

In the Supreme Court of Missouri

–
No. 84415

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**IN THE MATTER OF THE LIQUIDATION OF
PROFESSIONAL MEDICAL INSURANCE CO. and
PROFESSIONAL MUTUAL INSURANCE CO.
RISK RETENTION GROUP:**

**ARNOLD J. WOLF, D.P.M.,
ARTHUR AXELBANK, M.D., and
JONATHAN E. KLEIN, M.D.,**

Appellants,

v.

**A.W. MCPHERSON, DEPUTY DIRECTOR,
MISSOURI DEPARTMENT OF INSURANCE,**

Respondent.

–
**Appeal from the Circuit Court of Jackson County, Missouri
Honorable Lee E. Wells, Judge**

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BRIEF AMICUS CURIAE BY CERTAIN ESOP PARTICIPANTS

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ATTORNEYS FOR CERTAIN ESOP PARTICIPANTS

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INTRODUCTION

This appeal arises out of the ongoing liquidation of Professional Medical Insurance Company (“ProMed”) and Professional Mutual Insurance Company Risk Retention Group (“RRG”). ProMed is a stock insurance company, and the majority of its shares are held by an employee stock ownership plan and its employee participants (collectively, the “ESOP”). L.F. 1-2.¹

Glenn Jourdon (“Jourdon”), a former executive with ProMed and RRG, is one of the ESOP participants and is the sole shareholder of CIC. L.F. 2,5. He has filed a proposed amicus curiae brief separately. These twenty-six ESOP Participants respectfully submit this amicus brief in order to assure that the Court has the benefit of these employees’ perspective on the liquidation of the company they loyally served for many years. Many of these individuals are retirement age and have used their ESOP accounts

¹Appellants’ Supplemental (Corrected) Legal File will be cited as “L.F.” The Rule 84.16(b) Memorandum issued by the Court of Appeals on October 31, 2000 in the previous appeal (WD 57950) is an appendix to Appellants’ Substitute Brief and will be cited as “A” followed by the specific page reference, *e.g.*, “A.3.” The three hearing transcripts will be cited by date and page, *e.g.*, 12/20/2000 Tr. 31.

as retirement funds. Appellants' request that this Court order the repayment of interim distributions made from the ProMed estate (Subst. Brief at 33) would cause significant hardship on these former employees.

STATEMENT OF FACTS

These ESOP Participants incorporate by reference the Statement of Facts submitted by Respondent and those found in Jourdon and CIC's proposed amicus curiae brief.

The following facts are particularly noteworthy as they relate to the arguments made herein. Appellants allege that Jourdon and CIC acted improperly in managing RRG and establishing ProMed. *See* L.F. 31-33. These allegations, even if true, are too little and too late. The challenged transactions were approved by the Department of Insurance over a decade ago and individuals have relied on the transactions since that time. *See* A.3.

Further, the three Appellants' Motion to Intervene was not filed until over a year after the Receiver sent determination letters to the claimants, and ProMed claims were resolved through mediation. ProMed claimants settled and compromised their objections to the Receiver's determination letter, ultimately agreeing that objections to the February 1999 determination letter would be withdrawn.² Thereafter, the Court approved significant interim distributions to the ESOP and other ProMed claimants. A.5, A.18.

² An aspect of this mediation and settlement was recently discussed and upheld by the Court of

Appeals in case number WD 60537, decided on June 28, 2002. The slip opinion is still subject to revision at the time of this filing.

POINTS RELIED ON

I. The Trial Court Correctly Denied Intervention Because Appellants Do Not Have a Supreme Court Rule 52.18 “Interest” In The Matter In That Policyholders Have No Standing To Assert Mismanagement Claims In A Liquidation Proceeding.

Supreme Court Rule 52.12(a)

State ex rel. Missouri State Life Ins. Co. v. Hall, 52 S.W.2d 174, 330 Mo. 1107 (1932)

State ex rel. St. Louis Mut. Life Ins. Co. v. Mulloy, 52 S.W.2d 469, 330 Mo. 951 (Mo. 1932)

Mo. Rev. Stat. §374.010

R.S. 1929 (Mo St. Ann §5670)

Insurer’s Supervision, Rehabilitation and Liquidation Act (§375.1150-1246)

State ex rel. Melahn v. Romines, 815 S.W.2d 92-94 (Mo.App. 1991)

Mo. Rev. Stat. §375.1182.1(13)

Mo. Rev. Stat. §375.1176.3

Beach v. Beach, 207 S.W.2d 481, 486 (Mo.App. 1948)

Merrill v. Davis, 225 S.W.2d 763, 768 (Mo. 1950)

Mo. Rev. Stat. §375.1218.

