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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

MICHAEL FARRIMOND,
Plaintiff/Appellee

vs.

STATE OF OKLAHOMA, ex rel. CARROLL FISHER, Insurance Commissioner,
Defendant/Appellant

vs.

CARROLL FISHER, Receiver of Mid-Continent Life Insurance Company,
Intervenor/Appellant

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

Appeal from the District Court of Oklahoma County
Case No. CJ-99-5125-62
Noma D. Gurich, District Judge

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INTRODUCTION

The National Association of Insurance Commissioners ("NAIC") submits this brief as *amicus curiae* in support of Appellant, Carroll Fisher, Insurance Commissioner of the State of Oklahoma, and Intervenor/Appellant, Carroll Fisher, Receiver of Mid-Continent Life Insurance Company. This brief is submitted pursuant to this Court's Order granting leave to the NAIC to appear as *amicus curiae* in this cause.

The NAIC urges this Court to reverse the Order of the District Court of Oklahoma County, entered August 31, 1999 by District Judge Noma D. Gurich in Case No. CJ-99-5125-62. The District Court found that records of Mid-Continent Life Insurance Company ("Mid-Continent"), an Oklahoma-domiciled insurance company in receivership, are "records" as that term is used in the Oklahoma Open Records Act, 51 Okl. St. §§ 24A.1 *et seq.* Appellant was ordered to allow Appellee Michael Farrimond access to the records of Mid-Continent that were assembled in a document room for the purpose of prospective buyers conducting due diligence.

INTEREST OF THE *AMICUS CURIAE*

The NAIC is a non-profit legal association whose members are the chief insurance regulatory officials in each of the fifty states, the District of Columbia, and the territories and insular possessions of the United States. Founded in 1871, the NAIC is the oldest association of state government officials. The mission of the NAIC, as stated in its Constitution, is to assist state insurance regulators, individually and collectively, in serving the public interest and achieving the following fundamental insurance regulatory goals in a responsive, efficient and cost effective manner: (1) protect the public interest, promote competitive markets and facilitate the fair and equitable treatment of insurance consumers; (2) promote the reliability,

solvency and financial solidity of insurance institutions; and (3) support and improve the state regulation of insurance.

The interests of the members of the NAIC in the instant case are two. First, each member of the NAIC, by statute enacted in their respective jurisdictions, is given the exclusive authority to petition the court to place an insurer in receivership and to serve as receiver of that entity. Therefore, the issue in this case, whether the records of an insurance company in receivership are subject to the Oklahoma Open Records Act by virtue of the fact that the Insurance Commissioner acts as receiver, is one that may confront any of the members of the NAIC. In fact, as will be demonstrated in the NAIC's brief, the issue has arisen and has been litigated in other jurisdictions. Second, the impact of the receivership of an insurance company typically extends beyond the borders of the state of the insurer's domicile. In this case the insurer in question, Mid-Continent, while domiciled in Oklahoma, was licensed to transact business in thirty-seven states.[1] The insurance commissioner in each of those thirty-seven states is charged with the oversight of companies doing business within his or her state and with the protection of insurance consumers residing in that state. Therefore, the members of the NAIC have a direct interest in the outcome of the receivership proceeding pending against Mid-Continent Life.

The members of the NAIC are particularly well situated to address the insurance regulatory and public policy implications of such questions as whether the insurance commissioner acting as a court-appointed receiver is a state official under open records laws, whether the proprietary documents of an insurance company should be made available to any person that requests access to them under open records laws, the potential effects of granting

[1] 1996 Annual Statement, Schedule T.

public access to such records on the prospects for a successful rehabilitation or sale of the impaired or insolvent insurance company, and whether the privacy rights of policyholders in their financial information would be compromised by allowing the public access to all of the records of an insurance company. All of these questions are matters that should be considered by the Court in deciding this case.

