

**IN THE CHANCERY COURT FOR LEWIS COUNTY
AT HOHENWALD, TENNESSEE**

IN RE:)
)
SENTINEL TRUST COMPANY) **NO. 4781**
)
)

**ACTING COMMISSIONER-IN-POSSESSION'S AND RECEIVER'S FILING
CONCERNING 1) WHETHER BATES HAS STANDING TO OBJECT AND
2) WHETHER BATES' OBJECTIONS IMPACT UPON THE PROPOSED
METHODOLOGY TO CALCULATE DISTRIBUTIONS**

I. INTRODUCTION

On April 12, 2006, the Court heard argument upon and considered various Objections that had been filed concerning the Commissioner-in-Possession's and Receiver's Motion Seeking Approval of the Schedule of Claim Determinations and Approval of the Methodology Proposed to Calculate Distributions on Accepted Claims ("Motion Seeking Approval"). Regarding the Objections lodged by Danny N. Bates ("Bates"),¹ the Court reserved decision and ordered from the bench that the parties had until April 21, 2006 to submit further briefing on two points:

- 1) Whether Bates' has standing to lodge objections to the Schedule of Claim Determinations and to the proposed methodology of calculating distributions; and
- 2) What, if any, impact do Bates' objections have regarding the proposed methodology of calculating distributions.²

¹ On February 6, 2006, Bates filed Objections to the Motion Seeking Approval. On March 21, 2006, Bates filed a Notice which withdrew various unspecified Objections. On March 27, 2006, the Acting Commissioner-in-Possession ("Commissioner") and Receiver filed a Reply to Bates' Objections. On April 11, 2006, Bates filed a Response to that Reply.

² At the April 12, 2006 hearing, counsel for Bates requested permission to place Bates on the stand to testify concerning his Objections. The Court did not allow Bates to testify at that time, but, rather, ordered that, by April 21, 2006, Bates was to submit a document to the Court that would set forth all matters upon which he wanted to present testimony. The Commissioner and Receiver were allowed two (2) business days from the receipt of that filing to respond.

This submission is the Commissioner's and Receiver's further briefing on these two issues.

II. BATES STANDING ISSUE

The Commissioner and Receiver have asserted that Bates lacks standing to maintain objections to the determination of claims and to the proposed methodology for calculating distributions to claimants. In this submission, the Commissioner and Receiver reaffirm their position that Bates lacks proper standing to make the Objections he has made. In the alternative, however, the Commissioner and Receiver assert that Bates' standing, if such standing exists, would be limited strictly to objecting only to the Schedule of Claim Determinations and not to the proposed methodology of calculating distributions.

a) **Bates Lacks Standing Because He Is Not A Claimant of the Sentinel Trust Receivership Estate and He Has Not Demonstrated that He Will Suffer Injury in Fact**

It is undisputed that Bates has not filed or submitted a claim against the Sentinel Trust Receivership estate. He bases his position of proper standing, however, upon T.C.A. § 45-2-1504(g) which states that, after all the claims have been filed and after the Commissioner and Receiver have filed with the Court their determinations of those claims, then "any creditor, depositor or stockholder may file an objection to any determination made." Copy of T.C.A. § 45-2-1504 is attached as **Exhibit 1**. The Commissioner and Receiver assert, however, that the "creditors, depositors or stockholders" language of the statute is simply another way of saying "all claimants" because those groupings are the non-administrative claimants listed in T.C.A. § 45-2-1504(h) and (i). Moreover, it makes no sense to give a creditor or a depositor or a stockholder the ability to object to claim determinations when he/she/it has not filed a claim. To allow a single creditor, who has not taken the time nor expressed interest enough to file a claim, to interject himself/herself/itself into the proceedings through objecting to claim determinations

would unduly burden the liquidation process set forth in the statute. The same would be true for a stockholder who chooses not to file a claim but who then chooses to interject objection to the determination of claims. In essence, there must be some qualifying event to ensure that an objecting creditor, depositor or stockholder has an interest to pursue or protect rather than simply being an obstruction to the orderly progression of the liquidation. That qualifying event is the filing of a claim in the receivership -- something which Bates admittedly did not do. Because the statutory language of “any creditor, depositor or stockholder” makes sense only if it is another way of saying “any claimant,” and because Bates, while being a stockholder, is not a claimant, Bates has no standing to lodge the Objections he has made.

Bates’ assertion of standing is also flawed because he has not set forth any distinct and palpable injury that he will suffer as a result of the granting of the Motion Seeking Approval. In Tennessee, in order to have standing, a person must be facing actual and imminent injury that must be “distinct and palpable and not conjectural or hypothetical.” Marceaux I v. Sundquist, 107 S.W.3rd 527, 530-31 (Tenn. Ct. App. 2003); see also Petty v. Daimler/Chrysler Corporation, 91 S.W.3rd 765, 767-68 (Tenn. Ct. App. 2002). In short, while T.C.A. § 45-2-1504(g) says that a stockholder may object to determination of claims, that statute simply does not dispense with the need for that stockholder to show that the Commissioner’s and Receiver’s claim determinations are causing him/her/it distinct and palpable injury.

Bates’ position on standing is set forth in his April 11, 2006 “Response to Reply” filing wherein he states:

[Bates] believes that [he] has standing to object to motions of the Receivership and, as [a party] affected by the methodology used by the Receivership to pay claims lodged against Sentinel Trust Company, [Bates] submits that [he] has the right to object . . .

April 11, 2006 Response to Reply at p. 1. Respectfully, Bates can only be an “affected party” in one of two ways: 1) as a stockholder who arguably has an interest under T.C.A. § 45-2-1504(i) or 2) as a debtor or prospective debtor to the Sentinel Receivership estate. In neither instance is the interest sufficiently palpable or distinct to convey standing.

Under T.C.A. § 45-2-1504(i), a stockholder of an insolvent trust company will receive a distribution from the estate, in accordance with his respective stock interest, only after all other claims have been paid. The record in this case shows that approved claims as against the Sentinel Trust Receivership estate are approximately \$9.8 million. See Exhibit E to Motion Seeking Approval. Under any credible scenario, the Receivership estate assets will not come close to that number. Therefore, the Commissioner and Receiver can, with a fair degree of confidence, state that there will be no distribution to the Sentinel Trust stockholders. Because he will not receive a distribution from the estate, Bates cannot demonstrate any distinct or palpable injury that he will suffer, regardless of how the other claims set forth in the Schedule of Claim Determinations are handled. In the analogous setting of insolvent insurance company receiverships, courts have held that when the insurance company’s assets were insufficient to satisfy its liabilities, stockholders did not have standing to participate in the liquidation proceedings because the stockholders had no judicially recognized interest in the subject matter. Plaza B.V. v. Stephens, 913 S.W.2d 319, 322 (Ky. 1996) (copy attached as **Exhibit 2**).³ Accordingly, Bates’ professed interest as a stockholder has not been demonstrated. Indeed, he has no realizable stockholder interest in the Sentinel Trust Receivership estate and, thus, lacks standing to object to the Motion Seeking Approval.

³ For other cases wherein stockholders of insolvent insurance companies have been found to lack standing in the insurance receivership proceedings, please see Harnett v. Southern American Fire Ins. Co., 495 So. 902 (Fl. Ct. App. 1986); Metcalf v. Investors Equity Life Insurance Company of Hawaii, 910 P.2d 110 (Hawaii 1996) and Crawford v. American Standard Life and Accident Insurance Co., 37 P.3d 971 (Okla. Ct. App. 2001) (copies of cases attached as **Collective Exhibit 3**).

In oral argument on April 12, 2006, counsel for Bates stated, basically, that Bates had an interest in the claim determinations because the more claims that were paid, the less the Commissioner and Receiver could show as damages against Bates in a parallel suit against Bates and the other former directors and management of Sentinel Trust Company. Quite frankly, while the Commissioner and Receiver appreciate the honesty of this statement by Bates counsel, it simply does not state an interest sufficient to convey standing. Moreover, a circumstance wherein a receivership estate's debtor or prospective debtor (such as Bates) could interject himself into and stall receivership proceedings has given rise to cases such as In re: Matter of United Southern Bank, 718 S.W.2d 251 (Tenn. 1986) (copy attached as **Exhibit 4**) wherein it is made clear that debtors or prospective debtors have no standing to intervene at any stage in a receivership under T.C.A. § 45-2-1501. Id. at 255.

Thus, for these reasons, the Commissioner and Receiver assert that Bates has no standing to lodge the Objections he has made concerning the Motion Seeking Approval, and those Objections should be overruled.

b) **In the Alternative, Bates' Standing Should be Limited so as to Allow Only Objections as Against the Schedule of Claim Determinations and Not as to the Proposed Methodology for Calculating Distributions**

In the alternative, the Commissioner and Receiver assert that, if Bates is seen as having standing pursuant to the statutory language of T.C.A. § 45-2-1504(g) -- albeit that he does not have real, palpable or distinct injury, then Bates' ability to object should be limited to objections to the Schedule of Claim Determinations, and he should not be allowed to object to the methodology to calculate distributions.

i) **T.C.A. § 45-2-1504(g) Allows Bates Standing Only to Object to Claim Determinations**

T.C.A. § 45-2-1504 (copy attached as **Exhibit 1**) states that the commissioner is to file a schedule that would show whether a claim was accepted or rejected, what the approved amount of the claim was determined to be and what priority classification would be assigned to the claim. T.C.A. § 45-2-1504(f)(1)-(3). This was accomplished by the Commissioner and Receiver through the January 31, 2006 Notice of Filing of Commissioner-in-Possession's and Receiver's Schedule of Claim Determinations which had attached as Exhibit A thereto the actual Schedule of Claim Determinations.

