IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,365
Third District Court of Appeal no. 91-345

ALLEN GEE, as Official Liquidator of
UNIVERSAL CASUALTY & SURETY COMPANY, LTD. (in liquidation),
Petitioner

vs.

SEIDMAN & SEIDMAN, and
BINDER DIJKE OTTE & CO., et al.,
Respondents,

ON DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL

BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

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BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

The National Association of Insurance Commissioners (hereafter "NAIC"), by and through undersigned counsel, acting in the capacity of amicus curiae, pursuant to Rule 9.370, files its brief of amicus curiae in support of Petitioner, Allen Gee, as official Liquidator of Universal Casualty & Surety Company, Ltd.

STATEMENT OF FACTS

These proceedings arise from an action at law brought by Petitioner against auditors, Respondents, engaged by Universal Casualty & Surety Company, Ltd. (hereafter "Universal"). Petitioner alleged that Respondents' negligent audits concealed the true financial condition of Universal such that Universal was able to continue to incur liability until its losses exceeded $15 million. A jury found that Respondents acted negligently and that such negligence was the proximate cause of the losses.

The Third District Court of Appeal did not overturn the jury verdict. That Court instead held that since Universal's manager perpetrated a fraud, that fraud is imputed to Universal, and it is estopped from bringing an action against the negligent auditors for failure to discover the fraud. That Court also held that the fraud was perpetrated in furtherance of Universal's purposes, the business of insurance, and that Universal "benefited" from the fraud because it enabled Universal to continue its purposes. This finding, that Universal "benefited" from the fraud in that it enabled Universal to continue in its business, is a conclusion drawn by the Third District Court which played a critical role in the outcome of that Court's decision.

The Third District Court of Appeal relied upon two cases as authority for its holding: Cenco, Inc. v. Seidman & Seidman, 686 F.2d 449 (7th Cir. 1982) and Federal Deposit Insurance Corp. v. Ernst & Young, No. Civ. A. 3-90-0490-H, 60 U.S.L.W. 2235 (N.D. Tx. Sept. 30, 1991). These cases' holdings are inapplicable to an insolvent insurer in liquidation, and the Third

District Court erred in relying on these cases as precedent for the facts and issues raised in the instant case.

The NAIC believes that for reasons related to the unique nature of the liquidation of insolvent insurers and the liquidator's role, the Third District Court made the wrong decision, and permitting such a decision to stand would have an immediate, long term, negative impact on the insurance buying public.

SUMMARY OF ARGUMENT

Even though the Third District Court acknowledged all of the jury findings of fact relating to the negligence of the auditors and its proximate cause of the damages to Universal, that Court did not hold the negligent auditors liable for their own malpractice on an incorrectly applied theory of estoppel. This result leaves the Universal policyholders, innocent parties, without a remedy for the damages wrongfully inflicted by the auditors.

ARGUMENT

The NAIC Insurers Rehabilitation and Liquidation Model Act (hereafter, the "Model") places the liquidator in a unique position. The liquidator not only takes on the corporate identity of the insurer and may bring actions belonging to the insurer, but he also has a duty to act on behalf of the creditors and the policyholders in a fiduciary capacity. Although the liquidator may bring a cause of action which the insurer owned, any recovery is retained and utilized for the benefit of the insurer's creditors and policyholders. The liquidator is not limited to acting in one capacity or another at any given time. He has a statutory duty to act in the best interest of the insurer's insolvent estate, the policyholders and the creditors of the estate also. Foster v. Peat Marwick Main & Co., 587 A.2d 382 (Commonwealth Court of Pa., 1990).

The Third District Court's decision relies heavily on what it called "Cenco estoppel." The manager of Universal perpetrated a fraud on the innocent policyholders and on the unsuspecting Cayman Islands authorities. The auditors had a duty to perform a competent audit.

A competent audit would require independent verification of facts. There is no dispute that the auditors did not attempt to verify the existence or nonexistence of the fraudulent assets which appeared on Universal's financial reports. That they did not do so makes equitable estoppel inapplicable. Fidelity & Casualty Company of New York v. Northeast Drywall Company, 487 So.2d 42 (Fla. 1st DCA, 1986).

Application of Cenco to these circumstances is an incorrect result. Relieving these negligent auditors of responsibility otherwise imposed by the law and liability for the damages caused by their malpractice doesn't serve equity in any way; in fact, it defeats all equity because of the damages suffered by innocent policyholders of Universal.

The Cenco application has been distinguished by its own circuit when the insolvent entity is an insurer. A two-pronged test must be applied to the facts in order for Cenco estoppel to be allowed. The reviewing court must first determine whether the result would compensate the victims of the action complained of, and, second, whether the result would serve as a deterrent to similar future action. Schacht v. Brown, 711 F.2d 1343 (7th Cir. 1982). The Cenco application should be limited to its facts, not those in the instant case.

Under the Model, the liquidator is given powers to avoid preliquidation preferences and pre or post liquidation fraudulent conveyances which would be binding upon the corporation, but which were made in the absence of fair consideration or fair equivalent value, or with the intent to hinder, delay or defraud existing or future creditors, or which enable any creditor to secure a greater percentage of his debt than others similarly situated. The liquidator is empowered and obligated to assert the claims of the policyholders and creditors, and distribute the proceeds thereof to all classes proportionately; the policyholders and creditors are not bound by the actions of the corporation, nor is the liquidator in acting for them. Estoppel should not be invoked to bar the liquidator of an insolvent insurer from making a recovery against outside auditors for the benefit of the innocent policyholders and creditors. Bonhiver v. Graff, 248 N.W.2d 291, (Minn. 1976).

The policyholders and creditors, who ultimately bear the burden of the fraud, are not required to show that the corporation relied upon the auditors' statements in order to recover in negligence. Reliance is not an element of negligence. The only relevant element is proximate cause. The liquidator, on behalf of the policyholders and creditors, demonstrated to the satisfaction of the lower court that the damages of the policyholders and creditors were proximately caused by the actions of the auditors. Whether or not the corporation's controlling officer had knowledge of the inaccuracy of the auditors' representations at the time they were made is irrelevant to the liquidator's claim insofar as he represents the innocent policyholders and creditors. Because reliance is not an element of the policyholders' and creditors' claims, the recent Ernst & Young case featured in the panel opinion is inapplicable. That case, again, is not an insurance company insolvency case.

CONCLUSION

The NAIC urges the rule of law should be that insofar as the liquidator of an insolvent insurer seeks to assert claims on behalf of the insurer's innocent policyholders and creditors, the Cenco defense based upon the preliquidation misconduct of the controlling officer should not create estoppel barring recovery against negligent outside auditors and other professionals. Any other holding would be contrary to the established law of insurance insolvency, would encourage misconduct or negligence in the preparation of the insurer's financial information, and would thereby hamper the NAIC members and other regulatory authorities in exercising their supervisory functions which depend heavily upon the accuracy of financial information.

Submitted this _____ day of _____, 1993.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Motion By The National Association Of Insurance Commissioners To Appear As Amicus Curiae was mailed this 9th day of December, 1993, to:

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