

In the  
Supreme Court of Ohio 09-1816

MARY JO HUDSON,  
Superintendent of Insurance, State of Ohio,  
acting in her capacity as Liquidator of The Oil  
& Gas Insurance Company,

Plaintiff-Appellant,

v.

PETROSURANCE, INC.,

Defendant-Appellee.

: Case No. \_\_\_\_\_  
:  
:  
: On Appeal from the  
: Franklin County  
: Court of Appeals,  
: Tenth Appellate District  
:  
:  
: Court of Appeals Case  
: No. 08AP-1030  
:  
:

**MEMORANDUM IN SUPPORT OF JURISDICTION OF PLAINTIFF-APPELLANT,  
MARY JO HUDSON, SUPERINTENDENT OF INSURANCE**

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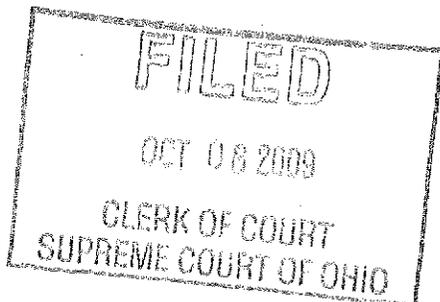
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## INTRODUCTION

In 1990, the Oil and Gas Insurance Company (“Company”) became insolvent and entered liquidation. Nearly 20 years later, all of the Company’s allowed creditors have been repaid the principal of their claims, but not the interest accruing during this lengthy process. Thanks largely to the liquidator’s sound decisions and good investments, a \$13 million surplus remains. These circumstances present a question of first impression, but one that will likely have a significant effect on the future of insurer liquidations in Ohio: Do creditors of a liquidated insurance company who are still owed interest on their claims have priority to surplus funds over the company’s shareholders?

Insurer liquidations are governed by R.C. Chapter 3903, which proclaims that its provisions are to be liberally construed to protect “the interests of insureds, claimants, creditors, and the public generally.” R.C. 3903.02(D). Every statute in the chapter reinforces this mandate; the purpose of liquidation is to make creditors and other injured parties whole if at all possible. This common-sense aim was unreasonably cast aside by the Tenth District Court of Appeals, which interpreted the lack of an explicit provision for the payment of interest in a way that favors the rights of the shareholder that ran the Company into insolvency over those of the injured creditors.

This choice raises numerous concerns. First, the Tenth District placed Ohio out of step with the overwhelming majority of jurisdictions that have considered this issue, making Ohio one of the few States that allows shareholders to recover while injured creditors remain. This fact alone makes the case worthy of review, for decisions of such national significance should come from this Court, not an intermediate court of appeals.

Additionally, the pure economic impact of the Tenth District’s decision stretches beyond the boundaries of this case. Eleven insurer liquidations are currently ongoing in Ohio, with

66,476 claims pending. Considering that 35 insurance companies have been liquidated in Ohio since 1976, and given the prevalence of the insurance industry in the State, future liquidations are also certain. In short, the decision will affect a massive number of present and future claimants and shareholders.

Moreover, the lower court's decision runs contrary to the traditional notions of equity that guide the liquidation statutes. The Company's sole shareholder, and the majority owner of that shareholder, used their control to drive the Company into insolvency. It warps the purposes of the liquidation statutes for these parties to recover before the claimants, who were oblivious to the wrongdoing and remain the most damaged by it, have been fully repaid.

The decision will also make it more difficult for troubled insurers to rehabilitate themselves. As the recent economic crisis demonstrated, the state and national economies depend on the financial well-being of insurance companies, banks, and similar institutions. When these entities falter, they need a solid influx of capital to survive and rebuild. As the Tenth District itself has noted, "[a] strong policy consideration is the encouragement of creditors to continue dealing with an ailing insurer so that, through successful rehabilitation, the insurer will remain in business." *Covington v. Airborne Express, Inc.*, 2004-Ohio-6978, ¶ 30. Potential creditors may risk doing business with these companies knowing they have, at worst, a possibility of recovering their claims and interest on them after liquidation. But armed with the knowledge that they may not receive their principal back for decades and no interest will ever be paid for the delay, such investors will be unwilling to take a risk on these vital organizations. This Court should take the opportunity to construe R.C. Chapter 3903 to avoid this scenario.

For these and other reasons, the Court should accept this case for review and reverse the judgment of the Tenth District Court of Appeals.

## STATEMENT OF THE CASE AND FACTS

### **A. The Oil and Gas Insurance Company was liquidated, and a surplus remained after creditors were repaid the principal of the debts.**

In 1990, the Franklin County Court of Common Pleas determined that the Company was insolvent and ordered it to be liquidated. The Ohio Superintendent of Insurance is the statutorily designated liquidator for such entities, see R.C. 3903.18(A); appellant Mary Jo Hudson (“Liquidator”) now holds that position. The Company’s sole shareholder, appellee Petrosurance, Inc., unsuccessfully objected to the liquidation. As this Court noted in a previous decision related to this liquidation, Petrosurance is a subsidiary of another corporation, which is itself a subsidiary of a third corporation, but all of these entities are ultimately controlled by one individual, Mark Hardy. *Fabe v. Prompt Finance, Inc.* (1994), 69 Ohio St.3d 268, 269. Hardy is the majority shareholder of Petrosurance.

As the liquidation progressed, the Liquidator collected and verified all of the claims against the Company and converted the Company’s assets to cash to pay the creditors according to her statutory powers. One of these assets was a settlement on a directors and officers liability insurance policy; the Liquidator obtained approximately \$725,000 under this policy as compensation for the directors’ actions. While this process was ongoing, the Liquidator invested the Company’s assets that were not presently needed, as R.C. 3903.21(A)(16) requires. Given the favorable market conditions in the 1990s, these investments yielded healthy returns.

In 2006, the Liquidator submitted her final report to the trial court regarding payment to the general creditors. The trial court approved her recommendations and the payment process began for these allowed creditors, who at that point had not been paid for over 16 years on the debts the Company owed them. The creditors were repaid only for the principal on these debts. After all

of these entities were paid, a \$13 million surplus remained, largely because of the Liquidator's good management and the favorable investment rates while the liquidation was ongoing.

**B. The trial court ordered the Liquidator to use the surplus to repay the Company's creditors for the interest that accrued on their claims during the liquidation process.**

The Liquidator filed a complaint for declaratory judgment against Petrosurance and Hardy, seeking a declaration regarding how she should distribute the surplus funds. The trial court granted the Liquidator's claims against Hardy, but these claims are not relevant to this appeal. Petrosurance counterclaimed that, as the Company's sole shareholder, it is entitled to any surplus remaining after all creditors have been paid. The Liquidator proposed using the surplus to repay the creditors for the interest that accrued on their claims during the lengthy liquidation process.

The parties moved for summary judgment on this issue (and other procedural matters not relevant to the present appeal). The trial court granted the Liquidator's motion for summary judgment, concluding that the Company's creditors are entitled to their accrued interest when funds remain after all allowed claims have been paid in principal, and that this right is superior to any shareholder's claim to the surplus. (Tr. Op., attached as Exhibit 2)

**C. The court of appeals reversed, holding that R.C. Chapter 3903 does not allow for interest payments to creditors.**

The Tenth District Court of Appeals reversed. *Hudson v. Petrosurance, Inc.*, 2009-Ohio-4307, ¶ 35 ("App. Op.", attached as Exhibit 1). After noting that R.C. Chapter 3903, which contains the rules for supervision, rehabilitation, and liquidation of insurance companies, does not expressly provide for the payment of interest to creditors, the court reviewed authorities from various other States concerning the payment of interest in these circumstances. App. Op. at ¶ 25-29. Choosing to move away from the approach of several states, the court interpreted the statutory silence in Ohio as a prohibition on this practice, even as it noted the inequities inherent in that decision. *Id.* at ¶ 30-35. The court remanded the case to the trial court to determine

whether Petrosurance was entitled to the surplus funds; the trial court, having found that the Liquidator could pay interest to the creditors, had declined to reach that issue. *Id.* at ¶ 46.

### **THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST**

**A. The decision below will affect all insurer liquidations in Ohio, and the deviation from the national consensus harms the state's insurance market.**

While the issue of how to distribute a surplus in an insurer liquidation is one of first impression in Ohio, the situation is not unique. Indeed, this specific issue has arisen in many other States, which have nearly unanimously favored the rights of creditors to interest. This Court should lend its voice to the national discussion and clarify Ohio law for several reasons.

First, the issue will have a far-reaching direct impact on Ohio's liquidations, and that alone warrants review. Eleven insurer liquidations are currently proceeding in Ohio. The ultimate resolution of this case will affect all 66,476 claims currently pending in these liquidations, and any further claims that may arise in them. Moreover, because the issue pertains to the rights and responsibilities of the Liquidator under R.C. Chapter 3903, it will affect all insurer liquidations in Ohio in the future. Given the prevalence of the insurance industry in Ohio, further liquidations are inevitable. By resolving this issue now, this Court can help to clarify the law for such future liquidations, thereby shortening the already lengthy legal process for these actions.

The Tenth District's opinion also provides an incentive for shareholders to delay the liquidation process. If no interest accrues on creditors' claims, the values of claims are fixed while the liquidated estate will earn interest and grow over time. If the shareholders can prolong the final distribution to the creditors for long enough, even a small estate can grow large enough to pay the creditors in principal and still reimburse the owners. In short, even the most insolvent insurers can realize a return on their investment, at the expense of their creditors, by bogging

down the process. Potential creditors, once aware that this might happen in future liquidations, will be understandably reluctant to invest in troubled or potentially troubled insurers.

By reviewing this case, this Court can clarify the law in this area, ensure that Ohio remains in step with other jurisdictions on this precise issue, and close a loophole that provides a significant monetary incentive for shareholders to delay liquidation proceedings.

**B. The lower court decision grants an enormous windfall to a single shareholder that drove its company into insolvency at the expense of a large class of creditors.**

Whenever a large insurer implodes, massive numbers of individuals—including policyholders, general creditors, and government entities—find themselves involuntarily interested in that company’s liquidation. To date, the Liquidator has received and processed more than 5,000 claims by parties in all three of those categories in this case alone. The Tenth District denied thousands of claimants the interest to which they would be entitled but for the liquidation, interest that accrued for nearly 20 years while their money was tied up in the administrative process.

Likewise, the decision below rewards Petrosurance for its mismanagement. The Company was insolvent when it was placed in liquidation; a surplus exists today only because the Liquidator’s investments generated interest for the estate. As the Company’s sole shareholder, Petrosurance elected all of the Company’s directors, who mismanaged the company into insolvency. Indeed, the Liquidator sued the Company’s directors for their actions in this regard, netting approximately \$725,000 in a settlement. Now, under the Tenth District’s decision, Petrosurance is able to place itself ahead of innocent creditors and claimants who have been deprived of the use of their money for nearly two decades despite the fact that it was the *only* party in a position to have avoided the Company’s insolvency.

