

COURT OF APPEAL
FIRST CIRCUIT
STATE OF LOUISIANA

2006-CA-0626

JAMES H. "JIM BROWN,
COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA,
Appellant and Defendant in Reconvension

versus

AMERICAN NATIONAL AGENTS INSURANCE GROUP,
A LOUISIANA PARTNERSHIP,
Appellee and Plaintiff in Reconvension

From the 19th Judicial District Court
Parish of East Baton Rouge
Hon. Janice Clark, Judge

On Appeal

**Original Brief of the Commissioner of Insurance,
Appellant and Defendant in Reconvension**

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Civil Case

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¹ 23 R. 4990.

² 25 R. 5474-75.

³ 19 R. 4131.

⁴ 25 R. 5524-27.

Jurisdiction of the Court

This is an appeal from a final judgment in a civil case. The judgment was signed on May 3, 2004 and mailed to the parties on May 4, 2004.⁵ The Commissioner of Insurance, appellant and defendant in reconviction, filed a timely motion for new trial on May 11, 2004.⁶ The trial court denied the motion for new trial, by written judgment signed July 16, 2004 and mailed to the parties on July 19, 2004.⁷ The Commissioner's petition for suspensive appeal was granted on August 17, 2004.⁸

The judgment is appealable under La. C.C.P. Art. 2083(A), and the order of appeal was obtained timely under La. C.C.P. Art. 2123(A)(2). Thus, this Court has jurisdiction here.

⁵ 23 R. 4990.

⁶ 23 R. 4991; see also *id.* at 4993 (showing the date filed).

⁷ 23 R. 5036.

⁸ 23 R. 5039-42.

Statement of the Case

1. Introduction

This dispute concerns actions by the Commissioner of Insurance in his role as liquidator of an insolvent insurance company. Among the assets that the Commissioner liquidated were certain securities (stock and a debenture or bond, convertible into stock) issued by Mobil Telecommunication Technologies Corp. (M-Tel). The Commissioner, through his agents, elected to liquidate these securities by a “programmed sale” or “staged sale,” i.e., selling fixed amounts of the securities at regular intervals over a period of time, to obtain a reasonable average price for them. The original plaintiffs, the late Sam Presley and his wife, Barbara McDaniel Presley,⁹ claiming to be the beneficial owners of the liquidated company, allege that the Commissioner should have sold the securities all at once, immediately upon gaining control of them, and that, had the Commissioner done so, he would have realized more money from the sale. In defense, the Commissioner contends that his actions were within his discretion as a public official or entity; therefore he is shielded from liability by La. R.S. 9:2798.1. The Commissioner further contends that the Presleys failed to carry their burden of proving a breach of the standard of care applicable to him as liquidator of a failed insurance company. Finally, the Commissioner contends that the Presleys are not proper plaintiffs to enforce any obligation that may exist in connection with liquidating the M-Tel securities.

⁹ After her husband died, Barbara Presley was appointed as administrator of his succession. She is now a plaintiff in two capacities: in her individual capacity and in her capacity as Sam’s succession representative. For convenience, the Commissioner will refer to her as “the Presleys,” to indicate her dual capacities.

2. Factual Background

In August 1990, Sam Presley Jr. (Barbara Presley's late husband) purchased American National Agents Group (ANA) for \$50,000. Although he ostensibly placed 83% ownership in his then girlfriend, Barbara McDaniel, and 17% in an employee and friend, Morris Mahana,¹⁰ in later criminal proceedings he would admit that he was the *de facto* owner of 100% of ANA.

At the same time Sam Presley purchased ANA, he also purchased in his own name two additional companies: United States General Agency (USGA) and American Funding Services, Inc. (AFSI). He operated ANA's business by using USGA as general agent and AFSI as a premium financier.

In 1992, the Louisiana Department of Insurance investigated American National Agents Group (ANA), learned of its actual insolvency, and placed it in conservatorship.¹¹ Shortly afterward, the court placed ANA in rehabilitation.¹² In May 1993, the court placed ANA in liquidation.¹³ On October 8, 1993, the court decreed that ANA, USGA, and AFSI were a single business enterprise, and ordered that USGA and AFSI be liquidated along with ANA.¹⁴

In due course, the Commissioner filed in the liquidation proceedings a petition against the Presleys and Mahana, alleging their indebtedness to the estate on account of their use and abuse of ANA assets.¹⁵ In response, the Presleys filed a reconventional demand against the Commissioner including numerous allegations, among them mismanagement of the estate.¹⁶ Eventually all claims by each side

¹⁰ 9 R. 1745-49; 18 R. 3894.

¹¹ 2 R. 68; Commissioner's Exhibit 21.11.

¹² 2 R. 127-29.

¹³ 3 R. 328; 9 R. 1730.

¹⁴ 4 R. 791-92.

¹⁵ 6 R. 1086.

¹⁶ 8 R. 1693.

against the other were dismissed or settled except for one: the Presleys' claim against the Commissioner over the liquidation of the M-Tel securities previously held by USGA.

3. The M-Tel securities

Before their liquidation, ANA and USGA each held a \$1 million M-Tel debenture (a bond convertible into common stock) and 50,000 shares of M-Tel stock. ANA's M-Tel securities were sold in mid-1993, between one and three months after entry of the liquidation order; those sales are not at issue here.

USGA's M-Tel securities did not come under the Commissioner's control until October 18, 1993 for two reasons. First, USGA was not liquidated until October 8, 1993, when the court declared it part of the ANA single-business enterprise. Second, USGA's convertible M-Tel debenture had been purchased on margin, with \$851,000 still owed on the purchase. To gain control of the debenture, the Commissioner had to make arrangements to pay the \$851,000 debt.

Once gaining control of USGA's M-Tel debenture, the Commissioner was faced with the problem of how to liquidate it. The debenture was classified as a "junk bond," meaning its rating was below investment grade.¹⁷ And the market for a \$1 million junk bond is "very thin."¹⁸

To liquidate this security and the others in the estate, the Commissioner contracted with investment professionals. He retained Charles Reichman, C.P.A., as an independent contractor to serve as investment funds manager. Reichman, in turn, negotiated a contract with Richard Bickerstaff of Hattier, Sanford & Reynoir,

¹⁷ 25 R. 5450 (testimony of defense expert Walter Morales).

¹⁸ *Id.*

to manage the ANA estate's investment portfolio. The Hattier contract was approved by the court.¹⁹

Under Reichman's supervision, the M-Tel securities were liquidated through a programmed or staged sale, i.e., selling fixed numbers of shares over a period of time to obtain a reasonable average price. The debenture was converted into common stock in order to facilitate its staged sale, because shares of stock are easier to sell separately than are pieces of a debenture or bond.²⁰ As a result of the programmed sale, the estate realized a gain of more than \$1 million.

The Presleys' claim against the Commissioner concerned this programmed sale. They contended that the M-Tel securities should have been liquidated immediately on receipt. With the benefit of hindsight, they contended that the price of the M-Tel securities was near an all-time high then, and that the Commissioner would have realized much more money from the sale had he sold at that all-time high price.

4. The criminal proceedings against various persons

Unknown to the Commissioner when the M-Tel securities were being liquidated, Reichman and Bickerstaff were engaged in offenses unrelated to those securities. Their offenses related to a \$25 million investment fund run by the Department. Under their scheme, they purchased securities in the name of Asset Management, Inc., a Bickerstaff-owned company, marked up the price, and sold the same securities to the receivers at the marked-up price.²¹ Through the vigilance of the Department's personnel, the two were caught. In the ensuing state and

¹⁹ Commissioner's Exhibit 21.1.

²⁰ 25 R. 5451 (Morales's testimony).