T.C.A. § 45-2-1504(g) states that "within twenty (20) days after the filing of the commissioner's schedule, any creditor, depositor or stockholder may file an objection to any determination made [in the schedule]" (brackets added for clarity). Later in subsection (g), the following is stated:

After filing the schedule, the commissioner may, from time to time, make partial distribution to the holders of claims which are undisputed or have been allowed by the court, if a proper reserve is established for the payment of disputed claims. As soon as practicable after the determination of all objections [to the schedule], the commissioner shall make final distribution.

T.C.A. § 45-2-1504(g) (brackets added for clarity). There is no allowance in the statute for a stockholder to object to matters relating to a partial or interim distribution, or even the final distribution for that matter.

The statute, therefore, seems to indicate that, as a general matter, a stockholder may object to any determination of a claim (i.e., the acceptance/rejection, the approved amount and the priority classification noted in T.C.A. § 45-2-1504(f)(1)-(3)), but may not object to anything else -- i.e., proposed distributions and the methods of calculating those distributions. This result is supported by the United Southern Bank case. That case addressed whether the former bank

directors of a failed state bank had standing to challenge the receiver's sale of bank assets, via a purchase-assumption transaction. It was clear from the record in that case that the same former bank directors who were objecting to the sale were debtors or prospective debtors of the bank liquidation estate -- i.e., the bank liquidation estate had claims to pursue against those individuals. In addressing the issue, vis-à-vis former directors who were debtors/potential debtors, the United Southern Bank court stated as follows:

In T.C.A. § 45-2-1504(g) the Legislature has limited standing to contest a receiver's "schedule of determinations" to creditors, depositors and stockholders. Although the statutes are silent with respect to who may be heard to question other acts of the commissioner or his duly appointed receiver, we hold that debtors and prospective debtors have no standing to intervene at any stage of a bank receivership pursuant to Title 45, chapters 1 and 2 of T.C.A. . . .

Further we hold that to whatever extent it may be appropriate to entertain a post-consummation attack on the ex parte approval of a purchase-assumption disposition of the assets of a bank in liquidation under Title 45, T.C.A., debtors and potential debtors have no standing to do so.

718 S.W.2d at 255.

T.C.A. § 45-2-1504 does not provide that stockholders may object to distributions or methodologies presented for the calculation of distributions -- it only says that stockholders can object to claim determinations. Particularly, since Bates is clearly a "debtor or prospective debtor," he should have no standing to intervene or object to the proposed methodology for calculating distributions that is set forth by the Commissioner/Receiver. United Southern Bank, 718 S.W. 2d at 255. Thus, at the very most, Bates should be seen as having standing⁴ only in relation to objection to claim determinations.

⁴ As set forth in the previous section of this brief, the Commissioner and Receiver do not concede their position that Bates has no standing to challenge claim determinations.

ii) **The Only Bates Objection to the Claim Determinations Has Already been Overruled by the Court and Should be Overruled**

If the Court decides that Bates has standing to object to claim determinations (as opposed to proposed methodologies for calculating distributions and/or distributions), it is important to note that, in all of Bates' Objections, only one addresses a claim determination issue, and the substance of that Objection has already been ruled upon by the Court.

As the Court is aware, much of what Bates sets forth in his Objections are attempts to raise matters already decided -- e.g., alleged misuse of "trust funds" to pay receivership expenses, alleged position that additional funds should have been placed in the Pooled Fiduciary Account as opposed to being held by the Receivership, etc. Indeed, in recognition of this, Bates filed his March 21, 2006 Notice which withdrew all Objections upon matters already decided in the case -- albeit Bates did not specify what Objections he was withdrawing. In good faith, and as presented in their March 27, 2006 Reply, the Commissioner and Receiver can identify only three (3) Objections from Bates which have not already been decided -- 1) whether Vault Checks should be paid 100¢/\$1.00; 2) whether the approximately \$680,000 withdrawn from the Pooled Fiduciary Account, pursuant to Order of Court, to fund June 1, 2004 bondholder payments was taken into account in the methodology proposed to calculate distributions and 3) whether the proceeds from the liquidation of a Hilliard Lyons account are trust funds (and, thus, available to be distributed) or are property properly retained by the Receiver.

To the extent that, under T.C.A. § 45-2-1504(g) and the United Southern Bank case, Bates can object to claim determinations, those objections must address the matters set forth in the Schedule of Claim Determinations -- 1) acceptance/rejection of claims, 2) establishing approved amounts of claims and 3) priority assigned to claims. T.C.A. § 45-2-1504(f)(1)-(3).

Only one of Bates Objections -- the Vault Check Objection -- addresses matters relating to the Schedule of Claim Determinations.⁵

As the Commissioner and Receiver understand it, Bates' position⁶ is that the Vault Check claims should be accepted (which the Schedule of Claim Determinations does) with an approved amount equal to the full amount of the check (which the Schedule of Claim Determinations also does). Bates' additional position, in his Objection, is that all of the Vault Checks should be paid at 100% before payment of other claimants -- which, in essence, is an argument that the Vault Checks should receive a higher priority designation than other claims. The position of the Commissioner and Receiver is that the Vault Checks are appropriately classified as "Class 5" claims and should be paid pro rata along with all other "Class 5" claims.

In the context of another Objection -- the Mayer Objection -- the Court has already determined that the Vault Checks are properly classified as "Class 5" claims and, thus, are not payable before the other "Class 5" claims. The Objection lodged by Kenneth L. Mayer requested 100% payment of his Vault Check claim. In overruling the Mayer Objection, the Court found that Mr. Mayer did not provide "any reason to reject the concept of pro rata distributions as to claims of equal priority so as to compel payment in full of his claims." See Mayer Order attached as **Exhibit 5**. By overruling the Mayer Objection requesting that his Vault Check claim be paid in full, the Court has recognized that the Vault Checks are not to be paid ahead of other "Class 5" claims, are properly classified as a "Class 5" claim and should be addressed in a pro rata fashion with the other "Class 5" claims. Accordingly, the Court has already decided the Vault Check issue raised by Bates. The Vault Checks will not be "paid in

⁵ The other two Objections -- the \$680,000 June 1, 2004 distribution issue and the Hilliard Lyons account issue -- have nothing to do with the Schedule of Claim Determinations.

⁶ In the Objections filed on February 6, 2006 by Bates, it appeared that Bates was questioning the validity of the Vault Check claims as a group. See Bates Objections at p. 6. But, in his April 11, 2006 Response to Reply filing, Bates makes clear that the Vault Checks should be recognized and "paid in full." Response to Reply at pp. 5-6.

full” ahead of the other “Class 5” claimants. Bates’ Objection to the contrary, to the extent that he has standing to make it, should be overruled.

Aside from the Court’s Order overruling the Mayer Objection, the Court should not, for other reasons, sustain Bates’ Objection (to the extent he has standing to make it) that the Vault Checks should be paid in full before the other claimants. Bates argues that funds to pay the Vault Checks “were reserved.” While Bates may have reserved amounts on paper in his various accountings, no funds were segregated to pay the Vault Check obligations. Rather, the Vault Checks were written against the Pooled Fiduciary Account, and, thus, the funds that were to cover those Vault Checks were supposed to be on deposit in the Pooled Fiduciary Account. Therefore, the Vault Check claimants are situated the same as any other claimant whose claim related to monies that should have been on deposit in the Pooled Fiduciary Account -- all of whom/which are “Class 5” claimants.

Accordingly, and in the alternative, to the extent that Bates has standing to make objections, such objections are limited to the Schedule of Claim Determinations. The only Objection lodged by Bates related to the Schedule of Claim Determinations is that the Vault Checks should be paid in full ahead of other similarly situated claims, which, in essence, objects to the “Class 5” priority assigned to the Vault Check claims. That issue, has been decided via the Court’s overruling of the Mayer Objection. Thus, upon further review, the Court, if it decides Bates has standing to object, should limit Bates’ ability to object only as to matters relating to the Schedule of Claim Determinations and then should overrule the one Objection (the Vault Check Objection) that relates to the claim determinations.

III. NONE OF BATES' OBJECTIONS IMPACT UPON THE PROPOSED METHODOLOGY OF CALCULATING DISTRIBUTIONS

a) None of Bates' Objections Have Impact Upon the Conceptual Framework of the Proposed Methodology

The second area upon which the Court instructed further briefing is to what extent Bates' Objections had impact upon the methodology proposed by the Commissioner and Receiver for calculating distributions. The Commissioner and Receiver assert that none of Bates' Objections have any impact upon the conceptual framework of that proposed methodology.

The proposed methodology is straight-forward. A percentage is derived by comparing the aggregate amount that should have been on deposit in the Pooled Fiduciary Account with the amount that is to be distributed. That percentage is then multiplied by the separate amounts that should have been on deposit for each category of claims⁷, and, thus, yields the amount of funds that would be available for distribution for each separate category of claims. From these separate amounts, "Class 1" and "Class 4"⁸ claims, which are attributable to the particular category of claims, are deducted. The remainder is then available for pro rata distribution to "Class 5" claimants in each category of claims, the pro rata amount being determined by comparing the total amount of approved "Class 5" claims in each category with the amount available to distribute in each category of claims.

That is the proposed methodology and, quite simply, it is not dependent upon any particular number of series of numbers. To that end, it does not matter what objections Bates makes concerning how much should be in the Pooled Fiduciary Account or how the \$680,000

⁷ The phrase "category of claims" is to refer to the various distinct categories of claims set forth in Exhibit E of the Motion Seeking Approval -- e.g., the claims relating to the Jacksonville Series '94 bond issue, the Jacksonville Series '96 bond issue, the Pearsall, Texas/Harvest Communities bond issue and so on.