This decision effectively rewards those who drove the company off a cliff, at the expense of the passengers along for the ride. Neither the liquidation statutes, nor the traditional notions of equity that they embrace, permit the perpetrators of wrongdoing to recover for their actions. The lower court's decision unjustly enriches these actors at the expense of innocent claimants. At a time when corporate malfeasance is all too common, an opinion institutionalizing such dramatic windfalls is undoubtedly of great interest to the citizens of Ohio.

**C. Because the Tenth District is the only court of appeals in the state that can hear insurer liquidation cases, and because the federal courts are unavailable in this context, this Court is the only one that can offer injured creditors relief.**

Finally, all insurer liquidations in Ohio must be filed in the Franklin County Court of Common Pleas, see R.C. 3903.04(E), so all appeals necessarily flow to the Tenth District. Because no other courts in the State have jurisdiction to hear liquidation cases, no conflict will ever arise, and the Tenth District's ruling, unless reversed, will govern all insurer liquidations. Moreover, federal courts will offer no reprieve for injured creditors because the federal McCarran-Ferguson Act commits the field of insurance regulation solely to the states. 15 U.S.C. § 1011 *et seq.* Thus, with no other state or federal forum available, the Tenth District's opinion will bind all such disputes in Ohio unless this Court intercedes.

For all of the above reasons, the Court should review the decision below.

## ARGUMENT

### **Appellant Mary Jo Hudson's Proposition of Law:**

*When all creditors' claims against a liquidated insurance company have been paid in principal and a surplus remains, the liquidator must pay the creditors for interest that accrued during liquidation before paying any remainder to the company's shareholders.*

Liquidation is designed to compensate those injured when a company can no longer meet its financial obligations. It exists to make whole, to the extent possible, the individuals and entities injured by this insolvency. See *Covington v. Ohio Gen. Ins. Co.*, 99 Ohio St.3d 117,

2003-Ohio-2720, ¶ 3. Shareholders have rights in the process, but they are in all ways subservient to the rights of the creditors injured by the original insolvency. Indeed, as this Court has noted, “[t]he statutory scheme for the regulation and liquidation of [insurance companies] is designed to protect the interests of the public from the difficulties experienced by the company, not to protect the company and its shareholders.” *Anderson v. Ohio Dep’t of Ins.* (1991), 58 Ohio St.3d 215, 219, overruled on other grounds, *Wallace v. Ohio Dep’t of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210, syll. ¶ 1; see also *Cay Machine Co. v. Firestone Tire & Rubber Co.* (1963), 175 Ohio St. 295, 299 (“[W]hen a corporation becomes insolvent the corporate property becomes a trust fund for the benefit of creditors.”).

It is antithetical to this process to allow a shareholder to take *anything* before the Company’s creditors have been *fully* compensated for their losses. Thus, when sufficient funds exist to repay these creditors for both their lost principal and the interest that accrued during the delay in repayment, the creditors should receive these funds, not the shareholders who were responsible for the delay. This basic principle is supported by (1) a liberal construction of the liquidation laws in R.C. Chapter 3903, (2) a review of the conclusions reached by courts in other States on this same issue, and (3) public policy.

**A. Under the plain language of the statutes in R.C. Chapter 3903, creditors are entitled to interest on their claims in liquidation when sufficient funds exist for this purpose.**

When construing a statute, a court must first look at the plain language of the provision. See *Medcorp., Inc. v. Ohio Dep’t of Job and Family Servs.*, 121 Ohio St.3d 622, 2009-Ohio-2058, ¶ 9. In this process, “[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage.” R.C. 1.42. If this review yields a clear meaning, the statute must be applied as written. *Medcorp.*, 2009-Ohio-2058, at ¶ 9. Although R.C. Chapter 3903 does not expressly provide for the payment of interest in liquidation proceedings, a

plain language review of this chapter reveals that liquidation is designed to compensate creditors and other injured parties as fully as possible, including the payment of interest when it is available, before shareholders may receive anything from the liquidated estate.

The stated purpose of R.C. Chapter 3903 “is the protection of the interests of insureds, claimants, creditors, and the public generally, with minimum interference with the normal prerogatives of the owners and managers of insurers.” R.C. 3903.02(D). This chapter is to be liberally construed to effectuate this purpose. *Id.* at (C). In short, statutes in this chapter should be reasonably interpreted in a manner that protects creditors’ rights and interests.

R.C. 3903.42 implements this purpose by establishing a priority schedule for the distribution of liquidated funds. The statute establishes nine classes of claims, and states that “[e]very claim in each class *shall be paid in full or adequate funds* retained for such payment before the members of the next class receive any payment.” *Id.* (emphasis added.) The claims are ranked in order of payment: (1) administration costs, (2) claims under policies for losses incurred, (3) claims of the federal government, (4) debts to employees, (5) claims of general creditors, (6) claims of state or local governments, (7) late claims and any claims other than those under the next two classes, (8) claims under surplus or contribution notes, and finally (9) *claims of shareholders and owners*. *Id.* at (A)–(I). Thus, creditors, and indeed every other class of claimants, have a higher priority than shareholders, and they must be repaid with “full or adequate funds” before the shareholders take anything.

This framework means that creditors are entitled to interest when it is available. The statutory preference is to repay all creditors in full, and interest is certainly part of the creditors’ claims. See *Sogg v. Zurz*, 121 Ohio St.3d 449, 2009-Ohio-1526, ¶ 7 (recounting the well-settled common law rule that interest follows principal unless there is a specific statute or stipulation to

the contrary). In most instances, though, full repayment of all claims is impossible. R.C. 3903.42 addresses that fact by allowing “adequate funds” to be used to pay each class. This concept is implicitly tied to R.C. 3903.02(D)(2), which provides that the purpose of protecting creditors is to be implemented by, among other things, the “[e]quitable apportionment of any unavoidable loss.” In other words, when the Liquidator can pay all creditors in full, she must, but if such payment is impossible, the creditors must bear the loss equally.

The United States Supreme Court has outlined how such loss-sharing works, and how it furthers the purpose of favoring creditors over shareholders:

[A]s a general rule, after property of an insolvent is in *custodia legis* interest thereafter accruing is not allowed on debts payable out of the fund realized by a sale of the property. But that is not because the claims had lost their interest-bearing quality during that period, but is a necessary and enforced rule of distribution, due to the fact that in case of receiverships the assets are generally insufficient to pay debts in full. . . . As this delay was the act of the law, no one should thereby gain an advantage or suffer a loss. For that and like reasons, *in case funds are not sufficient to pay claims of equal dignity, the distribution is made only on the basis of the principal of the debt.* But that rule [does] not prevent the running of interest during the Receivership; and *if as a result of good fortune or good management, the estate proved sufficient to discharge the claims in full, interest as well as principal should be paid.*

*Am. Iron & Steel Mfg. Co. v. Seaboard Air Line Ry.* (1914), 233 U.S. 261, 266 (emphasis added).

This time-honored rule reflects common sense: creditors are paid principal only, or a prorated portion of it, when funds are insufficient to pay them all in full. Paying each creditor, at least in part, also comports with the basic equitable principles underlying liquidation.

But when the remaining funds allow for full payment, the Supreme Court noted that this limiting rule need not apply. Because the Liquidator’s good management combined with the fortunate market conditions resulted in a surplus that can repay the Company’s creditors for at least part of the interest that accrued on the debts in this case, the Liquidator must use those funds to compensate them as fully as possible for their losses. Likewise, she must do so before

paying any sums to Petrosurance, which sits in the lowest possible priority class. Such an interpretation is the only way to fully protect the creditors' rights to full repayment, as required by R.C. 3903.02(D), and is the only one that gives effect to the "full or adequate funds" language and the priority classes set forth in R.C. 3903.42.

Moreover, even if this statutory scheme did not require the Liquidator to pay interest, which it does, she was certainly entitled to do so under the broad discretionary and equitable powers afforded to liquidators. Pursuant to R.C. 3903.43(A), a liquidator "may compound, compromise, or in any other manner negotiate the amount for which claims will be recommended to the court." See also R.C. 3903.21 (granting liquidators extensive powers). These provisions do not limit the liquidator to repaying only the principal of a debt; rather, she has extensive authority to set the terms by which debts will be repaid. See also *Ratchford v. Proprietors' Ins. Co.* (1989), 47 Ohio St.3d 1, 3. Adding interest to such claims when sufficient funds exist certainly falls within the ambit of these powers, as the Missouri Supreme Court noted in construing a functionally identical statute: "This reading of the legislature's use of the words 'compound,' 'compromise,' and 'negotiate' . . . is consistent with the legislative intent that the receiver's general duty is to review and settle claims in a fair manner on behalf of the insolvent insurer. . . . [T]herefore, the receiver was authorized to request the payment of prejudgment interest and the trial court was authorized to approve the request." *Wenzel v. Holland-Am. Ins. Co. Trust* (Mo. 2000), 13 S.W.3d 643, 646.

Reading these provisions together reveals that the General Assembly bestowed broad powers on liquidators to compensate creditors as fully as possible for their losses up to and including interest before the shareholders take the remainder of the liquidated estate. Although the ability to pay interest could have been expressed more clearly, as is the case with interest in

the banking liquidation context under R.C. 1125.24(B), the lack of precision in framing this ability does not overcome the liberal construction of these statutes in favor of creditors, the plain language of the priority rule, or the broad powers afforded to liquidators to protect creditors.

**B. The overwhelming majority of jurisdictions allow creditors to be paid interest in liquidation if a surplus exists after the payment of principal.**

The rule that creditors are entitled to receive interest on their claims against a liquidated estate when funds are available for such payment is hardly revolutionary; the principle is well-established throughout the country and beyond. The Tenth District rejected this strong consensus in favor of the slight minority viewpoint. This Court's should put Ohio in line with the reasonable, and overwhelming, majority view on this issue.

Courts in England have allowed surplus funds to be used to pay creditors for their accrued interest in these circumstances since the 1700s. See *City of New York v. Saper* (1949), 336 U.S. 328, 330 n.7 (finding it to be well-established in England that, "if the alleged 'bankrupt' proved solvent, creditors received post-bankruptcy interest before any surplus reverted to the debtor."). The United States Supreme Court has consistently reached the same conclusion. See *Nat'l Bank of the Commonwealth v. Mechanics' Nat'l Bank* (1877), 94 U.S. 437, 440 ("Where the right to recover exists in this class of cases, it includes interest as well as principal, unless there is something which would render the payment of the former inequitable."); *Am. Iron & Steel Mfg. Co.*, 233 U.S. at 266; *Ticonic Nat'l Bank v. Sprague* (1938), 303 U.S. 406, 411.