²¹ See the following documents included in Commissioner's Exhibit 54: Affidavit in Support of Application for Arrest Warrant (Charles Reichman), ¶ 4; and Affidavit in Support of Application for Arrest Warrant (Richard Bickerstaff), ¶ 4.

federal criminal proceedings, Bickerstaff and Reichman pleaded guilty to various crimes in connection with this scheme.²²

Meanwhile, the Presleys were likewise implicated in criminal proceedings. The two, along with others, were charged by federal prosecutors with conspiracy, RICO, mail fraud, and wire fraud, all in connection with ANA.²³ In due course, Sam Presley made a plea agreement with the federal prosecutors. As part of the plea agreement, he admitted that, though ANA was purchased ostensibly in Barbara's name, in fact "ownership and control rested with [Sam] Presley."²⁴ As a result of this agreement and admission, the charges against Barbara Presley were dismissed.²⁵

Sam Presley was imprisoned for his crimes. A few months after his release, he died, and Barbara Presley was appointed as his succession representative.²⁶

Action of the Trial Court

As stated above, the Commissioner filed a petition against the Presleys, alleging wrongful conduct by them to the detriment of ANA. In response, the Presleys filed a reconventional demand against the Commissioner alleging numerous things, including mismanagement of ANA's assets. In response to the reconventional demand, the Commissioner filed peremptory exceptions of no right

²² See generally Commissioner's Exhibit 54 (complete criminal files on both Reichman and Bickerstaff).

²³ Commissioner's Exhibit 14, depo. of Peter Strasser, depo. Exh. 2. Ms. Presley objected to admission of Strasser's deposition. The trial court asked the parties to brief her on the admissibility of the deposition, but to the Commissioner's knowledge has never ruled on Ms. Presley's objection. The parties have stipulated to include Strasser's deposition as part of the record on the appeal an exhibit with the notation "proffered/taken under advisement by the court." 26 R. 5723, 5728.

²⁴ *Id.*, depo. Exh. 8.

²⁵ *Id.*, depo. Exh. 9 at 14; see also *id.*, depo. Exh. 10.

²⁶ For convenience, this brief will use the shorthand phrase "the Presleys" to refer to Barbara Presley in her individual capacity and Barbara Presley in her capacity as succession representative.

of action and immunity.²⁷ Later, on discovering Sam Presley's admission that he, not Barbara Presley, was the true owner of ANA, the Commissioner filed an exception of no right of action pleading that fact.²⁸ In the alternative, the Commissioner pleaded *res judicata* and collateral estoppel; these exceptions were also based on Sam Presley's admission that he was the true owner of ANA.²⁹ The trial court overruled the exceptions of no right of action, *res judicata*, and estoppel; and referred the immunity exception to the merits.³⁰

Before trial, all claims between the parties were settled or dismissed except for one: the claim arising from the programmed sale of USGA's M-Tel securities. The case proceeded to bench trial on this single remaining claim. When the Presleys rested their case, the Commissioner moved for judgment as a matter of law based on discretionary-acts immunity.³¹ After hearing argument from both sides, the trial court took the motion under advisement and ordered the Commissioner to call his first witness.³² In the end, the trial court rendered judgment in favor of Barbara Presley against the Commissioner for \$1,247,132, thus impliedly overruling the Commissioner's exception of immunity.³³ The Commissioner timely filed a motion for new trial, which the trial court denied.³⁴

The Commissioner appealed. After briefing, oral argument, and submission of the appeal, this Court found the record incomplete, and remanded the case to the

²⁷ 17 R. 3631.

²⁸ 18 R. 3869.

²⁹ 18 R. 3996.

³⁰ 19 R. 4131 (overruling exception of no right of action); 23 R. 5085 (referring discretionary-function immunity to the merits).

³¹ 24 R. 5361.

³² 24 R. 5373.

³³ 23 R. 4990 (judgment); 25 R. 5474-75 (transcribed oral reasons for judgment).

³⁴ 23 R. 4991 (motion for new trial); *id.* at 5036 (judgment denying motion for new trial).

trial court for the record to be supplemented.³⁵ Returning to the trial court, the parties jointly stipulated to the exhibits to be included in the record on appeal, and the trial court signed an order conforming to the parties' stipulation.³⁶ The case is now returns to this Court for decision on the merits.

Assignment of Error

1. In rendering final judgment in favor of the Presleys, the trial court impliedly rejected the Commissioner's defense of immunity under La. R.S. 9:2798.1. Rejection of this defense was error.

2. The final judgment is erroneous for a second reason: The Presleys failed to carry their burden of proof, because they failed to establish the standard of care allegedly breached by the Commissioner in liquidating USGA's M-Tel securities.

3. The trial court erred in overruling the Commissioner's exceptions of no right of action, res judicata, or estoppel.³⁷

4. The trial court erred in failing to rule on the Presleys' objection to Peter Strasser's deposition.³⁸

Issues Presented for Review

1. Louisiana law shields the Commissioner and the Department of Insurance from liability "based upon the exercise or performance or the failure to exercise or perform their policy-making or discretionary acts when such acts are

³⁵ *Brown v. American Nat. Agents Ins. Group*, 2004-CA-2367 (La. App. 1 Cir. 2/10/06).

³⁶ 26 R. 5722 (stipulation); *id.* at 5727 (order).

³⁷ 19 R. 4131.

³⁸ 25 R. 5467-68. This assignment of error may be moot, as the Presleys' counsel later waived the objection. 25 R. 5565. Nonetheless, because the trial court's latest evidentiary order lists the deposition as "proffered / taken under advisement by the court," the Commissioner makes this assignment out of an abundance of caution.

within the course and scope of their lawful powers and duties.” La. R.S.

9:2798.1(B). Does this discretionary-acts immunity shield the Commissioner and the Department against claims arising from the Department’s decision to liquidate USGA’s M-Tel securities through a programmed sale?

2. The Presleys offered no expert testimony establishing the standard of care for a liquidator faced with the task of liquidating millions of dollars worth of securities, including a \$1 million junk bond. Did the trial court err in nevertheless finding that they carried their burden of proof?

3. Did the Presleys have any right to assert a claim in connection with liquidation of USGA’s M-Tel securities, when:

A. Sam Presley agreed to forfeit his interest in ANA and the related companies, including USGA.

B. Any claim Barbara Presley would have as purported majority owner of ANA is refuted by the federal criminal proceedings, in which criminal charges against her were dismissed in exchange for Sam’s admission that he, not she, was the true owner of ANA.

4. Is Peter Strasser’s deposition, with attached exhibits, relevant to prove the facts in Issue # 3 above?

Summary of the Argument

With the benefit of 20-20 hindsight, it is easy to say that more money may have been realized had the M-Tel securities been sold on October 18, 1993, when their price was near an all-time high. And with that same 20-20 hindsight, it is easy to question allowing Reichman and Bickerstaff to handle any securities in the estate. But the legal standards are based not on what we know today, but on what the Commissioner knew in October 1993. Based on what was known then, it was

reasonable for the Commissioner to contract with investment-management professionals to liquidate the ANA and USGA securities, to follow their advice, and to liquidate USGA's M-Tel securities through a programmed sale.

The decision to sell the M-Tel securities in stages was a proper exercise of the discretion vested in the Commissioner as liquidator of a defunct insurance company, and was within the course and scope of the Commissioner's lawful duties. The decision is reasonably related to the legitimate governmental objective of obtaining a reasonable average price for the shares rather than attempting to "time the market." And though Bickerstaff and Reichman were later found to have committed crimes unrelated to the M-Tel securities, there is no evidence that the Commissioner or any employee of the Department committed any crime in connection with the sale of those securities. For these reasons, La. R.S. 9:2798.1 prohibits imposition of liability on the Commissioner or the Department.

Aside from the discretionary-acts immunity afforded by R.S. 9:2798.1, there is another reason why the trial court's finding of liability was error: absence of proof on the standard of care supposedly breached by the Commissioner. The closest the Presleys came to establishing this element of her case was the testimony of their expert economist, Pat Culbertson. Although Culbertson opined that a programmed sale was "speculative,"³⁹ he offered no opinion that the standard of care demands that the liquidator immediately dump all securities on the market or to avoid selling them in stages. Indeed, he was not retained to venture such an opinion, but merely to calculate mathematically how much money would have been raised had all the M-Tel securities been immediately sold on October 18, 1993.⁴⁰

³⁹ 24 R. 5293, 5331.

⁴⁰ 24 R. 5330.

Finally, even if discretionary-acts immunity did not apply, and even if the Presleys had established a standard of care breached by the Commissioner, they have not established that they are proper plaintiffs to collect whatever debt may be owed. If a debt is owed, it is owed to the liquidated estate, as part of the estate's patrimony available to satisfy the claims of creditors.

