

ORIGINAL

In the  
Supreme Court of Ohio

MARY JO HUDSON,	:	Case No. 2009-1816
Superintendent of Insurance, State of Ohio,	:	
acting in her capacity as Liquidator of The Oil	:	
& Gas Insurance Company,	:	On Appeal from the
	:	Franklin County
Plaintiff-Appellant,	:	Court of Appeals,
	:	Tenth Appellate District
v.	:	
	:	Court of Appeals Case
PETROSURANCE, INC.,	:	No. 08AP-1030
	:	
Defendant-Appellee.	:	

**MERIT BRIEF OF PLAINTIFF-APPELLANT,  
MARY JO HUDSON, SUPERINTENDENT OF INSURANCE**

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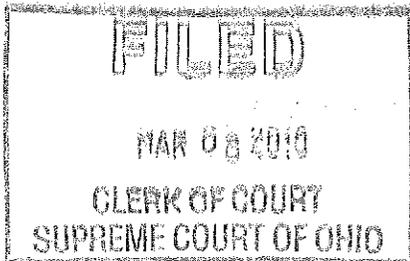
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## INTRODUCTION

At its core, this case is about the repayment of debt. Appellee Petrosurance, Inc., is the sole shareholder of the Oil and Gas Insurance Company (“Company”), an insurer that defaulted on numerous obligations when it fell into insolvency. At that point, the Company had lost the ability to function as a going concern and could not timely pay its creditors and other debt-holders. When an insurer has failed as a business enterprise in this manner, the Ohio Superintendent of Insurance, Appellant Mary Jo Hudson, has the statutory duty to liquidate the company’s assets to pay its debts. It has taken the Superintendent nearly twenty years to sift through the Company’s wreckage and repay creditors and other debt-holders merely the principal of the debts owed.

With the principal of those obligations paid, a surplus of approximately \$13 million remains. The question here is who is entitled to that money—the creditors and other debt-holders who are still owed the interest lawfully accruing on their claims over the years, or the shareholder, who seeks to recover the Company’s remaining assets as a return on its investment?

Though the relevant statutes do not explicitly permit or prohibit the payment of interest in these circumstances, the larger statutory scheme reveals that the Company’s debts to its creditors and other debt-holders should be paid in full, including interest, before the shareholder may take the remainder. The liquidation statutes must be construed liberally to protect “the interests of insureds, claimants, creditors, and the public generally,” see R.C. 3903.02(D), and the other sections make clear that creditors and other debt-holders should be repaid in “full or adequate funds” before shareholders take anything, see R.C. 3903.42. See also R.C. 3903.02(D)(4) (providing that only *unavoidable* losses should be equitably apportioned). When adequate funds exist to repay these debts fully, as here, interest should be paid. This Court’s jurisprudence lends further support to this interpretation.

While interest does not generally run on claims against an insolvent estate during liquidation (meaning that creditors and other debt-holders are generally only entitled to recover the principal of their debts), this rule exists only to maintain the equities in the process. In most instances, assets are insufficient to pay all creditors for both principal and interest, so equity limits the recovery to principal so that all may obtain a portion of the monies owed. When sufficient funds exist, though, interest should be paid; creditors' claims do not lose their interest-bearing qualities during liquidation, and these claimants remain entitled to be repaid fully for their losses. Indeed, the overwhelming majority of jurisdictions that have considered the issue, including the United States Supreme Court, support paying interest in these circumstances.

Such a rule does not prejudice shareholders; rather, it preserves the distinction between policyholders and creditors (who contract with insurers expecting to be paid in a timely manner) and shareholders (who take the risk of investment with the hope of sharing in the reward of profitability). When an insurer becomes insolvent, the shareholders' gambit has failed, to the detriment of those who innocently did business with them. While shareholders are entitled to any assets left after all of the company's debts have been paid, this right does not allow them to step in and seize funds when creditors and other debt-holders still possess valid claims against the Company.