⁸ As noted in previous briefings, there were no "Class 2" or "Class 3" claims submitted to the Receiver. See T.C.A. § 45-2-1504(h)(1)(B) and (C).

June 1, 2004 distribution was counted. Conceptually, the methodology is independent of all of that. Indeed, the proposed methodology can be reduced to a mathematical equation:

$$\frac{TAD}{APFA} \times IPFA - \text{Class 1/4 Claims} = DA; \frac{DA}{AC5C} \times IC5C = ADI$$

APFA -	Aggregate amount that should have been in Pooled Fiduciary Account;
TAD -	Total amount to be distributed on any particular distribution, be it an interim distribution or final distribution;
IPFA -	Amount that should have been in the Pooled Fiduciary Account for a particular category of claims (e.g., Pearsall, Texas/Harvest Communities, Bank of Oklahoma Successor Trustee, etc.);
Class 1/4 Claims -	Amount of “Class 1” or “Class 4” claims on a particular category of claims;
DA	Amount that would be distributable to a category of “Class 5” claimants;
AC5C -	Aggregate of all approved “Class 5” claims on a particular category of “Class 5” claims;
IC5C -	Individual approved “Class 5” claims; and
ADI -	Amount distributed on individual approved “Class 5” claims.

Thus, argument can be had with regard to what amount or number should be “plugged” into the equation/methodology, but that does not change the conceptual framework of the methodology. Accordingly, at a conceptual level, none of Bates’ Objections impact upon the methodology.

b) **Examination of Bates' Objections Vis-à-Vis Methodology for Calculating Distributions Indicates His Objections Should be Overruled**

However, it is only when an actual distribution is proposed that Bates' Objections⁹ can be discussed and disposed of. Because the Commissioner and Receiver plan to request the ability to make an interim distribution, they, therefore, would prefer to address those Objections at this time so as to know where they stand on the matter. As noted earlier, Bates' Objections relate to 1) paying the Vault Checks in full, 2) determining whether the aggregate Pooled Fiduciary Account amount includes the approximately \$680,000 June 1, 2004 distribution from that account and 3) determining whether the Hilliard Lyons account proceeds belong in the Pooled Fiduciary Account.

i) **Vault Check Objection**

Paying the Vault Checks in full from the Pooled Fiduciary Account, prior to payment of other claims, would decrease both 1) the amount available for any particular proposed distribution and 2) the aggregate amount that should have been in the Pooled Fiduciary Account by the total amount of Vault Check claims (approximately \$351,000). This would, in turn, reduce the percentage ratio and result in smaller amounts of funds being distributed to the "Class 5" claimants. Again, conceptually, changing the Vault Checks' assigned priority does not impact on the proposed methodology, but it would mean that payment of those claims would be given preference over similarly situated "Class 5" claims and would reduce the amount of any distribution to those other similarly situated "Class 5" claims. Again, the Vault Check claims are claims against the shortfall in the Pooled Fiduciary Account, just like all other "Class 5" claims, and, thus, it would be inequitable to prioritize them above the other "Class 5" claims.

⁹ Again, please note that the Commissioner and Receiver maintain that Bates has no standing to make the objections, generally, and also, specifically, has no standing to object to the methodology of calculating distributions.

Accordingly, based upon the above argument, based upon the fact that the Court's ruling on the Mayer Objection has already addressed the Vault Check issue and based upon a lack of standing to make the objection, the Commissioner and Receiver request that Bates' "vault checks should be paid in full ahead of other claims" Objection be overruled.

ii) **June 1, 2004 Objection**

Bates' next Objection relates to whether, and, if so, how, the approximately \$680,000 from the Pooled Fiduciary Account used to fund June 1, 2004 bondholder payments has been counted in the methodology. As noted in the Commissioner's and Receiver's March 27, 2006 Reply to Bates' Objections, the approximately \$680,000 has been subtracted from the aggregate amount that should have been on deposit in the Pooled Fiduciary Account to yield the number shown on Exhibit E to the Motion Seeking Approval -- \$9.745 million. Likewise, amounts that should have been on deposit in the Pooled Fiduciary Account for the bond issues that received June 1, 2004 payments have been reduced by the amounts of the funds used to make payments on each individual bond issue. The reaction of Bates to this information at the April 12, 2006 oral argument was that there was no proof to that effect and that he was hesitant to take the Commissioner's and Receiver's word on the matter.

Attached as **Exhibit 6** is an Affidavit of Jeanne B. Bryant which sets forth the amounts that were withdrawn, under authority of the Court's May 28, 2004 Order, to complete funding for the June 1, 2004 payments on various bonds. That Affidavit further shows that the amounts shown as on deposit in the Pooled Fiduciary Account for those particular bond issues after the June 1, 2004 payments (i.e., the net amounts) were the amounts used to aggregate toward the \$9.745 million amount that was supposed to be in the Pooled Fiduciary Account. The Affidavit further demonstrates that there is no material disagreement as between the Receiver's numbers

and the numbers presented in previous filings by Bates concerning the June 1, 2004 payments from the Pooled Fiduciary Account.

Accordingly, through this filing and the attached Bryant Affidavit, the Receiver asserts that it has been shown that the aggregate amount of funds that should have been on deposit in the Pooled Fiduciary Account (i.e., \$9.745 million) is net of the approximately \$680,000.00 that was withdrawn from that account for the June 1, 2004 payments. Any Objection by Bates to the contrary, to the extent that he has standing to make the objection, should be overruled.

iii) Proceeds from Hilliard Lyons Account Objection

The final Objection raised by Bates relates to whether the amounts realized from the liquidation of holdings in a Hilliard Lyons account were “trust funds” that should have been deposited into the Pooled Fiduciary Account or whether they were funds correctly retained by the Receiver. This Objection has nothing to do with the methodology proposed by the Commissioner and Receiver for calculating distributions. Even if the amounts realized from the Hilliard Lyons account were owed to, and placed into, the Pooled Fiduciary Account, there would be no impact upon the proposed methodology. That proposed methodology simply states, without reference to any specific amount, that the amount that is distributed, whether through interim or final distributions, would be distributed according to the method set forth.

Moreover, and as examined through previous filings and argument to the Court, Bates’ Objection on this point is flawed. Bates has admitted, in his February 6, 2006 Objections, that the proceeds from the Hilliard Lyons account, which were supposedly held in trust for various defaulted bond issues, should have been placed into the Pooled Fiduciary Account and used in partial payment “of the unreimbursed expenses carried by [Sentinel]” on those particular

defaulted bond issues. Bates Objection at p. 4. Previous final Orders of the Court¹⁰ leave no doubt that, when proceeds from the sale of assets relating to defaulted bond issues are realized by the Receiver, it is proper for the Receiver to retain amounts from those proceeds to pay the unreimbursed fees and expenses incurred/accrued by Sentinel in relation to the defaulted bond issue. Therefore, even under Bates' insistences, it is proper for the Receiver to have retained the proceeds from the Hilliard Lyons account, and any Objection to the contrary from Bates, to the extent that he has standing to make it, should be overruled.

That having been said, the Commissioner and Receiver have always maintained that they would recommend that excess funds held by the Sentinel Receivership should be, upon further Order of Court, used to address the claimants with claims upon the multi-million dollar shortfall in the Pooled Fiduciary Account. While the Commissioner and Receiver assert that they have properly retained the proceeds of the Hilliard Lyons account, in light of the fact that the amounts currently being held by the Receiver are sufficient to fund its operations and asset recovery efforts, and with the hope that doing so will put an end to the wasting of Receivership estate resources concerning this issue, the Commissioner and Receiver are willing to transfer the Hilliard Lyons account proceeds of \$195,127.22 to the Pooled Fiduciary Account. If that is acceptable to the Court, the Receiver will tender an Order allowing such to the Court in due course for the Court's consideration.

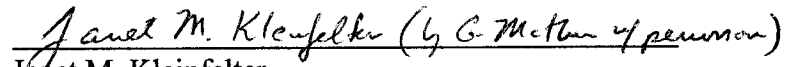
IV. CONCLUSION

For the reasons herein stated and for the reasons set forth in previous filings and argument before the Court, the Commissioner and Receiver request that the Court enter separate final Orders pursuant to Rule 54 Tenn.R.Civ.P. which 1) overrule Bates' Objections and 2) grant

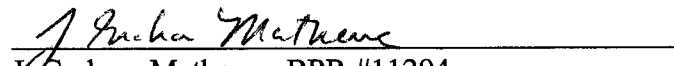
¹⁰ For example, Orders relating to Hernando County, Florida, Fort Pierce, Florida and Tarrant County, Texas.

the Commissioner's and Receiver's Motion Seeking Approval of the Schedule of Claim Determinations and Approval of the Methodology Proposed to Calculate Distributions on Accepted Claims.

Respectfully submitted,


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CERTIFICATE OF SERVICE

This is to certify that on April 21st, 2006 a copy of the foregoing Filing has been sent by First Class U.S. Mail, postage paid, and also by facsimile as noted, to:

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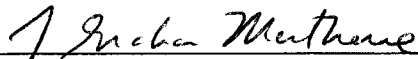
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Cited: *Tosco Corp. v. FDIC*, 723 F.2d 1242 (6th Cir. 1983); *In re Liquidation of United Am. Bank*, 743 S.W.2d 911 (Tenn. 1987).

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165 Tenn. 40, 52

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45-2-1504. Liquidation by commissioner. — (a) In liquidating a state bank, the commissioner may exercise any power of the office of commissioner, but shall not, without the approval of the court in which notice of possession has been filed:

(1) Sell any asset of the organization having a value in excess of five hundred dollars (\$500);

(2) Compromise or release any claim if the amount of the claim exceeds five hundred dollars (\$500), exclusive of interest; or

(3) Make any payment on any claim, other than a claim upon an obligation incurred by the commissioner, before preparing and filing a schedule of the commissioner's determinations in accordance with this chapter.