ARGUMENT

INTRODUCTION

The central issue in this case is whether certain documents of Mid-Continent Life Insurance Company ("Mid-Continent"), an Oklahoma-domiciled insurance company in receivership, are "records" so as to be subject to the requirements of the Oklahoma Open Records Act, 51 Okl. St. §§ 24A.1, *et seq.*

On November 26, 1997, in response to a petition filed by then Insurance Commissioner John P. Crawford, Mid-Continent was placed in receivership by order of the District Court of Oklahoma County. The order appointed Crawford as Receiver of Mid-Continent, vested title to all property of the company in the Receiver, and enjoined and restrained any persons from, *inter alia,* bringing any legal action against the company or the Receiver. On July 31, 1998 the District Court entered a Protective Order as to certain records and data of Mid-Continent. The Protective Order was amended on January 21, 1999. The amended Order allowed qualified prospective buyers and reinsurers access to certain Mid-Continent documents to conduct due diligence for the purpose of the development of proposals for the rehabilitation of Mid-Continent.

On July 16, 1999 Plaintiff/Appellee Farrimond filed a petition in the District Court of Oklahoma County seeking a determination that the Mid-Continent documents placed in a "Document Room" pursuant to the revised Protective Order were "records" subject to the

Open Records Act.[2] Farrimond also sought an injunction compelling Carroll Fisher, the current Insurance Commissioner, to allow him access to the documents in question. The District Court (1) determined that the documents in question were "records" subject to the Open Records Act and (2) ordered Defendant/Appellant Fisher, the Insurance Commissioner, to allow Farrimond access to the documents. The District Court erred in several respects, as will be ably demonstrated by the briefs of Defendant/Appellant and Intervenor/Appellant. However, this brief will address the central issue of whether the records of an insurance company in receivership are "records" subject to the requirements of the Oklahoma Open Records Act.

I.
THE DISTRICT COURT ERRED IN FINDING THAT THE DOCUMENTS OF AN INSURANCE COMPANY IN RECEIVERSHIP ARE RECORDS SUBJECT TO THE REQUIREMENTS OF THE OKLAHOMA OPEN RECORDS ACT.

An analysis of whether the documents in question in this case are records subject to the requirements of the Oklahoma Open Records Act must start with a review of the provisions of the act itself. The purpose of the act is stated in 51 Okl. St. § 24A.2:

> " . . . The purpose of this act is to ensure and facilitate the public's right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power . . ."

51 Okl. St. § 24A.3 contains the definitions of key terms used in the act:

> "1. 'Record' means all documents . . . created by, received by, under the authority of, or coming into the custody of public officials, public bodies, or their representatives in connection with the transaction of public business, the expenditure of public funds or the administering of public property . . ."
>
> "2. 'Public body' shall include, but not be limited to, any office, department, board, bureau, commission, agency, . . . supported in whole or in part by

[2]Case No. CJ-99-5125-61. The petition was filed in a new and separate proceeding, not in the Mid-Continent receivership case.

public funds or entrusted with the expenditure of public funds or administering or operating public property . . ."

"4. 'Public official' means any official or employee of any public body as defined herein . . ."

A.

THE INSURANCE COMMISSIONER ACTING AS A COURT-APPOINTED RECEIVER IS NOT A PUBLIC OFFICIAL OR PUBLIC BODY UNDER THE OKLAHOMA OPEN RECORDS ACT.

The first question that must be answered is whether the Insurance Commissioner, acting as the court-appointed receiver of a troubled insurance company, is a public official for purposes of the Open Records Act.

The Oklahoma Uniform Insurers Liquidation Act ("OUILA"), 36 Okl. St. §§ 1901, *et seq.*, provides for the Insurance Commissioner to be appointed as the receiver of a domestic insurer in a rehabilitation or liquidation proceeding.[3] However, while the OUILA designates the Insurance Commissioner as the person to be appointed as the receiver of a delinquent insurer, the Commissioner does not automatically accede to the position. The statutes alone do not confer the title of receiver upon the Commissioner. The Commissioner does not assume the position of receiver, with all of its concomitant rights and responsibilities, until the supervising court issues its order of appointment. Thus, the roles of Insurance Commissioner and receiver are separate and distinct.