In Re Jeter, 178 B.R. 787, *aff’d* 73 F.3d 205 (W.D.Mo. 1995).

Magidson v. Duggan, 212 F.2d 748, 759 (8th Cir. 1954)

II. The Trial Court Correctly Rejected Appellants’ Allegations Of Conflict Of Interest By The Receiver And Request For Appointment Of A Trustee Because Mo. Rev. Stat. §375.710 Gives The Court Broad Discretion In Protecting The Rights Of All Claimants, Including The ESOP Participants.

Mo. Rev. Stat. §375.710

Pensinger v. Pacific States Life Ins. Co., 25 F.Supp. 295, 297 (E.D. Mo. 1938)

Mo. Rev. Stat. §375.1222

Mo. Rev. Stat. §375.1176.3

Holloway v. Federal Reserve Life Ins. Co., 21 F.Supp. 516, 518 (W.D. Mo. 1937)

ARGUMENT

I. The Trial Court Correctly Denied Intervention Because Appellants Do Not Have a Supreme Court Rule 52.18 “Interest” In The Matter In That Policyholders Have No Standing To Assert Mismanagement Claims In A Liquidation Proceeding. (Response to Appellants’ Point I)

The gravamen of the three Doctors’ proposed Petition is that Glenn Jourdon allegedly failed to account for and disclose certain matters to the RRG Board in connection with transactions relating to Pro Med. This, they claim, is a breach of fiduciary duty. The proposed Petition names the ESOP as a defendant only as to the remedy sought and names RRG, Pro Med, CIC and Jourdon as defendants also. The Doctors seek monetary damages and the equitable remedy of “constructive trust.”

The Doctors’ Motion and proposed Petition fail to satisfy the requisites of the intervention rule, Supreme Court Rule 52.12(a). This Rule provides that three requirements must be met before mandatory

intervention is appropriate:

- 1) The applicant must have an interest in the subject matter.
- 2) The disposition of the action must impede the ability of the applicant to protect that interest.
- 3) There must be a lack of adequate representation.

The Doctors cannot meet even the first of these elements, and, accordingly, their intervention was properly denied.

As to the first, “interest” element, the viability of the Doctors’ claims is so tenuous that they cannot seriously contend they have an “interest” in the ProMed liquidation. Indeed, longstanding precedents in Missouri stand for the dual and death-knell propositions that policyholders have no standing to challenge the reorganization of a mutual company which has been approved by the Department of Insurance, as in this case, and only the Department of Insurance is empowered to recover damages for corporate mismanagement and/or fraudulent conduct by officers as alleged by the Doctors here. *See State ex rel. Missouri State Life Ins. Co. v. Hall*, 52 S.W.2d 174, 330 Mo. 1107 (1932) [private suit against insurance company for mismanagement may not be brought since the Insurance Code provides exclusive remedies] and *State ex rel. St. Louis Mut. Life Ins. Co. v. Mulloy*, 52 S.W.2d 469, 330 Mo. 951 (Mo. 1932) [plan of reorganization from a mutual to stock company may not be challenged by suits of policyholders, shareholders or private individuals].

These historic decisions analyze the Insurance Code in effect in this state in the 1930s. In significant regards, the key provisions now governing the supervision of insurance companies reflect the same tenor. *Compare*, Mo. Rev. Stat. §374.010 with R.S. 1929 (Mo St. Ann §5670) cited

in *Hall*, “the insurance department shall be charged with the execution of all laws now in force, or which may be hereafter enacted, in relation to insurance and insurance companies doing business in this state” The Insurance Code has evolved since the 1930s and now includes the Insurer’s Supervision, Rehabilitation and Liquidation Act (§375.1150-1246) which provides a comprehensive statutory scheme governing liquidations, that is both “self-contained” and “exclusive.” *State ex rel. Melahn v. Romines*, 815 S.W.2d 92,94 (Mo.App. 1991). This Act was passed after the *Ainsworth* decisions so heavily relied upon by Appellants.³

Under the statutory scheme, the Receiver is specifically empowered to bring any actions against third parties which may exist on behalf of the policyholders or shareholders of any insolvent company. Mo. Rev. Stat. §375.1182.1(13). The decision to pursue these claims is no longer the policyholders (or stockholders); their claims become fixed at the time of the order of liquidation. Mo. Rev. Stat. §375.1176.3. The statute specifically states that the “rights of shareholders provided by any other law . . . shall be suspended upon issuance of the order of liquidation.” *Id.*