In her capacity as Sam Presley's succession representative, Barbara Presley has no greater rights than Sam would have if he were alive. And Sam forfeited his interest in USGA and ANA when he pleaded guilty in federal court to felonies in connection with the ANA single-business enterprise.

In her individual capacity, Barbara Presley cannot collect a debt on behalf of USGA, because she never owned USGA. Nor can she make a claim as purported owner of ANA, because in fact she never owned that company. As part of his plea bargain in federal court, Sam Presley admitted that he, not Barbara, was always the true owner of ANA. In exchange for that admission, Barbara Presley gained an advantage: dismissal of criminal charges against her. Having gained that advantage, she cannot now take a contrary position to gain another advantage.

Argument

1. The discretionary-acts doctrine created by La. R.S. 9:2798.1 shields the Commissioner from liability for discretionary decisions made in liquidating the assets of a defunct insurance company.

Revised Statute 9:2798.1 shields this State's "public entities" from civil liability "based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties." La. R.S. 9:2798.1(B). The Commissioner and Department are unquestionably "public entities" under the statute. The statute's definition of "public entity" includes the State, any of its

departments or agencies, and any of its officers, officials, employees, or political subdivisions. La. R.S. 9:2798.1(A). The Commissioner and Department fit the definition.

The Louisiana Supreme Court, borrowing from federal law, has developed a two-part test for deciding whether this discretionary-acts doctrine applies to a specific set of facts. First, a court must determine whether the government actor had an element of choice. The doctrine does not apply when a statute or regulation prescribes a specific course of action for the government actor to follow; in that case the actor has no choice but to follow the directive. When discretion is involved, the court must then determine whether that discretion is the kind shielded by the doctrine, i.e. one grounded in social, economic, or political policy. If so, then the doctrine applies to shield the government actor or agency from liability. *Simeon v. Doe*, 618 So.2d 848, 852-53 (La. 1993). In developing this test, the Supreme Court relied on federal caselaw interpreting a similar federal statute, in particular *Berkowitz v. United States*, 486 U.S. 531, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988). *See Simeon* at 852-53.⁴¹

A. Louisiana law vests the Commissioner with discretion in deciding how to liquidate a defunct insurance company's assets.

Once the court has ordered liquidation of an insolvent insurer, Louisiana law instructs the Commissioner to take possession of and to liquidate the insolvent insurer's assets. La. R.S. 22:737(A).⁴² Because the law vests the Commissioner with this duty, it also vests him with discretion in carrying it out.

⁴¹ A plurality of the Louisiana Supreme Court, in dicta, has since criticized this two-part test. *See Gregor v. Argenot Great Central Ins. Co.*, 2002-1138 pp. 11-12 (La. 5/20/03), 851 So.2d 959, 966-67. *See* p. 17 *infra* for a fuller discussion of *Gregor*.

⁴² Revised Statute 22:737(A) provides, "Upon the entry of an order directing liquidation, the commissioner of insurance shall immediately proceed to liquidate the property, business and affairs of the insurer. He is hereby authorized to deal with the property and business of the insurer in his name as commissioner of insurance, or, if the court shall so order, in the name of the insurer."

In *Franklin Savings Corp. v. United States*, 180 F.3d 1124 (10th Cir. 1999), the court had no trouble finding, for purposes of the federal discretionary-acts doctrine, that acts like those complained of here are discretionary. In *Franklin*, plaintiffs sought damages against the Resolution Trust Corporation (RTC) allegedly caused by the RTC's conduct as a savings association's conservator. Like the Presleys, the plaintiffs in *Franklin* alleged "that the RTC engaged in unwise asset sales without considering all relevant factors. Plaintiffs contend the RTC thereby impaired [the S&L's] franchise value and failed to maintain the value, or maximize the sale price, of its assets." *Id.* at 1131. In short, they questioned "the RTC's decisions whether, when, and how to sell or manage various assets" *Id.* The court readily found that these decisions satisfied the first prong of the *Berkowitz* test:

Day-to-day decisions in operating a financial institution involve discretion. Unless a regulation specifically mandates a particular action, such decisions satisfy the first branch of *Berkowitz*. *See* [*United States v.*] *Gaubert*, 499 U.S. [315,] 325-31, 111 S. Ct. [1267,] 1267[, 113 L. Ed. 2d 335 (1991)] (applying *Berkowitz* to management of savings-and-loan). "Day-to-day management of banking affairs, like the management of other businesses, regularly requires judgment as to which of a range of permissible courses is wisest. *Id.* at 325, 111 S. Ct. [at] 1267. The Court found it "plain" that the actions at issue in *Gaubert* "involved the exercise of choice and judgment." *Id.* at 331
....

180 F.3d at 1131. Similarly here, the decisions of the Commissioner's agents about when and how to sell or manage various assets are discretionary decisions.

B. *Revised Statute 22:739.1 does not take from the Commissioner the discretion of when and how to liquidate assets of a defunct insurer.*

The Presleys do not contest the Commissioner's duty and authority to liquidate ANA's assets. Instead, they contend that his discretion in carrying out this duty is limited by a statute: La. R.S. 22:739.1.⁴³ The statute authorizes the

⁴³ The statute provides:

Commissioner to “invest any monies held in any proceedings under this Part” in any one of a list of investments. Because the list does not include stocks or junk bonds like the M-Tel debenture, the Presleys reason that this statute required the Commissioner to immediately dump the M-Tel securities on the market, regardless of the consequences.

The Presleys reach this conclusion by misinterpreting the statute. Their interpretation departs from the statute’s plain language, and violates the principle of reading a statute in light of other statutes on the same subject. La. Civ. Code art. 13. Properly interpreted, R.S. 22:739.1 tells the Commissioner what to do with money — not securities — that come under his control.

Revised Statute 22:739.1 immediately follows R.S. 22:739, which tells the Commissioner, when he has collected money in a liquidation proceeding, to deposit the money in state or national banks, savings banks, trust companies, or savings and loan associations chartered to do business in Louisiana.⁴⁴ The

Notwithstanding any law to the contrary, the commissioner of insurance may invest any monies held in any proceedings under this Part in the following securities:

(1) Investments in or loans upon the security of general obligations of the government of the United States or of the state.

(2) To the full extent of the amount insured or capable of being securitized or guaranteed in:

(a) Bonds or notes secured by a mortgage or trust deed issued, assumed, guaranteed, or insured by the United States or by any agency of the United States.

(b) Securities issued or mortgages guaranteed by the Federal National Mortgage Association or other similar corporations regulated by an agency of the United States.

(c) Conventional first mortgage loans capable of being securitized into guaranteed Federal National Mortgage Association mortgage backed securities.

(d) Bonds issued, assured, and guaranteed by the Inter-American Development Bank or the African Development Bank.

(e) First mortgage loans guaranteed by the administrator of veteran affairs pursuant to the provisions of the Servicemen’s Readjustment Act of 1944, as amended.

La. R.S. 22:739.1.

⁴⁴ La. R.S. 22:739 provides in pertinent part, “The monies collected by the commissioner of insurance in a proceeding under this Part shall be, from time to time, deposited in one or more

immediately following statute, R.S. 22:739.1, tells the Commissioner what he may do with that money: he may invest it in certain kinds of listed investments. Both statutes concern what may be done with money coming under the Commissioner's control, not what may be done with securities coming under his control.

This interpretation is supported by the most important word in R.S. 22:739.1: the verb *may invest*. “Notwithstanding any law to the contrary, the commissioner of insurance *may invest* monies” To invest means “[t]o apply (money) for profit” or “[t]o make an outlay of money for profit.” Black’s Law Dictionary 830 (7th ed. 1999). To convert money into securities is to invest. The opposite, to convert securities into money, is to *divest*. Revised Statute 22:739.1 governs investment, not divestment. To accept Ms. Presley’s interpretation of the statute would be to let it govern the exact opposite of what it says it governs.

In sum: by instructing the Commissioner to conduct a liquidation, Louisiana law vests him with the discretion in going about the task. Nothing in R.S. 22:739.1 robs him of that discretion.