Almost all of the states that have addressed this issue have embraced this rule, whether through explicit legislative enactments or through the interpretation of statutes similar to those at issue here. As the lower court noted, 13 states have expressly provided for interest to be paid to creditors when a surplus exists in an insurer liquidation. See *Petrosurance, Inc.*, 2009-Ohio-4307, ¶ 25 (noting that California, Connecticut, Kentucky, Maine, Minnesota, Nevada, New

Hampshire, New Mexico, Oklahoma, Rhode Island, Texas, Utah, and Wisconsin have revised their statutes to address this issue). Many other state courts have approved such payments under the reasoning outlined by the United States Supreme Court, even when the applicable liquidation statutes are silent in this regard. See, e.g., *Green v. Stone* (Ala. 1921), 87 So. 862, 866; *Taylor v. Corning Bank & Trust Co.* (Ark. 1932), 48 S.W.2d 1102, 1103; *Tagawa v. Karimoto* (Haw. 1958), 43 Haw. 1, 14; *People ex rel. Barrett v. Farmers State Bank of Irvington* (Ill. 1938), 20 N.E.2d 502, 504–05; *Bates v. Farmers Sav. Bank* (Iowa 1942), 3 N.W.2d 517, 519–20; *Emerald Investment Co. v. A.J. Harwi Hardware Co.* (Kan. 1937), 64 P.2d 16, 17–18; *State Banking Commr. v. Metro. Trust Co.* (Mich. 1940), 291 N.W. 228, 230; *Wenzel*, 13 S.W.3d at 646; *In re People by Stoddard* (N.Y. 1928), 163 N.E. 129, syll. ¶ 1, 3; *Hackney v. Hood* (N.C. 1932), 166 S.E. 323, 324; *Commonwealth ex rel. Woodside v. Seaboard Mut. Cas. Co.* (Pa. 1966), 215 A.2d 673, 674; *In re Liquidation of Badger State Bank* (S.D. 1944), 15 N.W.2d 744, 748–49; *State ex rel. McConnell v. Park Bank & Trust Co.* (Tenn. 1924), 268 S.W. 638, 642; *Metompink Bank & Trust Co. v. Bronson* (Va. 1939), 2 S.E.2d 323, 327.

Whether through legislation or jurisprudence, these jurisdictions recognize that liquidation is designed to compensate creditors as fully as possible for the injuries suffered as a result of a company's insolvency and that, if a surplus exists after creditors are repaid for their principal, they should be made as whole as possible through the payment of accrued interest. While shareholders certainly are entitled to any funds remaining after all creditors have been fully repaid, they should not be allowed to take while creditors' injuries, occasioned by the company's actions, remain; the equities rest with the creditors in these circumstances.

In sharp contrast, the lower court identified only two States that have come to the contrary conclusion: Texas, in a banking liquidation case, and Colorado. Both decisions relied heavily on

the fact that the state priority statutes did not explicitly provide for the payment of interest. See *Huston v. FDIC* (Tex. 1990), 800 S.W.2d 845, 849; *Stephens v. Colaiannia* (Colo. App. 1997), 942 P.2d 1374, 1376. But, as the cases cited above show, this argument provides little reason to abandon the driving purpose of Ohio's liquidation statutes as screened through the liberal construction rule and to break away from the overwhelming consensus on this issue. This Court should adopt the majority view.

**C. Allowing shareholders to take surplus funds in a liquidation over creditors who have not received interest violates public policy by discouraging entities from doing business with troubled insurers and encouraging dilatory behaviors by shareholders.**

Though the lower court's opinion has an undeniable impact on the creditors involved in this case, the message it sends to those thinking of doing business with troubled insurance companies is particularly disconcerting. The State and national economies depend on the willingness of individuals to invest in risky ventures. This need is especially pressing when the investments pertain to troubled, but economically vital entities like banks and insurance companies. Such entities need a solid influx of capital to survive and rebuild, and the primary way to generate such capital is through private financing. The lower court decision substantially discourages individuals from doing business with these entities, which contravenes public policy. See *Airborne Express, Inc.*, 2004-Ohio-6978, ¶ 30.

The Tenth District's decision also provides an incentive for shareholders to pursue unnecessary litigation in the liquidation process. If no interest accrues on creditors' claims, the values of claims are fixed while the value of the liquidated estate, invested pursuant to R.C. 3903.21(A)(16), will earn interest and grow over time. If the shareholders can delay final distribution long enough, even a small estate can grow large enough to pay the creditors in principal and still reimburse the owners. In short, even the most insolvent insurers can realize a return on their investment, at the expense of their creditors, by bogging down the process.

Liquidation “is designed to protect the interests of the public from the difficulties experienced by the company, not to protect the company and its shareholders.” *Anderson*, 58 Ohio St.3d at 219. The Tenth District opinion has subverted this purpose, turning liquidation into a tool for shareholders to gain through delay while their creditors are left uncompensated.

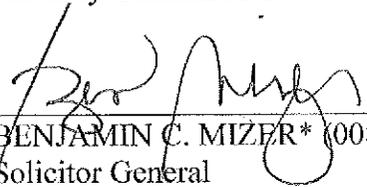
R.C. Chapter 3903 can be reasonably construed to avoid these problems; this Court should take this opportunity to do so.

### CONCLUSION

For the above reasons, this Court should grant review and reverse the decision below.

Respectfully submitted,

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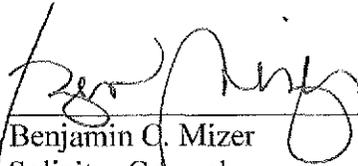
Mary Jo Hudson, Superintendent of  
Insurance, State of Ohio, acting in her  
capacity as Liquidator of The Oil & Gas  
Insurance Company

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Plaintiff-Appellant Mary Jo Hudson, Superintendent of Insurance, was served by U.S. mail this 8th day of October, 2009, on the following counsel:

Peter L. Cassady  
Laurie A. Lamb  
John Li  
Beckman Weil Shepardson LLC  
300 Pike Street, Suite 400  
Cincinnati, Ohio 45202

Counsel for Defendant-Appellee,  
Petrosurance, Inc.



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Benjamin C. Mizer  
Solicitor General

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
JULY 25 2009  
FRANKLIN CO. OHIO

2009 AUG 25 PM 12:04  
CLERK OF COURTS

Mary Jo Hudson,  
Superintendent of Insurance,  
State of Ohio, acting in her  
capacity as Liquidator of  
The Oil & Gas Insurance Company,

Plaintiff-Appellee,

v.

Petrosurance, Incorporated,

Defendant-Appellant,

Mark G. Hardy,

Defendant-Appellee.

No. 08AP-1030  
(C.P.C. No. 07CVH04-5862)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on August 25, 2009, defendant-appellant's first assignment of error is overruled and its second assignment of error is sustained, plaintiff-appellee's cross-assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part. This cause is remanded to that court for further proceedings in accordance with law consistent with said decision. Costs shall be assessed equally between plaintiff-appellee and defendant-appellant.

FRENCH, P.J., SADLER and CONNOR, JJ.

By   
Judge Judith L. French, P.J.

EXHIBIT 1

Jonathan M. Bryan

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO

2009 AUG 25 PM 12:05

CLERK OF COURTS

Mary Jo Hudson,  
Superintendent of Insurance,  
State of Ohio, acting in her  
capacity as Liquidator of  
The Oil & Gas Insurance Company,

Plaintiff-Appellee,

v.

Petrosurance, Incorporated,

Defendant-Appellant,

Mark G. Hardy,

Defendant-Appellee.

No. 08AP-1030  
(C.P.C. No. 07CVH04-5862)

(REGULAR CALENDAR)

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D E C I S I O N

Rendered on August 25, 2009

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*Richard Cordray, Attorney General, by Outside Counsel  
McNamara and McNamara, LLP, Keith McNamara, and  
Jonathan M. Bryan, for plaintiff-appellee.*

*Beckman Weil Shepardson LLC, Peter L. Cassady, Laurie A.  
Lamb, and John Li, for defendant-appellant.*

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APPEAL from the Franklin County Court of Common Pleas.

FRENCH, P.J.

{¶1} Defendant-appellant, Petrosurance, Inc. ("Petrosurance"), appeals the judgment of the Franklin County Court of Common Pleas entering summary judgment in

favor of plaintiff-appellee, Mary Jo Hudson, Ohio Superintendent of Insurance, in her capacity as liquidator of The Oil & Gas Insurance Company (the "Liquidator"), denying in part Petrosurance's motion for summary judgment, and dismissing Petrosurance's counterclaim. The Liquidator asserts a cross-assignment of error, pursuant to R.C. 2505.22, should this court sustain Petrosurance's assignments of error in whole or in part.

{¶2} Because this case arises out of the liquidation of The Oil & Gas Insurance Company ("OGICO"), a brief review of the liquidation proceedings is helpful. On August 31, 1990, the Franklin County Court of Common Pleas found that OGICO was insolvent and, pursuant to R.C. 3903.18, ordered the Superintendent of Insurance to liquidate it, over the objection of OGICO's sole shareholder, Petrosurance. On that same date, the court also approved the Liquidator's Notice of Liquidation and authorized the Liquidator to require all proofs of claim to be submitted to the Liquidator on or before August 31, 1991. On October 3, 1996, the court issued an order that all future claims, as defined therein, would be forever barred and foreclosed if not reported in writing to the Liquidator on or before December 31, 1997.

{¶3} On August 21, 1991, defendant, Mark G. Hardy, "acting for himself and FORUM HOLDINGS USA, and any and all other entities owned, controlled or affiliated by or with him," filed a proof of claim for an unstated amount, regarding "INTERCOMPANY BALANCES AND OTHER MONIES DUE." Eleven years later, on August 19, 2002, the Liquidator sent a determination letter to Hardy's counsel, denying the 1991 proof of claim in its entirety. No objections were filed with respect to the denial.

{¶4} On January 9, 2006, the trial court authorized payment in full to all general creditors of OGICO whose claims the Liquidator had allowed. Claims of general creditors are classified as Class 5 claims under the Ohio statute establishing the priority of claims in insurer liquidations. See R.C. 3903.42(E). The January 9, 2006 order stated that "any contingent or future Class 4, Class 5 or Class 6 Claims or any Class 4, 5, or 6 claims not included in the Liquidator's Reports of Class 4, Class 5 and Class 6 Claims and not previously disallowed or zero valued are hereby foreclosed and/or disallowed." After payment of all allowed claims, the Liquidator retains a surplus of over \$13 million, to which Petrosurance claims entitlement as OGICO's sole shareholder.

{¶5} On April 20, 2007, the Liquidator filed a complaint for declaratory judgment against Petrosurance and Hardy.<sup>1</sup> The Liquidator alleged that she had collected all of OGICO's assets, converted the assets to cash, considered all timely claims, and paid all allowed claims in full. The Liquidator requested a declaratory judgment that Petrosurance had no right to any remaining funds in her possession. Both defendants filed answers, and Petrosurance filed a counterclaim. In a judgment not relevant to this appeal, the trial court granted summary judgment in favor of the Liquidator on her claims against Hardy.