(b) Within six (6) months of the commencement of liquidation, the commissioner may elect to terminate any executory contract under which the state bank has contracted either to receive or to provide services, such services specifically including advertising, or any obligation of the bank as a lessee. A lessor who receives sixty (60) days' notice of the commissioner's election to terminate the lease shall have no claim for rent other than rent accrued to the date of termination or for claims for damages for such termination.

(c) As soon after the commencement of liquidation as is practicable, the commissioner shall take the necessary steps to terminate all fiduciary positions held by the state bank and take such action as may be necessary to surrender all property held by the bank as a fiduciary and to settle its fiduciary accounts. Such fiduciary accounts may be transferred by the commissioner to another qualified corporate fiduciary as determined by the commissioner, and notice of such transfer must be given by registered mail to the parties by the transferee corporate fiduciary.

(d) As soon after the commencement of liquidation as practicable, the commissioner shall send notice of the liquidation to each known depositor, creditor and lessee of a safe deposit box or bailor of property held by the bank at the address shown on the books of the institution. The notice shall also be published in a newspaper of general circulation in the community once a week for three (3) successive weeks. The commissioner shall send with the notice a statement of the amount shown on the books of the institution to be the claim of the depositor or creditor. The notice shall demand that property held by the bank as bailee or in a safe deposit box be withdrawn by the person entitled thereto and that claims of depositors and creditors, if the amount claimed differs from that stated in the notice to be due, be filed with the commissioner before a specified date not earlier than sixty (60) days thereafter in accordance with the procedure prescribed in the notice.

(e) Safe deposit boxes, the contents of which have not been removed before the date specified, shall be opened by the commissioner in the manner provided for boxes upon which the payment of rental is in default, and the sealed packages containing the contents and the certificates, together with any unclaimed property held by the bank as bailee and certified inventories thereof, shall be reported to the state treasurer who shall deal with them in

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accordance with the provisions of the Uniform Disposition of Unclaimed Property Act, compiled in title 66, chapter 29.

(f) Within six (6) months after the last day specified in the notice for the filing of claims or such longer period as may be allowed by the court in which notice of possession has been filed, the commissioner shall:

- (1) Reject any claim if the commissioner doubts the validity thereof;
- (2) Determine the amount, if any, owing to each known creditor or depositor and the priority class of the claim under this chapter and chapter 1 of this title;
- (3) Prepare a schedule of the commissioner's determinations for filing in the court in which notice of possession was filed; and
- (4) Notify each person whose claim has not been allowed in full and publish once a week for three (3) successive weeks a notice of the time when and the place where the schedule of determinations will be available for inspection and the date, not sooner than thirty (30) days thereafter, when the commissioner will file the schedule in court.

(g) Within twenty (20) days after the filing of the commissioner's schedule, any creditor, depositor or stockholder may file an objection to any determination made. Any objections so filed shall be heard and determined by the court, upon such notice to the commissioner and interested claimants as the court may prescribe. If the objection is sustained, the court shall direct an appropriate modification of the schedule. After filing the schedule, the commissioner may, from time to time, make partial distribution to the holders of claims which are undisputed or have been allowed by the court, if a proper reserve is established for the payment of disputed claims. As soon as is practicable after the determination of all objections, the commissioner shall make final distribution.

(h)(1) The following claims shall have priority:

- (A) Obligations incurred by the commissioner;
 - (B) Wages and salaries of officers and employees earned during the three-month period preceding the commissioner's possession in an amount not exceeding six hundred dollars (\$600) for any one (1) person;
 - (C) Fees and assessments due to the department; and
 - (D) Deposits to the extent of ten dollars (\$10.00) for each depositor.
- (2) After the payment of all other claims with interest at the maximum rate permitted on time deposits, the commissioner shall pay claims otherwise proper which were not filed within the time prescribed.
- (3) If the sum available for any class is insufficient to provide payment in full, such sum shall be distributed to the claimants in the class pro rata.
- (i) Any assets remaining after all claims have been paid shall be distributed to the stockholders in accordance with their respective interests.
- (j) Unclaimed funds remaining after completion of the liquidation shall be transferred to the state treasurer to be dealt with in accordance with the provisions of the Uniform Disposition of Unclaimed Property Act, compiled in title 66, chapter 29.
- (k) When the assets have been distributed in accordance with this chapter and chapter 1 of this title, the commissioner shall file an account with the court. Upon approval thereof, the commissioner shall be relieved of liability in connection with the liquidation and the charter shall be cancelled. [Acts 1969,

ch. 36, § 1 (3.504); 1973, ch. 294, § 6; 1978, ch. 561, § 34; T.C.A., § 45-904; Acts 1983, ch. 78, §§ 10, 11; 1999, ch. 112, § 15.]

Cross-References. Certified mail instead of registered mail, § 1-3-111.

Section to Section References. This section is referred to in §§ 45-2-1501, 45-2-1502.

Textbooks. Tennessee Jurisprudence, 5 Tenn. Juris., Banks and Banking, §§ 60, 63.

Cited: Tosco Corp. v. FDIC, 723 F.2d 1242 (6th Cir. 1983).

NOTES TO DECISIONS

ANALYSIS

- 1. Receivership.
- 2. Parties.
- 3. Sales of assets.

1. Receivership.

Where a statutory bank receivership has been instituted pursuant to statutory authority, the proceeding is pending until all statutory directives are complied with and the final accounting is approved. In re United S. Bank, 718 S.W.2d 251 (Tenn. 1986).

2. Parties.

Debtors and prospective debtors have no

standing to intervene at any stage of a bank receivership pursuant to title 45, chapters 1 and 2. In re United S. Bank, 718 S.W.2d 251 (Tenn. 1986).

3. Sales of Assets.

Section 45-2-1502(d)(2) relating to voiding transfers of assets of state banks made with the intent to create a preference, does not affect the statutory authority provided in other sections to make discretionary sales of assets with the approval of a court of competent jurisdiction; this reading of the preference section construes it in pari materia with the entire statutory scheme. In re Liquidation of United Am. Bank, 743 S.W.2d 911 (Tenn. 1987).

45-2-1505. Formation of new bank. — (a) Upon application of either five (5) individual incorporators or a bank holding company domiciled in this state, the commissioner may grant a charter and may issue a certificate of authority to such incorporators if the commissioner finds that the immediate formation of a new state bank will protect the depositors of a state bank closed in accordance with § 45-2-1502.

(b) The requirements contained in this chapter pertaining to the formation and operation of a state bank shall not be applicable for a period of one (1) year after formation of a new state bank hereunder, unless the commissioner determines that such requirements are necessary to the operation of the new state bank.

(c) None of the restrictions contained in the Bank Structure Act of 1974, compiled in part 14 of this chapter, or as the same may be hereafter amended, shall apply to the formation of the new state bank.

(d) The new state bank may acquire all or any part of the assets or deposits of a closed bank in accordance with the provisions of this chapter. [Acts 1980, ch. 510, § 5.]

Section to Section References. This section is referred to in § 45-2-103.

Textbooks. Tennessee Jurisprudence, 5 Tenn. Juris., Banks and Banking, § 61.

PART 16—EXAMINATION AND REPORTS

45-2-1601. Supervision of banks. — (a) Every person doing a banking business under the laws of this state shall be subject to supervision and regulation by the commissioner.

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913 S.W.2d 319

Page 1

913 S.W.2d 319

(Cite as: 913 S.W.2d 319)

H

Supreme Court of Kentucky.
 PLAZA B.V. and Lagalee Finance, Inc., Appellants,
 v.
 Don W. STEPHENS, Commissioner, Kentucky
 Department of Insurance, Appellee.
 No. 95-SC-581-TG.

Jan. 18, 1996.

Group of nonvoting shareholders in life insurer undergoing liquidation appealed from order of the Circuit Court, Franklin County, approving, inter alia, agreement under which state guarantee associations were granted right of first refusal on all of insurance company's real estate assets. The Supreme Court, Reynolds, J., held that nonvoting shareholders who had been denied intervention in case and did not have judicially recognized interest in subject matter, although allowed to appear and participate in defined aspects of case, did not have standing to appeal order.

Appeal dismissed.

Thomas Lewis, Special Justice, concurred in result only.

West Headnotes

[1] Action 13 ⇌ 13

13 Action

13I Grounds and Conditions Precedent

13k13 k. Persons Entitled to Sue. Most Cited Cases

Issue of standing must be decided on facts of each case.

[2] Action 13 ⇌ 13

13 Action

13I Grounds and Conditions Precedent

13k13 k. Persons Entitled to Sue. Most Cited Cases

Interest of party must be present or substantial interest as distinguished from mere expectancy in order to establish standing.

[3] Insurance 217 ⇌ 1378

217 Insurance

217VI Financial Impairment

217VI(B) Proceedings

217k1378 k. In General. Most Cited Cases

(Formerly 217k72.12)

Nonvoting shareholders did not have standing in rehabilitation/liquidation proceedings against insurance company; shareholders had no property rights where insurance company's assets were insufficient to satisfy its liabilities, and thus they had no judicially recognized interest in subject matter.

*320 William P. Curlin, Jr., Robert C. Moore, Hazelrigg & Cox, Frankfort, Mitchell A. Karlan, Gibson, Dunn & Crutcher, New York City, for appellants.

Steven L. Beshear, Janet A. Craig, Judith A. Villines, Stites & Harbison, Lexington, Robert Michael Connolly, Louisville, Michael F. Chazkel, Chazkel & Associates, East Brunswick, New Jersey, for appellees.