C. *The discretion given the Commissioner in liquidating an insolvent insurance company’s assets is grounded in the social, economic, or political policies of protecting the policyholders’ interests and discharging the insurance company’s debts.*

Once the court finds that the law vests the government actor with discretion, the next step in deciding whether the discretionary-acts doctrine applies is to examine whether that discretion is the kind shielded by the doctrine, i.e., one grounded in social, economic, or political policy. *Simeon*, 618 So.2d at 853. The Commissioner’s discretion in deciding when and how to convert securities into money satisfies this test.

state or national banks, savings banks, trust companies, or savings and loan associations chartered to do business in this state.... The commissioner of insurance may in his discretion deposit such monies or any part thereof in a national bank or trust company as a trust fund....”

When a statute vests the Commissioner with some discretion, the Court must presume that the Commissioner is exercising that discretion based on the same policy concerns that animate the statutes themselves. *See U.S. v. Gaubert*, 499 U.S. 315, 324, 111 S. Ct. 1267, 1274, 113 L. Ed. 2d 335 (1991); *La. v. Public Investors, Inc.*, 35 F.3d 216, 221 (5th Cir. 1994). Here, the public policy behind the statutes themselves is evident. Insurance is an industry affected with the public interest, and the purpose of the Insurance Code — including the provisions at issue here — is to regulate that industry in all its phases. *See* La. R.S. 22:2(A)(1). The purpose of Part XVI of the Insurance Code (governing rehabilitation, conservation, and liquidation of insolvent insurers) is to “protect the interest of the insurer’s policyholders, members, stockholders, creditors, or the public” La. R.S. 22:733(B). The public policy behind these statutes is exactly the kind of social, economic, or political policy protected by the discretionary-acts doctrine.

On this point, the district court’s decision in *Franklin Savings Corp. v. United States*⁴⁵ is instructive. Recall that *Franklin* involved a claim against the RTC as conservator or receiver for negligent management and operation of a failing S&L. The RTC filed a motion to dismiss based on the federal equivalent to our discretionary-acts doctrine. The district court granted the motion, and the appellate court affirmed. In granting the motion, the district court had no trouble finding that the discretion afforded the RTC to manage the troubled S&L was grounded in public policy:

The RTC’s actions while serving as conservator and receiver of [the S&L] were related directly to the public policy considerations regarding federal oversight of the thrift industry. *See Gaubert*, 499 U.S. at 332-33, 111 S. Ct. at 1278-79. Indeed, the nature of and inherent discretion underlying the agency’s decisions are what drove Congress to enact the discretionary function exception in the first place.

⁴⁵ 970 F. Supp. 855 (D. Kan. 1997), *aff’d*, 180 F.3d 1124 (10th Cir. 1999).

Franklin Savings Corp. v. U.S., 970 F. Supp. 855, 867 (D. Kan. 1997), *aff'd*, 180 F.3d 1124 (10th Cir. 1999).

The Presleys may argue that Bickerstaff and Reichman, in selling the M-Tel securities, were not motivated by public-policy concerns, but rather by ulterior motives born of their illegal scheme. Documentary evidence shows that their scheme related to acquisition of securities, not liquidating them, and therefore had nothing to do with the M-Tel securities.⁴⁶ But even if Bickerstaff and Reichman had ulterior motives related to M-Tel, their motives would have no bearing on the discretionary-acts analysis. “The focus of the inquiry is not on the agent’s subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and whether they are susceptible to policy analysis.” *La. v. Pub. Investors, Inc.*, 35 F.3d 216, 221 (5th Cir. 1994) (applying Louisiana law); *see also Gaubert*, 499 U.S. at 325, 111 S. Ct. at 1275. Thus, as recognized by the Tenth Circuit in *Franklin*, “it is unnecessary for government employees to make an actual ‘conscious decision’ regarding policy factors,” and in fact “courts should not inquire into the actual state of mind or decisionmaking process of [government] officials charged with performing discretionary functions.” 180 F.3d at 1135.

Indeed, during argument in the trial court, opposing counsel conceded that in examining discretionary immunity, the law is all that matters; Reichman’s and Bickerstaff’s subjective motives are irrelevant:

We don’t care what Mr. Reichman did from an intellectual or a moral basis. It was the very best he could do for the very best reasons. We’ll spot the State that. We’re simply saying that the statute tells you how to do it. That’s what you’re supposed to do. And then, for whatever reasons unknown to us, actually, and irrelevant to us, the State did not follow the Statute⁴⁷

⁴⁶ When Hattier would purchase securities, it would run the purchases through its own brokerage house, tacking on an extra “mark-up” in the process. *See* Commissioner’s Exh. 54, particularly the affidavits in support of the criminal complaints against Reichman and Bickerstaff.

⁴⁷ 25 R. 5503.

The Commissioner disagrees with that last sentence, because he did follow the statutes. But he agrees that, in the discretionary-acts analysis, Reichman's and Bickerstaff's motives are irrelevant: what counts is whether the Commissioner followed the law. As explained above, he did.

In sum: Louisiana law vested the Commissioner with discretion in deciding when and how to liquidate the M-Tel securities. That discretion is grounded in the public policy of protecting the interests of policyholders, creditors, owners, and the general public. Therefore, the discretionary-acts doctrine of R.S. 9:2798.1 applies, and compels reversal.

D. Application of the plurality decision in Gregor v. Argenot Great Central Insurance Co. leads to the same result.

In *Gregor v. Argenot Great Central Insurance Co.*, 2002-1138 pp. 10-11 (La. 5/20/03), 851 So.2d 959, 966-67, a plurality of the Louisiana Supreme Court eschewed the two-part test borrowed from *Berkowitz*, preferring a literal application of the plain wording of La. R.S. 9:2798.1. The Commissioner is uncertain whether *Gregor* actually displaces the two-part *Berkowitz* test, because *Gregor* was a plurality opinion, and in Chief Justice Calogero's view, that aspect of the plurality's discussion was dicta. *See id.* p. 1, 851 So.2d at 970 (Calogero, C.J., concurring) (the discussion "has no effect whatsoever either upon the legal analysis of the case before us or upon its outcome.").

The *Gregor* plurality preferred a literal application of R.S. 9:2798.1. If this Court follows that approach, the result will be the same as under the two-part *Berkowitz* test. Under R.S. 9:2798.1(B), liability must not be imposed on the Commissioner or the Department "based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties." Here, the

way to go about liquidating USGA's M-Tel securities was a discretionary act, and it was within the course and scope of the Commissioner's lawful powers and duties granted under R.S. 22:737(A). Thus, even if *Gregor* displaces the two-part test adopted from *Berkowitz*, the result is the same.

2. The Presleys failed to establish the standard of care applicable to the Commissioner as liquidator and fiduciary.

Logically, the analysis under the discretionary-acts doctrine must precede the negligence analysis; if the doctrine applies, then it pretermits any negligence analysis. *E.g. Franklin Savings Corp. v. U.S.*, 970 F. Supp. at 865. The doctrine indeed applies here, is dispositive, and pretermits a negligence analysis. Nonetheless, counsel would be remiss in not pointing out alternative bases for dismissal, including Ms. Presley's failure to prove an essential element of her case: breach of the applicable standard of care.

Two defense experts testified on the standard of care: W.O. Myrick and Walter A. Morales. Myrick has experience as a regulator examining insurance companies, liquidating them, and supervising them. He has served as Chief Examiner in Louisiana and as Acting Deputy Commissioner over the Louisiana Office of Receivership.⁴⁸ He is a certified insurance examiner and certified financial examiner.⁴⁹ He testified that the standard of care is that of a fiduciary.⁵⁰ In his view, to immediately dump the M-Tel securities on the market without the benefit of analysis and professional advice would have been "inappropriate."⁵¹ Rather, the prudent thing to do was to obtain advice from investment advisors,

⁴⁸ 24 R. 5374. *See also* Commissioner's Exh. 13, Myrick's résumé, for details of his expert qualifications.

⁴⁹ 24 R. 5375.

⁵⁰ 24 R. 5379.