{¶6} In its answer and counterclaim, Petrosurance alleged that the Liquidator retains in excess of \$13 million and that, as OGICO's sole shareholder, it is entitled to the surplus funds, after payment of any remaining administrative expenses. In its

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<sup>1</sup> The Supreme Court of Ohio addressed the relationship between OGICO, Petrosurance, and Hardy in *Fabe v. Prompt Finance, Inc.*, 69 Ohio St.3d 268, 269, 1994-Ohio-323, as follows: "OGICO's parent company is [Petrosurance], a subsidiary of Forum Holdings U.S.A., Inc. [which] is a subsidiary of Forum Re Group, Inc., a.k.a. The Group, Inc." Hardy was a director of each company and chief executive of The Group, Inc. "[A]ll related corporate entities come under the ultimate control of Hardy." *Id.*

counterclaim, Petrosurance alternatively prayed for a judgment declaring OGICO the sole owner of the surplus funds or for judgment against the Liquidator in the amount of the surplus funds. The trial court dismissed Petrosurance's counterclaim on September 24, 2007, for lack of subject-matter jurisdiction. The court stated that the parties' dispute regarding entitlement to the surplus funds would be determined by the Liquidator's declaratory judgment claim, but also stated that Petrosurance's claim "must be presented and adjudicated in accordance with the structure established in R.C. Chap. 3903."

{¶7} After the dismissal of its counterclaim, Petrosurance submitted a proof of claim to the Liquidator on October 17, 2007, pursuant to R.C. 3903.35. The Liquidator's representatives had provided the proof of claim form to Petrosurance in June 2006 and suggested that it submit the proof of claim to assert a right to the surplus funds. By letter dated November 1, 2007, however, the Liquidator informed Petrosurance that she would not file Petrosurance's claim because it was submitted after December 31, 1997, the purported deadline for filing a proof of claim in the OGICO liquidation. The Liquidator also stated that Petrosurance's claim was encompassed by Hardy's 1991 claim, which the Liquidator denied without objection. Petrosurance treated the Liquidator's return of its proof of claim as a denial and filed an objection, but the Liquidator did not ask the court for a hearing on the objection as required by R.C. 3903.39(B).<sup>2</sup>

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<sup>2</sup> R.C. 3903.39(B) states that "[w]hen objections are filed with the liquidator and the liquidator does not alter his denial of the claims as a result of the objections, the liquidator shall ask the court for a hearing as soon as practicable and give notice of the hearing in accordance with the Civil Rules to the claimant or his attorney."

{¶8} On November 28, 2007, the Liquidator filed a motion for summary judgment on its declaratory judgment claim, arguing that Petrosurance had waived any claim to the surplus funds by not submitting evidence to support its claim and by not objecting to the denial of Hardy's 1991 claim. Although the Liquidator's complaint did not suggest how the surplus funds should be disposed of, her motion for summary judgment suggested a pro rata distribution of the surplus, in the nature of interest, to those creditors whose allowed claims have been paid. Petrosurance filed its own motion for summary judgment on May 30, 2008, requesting that the surplus funds be paid to it, either as OGICO's sole shareholder or as a Class 9 claimant, under R.C. 3903.42.

{¶9} On August 5, 2008, the trial court issued a decision granting the Liquidator's motion for summary judgment and granting in part and denying in part Petrosurance's motion for summary judgment.<sup>3</sup> The trial court stated the issues as whether Petrosurance properly asserted a claim for the surplus funds and whether the Liquidator was permitted to pay interest to creditors who had been paid the principal of their allowed claims. The court concluded that, when funds in a liquidation estate exceed the sum of the allowed claims' principal, the claimants are entitled to interest. Based on the Liquidator's representation that the remaining funds are insufficient to pay the total interest due on the allowed claims, the court did not determine whether Petrosurance properly asserted a claim. The trial court entered final judgment in favor of the Liquidator on October 29, 2008.

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<sup>3</sup> The trial court issued an amended decision on the motions for summary judgment on August 13, 2008, to correct the misidentification of OGICO as Petrosurance in the August 5, 2008 decision.

{¶10} Petrosurance filed a timely notice of appeal and asserts the following assignments of error:

1. *The lower Court erred in dismissing Petrosurance's Counterclaim[.]*
2. *The lower Court erred in granting the Motion for Summary Judgment filed by the Liquidator and in failing to grant Petrosurance's Motion for Summary Judgment[.]*

In her conditional cross-assignment of error, the Liquidator asserts the following:

The lower court erred in not sustaining [the Liquidator's] Motion for Summary Judgment because Petrosurance did not timely submit evidence to support its claim to funds held by the Liquidator, and did not file a timely objection to the Liquidator's denial of its claim.

{¶11} We begin our analysis with Petrosurance's first assignment of error, by which it contends that the trial court erred in dismissing its counterclaim for a judgment declaring OGICO the sole owner of the funds held by the Liquidator or, alternatively, for judgment against the Liquidator in the amount of the surplus funds and for its attorney fees and costs. The Liquidator moved the trial court to dismiss the counterclaim, pursuant to Civ.R. 12(B)(1) or (6), for lack of subject-matter jurisdiction or for failure to state a claim upon which relief could be granted. The trial court granted the motion to dismiss, concluding that it lacked subject-matter jurisdiction over the counterclaim and stating that Petrosurance's right to the surplus funds must be presented and adjudicated in accordance with R.C. Chapter 3903.

{¶12} A trial court's standard of review for a dismissal, pursuant to Civ.R. 12(B)(1), is whether the complaint raises any cause of action cognizable by the forum. *Guillory v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 07AP-861, 2008-Ohio-2299, ¶6, citing *Milhoan v. E. Loc. School Dist. Bd. of Edn.*, 157 Ohio App.3d 716, 2004-Ohio-

3243, ¶10. We review an appeal of a dismissal for lack of subject-matter jurisdiction de novo. *Guillory*, citing *Moore v. Franklin Cty. Children Servs.*, 10th Dist. No. 06AP-951, 2007-Ohio-4128, ¶15.

{¶13} The Liquidator argues that the express language of both R.C. 3903.24(A) and the liquidation order precludes any civil action against her, including Petrosurance's counterclaim. R.C. 3903.24(A) provides, in pertinent part, as follows:

Upon entry of an order appointing a liquidator of a domestic insurer or of an alien insurer domiciled in this state, no civil action shall be commenced against the insurer or liquidator, whether in this state or elsewhere, nor shall any such existing actions be maintained or further prosecuted after the entry of the order. \* \* \*

Paragraph 17 of the liquidation order similarly states that "[n]o civil action shall be commenced against Defendant OGICO or Liquidator, whether in this state or elsewhere, \* \* \* after the entry of this Order."

{¶14} When a statute conveys a clear, unequivocal, and definite meaning, courts must apply the statute as written. *Benjamin v. Credit Gen. Ins. Co.*, 10th Dist. No. 04AP-642, 2005-Ohio-1450, ¶20, citing *Columbus v. Breer*, 152 Ohio App.3d 701, 2003-Ohio-2479, ¶12, and *Covington v. Airborne Express, Inc.*, 10th Dist. No. 03AP-733, 2004-Ohio-6978, ¶13. "The court must give effect to the words used in the statute, accord the words their usual and customary meaning, and not delete words or insert words that are not used." *Benjamin* at ¶20.

{¶15} Although the Liquidation Act does not define "civil action," the usual and customary meaning accorded that term is "[a]n action brought to enforce, redress, or protect a private or civil right; a noncriminal litigation." *Black's Law Dictionary* (7th ed.1999). See also Civ.R. 2 ("There shall be only one form of action, and it shall be

known as a civil action"). In *Benjamin*, this court concluded that a federal petition to compel arbitration violated the prohibition of R.C. 3903.24(A). Although the trial court found the prohibition inapplicable because the petition was "'defensive in nature,' having been 'spurred' by the liquidator's commencement of the state action against [the petitioner]," we noted that neither R.C. 3903.24(A) nor the liquidation order incorporating the prohibition limited the type of civil action prohibited, and we concluded that the trial court erred by grafting a judicial exception onto the plain statutory language. *Id.* at ¶¶18-20. We held that the petition to compel arbitration was a "civil action" because it sought enforcement of a private right conferred by contractual arbitration clauses. Similarly here, although filed in response to the Liquidator's action, Petrosurance's counterclaim constitutes a "civil action" because Petrosurance seeks to enforce or protect rights conferred through its ownership of OGICO stock. Because the plain and unambiguous language of R.C. 3903.24(A) precludes Petrosurance's counterclaim, we conclude that the trial court did not err in dismissing it. Accordingly, we overrule Petrosurance's first assignment of error.

{¶16} In its second assignment of error, Petrosurance contends that the trial court erred by granting the Liquidator's motion for summary judgment and by not fully granting its own motion for summary judgment. Petrosurance identifies the following issues implicated by its second assignment of error: (1) whether the Liquidator had a duty to file, consider, and approve Petrosurance's October 16, 2007 proof of claim; (2) whether the failure to file, consider, and approve that claim constituted an abuse of discretion and violated Petrosurance's rights to procedural due process and just compensation; (3) whether R.C. Chapter 3903 authorizes the Liquidator to pay interest

to claimants who have been paid in full; (4) whether the order authorizing payment of allowed claims bars further claims against the Liquidator, including claims for interest; and (5) whether payment of interest to other claimants has priority over shareholder claims.

{¶17} We review a summary judgment de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107; *Brown* at 711. We must affirm the trial court's judgment if any grounds the movant raised in the trial court support it. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶18} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. Because

summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 1992-Ohio-95, quoting *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2.

{¶19} R.C. Chapter 3903 sets forth a comprehensive framework for addressing the supervision, rehabilitation, and liquidation of insurance companies operating in Ohio. *McManamon v. Ohio Dept. of Ins.*, 179 Ohio App.3d 776, 2008-Ohio-6958, ¶9. The purpose of R.C. 3903.01 through 3903.59, "the insurers supervision, rehabilitation, and liquidation act" (the "Liquidation Act"), is to protect the interests of insureds, claimants, creditors, and the public generally. R.C. 3903.02(A), (D). To effectuate the purposes of the Liquidation Act, its provisions are to be liberally construed. R.C. 3903.02(C). Before turning to the specifics of Petrosurance's arguments, we first review the relevant provisions of the Liquidation Act itself.

{¶20} R.C. 3903.35 addresses the presentation of claims and provides, in part, as follows:

(A) Proof of all claims shall be filed with the liquidator in the form required by section 3903.36 of the Revised Code on or before the last day for filing specified in the notice required under section 3903.22 of the Revised Code \* \* \*.

\* \* \*

(D) The liquidator may consider any claim filed late \* \* \* and permit it to receive distributions which are subsequently declared on any claims of the same or lower priority if the payment does not prejudice the orderly administration of the liquidation. \* \* \*

When the Liquidator denies a claim, in whole or in part, she must give written notice to the claimant or his attorney, after which the claimant may file objections with the

Liquidator within 60 days. R.C. 3903.39(A). If the claimant does not file timely objections, he may not further object. Id. If the claimant objects and the Liquidator does not alter her determination, "the liquidator shall ask the court for a hearing as soon as practicable and give notice of the hearing in accordance with the Civil Rules to the claimant or his attorney and to any other persons directly affected." R.C. 3903.39(B).