Paying shareholders ahead of creditors and other debt-holders in these circumstances would violate the purpose of the liquidation statutes and the rules of priority for distributing liquidated assets, not to mention the rules of equity and the fundamental assumptions underlying the debtor-creditor relationship. For these and other reasons, this Court should reverse the Tenth District's decision and permit the Superintendent to pay the surplus as interest that accrued during liquidation to the Company's creditors and other debt-holders.

## STATEMENT OF THE CASE AND FACTS

Because the Court will have to examine the statutory liquidation scheme in detail, this section explains the relevant statutes before proceeding to the underlying factual and procedural history of the case.

**A. Revised Code Chapter 3903 provides a thorough framework for distributing the assets of an insolvent insurer in liquidation, with a focus on protecting the rights of various debt-holders and maintaining equity.**

Insurance companies play an integral role in the state, national, and global economies. As the current economic crisis has demonstrated, when an insurer faces financial difficulties, the effects are widespread. Revised Code Chapter 3903, also known as the Insurers Supervision, Rehabilitation, and Liquidation Act (“Act”), see R.C. 3903.02(A), creates a system for dealing with financially troubled insurers, with the aim of restoring them to solvency if at all possible. These provisions were enacted, and are to be construed liberally, to serve one guiding purpose—“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); see *id.* at (C). In short, the Act exists, above all else, to protect those innocent individuals and entities adversely affected by the insurer’s instability.

The Ohio Superintendent of Insurance is a central figure in this system, and the Act gives her numerous powers to help minimize the problems that arise when an insurer’s business falters. Initially, she regularly monitors the financial stability of insurers operating in the State. When the Superintendent determines that an insurer is in such condition as to render the continuance of its business hazardous to the public or the insurer’s policyholders, she may determine to formally supervise the insurer and provide it with a list of steps to take to avoid such problems. See R.C. 3903.09. If, during this period, the insurer fails to take the steps necessary to ameliorate its

problems in a timely manner, the Superintendent may give the company more time to act, or seek either to rehabilitate or liquidate the company. See *id.* at (D).

The Superintendent may then file a complaint for court-ordered rehabilitation when she believes that “[t]he insurer is in such condition that the further transaction of business would be hazardous, financially, to its policyholders, creditors, or the public.” R.C. 3903.12(A). In rehabilitation, the Superintendent takes possession of the insurer’s assets and administers them under court supervision. See R.C. 3903.13(A); see also R.C. 3903.04(E) (requiring all actions under this chapter to originate in the Franklin County Court of Common Pleas). The Superintendent has broad powers to rehabilitate the insurer, with the aim of restoring the company to solvency and stability. See R.C. 3903.14(B) (“The rehabilitator may take such action as the rehabilitator considers necessary or appropriate to reform and revitalize the insurer.”).

When an insurer reaches the point of no return and the Superintendent believes that further rehabilitation efforts “would substantially increase the risk of loss to creditors, policyholders, or the public, or would be futile, the superintendent may file a motion in the court of common pleas for an order of liquidation.” R.C. 3903.16(A); see R.C. 3903.17 (listing the grounds for liquidation to be ordered). If the court agrees that liquidation is appropriate, see R.C. 3903.18, the Superintendent assumes duties and broad powers to liquidate the insurer’s assets and repay creditors and other debt-holders, subject to court approval, see R.C. 3903.21; R.C. 3903.25(B). These powers include the ability to sell or otherwise dispose of the insurer’s property, see R.C. 3903.21(A)(7), and to invest all liquidated assets until they are needed, see *id.* at (A)(16).

While liquidating assets, the Superintendent is also responsible for notifying potential claimants of the insurer’s insolvency, setting deadlines for claims against the insurer’s estate, and

evaluating and paying those claims. See R.C. 3903.22; R.C. 3903.35; R.C. 3903.43. Claims made in a timely manner are verified and, if allowed, they are then placed into one of nine statutory classes, which dictate the order in which claims are paid. See R.C. 3903.42. Importantly, “[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, claims of insurance guaranty associations, and similar claims, (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 notes and similar obligations, and, finally, (9) *claims of shareholders and owners*. *Id.* at (A)–(I). Thus, shareholders have the lowest priority, and every other class of claimants must be paid with “full or adequate funds” before the shareholders take anything.