The courts of other jurisdictions have recognized this distinction between the insurance commissioner acting in his regulatory capacity and the commissioner acting as statutory receiver. *In re Liquidation of Ideal Mutual Ins. Co.,* 140 A.D.2d 62, 67; 532 N.Y.S.2d 371 (N.Y.App.Div. 1988) (Superintendent of Insurance, as liquidator of an

[3]36 Okl. St. §§ 1905, 1906 and 1914(A).

insurance company, occupies a legal personality separate and distinct from the Superintendent of Insurance as the public official charged with the general regulation of the insurance industry); *State of North Carolina ex rel. Long v. Alexander & Alexander Services, Inc.,* 711 F. Supp. 257, 262 (E.D.N.C. 1989) (Commissioner of Insurance as rehabilitator loses his identity as the State, and with it his immunity as an officer of the State, by assuming the identity of the insurer in actions brought for and against the insurer); *Foster v. Monsour Medical Foundation et al.,* 667 A.2d 18 (Pa. Commw. 1995) (Actions of the Insurance Commissioner prior to entry of an order of liquidation cannot be raised as defenses against a Statutory Liquidator to preclude or defeat the rights of the insurance company, its creditors, policyholders or shareholders, affirming Insurance Commissioner's argument that she operated in a dual capacity as a regulator and as the Statutory Liquidator).

It follows then, that with respect to open records or freedom of information laws, the distinction between the Insurance Commissioner acting in his or her capacity as the regulatory authority over the insurance industry and the Commissioner acting as a court-appointed rehabilitator or liquidator, should be recognized. Indeed, in the two cases in which this issue has arisen in other jurisdictions, the courts have recognized the legal distinction between the two positions.

In *Consolidated Edison Company of New York, Inc. v. Insurance Department of the State of New York,* 140 Misc. 2d 969, 532 N.Y.S. 2d 186 (N.Y.Sup.Ct. 1988), the Supreme Court of New York County found that the Liquidation Bureau of the State Insurance Department was not an agency of the state for purposes of New York's Freedom of Information Law. In that case the plaintiff sought an order compelling the Liquidation Bureau to allow it to examine certain documents in its possession relating to an insurance

company in liquidation. The court noted that the Liquidation Bureau operated as a separate entity, paying Federal and State taxes on each insurance company under its administration, continuing to employ officers and employees of the insolvent insurer and paying them from the assets of the company, holding the assets of insolvent insurance companies in fiduciary accounts separate and apart from state funds, and that the Bureau was not included in the general budget of the Insurance Department. The court also noted that the fact that the court could require the Superintendent as liquidator to post a bond indicated that he was to be treated as the receiver of the assets of a private corporation rather than a public official.[4]

In a more recent case, the Kentucky Court of Appeals reached the same conclusion. *Kentucky Central Life Ins. Co. v. Park Broadcasting of Kentucky, Inc.,* 913 S.W.2d 330 (Ky.App. 1996). In that case a television reporter made a request pursuant to Kentucky's Open Records Act for information concerning persons who had submitted bids for certain of the assets of Kentucky Central Life Insurance Company and its subsidiaries. Kentucky Central had been placed in rehabilitation and the Kentucky Insurance Commissioner was appointed as its rehabilitator. In reversing the decision of the Kentucky Attorney General that the rehabilitator was a public official and that the documents in question were public records, the Court of Appeals noted many of the same factors identified by the New York court. The Court of Appeals observed that the rehabilitator was performing a traditionally non-governmental function in serving as the receiver of a private company and that the primary purpose of the rehabilitation proceeding was the protection of policyholders and creditors. The court also noted that all of the costs of the proceeding were paid from Kentucky Central's assets, not from the insurance department's budget. Kentucky Central's

[4]*Consolidated Edison, supra,* at 532 N.Y.S. 2d 190.

assets were not deposited in the state treasury, but were retained separately. Kentucky Central's employees were paid by the company and not the state. The rehabilitator and Kentucky Central were required to retain private legal counsel rather than being represented by the attorney general. The court concluded that the rehabilitator was not a public agency under Kentucky's Open Records Act.[5]

These two cases are factually on all fours with the case at bar. Furthermore, the legal reasoning of the New York and Kentucky courts is sound. When the Insurance Commissioner is appointed by the supervising court to serve as the receiver of an impaired or insolvent insurance company, he serves in a private, non-governmental capacity. The position of court-appointed receiver, rehabilitator or liquidator is separate and distinct from his role as the regulator of the insurance industry. The receiver is not supported by or entrusted with public funds, but with the assets of a private company. He is not charged with the administration of public property, but with private property. Therefore, the receiver is not a "public official" or "public body" as those terms are used in the Oklahoma Open Records Act.[6]

B.

THE PRIVATE AND PROPRIETARY DOCUMENTS OF AN INSURANCE COMPANY IN RECEIVERSHIP ARE NOT RECORDS SUBJECT TO THE OKLAHOMA OPEN RECORDS ACT.