⁵¹ 25 R. 5406-07.

assess that advice, and usually to follow that advice.⁵² In his opinion, the Commissioner met this standard of care by seeking out and following the advice of Bickerstaff and the Hattier firm in liquidating the M-Tel securities.⁵³

Morales is a professional asset manager, and was accepted by the Court as an expert financial advisor.⁵⁴ He too testified that, in liquidating the M-Tel securities, the standard of care called for the Commissioner to obtain expert financial advice. “It’s well established that a fiduciary can employ outside experts to provide advice.... [i]t’s well within the role of a fiduciary in order to designate [an] advisor to assist in discharging fiduciary activity. ” he testified.⁵⁵ Moreover, the programmed sale, or sale in stages, of the M-Tel securities was reasonable advice for the advisors to give. “It’s not at all uncommon to see a fiduciary dispose of a concentrated position that way.”⁵⁶

Morales elaborated on some of the specific steps a fiduciary should follow when coming into possession of these kinds of securities. “First of all he needs to find out what he has.”⁵⁷ In this case, the fiduciary received reports from Hattier and others about M-Tel, all of them positive. Next, the fiduciary must assess those assets against anticipated liabilities. As Morales put it, “you have to balance the need to liquidate, generate cash to pay claims and pay expenses of the estate versus the objective of trying to maximize the value” of the investments.⁵⁸ In other words,

⁵² 25 R. 5407.

⁵³ 25 R. 5431.

⁵⁴ 25 R. 5432-33. *See* Commissioner’s Exh. 11, Morales’s résumé, for details of his expert qualifications.

⁵⁵ 25 R. 5440.

⁵⁶ 25 R. 5442.

⁵⁷ 25 R. 5444.

⁵⁸ 25 R. 5444-45.

the fiduciary must figure out what assets are available to manage the liabilities, and within the assets, what is the outlook.⁵⁹

Morales was asked whether it would ever be prudent for a fiduciary to immediately dump all the securities as soon as they were received. “The only way I can envision the requirement to do that,” he testified, “would be if you had bills staring you in the face that had to be met and you had to generate cash and that was the way to generate cash. Then the prudent thing to do would have been to sell all the stock on that day. Short of that, selling it over time to take yourself out of the business of trying to predict whether this is the high or low price is the prudent way to go.”⁶⁰

Here, the Commissioner met the standard of care established by these two experts. He obtained the advice of experts and followed their advice.⁶¹ In fact, the Presleys stipulated as much. The Commissioner had planned to call L.D. Barringer as an expert receiver.⁶² To speed up the trial, the Presleys stipulated to Mr. Barringer’s expertise, and stipulated that if called, he would testify that the Commissioner fulfilled his fiduciary duty and acted prudently by seeking the advice of professional advisors concerning when and how to liquidate the M-Tel securities.⁶³

That is the standard-of-care evidence on the defense side of the scale. The evidence on that same issue on the plaintiff side of the scale is virtually non-existent.

⁵⁹ 25 R. 5445.

⁶⁰ 25 R. 5456.

⁶¹ 25 R. 5431 (Myrick’s testimony).

⁶² See Commissioner’s Exhibit 10 (Barringer’s résumé) for details of his expert qualifications.

⁶³ 25 R. 5466.

The only expert called by the Presleys was Pat Culbertson, who was tendered and accepted as an expert in economics. He opined that the M-Tel securities could have been sold the same day they were received, and that, had they been sold on that day, the Commissioner would have realized more proceeds from the sale. But though the “worst” thing he could say about the programmed sale was that it involved a degree of “speculation,”⁶⁴ he offered no testimony on the standard of care.

Indeed, voir dire showed Culbertson’s lack of qualification to testify about the standard of care. He admitted that he does not trade securities, is not a licensed securities dealer, and is not a financial analyst. Aside from a family matter involving his uncle’s curatorship, he has never functioned as a fiduciary, such as for a trust or a bankrupt estate; nor has he ever functioned as an insurance liquidator.

In fact, assessing the standard of care was beyond the scope of Culbertson’s assignment in this case. He was retained for only one relatively simple task: to calculate the proceeds that would have results from selling all M-Tel securities on October 18, 1993:

The assignment that I was given said they received this stock at this time and had they disposed of it at this time, would it have made sense and what would the proceeds have been.... I carried out my assignment as it was presented to me.⁶⁵

The most basic elements of a negligence case are duty and breach of duty. By failing to establish the standard of care, the Presleys failed to establish these two basic elements.

⁶⁴ 24 R. 5293.

⁶⁵ 24 R. 5330; *see also id.* at 5280-81.

3. The Presleys have no claim against the Commissioner for any actions in connection with the ANA-related companies.

Finally, if the Commissioner owed a debt to somebody because of the way the M-Tel securities were liquidated, he would not owe it to the Presleys. The debt, if it existed, would be owed to the liquidated estate, for the benefit of policyholders and creditors.

If Sam Presley were still alive, he would have no claim against the Commissioner. He pleaded guilty in federal court to several felonies in connection with his operation of the ANA single business enterprise, and as part of that plea bargain, agreed to forfeit his interest in those companies.⁶⁶

As Sam Presley's succession representative, Barbara Presley stands here in Sam's shoes, and can assert no greater right than he himself would have. Anything that would bind Sam if he were still alive binds her as succession representative.

Individually, Barbara Presley has no claim. She did not own USGA, the company whose M-Tel securities are at issue here. Sam owned that company in his own name, but as stated above, he forfeited his interest in it.

Nor does Barbara Presley, individually, have any claim as the purported "owner" of ANA. Granted, on paper she was named the majority owner of ANA. And for a long time, believing that she was in fact the majority owner, the Commissioner alleged her ownership in these proceedings.⁶⁷ But the Commissioner has since discovered that her "ownership" was a sham. After making the allegation of Barbara's ownership, the Commissioner learned that, as part of Sam Presley's plea bargain in federal court, he admitted that he, in fact, was

⁶⁶ Commissioner's Exh. 14.7 (Strasser depo. Exh. 7) at 2 ¶ 5; Commissioner's Exh. 14.9 (Strasser depo. Exh. 9) at 5.

⁶⁷ *E.g.* 6 R. 1052.

100% owner of ANA.⁶⁸ Based on Sam Presley's admissions and plea, the criminal charges in the same proceeding against Barbara Presley were dismissed.⁶⁹ And because Barbara Presley stands before this Court in Sam Presley's shoes, and because she herself benefited from the admission in federal court, she is bound by the admission.

Granted, under Louisiana law, parties are not irrevocably bound to their allegations merely by making them. Rather, parties are allowed to plead in the alternative, even to the point of taking inconsistent positions. La. Code Civ. P. art. 892. But once a party has obtained in litigation some advantage based on one position, that party cannot thereafter take a contrary position in the same or other litigation. This principle has been recognized by Louisiana courts for at least 130 years:

- *Del Bondio v. New Orleans Mut. Ins. Assn.*, 28 La. Ann. 139 (1876): “After having gained an advantage by judicially alleging and maintaining that the contract was valid in the suit decided, this defendant will not be listened to when setting up the nullity of the same contract. It would be inequitable to do so.”
- *Caldwell v. Nelson Morris & Co.*, 120 La. 879, 45 So. 927 (1908): Defendant who convinced an Illinois court to dismiss a suit based on its being domiciled in Louisiana, could not be heard to plead in Louisiana that it that it was domiciled in Illinois.
- *Choate Oil Corp. v. Glassell*, 153 La. 715, 721, 96 So. 543, 545 (1922): Plaintiff who successfully sued to annul a sheriff's sale could not take a contrary position in later litigation. “Plaintiff cannot be allowed to thus change its position at will, and to suit its requirements.... Besides, plaintiff obtained a judgment decreeing the said sale to have been without legal

⁶⁸ Commissioner's Exh. 14.8 (Strasser depo. Exh. 8) at 1.

⁶⁹ Commissioner's Exh. 14.7 (Strasser depo. Exh. 7) at 1 ¶ 1; Commissioner's Exh. 14.9 (Strasser depo. Exh. 9) at 14; Commissioner's Exh. 14.10 (Strasser depo. Exh. 10).

effect, which has now been acquiesced in by both sides, and it is now too late for it to take a contrary position.”