In this process, the Superintendent is authorized to “compound, compromise, or in any other manner negotiate the amount for which claims will be recommended to the court,” R.C. 3903.43(A), and the court may then approve or disapprove the proposed settlement amounts, see *id.* at (B). The Superintendent also has a duty to apportion equitably “any unavoidable loss” among the claimants. R.C. 3903.02(D)(4). Because the assets of insolvent insurers are often insufficient to repay fully all their creditors and other debt-holders, this rule typically requires the Superintendent to pay only the principal of claims against the liquidated estate. See *Am. Iron & Steel Mfg. Co. v. Seaboard Air Line Ry.* (1914), 233 U.S. 261, 266 (recounting the rule that interest is not generally allowed on claims against liquidated estates). However, as discussed more fully in Sections A.1 and 2 below, this rule is not absolute.

**B. The Oil and Gas Insurance Company was liquidated, and a surplus remained after creditors and other debt-holders were repaid the principal of their claims.**

After supervision and rehabilitation efforts with the Oil and Gas Insurance Company failed, the Superintendent filed a motion with the Franklin County Court of Common Pleas in 1990 for a liquidation order, citing the Company's insolvency as a justification. (Trial Record ["TR"] 57, ex. 2). The court granted the motion over the objection of the Company's sole shareholder, appellee Petrosurance, Inc., and appointed the Superintendent as liquidator, as required by R.C. 3903.18(A). (*Id.*) 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 Superintendent collected and verified all of the claims against the Company and converted its assets to cash to pay the creditors and other debt-holders. (TR 3, ¶ 5). 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. (TR 57 ex. 9). While this process was ongoing, the Liquidator invested the Company's assets that were not presently needed, consistent with her authority under R.C. 3903.21(A)(16). (TR 57 p. 6). Given the favorable market conditions in the 1990s, these investments yielded healthy returns. (*Id.*)

The state of the Company's business and other complications forced the liquidation to proceed slowly. While Class 1 claims (for the Superintendent's costs in administering the estate) were paid on a rolling basis as separate charges accrued, other claimants had to wait for several years while the Superintendent verified and allowed their claims. The trial court approved the

first payments to Class 2 claimants (early access payments to guaranty associations to pay insurance policy claims as required under R.C. 3903.34) in 2000 and 2003, and approved payments to Class 2 policyholders in 2004, for a total of \$15,347,798.88. (*Benjamin v. Oil & Gas Ins. Co.*, Franklin County C.P. Case No. 90CVH-05-3409, Motion for Approval of Liquidator's Reports of Class 4, Class 5, and Class 6 Claims, filed January 9, 2006, p. 3). The Superintendent settled the Company's Class 3 debts, those held by the federal government, in 2005 for no money. (*Id.*). No Class 4 claims, those of employees for back pay, were allowed. In 2006, the trial court approved payment of \$19,970,587.68 to settle allowed Class 5 claims, those of general creditors, and \$91,479.89 to settle allowed Class 6 claims, those of state and local governments. (TR 57 p. 6). There were no allowed Class 7 (late-filed claims and similar obligations) due to the final bar date order, nor were there any allowed Class 8 claims (claims for surplus notes and similar obligations). In all classes, the creditors and other debt-holders received only the principal of their allowed claims. (*Id.*).

**C. The trial court ordered the Superintendent to use the remaining funds to pay the Company's creditors and other debt-holders for the interest that accrued on their claims during liquidation.**

After all of these claimants were paid, a \$13 million surplus remained, thanks to a combination of factors, including the Superintendent's good management, highly favorable interest rates while the liquidation was ongoing, and the fact that several potential claimants failed to assert their claims against the estate in a timely manner. (TR 3 ¶ 5; TR 27 ¶ 5).