The second question that must be answered is whether the documents of an insurance company in receivership are "records" subject to the requirements of the Open Records Act. The definition of "record" in the Act contains two elements.[7] First, the documents must be

[5] *Kentucky Central Life, supra,* at 335.
[6] 51 Okl. St. § 24A.3 (2) and (4).
[7] 51 Okl. St. § 24A.3 (1).

"created by, received by, under the authority of or coming into the custody, control or possession of public officials, public bodies or their representatives." The second element requires that the documents be received "in connection with the transaction of public business, the expenditure of public funds or the administering of public property." Neither element is present in this case.

As demonstrated by the preceding section of this Brief, the receiver of an insurance company is not a public official or public body as those terms are used in the Open Records Act. Thus, the documents in question in this case are not in the custody or control of a public official or body. Furthermore, the documents in question did not come into the custody or control of the receiver in connection with any public business or purpose. The receiver obtained possession of the Mid-Continent documents by virtue of his having been appointed to administer Mid-Continent's rehabilitation. Mid-Continent is a private company, engaged in the business of insurance. Its business is not public. Its property belongs to its shareholders, not the public. The receiver's authority is limited to the assets and business of the insurance company. 36 Okl. St. §§ 1910, 1914. His duty is to the supervising court, and to the policyholders, creditors and shareholders of Mid-Continent. The documents in question are not records that are filed with the Insurance Commissioner in the normal course of business, but instead contain private and proprietary information. Therefore, it must be concluded that the Mid-Continent documents which are the subject of this action are not public records subject to the Open Records Act. The New York and Kentucky courts reached the same conclusion in the two cases cited previously.[8]

[8] *Consolidated Edison, supra* and *Kentucky Central Life, supra.*

C.
THE PRIVACY RIGHTS OF POLICYHOLDERS AND THE PROPRIETARY INTEREST OF THE INSURER WOULD BE COMPROMISED BY ALLOWING PUBLIC ACCESS TO THE RECORDS OF AN INSURANCE COMPANY IN RECEIVERSHIP.

If the District court's Judgment is affirmed in this case and Plaintiff/Appellee is afforded access to the Mid-Continent documents in question, the privacy rights of Mid-Continent's policyholders will be compromised. We know from the record that the documents placed in the Mid-Continent Document Room contain confidential and proprietary information. A Protective Order was entered in the receivership proceeding restricting access to these documents. The Protective Order was amended to allow the documents to be made available to prospective buyers and reinsurers conducting due diligence for the purpose of submitting proposals for the rehabilitation of the company. According to the record below, the documents in the Data Room include detailed information about in force policies, such as policy number, plan code, issue year, issue age, face amount, annualized premium, sex, smoking status, and reserves. The documents also include policy specifications such as premium per thousand, policy fees, cash values and dividend scales.

This kind of information is both private, with respect to Mid-Continent policyholders, and proprietary, with respect to Mid-Continent. No public interest can be claimed in the documents. The documents in question have nothing to do with the transaction of any public business, the expenditure of public funds or the administration of public property. However, if the ruling of the District Court that these documents are public records is affirmed, then any person may obtain access to them by making a demand pursuant to the Open Records Act. Private policyholder information will be available to anyone for the asking. Proprietary

information will be there for the taking by competitors, further endangering an already troubled insurance company. Surely the Oklahoma Legislature did not intend such a result.

CONCLUSION

When the Insurance Commissioner is appointed by the supervising court to serve as the receiver of an impaired or insolvent insurance company, he serves in a private, non-governmental capacity. The position of court-appointed receiver, rehabilitator or liquidator is separate and distinct from the Commissioner's role as regulator of the insurance industry. The receiver is not supported by or entrusted with public funds. He is not charged with the administration of public property, but with the assets and liabilities of a private concern. The receiver is not a "public official" or "public body" as defined by the Oklahoma Open Records Act. The documents in question in this case are not records that are filed with the Insurance Commissioner in the normal course of business, but instead are the private and proprietary documents of the insurance company that came in to the possession of the court-appointed receiver. No public interest can be claimed in them. The Judgment of the District Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing Brief of *Amicus Curiae* was mailed this 27th day of January, 2000 to the following attorneys of record by depositing same in the United States mail, postage prepaid:

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