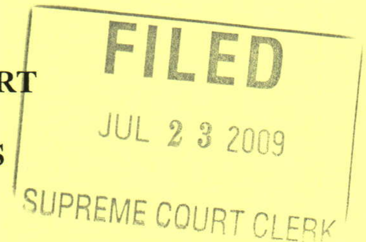
COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2008-SC-000381-TG



ON APPEAL FROM FRANKLIN CIRCUIT COURT
CASE NO. 04-CI-1067
TRANSFERRED FROM COURT OF APPEALS
CASE NO. 2008CA000945

**GALLATIN HEALTHCARE, LLC,
LOUDEN & COMPANY, LLC,
APPALACHIAN REGIONAL HEALTHCARE, INC.,
AND MODCO TRANSPORT** **APPELLANTS**

v.

JULIE MCPEAK, JOHN BURKHOLDER, SUCCESSOR IN CAPACITY AS EXECUTIVE DIRECTOR KENTUCKY OFFICE OF INSURANCE; AIK COMP F/K/A ASSOCIATED INDUSTRIES OF KENTUCKY SELECTIVE SELF-INSURED FUND, ET AL. **APPELLEES**

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CERTIFICATE OF SERVICE REQUIRED BY CR 76.12(6)

I hereby certify that on this 23t day of July, 2009, true and accurate copies of this Substituted Brief have been served by first class mail upon Sally Jump, Clerk, Franklin Circuit Court, Courthouse, 214 St. Clair Street, P.O. Box 678, Frankfort, Kentucky 40602; the Honorable Thomas D. Wingate, Franklin Circuit Court Judge, Courthouse,

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ARGUMENT

Appellants submit that the Order Approving Proposed Settlement entered April 17, 2008, by the Franklin Circuit Court should be reversed.

I. THE PROPER STANDARD OF REVIEW IS A "FAIR AND REASONABLE" STANDARD.

Appellee cites *Minor v. Stephens*, 898 S.W.2d 71, 75 (Ky. 1995), for the proposition that both the Trial Court's and this Court's review of its actions should be conducted under an abuse of discretion standard. As will be demonstrated below, the cases relied upon by Appellee are not instructive. In arguing for the application of an "abuse of discretion" standard, Appellee avails herself to *dicta* in *Minor* stating that "[t]he trial court's primary role is a supervisory one and the standard of the court's review of the Commissioner's actions is one of abuse of discretion." 898 S.W.2d at 83. However, Appellee is seeking the approval of a settlement agreement which seeks to settle claims which she does not even own.

The situation currently before the Court is analogous to the fact pattern in *In re Liquidation of Am. Mut. Liab. Ins. Co.*, 632 N.E.2d 1209 (Mass. 1994). In that case, the commissioner of insurance, acting as a permanent receiver of an insolvent insurer, reached a settlement with the insurer's former certified public accountant and auditor. The Supreme Judicial Court of Massachusetts recognized that state insurance guaranty funds had a general interest in the settlement that entitled them to notice and an opportunity to be heard, but lacked sufficient interests to be made parties. *Id.* at 1215. Nonetheless, the Massachusetts Supreme Court noted that:

> [a]s to the governing standard, we agree with the receiver that her regulatory function as commissioner requires some acknowledgement of her expertise and discretion. [. . .] On the other hand, as receiver, the commissioner is not acting strictly in a regulatory capacity in the capacity of representative of American Mutual's estate which invokes the interests

> of its policyholders and creditors. [. . .] The commissioner's role as a receiver is not one that calls on either her expertise or her discretion in the same way as does her role as commissioner.

Id. As such, the Court held that the "[. . .] abuse of discretion standard advocated by the receiver is insufficient [. . .]" and that the receiver should demonstrate that the proposed settlement was fair and reasonable. *Id.* at 1216. The Court noted the importance of the different functions of the Commissioner as commissioner as opposed to receiver. *Id.* at 1216-1217 ("should keep her role as receiver independent of her role as commissioner.")

Although distinguished from the fact pattern in *Minor*, the *In re Liquidation of Am. Mut. Liab. Ins. Co.* case is far more applicable here. See *Minor*, 898 S.W.2d at 83. In *Minor*, the issue before this Court was not the reasonableness of a settlement agreement with third party tortfeasors. Instead, a petition to terminate rehabilitation and convert it into liquidation was under consideration. In ruling that the Commissioner had not abused her discretion in transforming the Kentucky Central rehabilitation into liquidation, this Court in effect held "[. . .] that something more than blind hope is needed to continue a rehabilitation and avoid a liquidation." *Koken v. Legion Ins. Co.*, 831 A.2d 1196, 1230 (Pa. Commw. Ct. 2003) citing *Minor*, 898 S.W.2d 71.