Before moving to the terminal class of claims, those of shareholders for the remainder of the estate, the Superintendent filed a complaint for declaratory judgment against Petrosurance and Hardy, seeking a declaration regarding how she should distribute the surplus funds. (TR 3). The trial court granted the Superintendent's claims against Hardy, but these claims are not relevant to this appeal. (TR 50). Petrosurance counterclaimed that, as the Company's sole

shareholder, it is entitled to any surplus remaining after all creditors have been paid the principal of their claims. (TR 27 pp. 4–5). The Superintendent proposed using the surplus to repay the Company’s creditors and other shareholders for the interest that accrued on their claims during the lengthy liquidation process. (TR 57 pp. 8–13). Given the large number of claimants, and the extended period of time it took to liquidate the Company’s assets and verify all of the claims against the estate, the accrued interest likely will exceed the amount of the surplus. (TR 57 p. 13).

The parties moved for summary judgment on this issue (and other procedural matters not relevant to the present appeal). The trial court granted the Superintendent’s motion, concluding that the Company’s creditors and other debt-holders are entitled to their accrued interest in these circumstances: “[G]iven 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. . . . There is nothing found in Chapter R.C. 3903 that would alter that result.” (Tr. Op. at p. 8, attached as Ex. 3).

**D. 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 (attached as Ex. 2). 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. *Id.* at ¶ 25–29. Choosing to move away from the approach of several other jurisdictions, 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 under the statutory framework. (The trial court, having found that the Superintendent could pay interest to the creditors and other debt-holders, had declined to reach that issue. *Id.* at ¶ 46.<sup>1</sup>)

This Court accepted jurisdiction over the Superintendent’s discretionary appeal. 124 Ohio St. 3d 1415, 2009-Ohio-6816.

## 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.*

#### **A. Both Ohio law and that of other jurisdictions support paying accrued interest to creditors and other debt-holders when sufficient funds exist for that purpose.**

Liquidation is a complex process, but beneath the myriad rules and regulations, it has a simple aim—to make whole, to the extent possible, the individuals and entities injured by a company’s insolvency. See *Covington v. Ohio Gen. Ins. Co.*, 99 Ohio St. 3d 117, 2003-Ohio-2720, ¶ 3 (noting that liquidation exists “to pay the insurance company’s outstanding debts”). Though the exact circumstances of this case are relatively rare, leaving a dearth of directly on-point Ohio authority, this overriding goal mandates that creditors and other debt-holders receive interest on their claims before the shareholder may take the remainder of the estate. Indeed, the

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<sup>1</sup> If this Court were to affirm the Tenth District’s holding, this case would return to the trial court to determine whether Petrosurance raised a proper claim for the surplus funds under the statutory procedures for doing so. If the court determines that the claim was validly filed and should be allowed, Petrosurance will be able to recover on it. The exact value of that claim is not clear, though, in view of the Tenth District’s conclusions regarding the bar date for claims. In particular, its holding that the bar date did not preclude Petrosurance from submitting its shareholder claim may mean that other creditor claims that had previously been denied as untimely may still be valid, and the amounts paid for such claims could impact the amount remaining for Petrosurance’s claim. See *Petrosurance, Inc.*, 2009-Ohio-4307, at ¶¶ 41–45. While these considerations do not impact this Court’s examination of this appeal, these issues still need to be resolved on remand.

principles established in R.C. Chapter 3903 and the Ohio cases in this area support such repayment and provide a workable framework for doing so, and the vast majority of jurisdictions that have addressed this issue have reached the same conclusion.

- 1. Under the Ohio insurer liquidation system, creditors and other debt-holders are entitled to full repayment of debts, and shareholder rights to the remainder of a liquidated estate are in all ways subservient to these rights.**

Though no statute explicitly allows or prohibits paying interest on claims in liquidation, a close examination of R.C. Chapter 3903, and the cases interpreting it, reveals that creditors and other debt-holders are entitled to recover interest on their claims in liquidation when sufficient funds exist after the principal of all such claims have been paid. See *State ex rel. Shisler v. Ohio Pub. Emples. Ret. Sys.*, 122 Ohio St. 3d 148, 2009-Ohio-2522, ¶ 20 (requiring courts to read all statutes on the same subject matter together to clarify meaning in the absence of a clear statutory directive).

