote orderly and efficient administration of the estate by the district court for the benefit of creditors. Accordingly, we generally uphold

> reasonable procedures instituted by the district court that serve this purpose. (Citations omitted)

See also, *S.E.C. v. An-Car Oil Co., Inc.*, 604 F.2d 114, 119 (1st Cir. 1979) (district court has broad range of discretion); *S.E.C. v. Safety Finance Service, Inc.*, 674 F.2d 368, 372 (5th Cir. 1982) (no abuse of discretion shown). The court stated in *S.E.C. v. TLC Inv. and Trade Co.*, 147 F.Supp. 2d 1031, 1034-1035 (C.D. Calif. 2001):

> As all of the parties agree, the Applicants and all the other investors have some due process rights in this proceeding. . . . However, in keeping with the general rule that the process due varies according to the nature of the right and the type of proceedings, there are no specific standards or rules setting forth what rights investors in such proceedings have to participate. (Citations omitted)

See Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (adopting flexible standards for due process rights). The investors here were given more than ample notice and opportunity to be heard. No public investor is objecting to the order below as a party to this appeal.

CONCLUSION

For the reasons stated, the orders of the District Court approving the sale of conservatorship assets in this proceeding should be affirmed. There was no denial of due process to any public investors, and there was no necessity to make all public investors parties to this action by service of a summons and petition or otherwise. The due process rights of the public investors were adequately protected by the mailing of a notice and opportunity to be heard. No more is required.

Respectfully submitted,

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CERTIFICATE OF MAILING

The undersigned certifies that on the 14th day of October, 2003, a true and correct copy of the foregoing Brief was sent postage prepaid by first-class mail, to the following:

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