REYNOLDS, Justice.

A second group of nonvoting shareholders (Plaza B.V. and Lagalee Finance, Inc.) of the Kentucky Central Life Insurance Company allege standing, in lieu of limited status which they were once afforded in the primary appeal of this case, which opinion was rendered May 11, 1995. *Kentucky Central Life Ins. Co. v. Stephens*, Ky., 898 S.W.2d 83 (1995).

FN1. This is the fourth opinion issuing from this Court relating to the receivership/liquidation proceedings of

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EXHIBIT

2

913 S.W.2d 319

Page 2

913 S.W.2d 319
(Cite as: 913 S.W.2d 319)

Kentucky Central Life Insurance Company.

The Commissioner of Insurance, as liquidator of Kentucky Central Life Insurance Company, has moved to dismiss this appeal on the grounds that the parties who attempt to appeal have no standing to prosecute it; the order appealed from is not a final and appealable order; and the appellants have failed to name necessary parties.

The current appeal is from a May 26, 1995, ruling of the trial court which occurred during the trial court's continued oversight of the dissolution of the Kentucky Central Life Insurance Company and which order reads as follows:

The Court after a full hearing thereon, having considered the Motion filed by counsel for Don W. Stephens, Commissioner of Insurance for the Commonwealth of Kentucky and Court-appointed Liquidator ("Liquidator") for Kentucky Central Life Insurance Company ("KCL"), and *the objections thereto filed by the Board of Directors of KCL ("Board")*, and *joined in by certain non-voting shareholders of KCL ("Shareholders")* and being otherwise sufficiently advised; **HEREBY, FINDS, CONCLUDES and ORDERS** as follows:

1. The Guaranty Association Participation Agreement by and among the National Organization of Life and Health Insurance Guaranty Associations ("NOLHGA") and Participating State Life and Health Insurance Guaranty Associations, and KCL acting by and through Don W. Stephens, Insurance Commissioner of the Commonwealth of Kentucky as Rehabilitator and Liquidator of KCL and Jefferson-Pilot Life Insurance Company ("Jefferson-Pilot") which was filed with this Court on February 2, 1995, ("Participation Agreement") sets forth in detail the mechanics for implementing the provisions of the Court-approved Term Sheet among NOLHGA, the Liquidator and Jefferson-Pilot.
2. The Participation Agreement is consistent with the terms of the Term Sheet approved by this Court in its August 18, 1994 Order.
3. The Participation Agreement as tendered to this Court on February 2, 1995, complies with the provisions of KRS Chapter 304, Subtitles 33 and 42.
4. As of mid February, 1995, 100% of the state life and health guaranty associations with responsibility

to KCL policyholders had agreed to participate under the terms of the Term Sheet and the Participation Agreement.

***321** Accordingly, the Participation Agreement is hereby APPROVED, and the parties are directed to take whatever steps necessary or appropriate to implement its terms. (Emphasis ours.)

This group of nonvoting shareholders maintains that it does not collaterally attack the rulings rendered by this Court in the three Kentucky Central Life Insurance Company opinions, but states that it is the duty of the Commissioner and the circuit court to maximize the value of KCL's assets. It is alleged that Franklin Circuit Court should not have approved a provision of an agreement (the Participation Agreement) whereby 50 state guaranty associations, which are contributing over \$100 million to provide protection to KCL's policyholders, were granted right of first refusal on all of KCL's real estate assets. The appellants have asserted that the right of first refusal improperly depresses the value of KCL's assets to the detriment of all claimants. It is maintained that the foregoing aspect of the Participation Agreement is illegal.

The background and course which the litigants have pursued are minutely detailed in the foregoing cases. The motion of the nonvoting shareholders to intervene in these cases was denied as statutory authority does not exist to support their position. All nonvoting shareholders have acknowledged that rehabilitation and liquidation of an insolvent insurance company is a special statutory proceeding and that application and utilization of special statutory rules is left largely to the supervision of the trial judge in the exercise of sound judicial discretion.

FN2. Kentucky Central Life Ins. Co. v. Stephens, Ky., 897 S.W.2d 583 (1995); Minor v. Stephens, Ky., 898 S.W.2d 71 (1995).

The appellants' unlimited optimism relative to their standing to bring this appeal, which has lead them to state that this Court has decided their standing

913 S.W.2d 319

Page 3

913 S.W.2d 319
(Cite as: 913 S.W.2d 319)

issue adversely to appellee's argument, is not supported by any of the three records of the Kentucky Central cases heretofore decided, including *Minor v. Stephens*, Ky., 898 S.W.2d 71 (1995).

The order of December 14, 1994, referred to by appellants, issued by this Court, passed the nonvoting shareholders' appeal to the merits. The trial court denied the nonvoting shareholders' motion to intervene and this Court affirmed the trial court in its denial of the appointment of an official committee to protect "their interest." Nowhere has it been asserted that the Board of Directors of KCL failed to protect the interest of any entity or any special aspect thereof. Statutory authority provides that only the Board had leave to protest liquidation and this would apply equally to the procedures undertaken by the Commissioner as liquidator. KRS 304.33-180(1). The findings of fact and conclusions of law formerly rendered herein were affirmed on appeal.

Throughout these proceedings the National Association of Life and Health Guaranty Association (NOLHGA) and various guaranty associations were granted standing to appear and participate in defined aspects of the case (KRS 304.33-170[4]), and the court, as fairness might demand, permitted stockholders to meaningfully appear and participate in defined aspects of the case and counsel representing the shareholders, through the Board, was permitted to participate in such defined aspects of the case. All attempts to again intervene by the different groups of shareholders have been denied.

Pronouncedly set forth in the Findings of Fact (No. 55) (affirmed on appeal) the "shareholders of Kentucky Central do not have property rights in Kentucky Central because Kentucky Central's assets are insufficient to satisfy its liabilities." The Conclusions of Law (No. 7) unequivocally stated "the shareholders of Kentucky Central have no property rights in Kentucky Central because Kentucky Central's assets are insufficient to satisfy its liabilities to its policyholders." (See previously footnoted citations.) Also, it was further enunciated that the shareholders do not possess

either a historically rooted expectation of compensation or a reasonable investment-backed expectation necessary to support a claim of compensable taking of property under the Fifth Amendment of the United States Constitution or under the Kentucky Constitution.

*322 *Louisville v. Stock Yards Bank & Trust*, Ky., 843 S.W.2d 327 (1992), restates that the prevailing Kentucky authority establishing the benchmark for standing is "a judicially recognizable interest in the subject matter." The interest may not be "remote and speculative" but must be a present and substantial interest in the subject matter.

[1][2] The issue of standing must be decided on the facts of each case. *Rose v. Council for Better Educ., Inc.*, Ky., 790 S.W.2d 186 (1989). In summary, the interest of a party must be a present or substantial interest as distinguished from a mere expectancy. *Ashland v. Ashland F.O.P. # 3, Inc.*, Ky., 888 S.W.2d 667 (1994).

[3] In retrospect, the present "appellants" were not of record for the May 3, 1994, extended hearing when the substantive terms of the Term Sheet were initially approved.

The trial court's order of February 2, 1995, considered and approved the Participation Agreement, unless objections were filed and the court determined otherwise. Objections were timely filed by the Board on February 21, 1995, and notice of same was served upon counsel of record for the Joe Minor group of nonvoting shareholders, and counsel of record for the Plaza B.V. group of nonvoting shareholders. The Joe Minor group timely joined the Board's objections to the Participation Agreement. The Plaza B.V. group tendered untimely objections. We note that at the trial court hearing held to consider the Board's objections no inconsistency was alleged between the Term Sheet and Participation Agreement. Counsel for the Plaza B.V. nonvoting shareholders attended the hearing, but clearly made no appearance of record. The order of May 26, 1995, was entered approving the Participation Agreement and the court-approved Term Sheet. The parties who filed objections and appeared of record and

913 S.W.2d 319

Page 4

913 S.W.2d 319
(Cite as: 913 S.W.2d 319)

participated in the hearing prior to the entry of the order aforesaid have not appealed.

Minor, supra, provides that the Commissioner is best qualified to perform the liquidation process as he has no special interest in the outcome except to administer the matter for the maximum benefit of all interested parties. The Commissioner's accountability and fiduciary duties to all interested parties, and the orders in these records make it reasonably clear that safeguards existed which enabled detection of any violations of duty which would imperil any party's interest. *In the Matter of the Liquidation of Integrity Ins. Co.*, 231 N.J.Super. 152, 555 A.2d 50 (Ch.Div.1988).

Nonvoting shareholders have neither been granted standing in these cases nor have they gained standing by coattailing Kentucky Central's Board of Directors' position throughout these actions. It is unnecessary to rule that the May 26, 1995, order was not a final and appealable one nor that the appellants failed to name necessary parties.

ORDER

The appeal is dismissed.

GRAVES, KING, LAMBERT, STUMBO and
WINTERSHEIMER, JJ., concur.
THOMAS LEWIS, Special Justice, concurs in
result only.
Ky., 1996.
Plaza B.V. v. Stephens
913 S.W.2d 319

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495 So.2d 902

Page 1

495 So.2d 902, 11 Fla. L. Weekly 2149
(Cite as: 495 So.2d 902)

C

District Court of Appeal of Florida, First District.
William J. HARTNETT and International Funding
Corporation, Appellants,

v.

SOUTHERN AMERICAN FIRE INSURANCE
COMPANY, a Florida Corporation Authorized to
Transact an Insurance Business, Appellee.

Nos. BJ-192, BJ-193.

Oct. 14, 1986.