The 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); see *id.* at (C) (providing that the provisions in this chapter are to be construed liberally to effectuate this purpose). In short, statutes in this chapter should be reasonably interpreted to protect the rights and interests of creditors and other debt-holders over the rights of shareholders: “The 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. This purpose drives the liquidation process, where the insolvent company’s assets are gathered and used to repay its creditors and other debt-holders: “[W]hen a corporation becomes

insolvent the corporate property becomes a trust fund for the benefit of creditors.” *Cay Mach. Co. v. Firestone Tire & Rubber Co.* (1963), 175 Ohio St. 295, 299.

Though shareholders have a right to the remainder of the company, that right is a terminal one that takes effect only after all other claims are paid in full from the pool of liquidated assets. See R.C. 3903.42(I). Indeed, as this Court noted over a century ago, “[t]he rights of the creditors to the corporate property, so far as it is necessary to meet their demands, are superior to those of stockholders. . . . ‘A corporation holds its property in trust, *first* to pay its creditors, and *second* to distribute to its stockholders *pro rata*.’” *Rouse v. Merchants’ Nat’l Bank* (1889), 46 Ohio St. 493, 502–03 (quoting Perry on Trusts, § 242) (emphasis original); see also *Cay Mach. Co.*, 175 Ohio St. at 299 (noting that the assets of an insolvent corporation are “held by those in charge of winding up the affairs of the corporation to satisfy claims against the corporation and to distribute what remains to the shareholders”). And interest is certainly part of the claims at issue here. See *Sogg v. Zurz*, 121 Ohio St. 3d 449, 2009-Ohio-1526, ¶ 7 (recounting the settled common law rule that interest follows principal unless a specific statute provides otherwise).

In most cases, though, full payment of all debts is not possible in liquidation. Several provisions account for this fact. R.C. 3903.42 allows “adequate funds” to be used to pay each class if full repayment is impossible. R.C. 3903.18(B) gives teeth to this concept by codifying the general principle that the value of claims is fixed on the date of the liquidation entry. These provisions are implicitly tied to R.C. 3903.02(D)(4), which provides that the purpose of protecting creditors is to be implemented by, among other things, the “[e]quitable apportionment of any *unavoidable* loss.” (emphasis added). As the Illinois Supreme Court has noted, “[e]quity allows or withholds interest in accordance with what is equitable and just in view of all the circumstances in the case.” *People ex rel. Barrett v. Farmers State Bank of Irvington* (Ill. 1938),

20 N.E.2d 502, 504; see also *State Banking Comm'r v. Metro. Trust Co.* (Mich. 1940), 291 N.W. 228, 230 (“When the assets are insufficient to pay the full amount on the claims, a payment of interest to certain creditors will deny others the recovery of even the principal. He who seeks equity must do equity.”).

Read together, these provisions create a straightforward scheme. When an insurer enters liquidation, the values of all claims against the company are fixed to ensure that the interest on larger claims does not consume the funds available to pay all creditors and other debt-holders. In other words, the statutes equitably apportion unavoidable losses by halting the accrual of interest during the lengthy liquidation process. The liquidator then gathers all the claims of the creditors and other debt-holders (that is, those with claims in Classes 1–8) and pays the principal of these claims according to the prescribed order of distribution in R.C. 3903.42. Until all of those claims are made and paid, it is unclear whether a surplus will exist. See *Stein v. Delano* (3d Cir. 1941), 121 F.2d 975, 979 (“Until the principal of all the claims are paid it can not be known whether the estate would have enough remaining assets to make payment upon the interest.”).

If a surplus remains after all of those claims are paid, however, the loss of interest may be avoided, allowing creditors and other debt-holders to recoup the total value of their claims. The statutes prefer this result—R.C. 3903.42 recognizes that these claimants should be fully repaid for their losses if at all possible. If all such debts are discharged in full, only then are the shareholders, as the terminal class of claimants, entitled to the remainder of the company’s assets.