With respect to the “constructive trust” aspect of the three Doctors’ claim, it is axiomatic that a constructive trust is equitable in nature, *Beach v. Beach*, 207 S.W.2d 481, 486 (Mo.App. 1948) and for this reason alone, outside the Insurance Code. *Merrill v. Davis*, 225 S.W.2d 763, 768 (Mo. 1950);

³ These ESOP Participants support the arguments made by Respondent and Jourdon (as amicus) relating to the *Ainsworth* decisions relied upon by Appellants.

Mo. Rev. Stat. §375.1218. Even if it were within the Code, the Doctors cannot state a claim of constructive trust because they have not established that they do not have an adequate remedy in law. *In Re Jeter*, 178 B.R. 787, *aff'd* 73 F.3d 205 (W.D.Mo. 1995). More importantly, a constructive trust is imposed only where it will achieve justice, not do injustice. *Magidson v. Duggan*, 212 F.2d 748, 759 (8th Cir. 1954). Justice is not served if the ESOP Participants, as loyal employees who now are relying on their ESOP benefits, are deprived in any way of their vested interests because of Jourdon's alleged transgressions in a financial transaction in which the employees did not even participate.

II. The Trial Court Correctly Rejected Appellants' Allegations Of Conflict Of Interest By The Receiver And Request For Appointment Of A Trustee Because Mo. Rev. Stat. §375.710 Gives The Court Broad Discretion In Protecting The Rights Of All Claimants, Including The ESOP Participants. (Response to Appellant Point II)

The text of the conflict rule, Mo. Rev. Stat. §375.710, provides in pertinent part:

In case of any conflict of interests on any matter, or concerning the enforcement or settlement of any conflicting claims between two or more insurers, . . . such court, thereupon, shall have power to appoint a trustee, to have charge and control of the interest of any of the insurers as regards the settlement or enforcement of its claims in respect to the matter in controversy, or to make such other orders providing for the settlement, adjustment or enforcement of the rights of the insurer in the matter as to the court shall seem best adapted to the protection of the rights of all.

It this regard, it is important to note that the object to be attained by a liquidation proceeding is the prompt, fair and equitable closing of an estate for the benefit of all creditors. *Pensing v. Pacific States Life Ins. Co.*, 25 F.Supp. 295, 297 (E.D. Mo. 1938), *see also* Mo. Rev. Stat. §375.1222.

As noted above, the governing statutes provide that the rights and liabilities of any insurer and its creditors become fixed upon issuance of the Order of Liquidation. Mo. Rev. Stat. §375.1176.3. Thereafter, in order to protect their rights, creditors may file proofs of claim. Creditors may also file Objections to the Receiver's determinations. Objections are then to be heard by the Court if they cannot be resolved: "The Court alone is capable of determining what priorities, preferences and liens may be allowed and enforced against the assets of the company." *Holloway v. Federal Reserve Life Ins. Co.*, 21 F.Supp. 516, 518 (W.D. Mo. 1937).

Here, the Doctors have completely failed to comply with these exclusive statutory requirements and seek to raise issues not appropriately raised in the context of a liquidation proceeding long after claims have been reviewed and distributions made. Notwithstanding notice of the liquidation and notice of the RRG determination letter (and having filed proofs of claim with respect thereto), none of the Doctors timely filed Objections which could be promptly and properly resolved. Thus, the Doctors should not now be heard to say that the Receiver's determinations--which have been the subject of intense settlement negotiations and relied upon by the ESOP Participants and ESOP Trustee--must be thwarted.

WHEREFORE, for all of the reasons discussed above, the ESOP Participants respectfully request that the proposed intervention be disallowed.

Respectfully submitted,

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RULE 84.06(c) CERTIFICATE OF COMPLIANCE

I certify that:

1. The brief includes the information required by Supreme Court Rule 55.03;
2. The brief complies with the limitations contained in Supreme Court Rule 84.06(b);
3. According to the word count function of counsel's word processing software (Word Perfect Version 8), the brief contains 1,839 words; and
4. The floppy disk submitted herewith containing a copy of this brief has been scanned for viruses and is virus-free.

Angela K. Green

CERTIFICATE OF SERVICE

On this 3rd day of July, 2002, I hereby certify that two copies of the above and foregoing together with a copy of this brief on disk were served by mail, postage prepaid, to:

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