- *Colton v. Hartford Fire Ins. Co.*, 135 So.2d 489, 490 (La. App. 2 Cir. 1961): Liability insurer who insured both parties to accident could not, after convincing a court that first driver’s negligence was the sole cause of the accident, contend in a different suit that the accident was caused by the second driver’s sole negligence. To even consider the defense “would constitute a travesty of justice.”
- *Hoover v. Dodt*, 313 So.2d 364, 366 (La. App. 4 Cir. 1975): After plaintiff won a money judgment against Dodt based on the theory that Dodt owned certain property, she could not thereafter seek to set aside Dodt’s ownership of that same property.

This doctrine should be applied here. In federal court, the Presleys took the position that Sam was sole owner of ANA. Based on that position, they persuaded the federal court to dismiss criminal charges against Barbara. Having gained that advantage based on that prior position in federal court, Barbara should not be allowed to take a contrary position before another court, to obtain another advantage. To hold otherwise would be to allow her to play fast and loose with both courts.

4. The trial court erred in failing to rule on the Presleys’ objection to Peter Strasser’s deposition, or in failing to admit the deposition into evidence.

To prove Sam Presley’s ownership of ANA and his forfeiture of his interest in the ANA-related companies, the Commissioner offered the deposition of Peter Strasser with attached exhibits. Strasser was the assistant U.S. attorney who prosecuted the Presleys. Among other things, he authenticated the documents discussed above, in which Sam Presley admitted his ownership of ANA and forfeited his interest in the ANA-related companies. When the deposition was

offered into evidence, one of the Presleys' attorneys objected on grounds of irrelevance.⁷⁰ The trial court took the objection under advisement, but later in the trial, another Presley attorney apparently waived the objection, saying, "I'm telling you right now, we don't care if they use Peter Strasser's deposition."⁷¹ Despite that waiver, the trial court's most recent evidentiary order lists the deposition as "proffered / taken under advisement by the court."⁷²

The Presleys' objection as to relevance of Strasser's deposition should have been overruled. The deposition is relevant to prove two pertinent facts: (1) In federal criminal proceedings against them, the Presleys took the position that Sam, not Barbara, was always the owner of ANA. (2) The federal prosecutors and federal judge accepted that position, and based on it, dismissed all criminal charges against Barbara. Because of those facts, Louisiana law prevents Barbara Presley from taking a position in this litigation inconsistent with that taken by her husband and her in the federal criminal proceedings.

Conclusion

The discretionary-acts doctrine applies here to shield the Commissioner from liability for the acts alleged by the Presleys. By so holding, the Court will pretermite the other issues in this case. Should the Court reach the other issues, it should find no breach of the standard of care by the Commissioner, or no right on the Presleys' part to assert facts different from those they successfully asserted in the federal criminal proceedings. On one of these three grounds, this Court should reverse the trial court's judgment and dismiss the Presleys' claim with prejudice, at their cost.

⁷⁰ 25 R. 5467.

⁷¹ 25 R. 5565.

⁷² 26 R. 5723.

Respectfully submitted:
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*Attorneys for the Commissioner of
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and appellant*

Certificate of Service

I certify that on May 8, 2006, a copy of this brief was served on counsel for appellee listed below:

Arthur A. Lemann, III
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Lewis O. Unglesby
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Baton Rouge, LA 70801

JAMES H. (JIM) BROWN
COMMISSIONER OF INSURANCE
FOR THE STATE OF LOUISIANA

DOCKET NO: 388-758 DIV. "D"

VERSUS

19TH JUDICIAL DISTRICT COURT

AMERICAN NATIONAL AGENTS
INSURANCE GROUP,
A LOUISIANA PARTNERSHIP

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

POSTED

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JUDGMENT

This matter came for trial on various dates and was submitted after the close of evidence on the 5th day of November, 2003. The Court took the matter under advisement.

REPRESENTING THE PARTIES ARE:

COMMISSIONER OF INSURANCE

BRACE B. GODFREY, JR.
ADAMS & REESE

BARBRA PRESLEY

ARTHUR LEMANN, III
ATTORNEY AT LAW

PATRICK F. MCGREW
ATTORNEY AT LAW

LEWIS O. UNGLESBY
UNGLESBY & MARIONNEAUX

THE LIQUIDATOR

SHELTON DENNIS BLUNT
PHELPS DUNBAR

The Court having rendered reasons on April 20, 2004.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be Judgment in favor of plaintiff-in-reconvention Barbra Presley and against the Commissioner of Insurance, James H. Brown in the full and true sum of **ONE MILLION TWO HUNDRED FORTY-SEVEN THOUSAND, ONE HUNDRED THIRTY-TWO AND 00/100 (\$1,247,132.00)** DOLLARS with legal interest from date of judicial demand and each party to bear its own costs.

Judgment signed in Baton Rouge, Louisiana on ^{May} April 3, 2004.

REC'D C.P.
MAY 4 2004

Jared Clark

JUDGE, 19TH JUDICIAL DISTRICT COURT

I hereby certify that on this day a notice of the above judgement was mailed by me, with sufficient postage affixed, to: *all cop*

Done and signed on

5-4-04

J. Knight

Deputy Clerk of Court

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[Signature]
DY. CLERK OF COURT

JAMES H. BROWN
V.
ANA INSURANCE GROUP

NO. 388-758 DIVISION D
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

ORAL REASONS FOR JUDGMENT

TUESDAY, APRIL 20, 2004

HONORABLE JANICE G. CLARK, JUDGE PRESIDING

THE COURT: THIS IS NO. 388-758, JAMES H. BROWN V. ANA INSURANCE GROUP.

THE COURT HAS BEFORE IT AN ISSUE OF LIABILITY AS TO A FIDUCIARY WITH RESPECT TO THE OFFICIAL DUTIES OF THE COMMISSIONER OF INSURANCE AS LIQUIDATOR IN THIS MATTER.

THE RECORD REFLECTS, AND THIS COURT FINDS, THAT THE COMMISSIONER CONTRACTED WITH RICHARD BICKERSTAFF AND CHARLES REICHMAN AS AGENTS FOR THE ESTATE, WHO, IN TURN, SOLD STOCK AND DEBENTURES, BUT IN SUCH A WAY THAT THEY RECEIVED UNJUSTIFIED MONEY PAYMENTS.

THE ANA STOCK AND DEBENTURES WERE SOLD IN A MANNER WHICH SHOULD HAVE SUBSTANTIALLY BENEFITTED THE ESTATE, AND THE USGA STOCK AND DEBENTURES WERE SOLD AND HANDLED IN SUCH A MANNER MERELY TO PROFIT BICKERSTAFF AND REICHMAN.

THE COMMISSIONER, AS LIQUIDATOR, HAD A FIDUCIARY DUTY AND RESPONSIBILITY TO OVERSEE AND REVIEW REICHMAN'S AND BICKERSTAFF'S PERFORMANCE, WHICH THE RECORD REFLECTS THEY WERE ALLOWED TO OPERATE ESSENTIALLY WITH IMPUNITY.

THEREFORE, LIABILITY FOR DAMAGES UNDER

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19th JUDICIAL DISTRICT COURT

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RESPONDEAT SUPERIOR ARE ESTABLISHED.

PLAINTIFFS-IN-RECONVENTION CONTEND THAT \$2494,264.00 REPRESENTS THE LOSS SUSTAINED. WHILE THE MATHEMATICAL CALCULATION MAY HAVE BEEN CORRECT, IT APPEARS TO THIS COURT THAT THAT ENTIRE AMOUNT WAS NOT DUE AND OWING TO THE FRAUDULENT CONDUCT AND SUBSTANDARD PERFORMANCE OF THE AGENTS.

IT APPEARS, HOWEVER, THAT HALF OF SUCH SUM WAS ESTABLISHED TO BE A DIRECT RESULT OF THE CONDUCT OF BICKERSTAFF AND REICHMAN, BY A PREPONDERANCE OF THE EVIDENCE.

THEREFORE, THE COURT IS GOING TO ENTER JUDGMENT IN FAVOR OF PETITIONER IN THE AMOUNT OF \$1,247,132.00, TOGETHER WITH INTEREST FROM DATE OF JUDICIAL DEMAND, WITH EACH PARTY TO BEAR ITS OWN COSTS.