Majority shareholders of insolvent insurance corporation filed objections to recommendations made by receiver in insolvency proceeding. The Circuit Court, Leon County, William C. Gary, J., entered orders denying the objections, and shareholders appealed. The District Court of Appeal, Ervin, J., held that shareholders lacked standing to contest claims filed in receivership of the corporation.

Affirmed.

West Headnotes

Insurance 217 ↪ 1412

217 Insurance

217VI Financial Impairment

217VI(D) Claims

217k1412 k. In General. Most Cited Cases

(Formerly 217k72.9)

Majority shareholders of insolvent insurance corporation were not "interested persons" entitled to appear at hearing on receiver's report, and thus, lacked standing to contest claims filed in receivership of the corporation. West's F.S.A. §§ 631.001 et seq., 631.001(3, 4), 631.181; F.S.1969, § 631.181(3, 4).

*903 William L. Rogers of Barrett & Rogers,

Miami, for appellants.

Michael L. Berry, Tallahassee, for appellee Florida Dept. of Ins. as Receiver of Southern American Fire Ins. Co.

John M. McNatt, Jr. & Jack W. Shaw, Jr. of Mathews, Osborne, McNatt, Gobelman & Cobb, Jacksonville, for appellee Florida Ins. Guar. Ass'n.

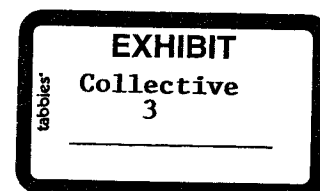
ERVIN, Judge.

Appellants appeal two orders of the circuit court. The first, BJ-192, denies objections filed by appellants to the receiver's recommendation to a claim filed pursuant to Chapter 631. The second, BJ-193, denies appellants' standing under Chapter 631, Florida Statutes (1975) to object to the receiver's recommendations on various claims filed by a third person. We affirm both orders:

Appellants, William J. Hartnett and International Funding Corporation, are the majority shareholders of Southern American Fire Insurance Company, which has been in receivership under the provisions of Chapter 631 since 1975. Appellants filed a massive number of objections to recommendations made by the receiver in this insolvency proceeding. In both appeals appellants have raised the same two issues: First, whether the majority shareholders have standing to contest claims filed in the receivership of Southern American, and second, whether the Florida Insurance Guaranty Association may seek reimbursement from the receivership.

The liquidation of the subject insurance company began in 1975 and is governed by Chapter 631, Florida Statutes (1975). Claims against insolvent insurers are processed in accordance with Section 631.181, which provides, after claims are filed, that the receiver prepare a report together with his recommendations which are forwarded to the circuit court. The court thereafter conducts a hearing upon providing notice "to such persons as *shall appear to the court* to be interested therein." Section 631.181(3) (e.s.). All *interested* persons are entitled to appear at the hearing. Section

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495 So.2d 902

Page 2

495 So.2d 902, 11 Fla. L. Weekly 2149
(Cite as: 495 So.2d 902)

631.181(4). Section 631.001(4) provides that the purpose of the act “is [for] the protection of the interests of *insureds*, *creditors* and the *public* generally....” (e.s.) Absent from the purpose of the act is the protection of *shareholders* of the insolvent insurance company. Section 631.001(3) provides that the act “shall be liberally construed to effect the purpose stated in subsection (4).” The order of the trial court holding that appellants did not have standing is consistent with the construction of Chapter 631 and cannot be characterized as an abuse of discretion by the trial court. Since appellants do not have standing, we decline to consider the second issue they have raised.

AFFIRMED.

WIGGINTON and BARFIELD, JJ., concur.
Fla.App. 1 Dist., 1986.
Hartnett v. Southern American Fire Ins. Co.
495 So.2d 902, 11 Fla. L. Weekly 2149

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910 P.2d 110

Page 1

80 Hawai'i 339, 910 P.2d 110

(Cite as: 80 Hawai'i 339, 910 P.2d 110)

H

Supreme Court of Hawai'i.
Wayne METCALF, Insurance Commissioner of the
State of Hawai'i, Petitioner-
Appellee, [FN1]

FN1. Wayne C. Metcalf succeeded Lawrence M. Reifurth as the Insurance Commissioner of the State of Hawai'i during the pendency of this action. Pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 43(c)(1), Metcalf has been substituted automatically for the Petitioner-Appellee in the instant case. Although not a named party, the Hawaii Life and Disability Insurance Guaranty Association is expressly granted standing to appear in the delinquency proceedings in this case under HRS § 431:16- 208(*l*) (1993).

v.

INVESTORS EQUITY LIFE INSURANCE
COMPANY OF HAWAII, LTD., a Hawai'i
Corporation, Respondent,

and

Investors Equity Life Insurance Holding
Company, Intervenor-Appellant.

No. 18691.

Jan. 11, 1996.

In delinquency proceedings, shareholder, which had intervened, appealed from order of the Circuit Court, First Circuit, granting Insurance Commissioner's petition to liquidate insurer. The Supreme Court held that shareholder did not have standing to oppose petition to liquidate insurer.

Appeal dismissed.

West Headnotes

Insurance ↻1378

217k1378 Most Cited Cases

(Formerly 217k72.2)

Shareholder did not have standing to oppose petition to liquidate insurer in delinquency proceedings. HRS §§ 431:15-101(d), 431:15-104(c), 431:15- 303(d), 431:15-305(a).

****110 *339** Wayne S. Sakamoto (of counsel) (John Francis Perkin, Lyle Hosoda, Kimble R. Cook and Donald L. Wilkerson, with him on the briefs, of Perkin & Hosoda), Honolulu, for intervenor/respondent-appellant.

John Y. Yamano (William C. McCorriston and Joel D. Kam, with him on the brief, of McCorriston Miho Miller Mukai), Honolulu, for petitioner-appellee.

David J. Reber (Karen L.S. Stanitz and Russell K. Kaupu, with him on the brief, of Goodsill Anderson Quinn & Stifel), Honolulu, for intervenor-appellee.

Before MOON, C.J., and KLEIN, LEVINSON, NAKAYAMA and RAMIL, JJ.

PER CURIAM.

Intervenor-Appellant Investors Equity Life Insurance Holding Company (IELHC) appeals from the circuit court's January 27, 1995 order granting Petitioner-Appellee's petition to liquidate Investors Equity Life Insurance Company of Hawaii (IEL) pursuant to Hawai'i Revised Statutes (HRS) chapter 431, article 15 (1993), the Insurers Supervision, Rehabilitation and Liquidation Act (Article 15). [FN2] IELHC, which is IEL's parent ****111 *340** company, [FN3] raises two points of error on appeal: 1) there is insufficient evidence in the record to support the circuit court's findings of fact (FOF) and conclusions of law (COL); and 2) the circuit court's failure to provide for a full evidentiary hearing was a denial of IELHC's right to due process. We do not reach these contentions, however, because IELHC lacked standing to oppose

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910 P.2d 110

Page 2

80 Hawai'i 339, 910 P.2d 110

(Cite as: 80 Hawai'i 339, 910 P.2d 110)

the liquidation petition in the circuit court.

FN2. HRS § 431:15-306 (1993) provides:

Grounds for liquidation. The commissioner may petition the circuit court of the first judicial circuit for an order directing the commissioner to liquidate a domestic insurer or an alien insurer domiciled in this State on any ground under which the commissioner may apply for an order of rehabilitation under section 431:15-301, whenever the commissioner believes that attempts to rehabilitate the insurer would substantially increase the risk of loss to its creditors, its policyholders or the public, or would be futile, or that rehabilitation would serve no useful purpose, whether or not there has been a prior order directing the rehabilitation of the insurer.

The provisions of HRS § 431:15-301(a) relevant to the instant case are:

Grounds for rehabilitation. (a) The commissioner may apply by petition to the circuit court of the first judicial circuit for an order authorizing the commissioner to rehabilitate a domestic insurer or an alien insurer domiciled in this State, on any one or more of the following grounds whenever the commissioner reasonably believes that the insurer may be successfully rehabilitated without substantial increase in the risk of loss to the insurer's policyholders, creditors, or to the public:

- (1) The insurer is insolvent;
- (2) The insurer is in such condition that the further transaction of business would be hazardous, financially, to its policyholders, creditors or the public;
- ... [or]
- (12) The insurer has failed to file its annual report or other financial report required by statute within the time allowed by law and, after written demand by the commissioner, has failed to give an adequate explanation immediately[.]

FN3. IEL, which was purchased by IELHC in 1991, is an insurance company involved primarily in the issuance of deferred annuities as well as traditional and interest-sensitive life insurance policies.

The dispositive issue in this case is whether IELHC had standing to appear before the circuit court, notwithstanding the court's August 10, 1994 order approving the parties' stipulation to allow IELHC to intervene in the delinquency proceedings for the purpose of proposing a rehabilitation plan.

Although HRS § 431:15-307(d) (1993) provides that the circuit court may make the necessary declarations in a proceeding to liquidate an insurance company "[a]fter providing such notice and hearing *as it deems proper*" (emphasis added), the court's decision to provide IELHC an opportunity to participate in these delinquency proceedings did not, in itself, confer standing on the company. Article 15 does not recognize the interests of shareholders, like IEHLC, of an insolvent insurance company. *Cf. Hartnett v. Southern Am. Fire Ins. Co.*, 495 So.2d 902, 903 (Fla. Dist. Ct. App. 1986) (affirming the trial court's holding that shareholders of an insolvent insurance corporation did not have standing to participate in delinquency proceedings). Rather, HRS § 431:15-104(c) (1993) provides:

No court of this State has jurisdiction to entertain, hear or determine any complaint praying for the dissolution, liquidation, rehabilitation, sequestration, conservation, or receivership of any insurer, or praying for an injunction or restraining order or other relief preliminary to, incidental to, or relating to that type of proceedings other than in accordance with this article.