Additionally, this Court should recognize that the principal decision cited in *Minor* for the statement that the "burden of proof is upon those contesting the Commissioner's decision," *Foster v. Mutual Fire Marine and Inland Ins. Co.*, 614 A.2d 1086 (Pa. 1992), has subsequently been clarified by Pennsylvania courts. As noted by the Court in *Koken*:

> *Mutual Fire* established a three-part test for determining whether this Court has properly approved, disapproved or modified a plan of rehabilitation proposed by the Rehabilitator. It does not stand for a broad proposition that every action taken or opposed by a rehabilitator in the course of an Article V [Pennsylvania's insurance solvency statute] rehabilitation proceeding should be given a high degree of deference.

831 A.2d at 1231. Noting that each administration scheme strikes a balance in allocation of authority between total judicial dominance and complete administrative control, the *Koken* court held:

> Deference is not appropriate where, as here, the Court must apply specific statutory standards to the evidence presented by the Rehabilitator, MRM [Mutual Risk Management, Ltd.] and by the Policyholder Intervenors that oppose liquidation. To apply deference to the job of factfinding would undermine this Court's responsibility to act upon the Rehabilitator's petition in a fair and neutral manner. Further, to apply the deference standard as proposed by the Rehabilitator would shift the burden of proof, improperly, to those opposing a petition to liquidate.

Id. at 1232 citing *LaVecchia v. HIP of N.J., Inc.*, 734 A.2d 361, 364 (N.J. Super. Ct. Ch. Div. 1999) (holding that trial court must determine if entry of an order of liquidation is appropriate and rejecting Insurance Commissioner's contention that an order of liquidation should be entered absent a showing of abuse of discretion by the Commissioner in her determination to seek liquidation).[1]

In light of the unique circumstances presented by the AIK Comp rehabilitation – where Appellants and other Group Members are funding the rehabilitation with their own monies and the settlement impacts claims that are not owned or controlled by Appellee – this Court should employ a fair and reasonable standard in reviewing the proposed settlement agreement and place the onus on Appellee to justify its actions and conclusions.

II. APPELLEE DOES NOT HAVE EXCLUSIVE CONTROL OVER ALL CLAIMS.

Appellee's citation to decisions from other jurisdictions does not establish that she has exclusive ownership of the claims belonging to other parties which was granted to

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[1] See also, *Florida Dep't. of Ins. v. Cypress Ins. Co.*, 660 So.2d 1177, 1182-1183 (Fla. Dist. Ct. App. 1995) (explaining that the Department must apply to the court for an order of liquidation and the court is not required to give deference to the Department's findings regarding the necessity of liquidation); *Angoff v. Casualty Indem. Exch.*, 963 S.W.2d 258, 263 (Mo. Ct. App. 1997).

Appellee by the Trial Court. Appellee has cited these cases to support her conclusion that she alone has the authority to pursue every claim against any party liable to AIK Comp.

The first case is *Corcoran v. Frank B. Hall & Co., Inc.*, 149 A.D.2d 165 (N.Y. App. 1989). *Corcoran* involves a liquidation and not the near successful rehabilitation of a struggling entity as here. The *Corcoran* court followed New York precedent and held that a receiver acting in a liquidation had exclusive jurisdiction to pursue claims both for and against an insurance company. Such a holding is consistent with the Kentucky statutory framework whereby a receiver acting as a liquidator under KRS §§ 304.33-240(13) and (14), (as opposed to a receiver acting as a rehabilitator), has substantially greater powers under his statutory grant of authority. In contrast, the breadth of the power granted to a rehabilitator under KRS § 304.33-160 is simply not as broad as the power granted to a liquidator under either Kentucky or New York law. Accordingly, the holding in *Corcoran* does not support the position advanced by Appellee.

The second case cited by Appellee is *Foster v. Pete Marwick Maine & Co.*, 587 A.2d 382 (Pa. Commw. Ct. 1991). In that case, the Insurance Commissioner of Pennsylvania (as the rehabilitator of a formerly insolvent insurance company) brought suit against Pete Marwick Maine & Co. for failing to exercise the required degree of skill and professional care in conducting audits and performing accounting services for an insolvent carrier. The accountant filed a motion to dismiss, asserting that the rehabilitator was asserting claims on behalf of policyholders, creditors and others, and not on behalf of the insurer. In ruling that the complaint stated a cause of action, the court found that the receiver had standing to assert the claims on behalf of the insurer as well as on behalf of the policyholders. The court *did not decide, however, that the receiver had sole and exclusive jurisdiction to pursue these claims.*