{¶21} The Liquidation Act requires that an insolvent insurer's assets be distributed to classes of claimants based on the priorities of their claims. *Fabe v. Am. Druggists' Ins. Co.* (1990), 70 Ohio App.3d 595, 603. Priority of distribution of allowed claims from the liquidation estate is established by R.C. 3903.42, which provides, in part, as follows:

The priority of distribution of claims from the insurer's estate shall be in accordance with the order in which each class of claims is set forth in this section. Every claim in each class shall be paid in full or adequate funds retained for such payment before the members of the next class receive any payment. No subclasses shall be established within any class. The order of distribution of claims shall be:

(A) Class 1. The costs and expenses of administration \* \* \*:

\* \* \*

(B) Class 2. All claims under policies for losses incurred, including third party claims, all claims of contracted providers against a medicaid health insuring corporation for covered health care services provided to medicaid recipients, all claims against the insurer for liability for bodily injury or for injury to or destruction of tangible property that are not under policies, and all claims of a guaranty association or foreign guaranty association. \* \* \* Claims under nonassessable policies for unearned premium or other premium refunds.

(C) Class 3. Claims of the federal government.

(D) Class 4. Debts due to employees for services performed  
\* \* \*

(E) Class 5. Claims of general creditors.

(F) Class 6. Claims of any state or local government. \* \* \*

(G) Class 7. Claims filed late or any other claims other than claims under divisions (H) and (I) of this section.

(H) Class 8. Surplus or contribution notes, or similar obligations, and premium refunds on assessable policies.  
\* \* \*

(I) Class 9. The claims of shareholders or other owners.

If any provision of this section or the application of any provision of this section to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this section, and to this end the provisions are severable.

{¶22} We begin our review of the second assignment of error with Petrosurance's stated issues concerning the Liquidator's authority to pay interest. Petrosurance frames those issues as follows:

Third Issue Presented: Whether Chapter 3903 of the Ohio Revised Code authorizes the Liquidator to pay interest to claimants in the liquidation of an insurance company.

Fourth Issue Presented: Whether the Liquidator is authorized to pay and claimants are entitled to receive interest on claims that have been paid in full by the Liquidator.

Fifth Issue Presented: Whether the Liquidator is barred from paying interest on allowed claims because the order authorizing the payment of claims bars any further claims against the Liquidator, including those for interest.

Sixth Issue Presented: Whether payment of interest to other claimants has priority over shareholders' claims.

Because they are interrelated, we address these issues together.

{¶23} Petrosurance primarily argues that the Liquidator may not pay interest on the allowed claims, to the exclusion of Petrosurance, because the priority statute, R.C. 3903.42, does not provide for interest. This court has previously held that R.C. 3903.42 is unambiguous. See *Covington v. Indiana Dept. of Natural Resources*, 10th Dist. No. 01AP-1034, 2002-Ohio-2874, ¶19. Accordingly, the plain meaning of the statutory language is paramount and must be applied. *Id.* Petrosurance maintains that a literal reading of R.C. 3903.42 precludes payment of interest, whereas the Liquidator maintains that the statutory silence regarding interest is not determinative of her authority and that a pro rata payment of the surplus to claimants takes priority over the shareholder claims. The trial court acknowledged the Liquidation Act's silence regarding the payment of interest, but nevertheless found that the surplus funds should be used to pay interest on allowed claims before any payment is made to Petrosurance.

{¶24} As a general rule, interest on claims against the property of an insolvent, accruing after the insolvent's property passes into a receiver or liquidator's hand, is not recoverable. *Am. Iron & Steel Mfg. Co. v. Seaboard Air Line Ry.* (1914), 233 U.S. 261, 266, 34 S.Ct. 502, 504; *Matter of People (Norske Lloyd Ins. Co.)* (1928), 249 N.Y. 139, 146-47. Although delay in payment as a consequence of liquidation injures the creditor, "[w]hen the [liquidation estate] is insufficient to pay in full all the creditors who have the right to share in it, the burden of the consequent loss and injury should be equitably distributed among the creditors." *Id.* at 147. The United States Supreme Court explained that the general rule:

\* \* \* is a necessary and enforced rule of distribution, due to the fact that in case of receiverships the assets are generally insufficient to pay debts in full. If all claims were of equal dignity and all bore the same rate of interest, from the date

of the receivership to the date of final distribution, it would be immaterial whether the dividend was calculated on the basis of the principal alone or of principal and interest combined. \* \* \* [I]n case funds are not sufficient to pay claims of equal dignity, the distribution is made only on the basis of the principal of the debt. \* \* \*

*Am. Iron* at 266, 34 S.Ct. at 504. However, the Supreme Court went on to state that the general rule "did not prevent the running of interest during the Receivership; and if as a result of good fortune or good management, the estate proved sufficient to discharge the claims in full, interest as well as principal should be paid." *Id.* In *Matter of People* at 147, the court similarly stated that the general rule is inapplicable "when the reason for the rule fails" and held that, "[i]f the fund in liquidation proves sufficient to pay all claims in full with interest, then interest accruing during liquidation is allowed." Based on that rationale, and citing a litany of cases in which courts have applied that rationale in the context of bank liquidations, the Liquidator maintains that the paid claimants are entitled to interest from the surplus funds.

{¶25} We do not disagree with the policy basis for paying interest on creditors' claims before returning funds to the shareholders or owners of a liquidated entity where payment of all principal claims leaves a surplus in the liquidation estate. In fact, many states have legislatively incorporated provisions to that effect into their insurer liquidation priority schemes. Most states that have provided for interest payments by statute in this context have established a separate priority class, encompassing interest on higher priority claims, above the class for claims of shareholders or owners. See Conn.Gen.Stat. section 38a-944; Ky.Rev.Stat.Ann. section 304.33-430; Me.Rev.Stat.Ann. title 24-A, section 4379; Minn.Stat.Ann. section 60B.44; Nev.Rev.Stat.Ann. section 696B.420; N.H.Rev.Stat.Ann. section 402-C:44;

N.M.Stat. Ann. section 59A-41-44; Okla. Stat. Ann. title 36, section 1927.1; R.I. Gen. Laws section 27-14.3-46; Tex. Ins. Code Ann. section 443.301; Utah Code Ann. section 31A-27a-701; Wis. Stat. Ann. section 645.68. California accomplishes the payment of interest somewhat differently, by providing that no payment will be made to any shareholder or owner for residual value in the estate unless all claims of specified higher priorities have been paid in full, together with interest. Cal. Ins. Code section 1033(f). Thus, at least 13 states have specifically provided for the payment of interest on creditors' claims in an insurer liquidation prior to payment to the insurer's shareholders. But see N.Y. Ins. Law section 7434 (Consol. 2009) ("[n]o creditor shall be entitled to interest on any dividend by reason of delay in payment of such dividend").

{¶26} Ohio, however, like the majority of states, has not addressed the availability of interest on claims against a liquidated insurer by statute. Because neither *Am. Iron* nor *Matter of People* involved the application of statutory priorities like those contained in R.C. 3903.42, which govern the payment of claims here, we look to cases addressing the availability of interest where payment of claims is subject to the strictures of a priority statute that, like R.C. 3903.42, is silent on interest.

{¶27} Petrosurance urges this court to follow the reasoning of the Supreme Court of Texas in *Huston v. Fed. Deposit Ins. Corp.* (Tex. 1990), 800 S.W.2d 845, a bank liquidation case. Like R.C. 3903.42, Texas' banking liquidation priority statute was silent regarding the availability of interest on claims paid out of the liquidation estate. Although a surplus remained in the liquidation estate after payment of all principal claims, the Texas court held that the liquidator was not permitted to pay interest on creditors' claims. The court concluded that, "[w]ithout further legislative guidance, a

strict interpretation of the statute would compel the conclusion that no interest should be paid on creditor[s'] claims. \* \* \* [T]here is a statute which controls the payment of the claims \* \* \* and the statute does not provide for the payment of interest." *Huston* at 849. See also *Stephens v. Colaiannia* (Colo.App.1997), 942 P.2d 1374 (rejecting claimants' contention that they were entitled to interest that accrued after commencement of liquidation proceedings because, in the absence of a statute providing for post-liquidation interest, the receiver had no authority to pay interest).

{¶28} In contrast to *Huston* and *Stephens*, other courts have permitted the payment of interest despite silence regarding interest in state priority statutes, and the Liquidator urges us to follow the reasoning of those cases. For example, in *Koken v. Colonial Assur. Co.* (Pa.Cmwth.2005), 885 A.2d 1078, the Pennsylvania court held that the liquidator was authorized to pay interest to claimants where the estate contained a surplus, but that the liquidator was not authorized to restrict interest solely to the highest classes of creditors. The Pennsylvania court relied on prior cases from that state following the rationale of *Am. Iron*.

{¶29} In *Wenzel v. Holland-America Ins. Co. Trust* (Mo.2000), 13 S.W.3d 643, the Supreme Court of Missouri affirmed an award of interest accruing between the court's declaration of insolvency and the payment of each allowed claim where the receivership assets exceeded the sum of the allowed principal claims despite the absence of a specific provision for interest in the state insurance code. The court held that the absence of specific statutory language regarding the payment of interest did not end its inquiry, even though the insurance code was the exclusive source of the liquidator's authority. Based on a statutory provision authorizing the liquidator to

"compound, compromise or in any other manner negotiate the amount for which claims will be allowed," the court concluded that the liquidator was authorized to request, and the trial court was authorized to approve, the payment of interest. *Id.* at 645-46. The court stated that, in compounding, compromising, and negotiating claims, the liquidator was authorized to set the terms by which properly submitted claims would be paid, and that he could settle claims by either increasing or decreasing the claimed amount. Because Ohio's Liquidation Act contains similar language regarding the Liquidator's authority to negotiate claims, the Liquidator urges us to follow the *Wenzel* court's reasoning and to permit payment of interest.

{¶30} Upon review, we conclude that the Liquidator's position regarding interest is irreconcilable with the unambiguous language of the Liquidation Act. Accordingly, we disagree with the trial court's statement that nothing in R.C. Chapter 3903 alters the principle favoring the payment of interest on creditors' claims prior to any disbursement to the shareholders or owners of a liquidated entity.

{¶31} First, while R.C. 3903.43(A) contains language nearly identical to the Missouri statute at issue in *Wenzel*, we decline to apply that court's analysis to the Ohio statute. R.C. 3903.43(A) provides, in part, as follows:

The liquidator shall review all claims duly filed in the liquidation and shall make such further investigation as he considers necessary. He may compound, compromise, or in any other manner negotiate the amount for which claims will be recommended to the court \* \* \*. Unresolved disputes shall be determined under section 3903.39 of the Revised Code. \* \* \*

The language of R.C. 3903.43(A) does not grant the Liquidator authority to award post-liquidation interest to creditors after payment of creditors' principal claims, but before

paying shareholder claims. While the Liquidator was clearly authorized to compound, compromise or negotiate the amount of the claims she recommended for payment to the liquidation court, the discretion provided by R.C. 3903.43(A) applies only to the Liquidator's actions in submitting her recommendation to the court. Here, the Liquidator submitted her report and recommendation of Class 4, 5, and 6 claims to the liquidation court on January 9, 2006, the same day the court approved the report and ordered distribution on those claims. Having determined "the amount for which claims [would] be recommended to the court," the Liquidator has no further discretion under R.C. 3903.43(A) that would relate to her authority or lack of authority to pay interest on the allowed claims.