(Emphases added.) Under Article 15, the Insurance Commissioner possesses the sole discretion to prepare a rehabilitation plan "[i]f the rehabilitator [i.e., the Insurance Commissioner] determines that reorganization, consolidation, conversion, reinsurance, merger, or other transformation of the insurer is *appropriate* [.]" HRS § 431:15-303(d) (emphases added). [FN4] Furthermore, HRS § 431:15-305(a) (1993) provides

910 P.2d 110

Page 3

80 Hawai'i 339, 910 P.2d 110

(Cite as: 80 Hawai'i 339, 910 P.2d 110)

in pertinent part that "[t]he court shall permit *the directors of the insurer* to take such actions as are reasonably necessary to defend against the petition[.]" (Emphasis added.)

FN4. We expressly decline to decide the question whether it is an abuse of discretion for the circuit court to rely upon arguments presented "[a]fter providing such notice and hearing as it deems proper" under HRS § 431:15-307(d), when issuing an order resolving a petition for liquidation.

Like the Florida statute construed in *Hartnett, supra*, the purpose of Article 15 is for "the protection of the interests of *insureds, claimants, creditors*, and the *public* generally with minimum interference with the normal prerogatives of the owners and managers of insurers[.]" HRS § 431:15- 101(d) (emphases added). "Absent from the purpose of the act is the protection of *shareholders* of the insolvent insurance company. Section [431:15- 101(c)] provides that the act 'shall be liberally construed to effect the purpose stated in subsection ([d]).' " *Hartnett*, 495 So.2d at 903 (emphasis in original). [FN5] Therefore, we hold that IELHC did not have standing to oppose the petition to liquidate IEL in the instant case.

FN5. We observe that IELHC "do[es] not assert that the board of directors of [IEL] failed to protect their interests or any special aspect thereof." *Minor v. Stephens*, 898 S.W.2d 71, 76 (Ky.1995) (holding, inter alia, that shareholders were not entitled to appointment of an official committee to protect their interests).

Accordingly, this appeal is dismissed for lack of IELHC's standing to oppose the petition to liquidate IEL in the circuit court.

80 Hawai'i 339, 910 P.2d 110

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37 P.3d 971

Page 1

37 P.3d 971, 2001 OK CIV APP 152

(Cite as: 37 P.3d 971)

C

Court of Civil Appeals of Oklahoma,
Division No. 3.
STATE of Oklahoma, ex rel. John P.
CRAWFORD, Insurance Commissioner,
Petitioner/Appellee,
and
Oklahoma Life & Health Insurance Guaranty
Association, Intervening Petitioner,
v.
AMERICAN STANDARD LIFE AND
ACCIDENT INSURANCE COMPANY, a
domestic insurer in
the State of Oklahoma, Respondent,
and
David J. Nicholas Insurance Company, Inc.; David
J. Nicholas; and The
Nicholas Equity Holders of American Standard Life
Insurance Co.,
Intervenors/Appellants.
No. 94,318.
Released for Publication by Order of the Court
Of Civil Appeals of Oklahoma, Division No. 3.

Nov. 9, 2001.

Stockholders, equity holders, and creditors of insurer placed in receivership and ordered liquidated brought motion to intervene in liquidation proceedings in order to pursue a claim owned by receiver. The District Court, Oklahoma County, Nancy L. Coats, J., denied the motion. Stockholders appealed. The Court of Civil Appeals, Buettner, P.J., held that: (1) statute providing for appointment of insurance commissioner as receiver for an insurer in a delinquency proceeding and vesting rights in receiver applied, and (2) addressing an issue of first impression, stockholders did not have standing to intervene.

Affirmed.

West Headnotes

[1] Statutes ↪223.4

361k223.4 Most Cited Cases

Where a matter is addressed by two statutes, one specific and the other general, the specific statute prevails over the general one.

[2] Insurance ↪1407

217k1407 Most Cited Cases

Statute providing for appointment of insurance commissioner as receiver for an insurer in a delinquency proceeding and vesting rights in receiver, rather than pleading code provision permitting anyone to intervene as of right, applied to stockholders' motion to intervene in liquidation proceedings in order to pursue claim owned by receiver; if any right of action existed in favor of insurer placed in receivership, it was vested in receiver. 12 Okl.St. Ann. 2024; 36 Okl.St. Ann. §§ 1901 et seq., 1914, subd. A, B.

[3] Insurance ↪1407

217k1407 Most Cited Cases

Stockholders of insurer placed in receivership did not have standing to intervene in liquidation proceedings brought against insurer in order to pursue claim owned by receiver. 12 Okl.St. Ann. 2024; 36 Okl.St. Ann. §§ 1901 et seq., 1914, subd. A, B.

*971 Appeal from the District Court of Oklahoma County, Oklahoma, Honorable Nancy L. Coats, Trial Judge.

AFFIRMED.

Chris L. Rhodes, III, Robert P. Redemann, Andrew D. Downing, Rhodes, Hieronymous, Jones, Tucker & Gable, P.L.L.C., Tulsa, OK, for Petitioner/Appellee.

David J. Nicholas, Edmond, OK, Pro Se.

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37 P.3d 971

Page 2

37 P.3d 971, 2001 OK CIV APP 152

(Cite as: 37 P.3d 971)

OPINION

Opinion by KENNETH L. BUETTNER, Presiding Judge.

¶ 1 In 1991, American Standard Life and Accident Insurance Company (ASL) was placed in receivership. Efforts to rehabilitate ASL were not successful. In 1997, the trial court ordered it liquidated. Intervenor/Appellants, David J. Nicholas Insurance Company, Inc., David J. Nicholas, and The Nicholas Equity Holders of American Standard Life Insurance Co. (collectively, Appellants) [FN1], seek review and reversal of the order *972 of the liquidation court denying them the right to intervene in the liquidation proceedings in order to pursue a claim owned by the Receiver. [FN2], [FN3]

FN1. In the instant appeal, Appellants were represented by attorneys who filed a brief in chief. These attorneys filed a Motion to Withdraw which was granted. There has been no appearance or filings by any new counsel for Appellants or by any Appellant, *Pro se*. The individual Appellant is now deemed to be appearing *pro se*. The corporate Appellants are now unrepresented parties. The brief filed by Appellants' previous attorneys will be considered.

FN2. The current Insurance Commissioner and Receiver is Carroll Fisher.

FN3. Appellants previously appealed the order of liquidation. Before a decision on the merits was entered, they dismissed the appeal. The order of liquidation therefore stands as a final order. On April 15, 1999, Appellants filed a Petition to Vacate the Order of Liquidation pursuant to 12 O.S.1991 § 1031 *et seq.* They alleged irregularity, unavoidable casualty or misfortune, and fraud. The trial court denied the petition and they appealed. That appeal was dismissed for failure to prosecute. See No. 93,372. The order

denying the petition to vacate stands as a final order. According to the brief of Petitioner/Appellee, the State of Oklahoma, *ex rel.* John P. Crawford, Insurance Commissioner (Appellee) and not denied by Appellants, prior appellate proceedings, other than the one being considered in this opinion include the following: Case No. 82,049--voluntary dismissal of appeal by Nicholas; Case No. 82,692-- order appealed by Nicholas affirmed by memorandum opinion; Case No. 84,800--order appealed by Nicholas affirmed by memorandum opinion; Case No. 84,863--order appealed by Nicholas affirmed by memorandum opinion; Case No. 90,558--voluntary dismissal of appeal by Nicholas; Case No. 91,701--order appealed by Nicholas affirmed by memorandum opinion; Case No. 93,372--Nicholas' appeal dismissed by the court for failure to prosecute; and, Case No. 93, 476--Nicholas' appeal dismissed by the court for failure to prosecute. The list includes the two cases mentioned above.

¶ 2 On July 16, 1999, Appellants filed their Amended Motion to Intervene. The alleged purpose of the intervention was to allow Appellants to intervene as plaintiffs and (in effect) represent ASL and the Receiver in asserting a claim against the Pennsylvania Life & Health Insurance Guaranty Association by and for the Life Assurance Company of Pennsylvania (Pennsylvania Life & Health). They alleged Pennsylvania Life & Health filed an amended claim against ASL for \$35.6 million, when, in fact, ASL is entitled to more than \$30 million back from Pennsylvania Life & Health. Appellants allege that their right and interest as creditors [FN4] of ASL has not and will not be protected by the Receiver. The trial court's order denying the motion to intervene provides, in pertinent part:

FN4. As stockholders, equity holders, and creditors of ASL.

37 P.3d 971

Page 3

37 P.3d 971, 2001 OK CIV APP 152

(Cite as: 37 P.3d 971)

The Court, having heard and considered the arguments of Counsel and being fully advised via memorandums of law, finds that the Nicholas Equity Holders' Amended Motion and Petition to Intervene should be denied in all respects for the following reasons:

- a. The Nicholas Equity Holders have no right to intervene pursuant to 12 O.S.2024;
- b. The Nicholas Equity Holders lack the requisite standing to intervene;
- c. The issues and claims the Nicholas Equity Holders put forth as the basis for intervention are the settled law of the case and barred by the doctrine of *res judicata*;
- d. The issues and claims the Nicholas Equity Holders put forth as the basis for intervention are the settled law of the case and barred by the doctrine of collateral estoppel.

IT IS THEREFORE ORDERED that the Nicholas Equity Holders' Amended Motion and Petition to Intervene is denied.

¶ 3 In their brief, Appellants assert four propositions of error:

Proposition I: The District Court erred in determining that the Nicholas Equity Group has no right to intervene.