JUDGMENT TO BE SIGNED ACCORDINGLY. NOTIFY COUNSEL.

JAMES H. "JIM" BROWN, AS : NUMBER 388,758 DIVISION "D"
 COMMISSIONER OF INSURANCE : 19TH JUDICIAL DISTRICT COURT
 FOR THE STATE OF LOUISIANA :
 VERSUS : EAST BATON ROUGE PARISH
 ANA INSURANCE GROUP, : STATE OF LOUISIANA
 A LOUISIANA PARTNERSHIP :

**STATE
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JUDGMENT
ON PRE-TRIAL EXCEPTIONS AND MOTIONS
HEARD ON MARCH 17, 2003

This matter came before the Court pursuant to assignment. In attendance were:

Shelton Dennis Blunt – Attorney for Michael R. D. Adams, the Court-appointed Receiver of the ANA Insurance Group, Plaintiff in the Main Demand.

Brace B. Godfrey and Warren E. Byrd – Attorney’s for the State of Louisiana and James H. “Jim” Brown, Commissioner of the Department of Insurance (now through Acting Commissioner Robert J. Wooley), Defendant in the Reconventional Demand filed by Sam L. Presley, Jr. and Barbara McDaniel Presley.

Patrick McGrew – Attorney for Barbara McDaniel Presley and the Estate of Sam L. Presley, Jr. (now Represented by Barbara McDaniel Presley, the Provisional Administratrix) Defendant’s in the Main Demand and Plaintiff’s in Reconvention.

Arthur L. Lemann, III – Attorney for Barbara McDaniel Presley as Plaintiff in the Reconventional Demand.

Lewis O. Unglesby – Attorney for Barbara McDaniel Presley as Plaintiff in the Reconventional Demand.

Michael Adams – The Court-appointed Receiver of the Estate of the ANA Insurance Group, In Liquidation.

After considering the Exceptions and Motions filed by James H. “Jim” Brown, Commissioner of Insurance for the State of Louisiana and Liquidator, and Michael R. D. Adams, the Court-appointed Receiver of the ANA Insurance Group Estate (in Liquidation), Plaintiff in the main demand, Defendant in the Reconventional Demand, hereafter jointly referred to as Movers, and hearing the arguments of counsel, and allowing the introduction and filing into the record of all documents attached as exhibits to the Exceptions and Motions, and the law, and for the reasons orally assigned:

I hereby certify that on this day a notice of the above judgement was mailed by me, with sufficient postage affixed, to: all COK

Done and signed on 4-1-03

[Signature]

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IT IS ORDERED, ADJUDGED AND DECREED that:

1. Mover's Motion to Disqualify Lewis Unglesby, Patrick McGrew and Arthur Lemann shall be, and it is hereby, **DENIED**.
2. Mover's Peremptory Exception of No Right of Action Due to Forfeiture of Ownership or Non-Ownership or, In the Alternative, Motion to Dismiss shall be, and it is hereby, **DENIED**.
3. Mover's Peremptory Exception of Res Judicata or in the Alternative, Motion to Dismiss on the Ground of Collateral Estoppel shall be, and it is hereby, **DENIED**.
4. Mover's Motion to Take Judicial Notice of the Finding Made by the United States District Court, Eastern District of Louisiana, in "United States of America vs. Sam Presley, II, Barbara McDaniel (Presley), Morris Mahana, Robert Barich and Noel Joseph Bunol, III" Criminal No. 95-368 shall be, and it is hereby, **DENIED**.
5. Mover's Motion on Behalf of the Commissioner/Receiver to Reopen Discovery to Permit Additional Discovery Depositions shall be, and it is hereby, **DENIED** as to the request to depose Provino Mosca; except that Mover's are **GRANTED** five (5) days from the date of the hearing to take the deposition of David Lyons, Special Agent of the Federal Bureau of Investigation. Such deposition must be taken in the Duty Court of the 19th Judicial District Court with written questions submitted to the Court in advance of the deposition. However, upon further request by Mover, and upon agreement of counsel noting the unavailability of David Lyons for deposition within the time specified by the Court, Movers is further **GRANTED** until April 15, 2003 to depose David Lyons in accordance with the instructions provided by the Court.
6. Mover's Motion to Waive All Attorney Client Communications Regarding the Ownership of the ANA Insurance Group shall be, and it is hereby, **DENIED**.

- 7. Mover's Innominate Motion to Admit Grand Jury Testimony of Deceased Witnesses shall be, and it is hereby, **DENIED**.
- 8. Mover's Supplement Innominate Motion to Admit Previous Sworn Testimony of Sam Presley, Jr., Deceased Party and for Negative Inferences from Fifth Amendment Responses shall be, and it is hereby, **DEFERRED** to the merits.


The trial of this matter shall commence on April 25, 2003, at 9:30 o'clock a.m., without any further stay or continuance.

Mover, shall be given five (5) days to file an Application for Supervisory Writ in the First Circuit Court of Appeal. However, upon further request of Mover, and upon agreement of counsel, Mover is **GRANTED** until March 27, 2003 to file an Application for Supervisory Writs in the First Circuit

Court of Appeal.

THIS READ AND RENDERED in open Court on March 17, 2003.

THIS SIGNED at Baton Rouge, Louisiana, this 27 day of March, 2003.



JANICE G. CLARK, JUDGE

APPROVED AS TO FORM AND SUBSTANCE BY:

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JAMES H. BROWN
V.
ANA INSURANCE GROUP

NO. 388-758 DIVISION D
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HEARING

MONDAY, MARCH 17, 2003

HONORABLE JANICE G. CLARK, JUDGE PRESIDING

REPORTER'S NOTE: THIS MATTER WAS CALLED FOR
HEARING.

THE COURT: MAKE YOUR APPEARANCES FOR THE
RECORD, PLEASE.

MR. BYRD: THERE ARE SOME STILL WALKING IN.
THANK YOU.

THE COURT: ALL RIGHT.

MR. LEMANN: ARTHUR LEMANN, YOUR HONOR, ON
BEHALF OF BARBARA PRESLEY.

MR. MCGREW: PATRICK F. MCGREW ON BEHALF OF
BARBARA PRESLEY AS THE EXECUTRIX OF THE ESTATE OF
SAMUEL L. PRESLEY, JR. AND BARBARA PRESLEY
INDIVIDUALLY.

MR. GODFREY: BRACE B. GODFREY, JR., YOUR
HONOR, ON BEHALF OF FORMER COMMISSIONER JIM BROWN
AND, THROUGH HIM, THE CURRENT COMMISSIONER AND THE
RECEIVER AS WELL OF ANA INSURANCE GROUP.

THE COURT: ALL RIGHT.

MR. BYRD: GOOD MORNING, YOUR HONOR. WARREN
BYRD HERE WITH MR. GODFREY AS WELL REPRESENTING
THE STATE OF LOUISIANA IN THE RECONVENTIONAL
DEMAND BY SAM AND BARBARA PRESLEY. MR. BLUNT IS
ON HIS WAY HERE.

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MORE THAN ONE OCCASION, THE FIRST CIRCUIT COURT OF APPEAL SAYS THAT THE COMMISSIONER HOLDS THIS PROPERTY SUBJECT TO ANY CLAIM THAT MIGHT BE MADE AGAINST IT AND IT DOES NOT MATTER THE CHARACTER, THE RACE, THE RELIGIOUS BELIEF, OR THE PRIOR CONVICTIONS OF THE CLAIMANT. THANK YOU, YOUR HONOR.

THE COURT: THANK YOU. THIS COURT HAS RECEIVED AND REVIEWED NOW HUNDREDS OF PAGES. THIS LITIGATION HAS BEEN ONGOING AT LEAST EIGHT YEARS, ACTIVELY THE LAST FOUR YEARS. THIS MATTER HAS BEEN UP ON RULE DAY AT LEAST TWELVE TIMES.