{¶32} Second, R.C. 3903.42 requires that every claim in each class be paid in full, or that adequate funds be retained to pay every claim in full, before members of the next class receive any payment. If, as the trial court found, interest is but one facet of each claim, inherent in the claim for principal, no claim would be paid in full until interest was paid. Thus, to comply with the mandate of R.C. 3903.42, interest on claims within each priority class would have to be paid before the Liquidator could make any payment, either principal or interest, toward claims in lower classes. The trial court impliedly recognized this when it held that, "until the claims (necessarily including interest) of those higher in priority than Petrosurance's are satisfied, the claim of Petrosurance does not have to be recognized." The trial court's holding results in a framework by which, when the payment of principal claims in Classes 1 through 8 leaves a surplus in the liquidation estate, interest on those claims should be paid prior to any payment of Class 9 shareholder claims. That framework is contrary to the mandate

that every claim in each class be paid in full before any payment is made on claims in the next class. Moreover, whether or not interest is an inherent part of each claim, there is no justification in the statutory language for the trial court's different treatment of Class 9 shareholder claims. While the General Assembly could, as several other states have, create a statutory framework that requires the payment of interest on higher priority claims after payment of all principal claims, but before payment of shareholder claims, it has not done so.

{¶33} Our conclusion that the General Assembly did not intend that interest be available to creditors in an insurer liquidation is further aided by our examination of the General Assembly's treatment of priority in another liquidation context. See *Ratchford v. Proprietors' Ins. Co.* (1989), 47 Ohio St.3d 1 (finding it instructive to look at the statutory scheme dealing with liquidations of insolvent saving and loan associations as an indicator of the General Assembly's intent under R.C. Chapter 3903); see also *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, ¶20 (a court may consider laws upon the same or similar subjects in order to determine legislative intent). In this instance, we look to R.C. 1125.24, the statute governing priority of claims in a banking liquidation.

{¶34} Like R.C. 3903.42 in the insurance context, R.C. 1125.24(A) establishes the order in which claims against a liquidated bank are to be paid from the liquidation estate. Unlike R.C. 3903.42, however, R.C. 1125.24(B) specifically provides that "[i]nterest shall be given the same priority as the claim on which it is based, but no interest shall be paid on any claim until the principal of all claims within the same class has been paid or provided for in full." Also unlike R.C. 3903.42, shareholders' claims

are not listed among the priority classes set forth in R.C. 1125.24(A). Rather, R.C. 1125.24(C) provides that funds may be paid to the liquidated bank's shareholders only after all claims have been paid pursuant to R.C. 1125.24(A), and interest has been paid pursuant to R.C. 1125.24(B). Thus, not only does R.C. 1125.24 expressly provide for the payment of interest on creditors' claims, it requires that interest be paid before shareholders are entitled to recover.

{¶35} We acknowledge the potential unfairness of denying interest to creditors of an insurer in liquidation where, as here, the liquidation estate proves sufficient to pay the principal amount of all allowed claims and a surplus remains. Liquidation proceedings will, of necessity, result in delay in the payment of claims, and the delay, in turn, will result in loss to creditors whose recovery is postponed. Nevertheless, the remedy for any such unfairness must stem from legislative action, not from a decision of this court. Numerous state legislatures have taken steps to eliminate the unfairness that may result in situations like this by expressly incorporating the payment of interest into their statutory priority schemes. While the General Assembly addressed the payment of interest in R.C. 1125.24 with respect to banking liquidations, it has not done so in R.C. 3903.42 with respect to insurance liquidations. In the absence of legislative authority, we conclude that interest is not available on creditors' claims already paid by the Liquidator in this case. See *Huston*. As a result of that conclusion, we need not address whether the court order authorizing the payment of Class 4, 5, and 6 claims bars subsequent payment of interest or whether payment of interest would have priority over shareholder claims, as those issues are now moot.

{¶36} Despite our conclusion that interest is not payable under R.C. Chapter 3903, the question remains whether Petrosurance properly asserted a claim in the OGICO liquidation and, if not, whether its failure to do so precludes recovery of the surplus funds. Thus, we turn to the remaining issues under Petrosurance's second assignment of error, concerning the Liquidator's response to Petrosurance's 2007 proof of claim, and the Liquidator's cross-assignment of error, by which she maintains that Petrosurance's failure to timely submit evidence to support a claim to the surplus funds and Petrosurance's failure to timely object to the denial of Hardy's 1991 claim bar Petrosurance's entitlement to the surplus funds and entitled the Liquidator to summary judgment.

{¶37} It is undisputed that the Liquidator's representatives provided Petrosurance with a proof of claim form in 2006 and suggested that Petrosurance needed to complete it to assert a right to the surplus funds. After Petrosurance submitted the proof of claim to the Liquidator, the Liquidator returned it unfiled, stating that she "must reject the attempt to file the claim and cannot open or reopen a claim file in the OGICO liquidation estate" because the claim was submitted after the December 31, 1997 bar date, which elapsed nearly ten years before the Liquidator gave the form to Petrosurance. The Liquidator also suggested that Petrosurance's proof of claim constituted a "second shot" at Hardy's 1991 claim, which the Liquidator denied in 2002.

{¶38} Petrosurance maintains that, having provided the proof of claim form to Petrosurance in 2006, the Liquidator is equitably estopped from refusing to file, consider, and approve its claim. "Equitable estoppel prevents relief when one party

induces another to believe certain facts exist and the other party changes his position in reasonable reliance on those facts to his detriment.' " *Doe v. Archdiocese of Cincinnati*, 116 Ohio St.3d 538, 2008-Ohio-67, ¶7, quoting *State ex rel. Chavis v. Sycamore City School Dist. Bd. of Edn.*, 71 Ohio St.3d 26, 34, 1994-Ohio-24. A prima facie case of equitable estoppel requires proof of (1) a factual representation that, (2) is misleading, (3) induces actual reliance that is reasonable and in good faith, and (4) causes detriment to the relying party. *Ruch v. Ohio Dept. of Transp.*, 10th Dist. No. 03AP-1070, 2004-Ohio-6714, ¶14.

{¶39} As a general rule, estoppel does not apply against the state, its agencies or agents in the exercise of governmental functions. See *Sun Refining & Marketing Co. v. Brennan* (1987), 31 Ohio St.3d 306, 307; *State ex rel. Glasstetter v. Connelly*, 179 Ohio App.3d 196, 2008-Ohio-5755, ¶12. Some courts, however, have concluded that a state agent, acting as a liquidator, engages in functions that are more proprietary than governmental. See, e.g., *State ex rel. Merion v. Unemployment Comp. Bd. of Review* (App.1943), 68 N.E.2d 411, 45 Ohio Law Abs. 614; *In re Reliance Group Holdings, Inc.* (Bankr.E.D.Pa.2002), 273 B.R. 374. In fact, this court recently noted that the Superintendent of Insurance, as liquidator, is essentially a court appointed private trustee who, for all practical purposes, stands in the insurer's shoes, and that any benefit in an action initiated by the liquidator accrues, not to the state, but to the insured's members, shareholders, policyholders, and creditors. *Benjamin v. Ernst & Young, L.L.P.*, 167 Ohio App.3d 350, 2006-Ohio-2739, ¶15, 18. This court has also acknowledged, in a case involving an estoppel defense against the Liquidator's

predecessor, that estoppel may lie against the state in some instances. See *Covington v. Metrohealth Sys.*, 150 Ohio App.3d 558, 2002-Ohio-6629, ¶32.

{¶40} Nevertheless, we conclude that the doctrine of equitable estoppel is inapplicable here. Hardy states that "the Chief Deputy Liquidator [and] counsel for the Liquidator \* \* \* suggested to [Hardy] that Petrosurance should submit a standard proof of claim form to more fully assert its rights to [the] surplus as a shareholder, and they presented him a form they had prepared for Petrosurance's use in that respect and upon which they had caused Petrosurance's name to be imprinted." Hardy Affidavit, at ¶8. Petrosurance argues that it filed its proof of claim in reliance on the Liquidator's actions and that, as a result, the Liquidator should be estopped from denying its claim. We disagree. The record contains no evidence that Petrosurance suffered a detriment as a result of its supposed reliance on the Liquidator's suggestion that it file a proof of claim. Although the Liquidator refused to consider Petrosurance's 2007 proof of claim, Petrosurance is in no worse position, having attempted to file the proof of claim, than it would have been had it not filed a proof of claim. Accordingly, we reject Petrosurance's estoppel argument.

{¶41} We now turn to the Liquidator's stated bases for refusing to file Petrosurance's proof of claim, i.e., that the claim was barred by (1) the December 31, 1997 absolute final bar date, and (2) the Liquidator's denial of Hardy's 1991 proof of claim. We first consider the effect, if any, of Hardy's 1991 proof of claim on Petrosurance's 2007 proof of claim. Hardy filed the 1991 proof of claim for unstated intercompany balances and other monies due on behalf of all entities owned, controlled or affiliated by or with him. The proof of claim form contained various boxes that could

be checked to describe the claim. Among the checked boxes on the 1991 proof of claim is one beside the following statement: "Claim is made by a general creditor for unpaid invoices." Hardy also checked boxes that stated: "Claim is made against policyholder of the above named Company" and "All other claimants (Describe nature of claim and consideration given for it)," although Hardy did not describe any other claim.

{¶42} When the Liquidator denied the 1991 proof of claim, the determination letter stated that the Liquidator determined that the claim was a Class 5 claim of a general creditor and that the Liquidator valued the claim in the amount of \$0.00 based on it being filed in an unstated amount and having not been updated or supported. The Liquidator noted that its records reflected no balance due either Forum Holdings or Hardy. The Liquidator's determination, by its terms, denied Class 5, general creditor claims by the entities on whose behalf Hardy filed the proof of claim. Neither Hardy, Forum Holdings USA, nor any other entity filed objections to the denial of the 1991 proof of claim, and the right of those entities to object to the Liquidator's denial of their Class 5 claims was extinguished pursuant to R.C. 3903.39(A).

{¶43} We disagree with the Liquidator's contention that Petrosurance's claim to the surplus funds was encompassed by the 1991 proof of claim. Although Petrosurance is arguably included within the class of claimants on whose behalf Hardy filed the 1991 proof of claim, as an entity owned, controlled or affiliated by or with Hardy, there is no indication in either the proof of claim or the Liquidator's denial of the claim that the proof of claim encompassed a shareholder claim for surplus funds. Accordingly, Petrosurance had no basis for filing objections regarding a Class 9 shareholder claim because neither the proof of claim nor the Liquidator's denial encompassed such a

claim. Upon review, we conclude that Hardy's 1991 proof of claim, and the Liquidator's denial of it, are irrelevant to Petrosurance's 2007 proof of claim and to Petrosurance's entitlement to the surplus funds in the liquidation estate as OGICO's sole shareholder.