Proposition II: The District Court erred in determining that the Nicholas Equity Group lacked standing to intervene.

Proposition III: The District Court erred in determining that the issues and claims set forth by the Nicholas Equity Group are settled law and barred by the doctrine of *res judicata* or claim preclusion.

Proposition IV: The District Court erred in determining that the issues and claims set forth by the Nicholas Equity Group are *973 settled law and barred by the doctrine of collateral estoppel or issue preclusion.

¶ 4 Appellants contend the trial court erred in holding they were not entitled to intervene as a matter of right. In addition, they argue the court should have permitted them to intervene as a matter of permissive intervention. Appellants argue that 12 O.S.1991 § 2024, part of the Oklahoma Pleading Code, controls in this appeal. For case authority

they cite *Morton v. Baker*, 1938 OK 409, 82 P.2d 998, and *Grand River Dam Authority v. Brogna*, 1991 OK CIV APP 104, 827 P.2d 901. Appellee responds that § 2024 does not give Appellants an unconditional right to intervene and that Appellants do not have any interest relating to the property or transaction. Therefore, Appellee contends, intervention as a matter of right does not exist. Appellee contends § 2024 does not permit permissive intervention because no statute confers a conditional right to intervene and Appellants have no claim or defense in common with the "main action" as to law or fact. Section 2024 provides in part:

A. INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action:

1. When a statute confers an unconditional right to intervene; or
2. When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest.

B. PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action:

1. When a statute confers a conditional right to intervene; or
2. When an applicant's claim or defense and the main action have a question of law or fact in common.

...

¶ 5 Appellee cites the Oklahoma Uniform Insurers Liquidation Act (OUILA, 36 O.S.1991 §§ 1901 *et seq.*, as amended) and argues that it controls this matter. He claims that the shareholders are interested only as Class 10 creditors, which is the last priority class, and that they would be entitled to a distribution only if all other liabilities are first paid. [FN5] Appellee concedes Appellants may file a claim in the liquidation as Class 10 creditors, but asserts they are otherwise not entitled to participate in proceedings involving individual assets administered by the Receiver. The OUILA provides for the appointment of the Insurance Commissioner

37 P.3d 971

Page 4

37 P.3d 971, 2001 OK CIV APP 152

(Cite as: 37 P.3d 971)

as the receiver for an insurer in a delinquency proceeding. Title 36 O.S.1991 § 1914 (A) and (B) provides:

FN5. Appellee refers to the Order of Liquidation dated November 21, 1997, wherein the court found ASL to be \$37 million insolvent. Nicholas appealed that order, but the appeal was dismissed.

A. Whenever under this article a receiver is to be appointed in delinquency proceedings for a domestic or alien insurer, the court shall appoint the Insurance Commissioner as such receiver. The court shall order the Insurance Commissioner forthwith to take possession of the assets of the insurer and to administer the same under the orders of the court.

B. As domiciliary receiver, the Insurance Commissioner shall be vested by operation of law with the title to all of the property, contracts, and rights of action and all of the books and records of the insurer, wherever located, as of the date of entry of the order directing him to rehabilitate or liquidate a domestic insurer or to liquidate the United States branch of an alien insurer domiciled in this state, and he shall have the right to recover the same and reduce the same to possession; except that ancillary receivers in reciprocal states shall have, as to assets located in their respective states, the rights and powers which are herein prescribed for ancillary receivers appointed in this state as to assets located in this state. [FN6]

FN6. This statute was amended in 2000, but the amendments did not change its meaning and are not material to the issue being considered.

...

[1][2] ¶ 6 Oklahoma has long followed the rule that where a matter is addressed by two statutes, one specific and the other general, the specific statute prevails over the general *974 one. *Hall v. Globe Life and Accident Insurance Company of Oklahoma*, 1999 OK 89, 998 P.2d 603, 605. At

best for Appellants, this is the case here. The OUILA controls. If any right of action existed in favor of ASL, it was and is now vested in the Receiver. Appellants' Motion to Intervene as a Plaintiff was properly denied for lack of standing. Any other ruling would have been contrary to § 1914(B). General creditors in the receivership do not have the direct interest in any single asset of the receivership to justify intervention in the Receiver's action to administer the assets. If a Class 10 creditor was held to have such a direct interest, then all claimants would have a sufficient interest to support intervention in practically every action by the Receiver. This would thwart the purposes of § 1914.

[3] ¶ 7 Appellants opposed the liquidation order, but that order is final. As to the right of stockholders in a corporate insurance company to intervene in a delinquency proceeding, at the liquidation stage, in any manner other than to file claim as Class 10 creditors, this may be a matter of first impression. None of the parties cite any Oklahoma court decision answering the question, and we are not familiar with such a decision. Appellee points out that numerous other states have statutes which are the same as or substantially similar to the OUILA. Other states have held that shareholders do not have standing to redress an injury to their insolvent insurer. See *Franchise Tax Board of California v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336, 110 S.Ct. 661, 665, 107 L.Ed.2d 696 (1990) ("Shareholder standing rule" is longstanding equitable restriction prohibiting shareholders from initiating actions to enforce rights of corporation unless corporation has refused to act for reasons other than good faith business judgment. Exception exists where shareholder has direct, personal interest in the cause of action.); *Hartnett v. Southern American Fire Ins. Co.*, 495 So.2d 902, 903 (Fla.App.1986) (majority shareholders of insolvent insurance corporation sought to challenge receiver's actions, but were denied on basis of lack of standing.); *Plaza B.V. v. Stephens*, 913 S.W.2d 319, 321 (Ky.1996) (Shareholders of insurance company had no property rights in the company where the company's assets are insufficient to satisfy its liabilities to the policyholders, and

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37 P.3d 971

Page 5

37 P.3d 971, 2001 OK CIV APP 152

(Cite as: 37 P.3d 971)

shareholders do not possess expectation of compensation so as to constitute a property interest which might confer standing in insurance company's liquidation proceedings.); *Metcalf v. Investors Equity Life Ins. Co.*, 80 Hawai'i 339, 910 P.2d 110 (Hawaii 1996) (Shareholder did not have standing to oppose petition to liquidate insurance company.); and *Ainsworth v. Old Sec. Life Ins. Co.*, 685 S.W.2d 583, 586 (Mo.App.1985) (Receivership is not an "action" under rule permitting intervention in an action, thus sole shareholder was not permitted to intervene in receivership of insurance company in a delinquency proceeding.). We agree and hold Appellants did not have standing to intervene. The trial court's ruling was correct.

¶ 8 It becomes unnecessary to decide any other issue presented by the parties.

¶ 9 AFFIRMED.

HANSEN, C.J., concurs; CARL B. JONES, J., sitting by designation, concurs.

37 P.3d 971, 2001 OK CIV APP 152

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onstrate that they contained lead splatters consistent with an injury from a bullet fired from a high-powered rifle at close range. Further, as pointed out by the state, the fragments could be of material assistance to the jury in visualizing the massive injury which caused Mrs. Smith's death and had some bearing on proving the element of deliberation and premeditation, an issue which the defendant would not concede. The evidence, being relevant to issues to be decided by the jury, was admissible in our opinion. See *State v. Morris*, 641 S.W.2d 883 (Tenn.1982). Being admissible, it was proper for the prosecution to call attention to the exhibit in his argument. And, if his comments were improper, considering the evidence in this case, they could not have affected the jury's verdict in either the guilt or sentencing phase of the trial.

Petition to Rehear denied, at the cost of the Appellant.

BROCK, C.J., and FONES, HARBISON and DROWOTA, JJ., concur.



In the Matter of the Liquidation of UNITED SOUTHERN BANK OF NASHVILLE, Nashville, Tennessee, a Tennessee Banking Corporation.

Supreme Court of Tennessee.

Oct. 6, 1986.

Former directors and shareholders of bank in receivership filed motion to intervene. The Chancery Court, Davidson County, Robert Brandt, Chancellor, denied intervention, and Court of Appeals denied appeal without reaching merits. The Supreme Court, Fones, J., held that: (1) there was a receivership pending in chancery court in which intervention was possible,

but (2) former directors and shareholders lacked standing to intervene to assert that sale of claims against them to FDIC in its corporate capacity was invalid.

Affirmed

1. Banks and Banking ⇐505

Proceeding which began when FDIC petitioned to approve sale of some assets of bank in receivership to second bank and remainder of assets to FDIC in its corporate capacity was statutory bank receivership pursuant to express authority contained in Tennessee Banking Act, and thus was still pending, so as to allow former directors and stockholders of first bank to seek to intervene, where final accounting had not yet been approved. T.C.A. §§ 45-1-101 et seq., 45-2-1504.

2. Banks and Banking ⇐505

Former directors and shareholders of bank in receivership lacked standing to intervene in pending statutory bank receivership proceedings to seek adjudication that Federal Deposit Insurance Corporation's sale of claims against them to FDIC in its corporate capacity was invalid and that those claims still belonged to FDIC in its receiver capacity, as former directors and shareholders were potential debtors, who could not seek to control or influence the bringing of suit against themselves.

3. Constitutional Law ⇐306(1)

Ex parte court approval of sales of assets of banks in liquidation pursuant to purchase-assumption method satisfies due process requirements if depositors, creditors and stockholders are accorded right to require receiver to account for any alleged misfeasance or malfeasance in connection with that sale, subsequent to its consummation. U.S.C.A. Const.Amends. 5, 14.

Val Sanford, Dick Lansden, William L. Brooks, Lew Conner, Aubrey B. Harwell, Jr., Thomas P. Kanaday, Jr., Robert P. Ziegler, Herbert R. Rich, Richard Lodge,

EXHIBIT

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