A close reading of the case reveals a more significant difference between the Kentucky and Pennsylvania statutes, rendering *Foster* even less applicable to this case. KRS § 304.33-160(4) includes introductory words that define the class of persons against whom a rehabilitator may pursue legal action. The statute also describes the entity on whose behalf a rehabilitator may act and provides that a rehabilitator may take action in "pursuit of insurer's claims against insiders." *Id.* Accordingly, KRS 304.33-160(4) only provides Appellee with the requisite authority to pursue claims against the insurer's former "insiders." *This particular language was not included in the Pennsylvania statute.* Under Kentucky law, the plain meaning of a statute cannot be ignored by the courts simply because another interpretation might be considered a "better" or "wiser" policy. See *Owens-Illinois Label, Inc. v. Commonwealth*, Ky. App., 27 S.W.3d 798 (2000). The Kentucky statute clearly contains language that defines on whose behalf Appellee may act and also against whom she may act. This clear and unambiguous statute cannot be ignored. The Court must interpret the statute by the words actually used by the legislature and not surmise what the General Assembly may have intended but was not stated. *Flying J Travel Plaza v. Commonwealth*, Ky. App., 928 S.W.2d 344 (1996).

The third case cited by Appellee is *Insurance Commissioner v. Arcilio*, 561 N.W.2d 412 (Mich. Ct. App. 1997). In August 1994, the Insurance Commissioner of Michigan sought an order of rehabilitation and an *ex parte* order for seizure of certain assets. The petition was granted and, about a month later, the court amended the order to grant exclusive control over all of the carrier's assets in the United States, including all causes of action. The facts of *Arcilio* show that the claims at issue were against the former officers and directors of the troubled insurer and that there was $50,000,000 of coverage available through D&O policies. Certain claimants had filed suit against the

policies, and the Michigan rehabilitator sought to enjoin the pursuit of those claims on the grounds that the cause of action against the carrier's former officers and directors was an asset of the rehabilitation estate. This $50,000,000 insurance policy was viewed as a potential source, and possibly the sole source, of funding for all policyholders to obtain any recovery or relief. Accordingly, the rehabilitator argued that the claimants' suit was potentially disruptive to the management of the estate. Indeed, if one group of claimants were to obtain the proceeds then other potential claimants would receive nothing.

There are several procedural and factual distinctions to draw between *Arcilio* and the case before this Court. In *Arcilio*, the claims for insurance proceeds were an integral part of the rehabilitation proceeding. In the current case, Group Members collectively have paid tens of millions of dollars to keep AIK Comp in a posture to pay its claims and administer the estate. Secondly, the receiver in *Arcilio* had promptly filed a complaint against the former directors and officers of the carrier, a trust fund established to protect the policyholders, as well as the auditor for the carrier. Thus, the *Arcilio* receiver had acted promptly and diligently to pursue his claims. In the current case, the Rehabilitator substantially delayed her pursuit of claims against culpable insiders or third party professionals. Unlike *Arcilio*, therefore, pursuit of the claims against the third parties is not necessary as an integral part of AIK Comp's initial steps towards rehabilitation. Pursuit of these claims is, however, essential in maintaining the integrity of the rehabilitation process, avoiding the need to call the contingent notes, and may be a source of funds to offset the assessments paid to date. Thus, the status of the AIK Comp Rehabilitation stands in stark contrast to the *Arcilio* rehabilitation proceeding.

In entering an injunction, the *Arcilio* court specifically exempted the pursuit of claims "personal to such persons or entities alone and which cannot be pursued by the

rehabilitator." Judge Graham's Order of May 25, 2006 clearly articulates that Appellant and other Group Members own claims which they may pursue on their own behalf. The Kentucky statutory scheme granting permissive power to Appellee to seek claims against insiders is not an exclusive grant of jurisdiction and, accordingly, Appellant and Group Members have extensive rights to pursue those claims.

Finally, the *Arcilio* court was based upon a Michigan statute that vested in the receiver "title to all assets of the insurer in rehabilitation." *See* MCLS § 500.8113(1) (2005). The Kentucky statute governing rehabilitation, on the other hand, provides that an order of rehabilitation "shall direct the rehabilitator forthwith to take possession of the assets of the insurer and *to administer them under orders of the court*." KRS § 304.33-150(1) (Emphasis supplied). This statutory grant of authority to take possession of assets pursuant to court administered control is substantially different from the grant of authority given to a ***liquidator*** under KRS § 304.33-200 which provides as follows:

> [. . .] An order to liquidate the business of a domestic insurer shall appoint the commissioner and his successors in office liquidator and shall direct the liquidator forthwith to take possession of the assets of the insurer and to administer them under the orders of the court. *The liquidator 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 ordered liquidated, wherever located, as of the date of the filing of the petition of liquidation.* [. . .]

(Emphasis supplied). When the provisions of the Kentucky statutes governing orders of rehabilitation are compared to those statutory provisions governing liquidation, it is clear that the General Assembly envisioned two (2) distinct and separate roles for a Kentucky receiver acting in rehabilitation as opposed to liquidation. These distinctions, specifically directed to the powers granted to the rehabilitator on the one hand and the liquidator on the other hand, are set forth in the unambiguous language of the Kentucky statute. Michigan law, on the other hand, does not draw this distinction between liquidators and

rehabilitators. These disparate grants of power – the limited powers conferred by the General Assembly – should be recognized in the assessment of Appellee's attempt to assert exclusive rights to pursue claims against third parties.