{¶44} The Liquidator also maintains that she had to refuse Petrosurance's proof of claim because she has no authority to accept claims filed after an absolute final bar date. Thus, the Liquidator asserts that the trial court's establishment of December 31, 1997, as an absolute final bar date precluded the 2007 proof of claim despite R.C. 3903.35(D), which provides, in part, that "[t]he liquidator may consider any claim filed late \* \* \*, and permit it to receive distributions which are subsequently declared on any claims of the same or lower priority if the payment does not prejudice the orderly administration of the liquidation."<sup>4</sup> The Liquidator's argument ignores the fact that the absolute final bar date applied only to "future claims," as defined by the court's order establishing that date. That order defined a "future claim" as follows:

[A]ny unknown claim (1) yet to be asserted which would be purported to be covered by any Proof of Claim \* \* \* which was timely filed with the Liquidator by August 31, 1991, but which was filed without any knowledge of or documentation to support a future claim; (2) which, if asserted, would be asserted *under policies of insurance or bonds issued by OGICO*; and (3) which is not reported to the Liquidator by December 31, 1997. \* \* \*

(Emphasis added.) The Notice of Establishment of Absolute Final Bar Date and Foreclosure of Future Claims approved by the trial court stated: "This Notice only applies to Future Claims as defined herein." Because Petrosurance's shareholder claim

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<sup>4</sup> There has been no assertion that payment to Petrosurance would prejudice the orderly administration of the liquidation where all allowed claims have been paid, all further Class 4, 5, and 6 claims have been foreclosed or zero-valued by court order, and a surplus remains in the Liquidator's possession.

is not asserted under an insurance policy or bond issued by OGICO, the December 31, 1997 absolute final bar date was inapplicable to Petrosurance's claim and did not justify, let alone require, the Liquidator's refusal to file, consider or approve the claim. For these reasons, we reject both of the Liquidator's stated bases for refusing to file Petrosurance's proof of claim.

{¶45} Having concluded that Petrosurance did not waive its right to file a claim for the surplus funds, that the absolute final bar date did not apply to Petrosurance's shareholder claim, and that the payment of interest to higher priority claimants is not permitted under R.C. 3903.42, we conclude that the Liquidator was not entitled to summary judgment on her claim for a declaratory judgment that Petrosurance had no right to any remaining funds in the Liquidator's possession. Likewise, to the extent that Petrosurance's motion for summary judgment sought a rejection of the Liquidator's proposed declaratory judgment, the trial court erred in denying that motion.

{¶46} We do not, however, determine that Petrosurance was, as a matter of law, entitled to a contrary declaratory judgment that it was solely entitled to the surplus funds. The trial court properly dismissed Petrosurance's counterclaim for lack of subject-matter jurisdiction. In dismissing the counterclaim, the court held that Petrosurance's right to funds from the liquidation estate must be established through the procedures set forth in R.C. Chapter 3903. Although Petrosurance attempted to initiate those procedures by filing its 2007 proof of claim, the Liquidator thwarted those efforts by erroneously refusing to file the proof of claim and refusing to request a hearing when Petrosurance filed its objections to the Liquidator's action. While it is questionable whether the issue of Petrosurance's entitlement to the surplus funds was before the trial

court after the dismissal of Petrosurance's counterclaim, based on its erroneous determination that the Liquidator was entitled to pay interest to creditors before making any payment to Petrosurance, the trial court did not address and determine Petrosurance's entitlement to the surplus funds, and we will not resolve this question in the first instance on appeal.

{¶47} In conclusion, we overrule Petrosurance's first assignment of error and affirm the trial court's judgment dismissing Petrosurance's counterclaim. We sustain Petrosurance's second assignment of error to the extent stated above, and we overrule the Liquidator's cross-assignment of error. Therefore, we reverse the trial court's entry of summary judgment in favor of the Liquidator and denial of Petrosurance's motion for summary judgment solely to the extent it sought a denial of the Liquidator's requested declaratory relief. We remand this matter to the trial court for further proceedings consistent with this decision.

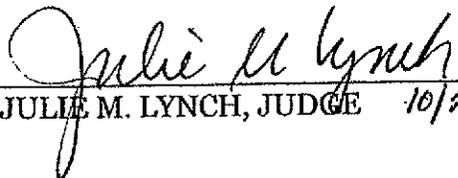
*Judgment affirmed in part,  
reversed in part, and cause remanded.*

SADLER and CONNOR, JJ., concur.

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There is no just reason to delay the entry of this judgment in case number  
07CVH04-5862. Costs to be paid by defendants.

  
JULIE M. LYNCH, JUDGE 10/22/08

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IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO  
CIVIL DIVISION

MARY JO HUDSON,  
Superintendent of Insurance,  
State of Ohio, Liquidator of  
The Oil & Gas Insurance Company,  
  
PLAINTIFF,  
  
vs.  
  
THE OIL & GAS INSURANCE COMPANY,  
  
DEFENDANT.

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CASE NO. 90CVH05-3409

JUDGE LYNCH

MAGISTRATE McCARTHY

FILED  
COMMON PLEAS COURT  
FRANKLIN CO. OHIO  
2008 AUG 13 PM 4:00  
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO  
CIVIL DIVISION

MARY JO HUDSON,  
Superintendent of Insurance,  
State of Ohio, Liquidator of  
The Oil & Gas Insurance Company,  
  
PLAINTIFF,  
  
vs.  
  
PETROSURANCE, INC. ET AL.,  
  
DEFENDANTS.

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CASE NO. 07CVH04-5862

JUDGE LYNCH

MAGISTRATE McCARTHY

AMENDED\* DECISION GRANTING PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT AGAINST DEFENDANT PETROSURANCE, INC.

FILED ON NOVEMBER 28, 2007

AND

AMENDED\* DECISION ON DEFENDANT PETROSURANCE  
INCORPORATED'S MOTION FOR SUMMARY JUDGMENT

FILED ON MAY 30, 2008

Lynch, J.

Now before the court in this declaratory judgment action are plaintiff's motion for summary judgment against defendant Petrosurance, Inc. and a cross

motion for summary judgment asserted by Petrosurance Inc. against plaintiff Hudson. The motions center on two issues, namely (1) whether the claim of Petrosurance ought to be recognized as being properly asserted and (2) whether monetary interest ought to be paid to those claimants whose principal claims have already been approved and paid by plaintiff.

## I

Summary judgment was established through Civ.R. 56(C) as a procedural device designed to terminate litigation when there is no need for a formal trial. *Norris v. Ohio Std. Co.* (1982), 70 Ohio St. 2d 1. The rule mandates that the following be established: (1) that there is no genuine issue of any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion and, viewing the evidence most strongly in favor of the non-moving party, that conclusion is adverse to the non-moving party. *Bostic v. Connor* (1988), 37 Ohio St. 3d 144.

Summary judgment will not be granted unless the movant sufficiently demonstrates the absence of any genuine issue of material fact. A "party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." *Dresher v. Burt* (1996), 75 Ohio St. 3d 280, 293.

## II

In considering the issues presented, it must first be observed that the matter at hand involves the liquidation of a domiciliary insurance company, the

Oil and Gas Insurance Company. Thus, the dictates of Ohio's version of the Insurers Supervision, Rehabilitation, and Liquidation Act are operative. Ohio's Liquidation Act is a comprehensive statutory scheme which, among other things, regulates delinquency proceedings in connection with insolvent insurance companies. The Liquidation Act is designed to protect the "interests of insureds, claimants, creditors, and the public generally," to enhance the "efficiency and economy of liquidation," and "to minimize legal uncertainty and litigation." R.C. 3903.02(D). Pursuant to the Liquidation Act, this court assumed exclusive subject matter jurisdiction over all claims and proceedings concerning assets of the Oil and Gas Company's liquidation estate. See, *Benjamin v. Credit Gen. Ins. Co.*, 2005 Ohio 1450, 2005 Ohio App. LEXIS 1402 (Ohio Ct. App., Franklin County).

Ohio's statutory insurance liquidation scheme vests within the liquidator broad and largely unfettered powers, under the supervision of this court, to maximize the assets available to her in discharging her duties to claimants, shareholders and creditors of the insolvent Oil and Gas Insurance Company. The statutes require this court to liberally construe the controlling law in favor of their mentioned stated purposes. R.C. 3903.02(C). *Benjamin v. Pipoly*, 155 Ohio App. 3d 171, 2003 Ohio 5666, 800 N.E.2d 50, 2003 Ohio App. LEXIS 5021 (Ohio Ct. App., Franklin County).

### III

In first considering the second enumerated issue (whether monetary interest ought to be paid to those claimants whose principal claims have already been approved and paid by plaintiff), the court observes that the Liquidation Act

is silent on the issue of payment of interest to claimants with approved claims.<sup>1</sup> With rare exception,<sup>2</sup> courts and commentators who have considered the issue have found that under certain circumstances, the payment of interest ought to be made to claimants whose claims have been allowed by the liquidator of an insolvent insurance company or financial institution. Most particularly, when it is the case that after all allowed principal claims have been paid there exists a "surplus" or funds remaining in the hands of the liquidator, then in that circumstance, those funds are to be used to attempt to make the claimants whole by recognizing and paying interest on the allowed claims, typically from the time of the claim becoming due until the time of the liquidator's initial claim payment was made to the claimant.

Numerous courts have elucidated on the issue at hand. Prior to the adoption of the uniform Liquidation Act, courts relied on common law considerations in finding that interest was payable to claimants in a situation involving funds remaining in the hands of a liquidator subsequent to the payment of underlying claims. In *Ohio Savings Bank & Trust Co. v. Willys Corp.*, 8 F.2d 463, 1925 U.S. App. LEXIS 3295, 44 A.L.R. 1162 (2d Cir. N.Y. 1925), it was noted:

... as a general rule, after property of an insolvent is in *custodia legis*, interest thereafter accruing is not allowed on debts payable out of the funds realized by a sale of the property. The reason assigned is that in such cases the delay in distribution is held to be the act of the law and a necessary incident to the settlement of the estate. In such case interest is payable from the time the debt became due and payable up to the date of the appointment of the receivers.

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<sup>1</sup> Compare, KRS 304.33-430 (8), of the Kentucky Insurance Code providing a priority ranking for "Interest on claims already paid."

<sup>2</sup> *McPherson v. Holland-America Ins. Co. Trust*, 1999 Mo. App. LEXIS 832 (Mo. Ct. App. June 22, 1999) abrogated by *Wenzel v. Holland-America Ins. Co. Trust*, 13 S.W.3d 643, 2000 Mo. LEXIS 26 (Mo. 2000).

\* \* \*

But this is not because the claims lose their interest-bearing quality during the period within which the property is in *custodia legis*. The rule does not prevent the running of interest during a receivership, and if, as a result of good fortune or good management, the estate proves sufficient to discharge the claims in full, interest as well as principal is to be paid. At 468.

The syllabus holding in *In re People by Stoddard*, 249 N.Y. 139, 249 N.Y. (N.Y.S.) 139, 163 N.E. 129, 1928 N.Y. LEXIS 776 (1928) states the recognized general rule:

The rule that interest is not allowed after the property of an insolvent has passed into the hands of an official liquidator applies only in the distribution of the proceeds of the property by the liquidator where the proceeds are insufficient to pay all creditors in full. It is a rule of administration and not of law, for the law does not contemplate that a debtor may stop the running of interest until he has paid his debt. Interest continues to run against the debtor during liquidation and if the fund proves sufficient to pay all claims in full with interest, then interest accruing during liquidation is allowed.