THIS COURT IS WELL AWARE THAT THERE'S SOME CONDUCT THAT HAS OCCURRED WHICH HAS BEEN LESS THAN EXEMPLARY WITH RESPECT TO SOME OF THE WITNESSES AND OTHER PERSONS IN THIS MATTER. THERE ARE WITNESSES WHO HAVE PLED GUILTY TO CRIMES AND FELONIOUS CONDUCT. THERE HAVE BEEN PUBLIC OFFICIALS WHO HAVE BREACHED THEIR OBLIGATION TO THE PUBLIC FISC AND THE PUBLIC FAITH.

AT THE END OF THE DAY THIS COURT HAS TO MAKE AN INDEPENDENT DETERMINATION OF THE FACTS AND APPLY THE LAW IN THIS STATE ACTION IN ACCORDANCE WITH THE LAW. THIS COURT CANNOT BE INTIMIDATED BY THE FIRST CIRCUIT OR BY A FEDERAL DISTRICT COURT, WHETHER MIDDLE OR EASTERN, AND THIS COURT WOULD NOT BE UPHOLDING ITS SWORN DUTY TO ALLOW SOMEONE ELSE TO MAKE A DECISION THAT THIS COURT IS CLEARLY CALLED UPON TO MAKE.

THIS COURT IS FIRMLY OF THE OPINION THAT THERE DOES EXIST A RIGHT OF ACTION ON BEHALF OF MS. BARBARA PRESLEY IN THIS ACTION AT LAW IN WHICH

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SHE HAS OWNERSHIP INTEREST IN CERTAIN PROPERTY AND CERTAIN RIGHTS THAT FLOW FROM THAT PROPERTY. WHETHER OR NOT SHE'S MARRIED TO A NO GOOD MAN, I'M NOT CALLED UPON TO DECIDE, THE COURT BEING WELL AWARE THAT MEN HAVE BEEN LYING TO WOMEN FOR TWO THOUSAND YEARS, AND COUNTING.

THE COURT IS NOT CALLED UPON TO REVIEW WHETHER OR NOT SOME PERSONS IN CALIFORNIA CONSPIRED WITH SOME OTHER PERSONS IN CALIFORNIA WHO THEN CONSPIRED WITH SOME OTHER PEOPLE IN NEW ORLEANS. NOPE, THIS IS NOT THAT KIND OF ACTION. I DON'T HAVE TO DO THAT. MAYBE THERE WILL BE ANOTHER DAY WHEN I WILL HAVE TO DO THAT.

THE COURT IS OF THE OPINION THAT RIGHT OF ACTION DOES EXIST, AND, THEREFORE, THE EXCEPTION OF NO RIGHT OF ACTION IS HEREBY OVERRULED. JUDGMENT TO BE SIGNED ACCORDINGLY. FIVE DAYS TO TAKE WRITS. LET'S GO TO THE NEXT ONE.

MR. BLUNT: THERE WAS ONE MORE EXCEPTION THAT I THINK WE HAD AND THAT WAS WITH REGARD TO RES JUDICATA OR --

MR. GODFREY: THAT IS ACTUALLY RESOLVED BY THE ARGUMENT AND THE COURT'S RULING.

MR. BLUNT: I JUST WANTED THE RECORD TO BE CLEAR FOR PURPOSES OF PREPARING THE JUDGMENT. I GUESS THE COURT IN FACT -- SORT OF DE FACTO HAS DENIED THAT ONE AS WELL.

THE COURT: I HAVEN'T HEARD IT YET. YOU WANT ME TO HEAR IT, THE COURT WILL HEAR IT.

MR. GODFREY: YOUR HONOR, JUST BRIEFLY --

THE COURT: YOU HAVE TO REALIZE THOUGH THAT AT SOME POINT IN TIME THIS COURT HAS TO MAKE A

JUDGMENT.

MR. GODFREY: ABSOLUTELY, YOUR HONOR. BUT JUST IN TERMS FOR THE SAKE OF TIME, THE RES JUDICATA ARGUMENT WAS ESSENTIALLY THE FINAL DISPOSITION OF THE FEDERAL CRIMINAL PROCEEDINGS HAVING TO DO WITH THE JUST DETERMINATION THAT SAM PRESLEY SINGULARLY CONTROLLED AND OWNED ANA.

THE COURT: OBITER DICTUM, OBITER DICTUM.

MR. GODFREY: YES, YOUR HONOR. THAT IS THE BASIS, HOWEVER, OF THE RES JUDICATA ARGUMENT.

THE COURT: ALL RIGHT.

MR. MCGREW: OBVIOUSLY, YOUR HONOR, WE TAKE ISSUE WITH THE FACT -- I MEAN, THE RES JUDICATA RULES ARE REAL CLEAR. THE CASE LAW IS REAL STRAIGHTFORWARD. THE MOST RECENT LOUISIANA CASE IS CITED IN OUR BRIEF KELTY V. BRUMFIELD. FIRST OF ALL, ALL THE ESSENTIAL ELEMENTS MUST BE THERE. EACH ESSENTIAL ELEMENT MUST BE ESTABLISHED BEYOND ALL QUESTION, THE IDENTITY OF THE THING --

THE COURT: NOT BEYOND ALL QUESTION.

MR. MCGREW: WELL, THAT'S WHAT THE SUPREME COURT IN KELTY SAID, BUT I WILL LEAVE IT TO THE COURT'S DISCRETION.

THE COURT: NOT BEYOND ALL QUESTION.

MR. MCGREW: THE IDENTITY OF THE THING DEMANDED, THE CAUSE OF ACTION THE SAME. WELL, IN THE FEDERAL CASE THEY'RE TRYING TO THROW ME IN JAIL. IN THIS CASE WE'RE TRYING TO DECIDE WHO OWNS PROPERTY. THE PARTIES MUST BE THE SAME. WELL, IN THE FEDERAL CASE IT'S THE UNITED STATES GOVERNMENT VERSUS MR. PRESLEY AND HERE IT'S A BUNCH OF OTHER PEOPLE VERSUS MR. PRESLEY. AND THE

ISSUES MUST BE CONSIDERED BY THE COURT IN CONTEST BETWEEN THE SAME PARTIES. MS. PRESLEY WASN'T PRESENT WHEN THIS DETERMINATION WAS MADE. THERE'S NO CONTEST AS TO HER. RES JUDICATA DOESN'T FIT THIS CASE AT ALL, YOUR HONOR. THANK YOU.

MR. GODFREY: JUST AS A MATTER OF PROCEDURE, YOUR HONOR, WE WOULD OFFER, FILE, AND INTRODUCE ON THAT PARTICULAR ISSUE JUDGE FELDMAN'S FACTUAL BASIS BECAUSE THAT WAS THE BASIS OF THE ARGUMENT.

THE COURT: THANK YOU VERY MUCH. THE COURT HAS REVIEWED THIS MATTER. AS I HAVE INDICATED TO YOU PREVIOUSLY, THE COURT IS OF THE OPINION THAT THIS COURT IS CALLED UPON TO DECIDE THE ISSUE OF THE OWNERSHIP, THE INTEREST, ENTITLEMENT, AND ANY RESIDUAL THAT MAY OR MAY NOT EXIST WITH RESPECT TO MS. BARBARA PRESLEY INDIVIDUALLY AND IN HER CAPACITY AS THE ADMINISTRATRIX, NOT MR. FELDMAN, THE HONORABLE JUDGE FROM THE EASTERN DISTRICT, AND NOT MR. POLOZOLA, THE HONORABLE JUDGE FROM THE MIDDLE DISTRICT.

THEY DID HAVE COMPELLING AND IMPORTANT MATTERS BEFORE THEM AND THIS COURT DOES NOT MAKE LIGHT OF THOSE, BUT THEY DO NOT HAVE BEFORE THEM THE ISSUE OF CONSTRUING LOUISIANA LAW WITH RESPECT TO PROPERTY INTERESTS AND PROPERTY RIGHTS, NOR DO THEY HAVE BEFORE THEM THE ISSUE OF THE OBLIGATION OF THE COMMISSIONER OF INSURANCE IN TERMS OF LIQUIDATION OF INSURANCE COMPANIES AND THE DISTRIBUTION THEREOF FOR THE CITIZENS OF THIS STATE.

HAPPILY OR UNHAPPILY, THIS COURT WAS ELECTED TO DO THAT, MR. GODFREY. THANK YOU VERY MUCH.