Appellee attempts to distinguish the holding in *In re Integrity Ins. Co.,* 573 A.2d 928 (Sup. Ct. N.J. 1990). That decision however, presents the best analysis of the questions in this case. In *Integrity*, the court determined that even though a cause of action is applicable to one or more group members and thus resulted in harm common to all members, it does not change the personal nature of such claims. *Id.* at 939. The court further found that the best way to afford the required elements of due process to the various parties, including policyholders, was through a class action type of proceeding so that personal claims could be properly presented. Here Appellant and other Group Members which have paid millions have indemnity claims that are personal to them up to the amount of the assessment that they have paid. Appellee cannot pursue these indemnity claims because the payments on which they are based were made by Appellant and Group Members themselves.

The analysis undertaken in *Integrity* is instructive for this Court. The allegations in *Integrity* are strikingly similar to the claims here in that it was alleged that as a result of mismanagement and fraud, the officers, owners and accountants concealed the true economic status of the company by preparing and disseminating false financial statements. *Id.* at 487-88. But for these misrepresentations and concealments, the state insurance regulator would have shut down the carrier, policyholders would not have purchased insurance policies, and the creditors would not have extended credit. While the court held that the liquidator <u>may</u> prosecute the claims on behalf of the policyholders and creditors, that power was not exclusive and as broad as the liquidator claimed.

Claims that are personal to policyholders or creditors or for which the recovery will not rebound to the estate were found not within the power of the liquidator to assert. *Id.*[2]

Here, considering that Appellant and Group Members have personally paid the assessments and the callable contingent notes have been tendered, the recoveries from the third party claims will not "rebound to the estate." As in *Integrity*, the grant of power to Appellee is permissive --"may"-- and the claims do not exclusively belong to her.

Corcoran, *Foster* and *Arcilio* are not persuasive precedent upon which this Court can conclude that Appellee, and Appellee alone, has the power to pursue claims against the officers, trustees, and others. All of those cases begin with a close reading of the state statutes that conferred the requisite powers on the liquidator or rehabilitator. One must also begin with an examination of the applicable statutes. When these 3 cases are examined closely, there are statutory or procedural differences which distinguish the application of the particular case holding to the proceeding at issue before this Court.

Another distinguishing factor in the examination of these cases is that there were limited sources for funds to pay the claims and expenses of the distressed carrier. In the case before the Court, Appellant and the Group Members have paid their assessments, the legitimate claims are being paid as they become due, and there are not competing claims over limited assets that jeopardize the payment of the claims and the operation of the estate. Given the payment of the assessment, the immediate need for funds to pay claims has passed and there is adequate time to pursue the third party claims.

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[2] This holding is consistent with the holdings in *Cotton v. Republic National Bank of Dallas*, 395 S.W.2d 930 (Tex. Civ. App. 1965) and *In re Rehabilitation of Centaur Insurance Co.*, 606 N.E.2d 291 (Ill. App. Ct. 1st Dist. 1992).

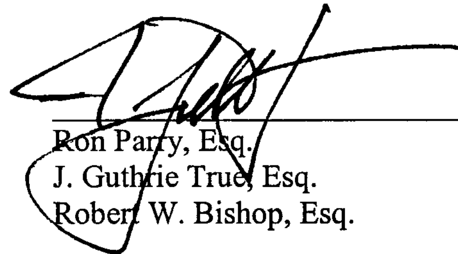
III. APPELLEE'S CONTENTION THAT CIVIL RULE 23 HAS ABSOLUTELY NO APPLICATION HERE IS CONTRARY TO THE LAW AND THE ORDERS ENTERED BY THE TRIAL COURT

Appellee contends – without explanation – that Appellant's discussion of CR 23 is "misleading." Appellant's Brief, pg. 45. Appellee ignores the fact that the Franklin Circuit Court repeatedly cited CR 23 and explained how its Order was in compliance with CR 23. R.A., Tab 100. In fact, in the Order Approving Settlement the Franklin Circuit Court cited CR 23 multiple times and discussed how its notice plan was consistent with the Civil Rules. R.A., Tab 100. The problem however, is that the Court never certified a class before dismissing the claims of the absent class members. Nor did the court make the mandatory findings pursuant to CR 23.01 and 23.02. *Wiley v. Adkins,* Ky., 48 S.W.3d 20, 23 (2001).

CONCLUSION

For all the foregoing reasons, Appellants respectfully request that the Franklin Circuit Court's Order entered April 17, 2008 be REVERSED.

Respectfully submitted,



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