A commentator on the issue has further explained thus:

The modification in ordinary interest rules produced by insolvency may, according to the weight of reason and authority, be summarized as follows:

The commencement of insolvency proceedings does not arrest the running of interest, but justice requires that interest thereafter accruing should not be computed on any claims, either general or preferred, in arriving at the basis of distribution of the assets, unless those assets have first proved sufficient to pay an amount equal to the principal of all claims of every class, leaving a surplus. In the latter event, in determining the balanced due on the claims for the purpose of distributing the surplus, interest should be calculated at the rates normally applicable to the several claims; and the dividends theretofore paid should, for the purpose of such computation, be applied according to the method in ordinary cases of partial payments on interest-bearing debts.

Hanson, *Effect of Insolvency Proceedings on Creditor's Right to Interest*, 32 Michigan Law Review 1069.

Other courts considering the issue have reached the same result. See, e.g., *McConnell v. Pacific Mut. Life Ins. Co.*, 205 Cal. App. 2d 469, 24 Cal. Rptr. 5, 1962 Cal. App. LEXIS 2153 (Cal. App. 2d Dist. 1962);<sup>3</sup> *Commonwealth ex rel. Woodside v. Seaboard Mut. Casualty Co.*, 420 Pa. 237, 215 A.2d 673, 1966 Pa. LEXIS 757 (1966); *Koken v. Colonial Assur. Co.*, 885 A.2d 1078, 2005 Pa. Commw. LEXIS 587 (Pa. Commw. Ct. 2005)

Following adoption of the uniform Liquidation Act courts have continued to respect the solid rationale and logic voiced by predecessor courts who had considered the issue at hand. In this connection, courts have read the language of the Act to continue to permit the payment of interest under those circumstances explained above. In so doing, some courts have acknowledged the broad powers granted to the liquidator by the Act.

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<sup>3</sup> The cited case was an insurance company liquidation case. The court observed, however, that the law as described is equally applicable to liquidations involving financial holdings companies. See, e.g., *The Benj. Franklin Shareholders Litigation Fund v. FDIC*, 2006 U.S. Dist. Ct. Motions 860189, 2006 U.S. Dist. Ct. Motions LEXIS 50039 ("Like the federal courts, every state court which has ever considered whether interest should be paid on the claims of creditors of a bank in liquidation has held interest allowable."); *Lanigan v. Apollo Sav.*, 30 Ill. App. 3d 781, 332 N.E.2d 591, 1975 Ill. App. LEXIS 2692 (Ill. App. Ct. 1st Dist. 1975) ("The receiver was appointed for the purpose of liquidating the association not to make a profit for the permanent reserve shareholders"); *Stein v. Delano*, 121 F.2d 975, 1941 U.S. App. LEXIS 4598 (3d Cir. N.J. 1941) ("It may be a hardship on the stockholders to hold them for interest accruing during the delay of administration. It certainly is a hardship on the creditors to lose this interest. The question, however, is not one of hardship, but of legal right," finding interest payable to claimants; *Andress v. Carter (In re First-Central Trust Co.)*, 75 Ohio App. 1, 14, 60 N.E.2d 503, 509, 30 Ohio Op. 248 (1944), rev'd on other grounds, 145 Ohio St. 498, 62 N.E.2d 311, 31 Ohio Op. 169 (1945) ("... the general rule is that interest on general claims against an insolvent bank will not be computed for the period after the bank passes into the hands of a receiver or liquidator where the assets of the bank are not sufficient to pay the principal of all the debts. If, however, the assets of the insolvent bank do in fact turn out to be sufficient to meet all demands and leave a surplus over, interest on all claims will, in the absence of a statutory prohibition, be allowed out of the surplus to the creditors for the period during which the insolvent bank has been in the hands of the receiver or liquidator.").

For example, in *Wenzel v. Holland-America Ins. Co. Trust*, 13 S.W.3d 643, 2000 Mo. LEXIS 26 (Mo. 2000), the court recognized the generally accepted principle that the state's insurance code is the exclusive source of the receiver's authority in the context of insolvent insurance companies and went on find permissible the payment of interest in a circumstance where the receivership assets exceeded the sum necessary to satisfy the principal claims allowed. The court observed the language in the Act and found:

[The language of the Act] authorizes the receiver to "compound, compromise or in any other manner negotiate the amount for which claims will be allowed . . ." This sentence, by its plain language, confers broad powers upon the receiver in making payments upon properly submitted claims. It is in giving definition to the words that the broad authority becomes evident.

The words "compound," "compromise," and "negotiate" are not defined in chapter 375. This Court, therefore, refers to standard dictionary definitions to supply ordinary meaning. To "compound" is "to settle amicably, adjust by agreement" or, alternatively, "to add to, augment." "Compromise" is defined as "to adjust or settle (a difference) between parties." "Negotiate" means "to communicate or confer with another so as to arrive at the settlement of some matter."

In compounding, compromising, and negotiating, therefore, the receiver is authorized to set the terms by which any and all properly submitted claims will be paid. The receiver may settle claims either by increasing or decreasing the claimed amount. This reading of the legislature's use of the words "compound," "compromise," and "negotiate" in subsection 1 of section 375.1220 is consistent with the legislative intent that the receiver's general duty is to review and settle claims in a fair manner on behalf of the insolvent insurer. Pursuant to subsection 1 of section 375.1220, therefore, the receiver was authorized to request the payment of prejudgment interest and the trial court was authorized to approve the request. (Citations omitted.)

Thus, upon a review of the relevant case law and pertinent legal literature, it is clear that the law fully supports the notion that interest should be paid to

liquidation claimants when funds remain with the liquidator following the payment of underlying principal claims.

#### IV

Defendant believes it to be a weakness to the liquidator's position of paying interest that many cases cited by her are not Ohio cases and "do not deal with the statutory duties of the liquidator under R.C. Chapter 3903." While it appears to be the circumstance that Ohio is not overwhelmed with insurance liquidation litigation, that fact is of virtually no consequence when considering the powers and responsibilities of the liquidator. As alluded to above, the liquidator is imbued with broad and largely unfettered powers and is under the direct supervision of this court.

R.C. 3903.21, R.C. 3903.43 and R.C. 2735.04 each grant expansive powers to the liquidator. It cannot be seriously argued that the liquidator does not possess the power, subject to court approval, to pay claims in a manner recognized to be proper by most every court to consider the issue. As pointed out herein, given the existence of residual funds in the possession of the receiver, the law almost universally favors the payment of interest on claims prior to any disbursement being made to shareholders or owners of the liquidated business. There is nothing found in Chapter R.C. 3903 that would alter that result.

Nevertheless, one could assert that Petrosurance is a claimant along with the other claimants and is granted a statutory priority position that must be recognized and acknowledged by a consideration and payment of its claim prior to a determination being made on the matter of whether or not a surplus exists. In other words, one could claim that as a matter of fact, there can be no identifiable

surplus of funds until and unless the claim of Petrosurance is considered and perhaps paid – only then can a determination be made on the issue of whether there exists a surplusage of funds.

It is important to note, however, that this analysis ignores the nature of the claims presented by the numerous claimants to whom the liquidator has made some payment. As many of the cited cases reveal, the interest on a claim is but one facet of the claim itself.<sup>4</sup> In other words, accruing interest on money withheld is *inherent in the underlying claim* for principal.<sup>5</sup> The fact that it may be paid only in circumstances involving excess or residual holdings simply is a principle followed in recognition of the importance of assuring that the creditors are first afforded equitable treatment of their principal claims before considerations of interest payments are made. See, generally, Hanson, *Effect of Insolvency Proceedings on Creditor's Right to Interest*, 32 Michigan Law Review 1069.

In other words, neither the appointment of a receiver nor the taking over by her of the corporate assets terminates the right of any creditor to have interest run on his claim, but merely limits his remedies *in rem* to effectuate its payment.<sup>6</sup> *Thomas v. Western Car Co.*, 149 U.S. 95; *People v. American Loan & Trust Co.*, 172 N. Y. 371; *American Iron Co. v. Seaboard Air Line*, 233 U.S. 261; *People v. Merchants Trust Co.*, 187 N. Y. 293. Thus, until the claims (necessarily including

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<sup>4</sup> Petrosurance bases much of its reasoning on its stated premise that the claimants "have been paid in full." This is not a correct assessment inasmuch as the claimants have claims for interest that are outstanding and are a component of the underlying claim for principal.

<sup>5</sup> The notion that a claim has an interest component is consistent with the required treatment of potential future claims. See, R.C. 3903.37(C).

<sup>6</sup> Petrosurance asserts that by recognizing claims for interest, the liquidator is attempting to "invent a new subclass" which would conflict with the Liquidation Act. The recognition of interest claims does not create a new subclass; it merely acknowledges the existence of one facet of already existing claims. See, *Koken*, *supra*.

interest) of those higher in priority than Petrosurance's are satisfied, the claim of Petrosurance does not have to be recognized.

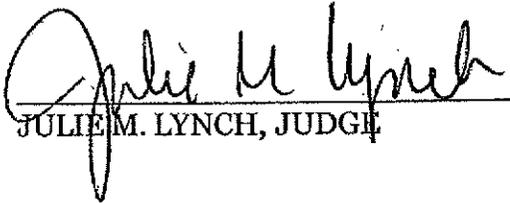
#### V

Petrosurance raises an additional issue concerning the fact that not every claimant made a formal claim for interest. This circumstance is not detrimental to the claimants' rights to receive interest. The right to receive interest on a claim in liquidation is an inchoate right and coexistent with the right to receive principal. When the proceeds of the liquidation procedure exceed the sum of the principal claims, the claimants' right to interest ripens and must be recognized by the receiver and paid as allowed. A demand for something already possessed by the claimants is not required to bring the right into existence.

#### VI

Moving on to consider the remaining issue, namely, whether the claim of Petrosurance ought to be recognized as properly asserted, the liquidator has taken the position that the claim was filed late or not filed at all and should be disregarded accordingly. Upon consideration, it is found that, as a practical matter, the tardy attempted filing of Petrosurance's claim is of no apparent consequence. Based upon undisputed representations of the liquidator, once interest is paid on claims as permitted herein, no funds will remain sufficient to pay Petrosurance. Moreover, even if funds will exist after the payment of interest as permitted, the funds will "revert to the undistributed assets" of the Oil and Gas Insurance Company (R.C. 3903.38) and should be paid to Petrosurance without regard to the timeliness of its formal claim (R.C. 3903.45).

Therefore, and upon a full consideration, the court finds plaintiff's motion for summary judgment to be well taken and therefore grants it. Further, on the matter of defendant's motion for summary judgment, it is granted and denied consistent with the determinations made herein. Counsel for plaintiff shall prepare and submit to the court the necessary judgment entry and order authorizing the liquidator to submit a plan in furtherance of the liquidation.

  
JULIE M. LYNCH, JUDGE

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\* The within Amended Decisions were necessitated due to editing oversights that occurred on pages 3 and 10 wherein the Oil and Gas Insurance Company was misidentified as the Petrosurance Insurance Company. Those errors have been corrected in the present decisions.