This idea is hardly revolutionary; the United States Supreme Court detailed and approved this exact repayment process long ago.

[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.*, 233 U.S. at 266 (emphasis added). This time-honored rule comports with the basic equitable principles underlying liquidation, and with common sense. No reason exists to pay claims in part when funds exist to pay them in full.

The General Assembly could have expressed the ability to pay interest more clearly, as it did in the banking liquidation context. See R.C. 1125.24(B)–(C) (allowing the payment of interest to claimants before shareholders, albeit under a strikingly different priority statute). But the absence of a specific provision for interest in R.C. 3903.42 does not render the obligation to pay such interest a nullity, nor does it eliminate the priority rule that shareholders are only allowed to take after all of their company’s debts have been paid in full. This idea is especially true given the liberal construction rule in R.C. 3903.02(C)—any ambiguities should be resolved in favor of the creditors’ and other debt-holders’ rights.

At bottom, then, the Company, and by implication its sole shareholder, Petrosurance, are debtors who owe obligations to those with claims in Classes 1 through 8. Because the Superintendent’s good management combined with the fortunate market conditions resulted in a surplus that can repay the Company’s creditors for the interest that accrued on their claims, she must use those funds to compensate them as fully as possible. Until those debts are completely paid, Petrosurance may not take anything.

- 2. The vast majority of other jurisdictions permit the payment of interest to creditors and other debt-holders when sufficient surplus funds exist for that purpose.**

Though specific liquidation laws vary by jurisdiction, the basic concept of liquidation and the equitable rules underlying it are consistent across the country. As such, the conclusions that other jurisdictions have reached on the precise issue here (whether in the banking or the insurance liquidation context) are highly instructive. The vast majority of jurisdictions that have considered the issue permit the payment of interest to creditors and other debt-holders in the manner set forth above. This Court should put Ohio in line with the reasonable, and overwhelming, majority view.

The rule that interest may be paid in these circumstances has deep roots. Courts in England have allowed surplus funds to be used to pay creditors for their accrued interest in similar situations 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 consistently has reached the same conclusion in liquidation cases since the 1800s. 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.”); see also *Ticonic Nat’l Bank v. Sprague* (1938), 303 U.S. 406, 411 (noting that “interest is proper where the ideal of equality is served”); *Am. Iron & Steel Mfg. Co.*, 233 U.S. at 266; *Richmond v. Irons* (1887), 121 U.S. 27, 64.

The federal circuit courts have discussed this rule as well. After explaining that the general rule prohibiting the running of interest in liquidation is inapplicable when a surplus remains, the Third Circuit noted that “[w]hen a liability for interest is a debt against the corporation, it is like

any other debt, and the stockholders are liable therefore, as well as for the principal. . . .” *Stein*, 121 F.2d at 979 (quoting 13 Fletcher Cyclopedia Corporations § 6299). Numerous other circuit courts are in accord. See, e.g., *In re D.C. Sullivan & Co., Inc.* (1st Cir. 1991), 929 F.2d 1, 2–4; *Nolte v. Hudson Nav. Co.* (2d Cir. 1925), 8 F.2d 859, 868; *Johnson v. Norris* (5th Cir. 1911), 190 F. 459, 461–64; *In re Macomb Trailer Coach* (6th Cir. 1952), 200 F.2d 611, 613 (“If in the administration of the bankrupt estate it develops that the estate is solvent, interest is allowed on secured claims to the date of payment.”); *United States v. Kalishman* (8th Cir. 1965), 346 F.2d 514, 518.

Almost all of the States that have addressed this issue have reached the same conclusion, though they have done so in different ways. Numerous state courts have approved such payments under the reasoning outlined by the United States Supreme Court, even when the applicable statutes are silent in this regard. See, e.g., *Green v. Stone* (Ala. 1921), 87 So. 862, 866 (“If, after the principal of all debts shall have been paid, there remains a fund which may be applied to interest, all creditors shall receive payment thereof in the order already indicated,” and any remainder “shall be distributed pro rata among the stockholders.”); *Taylor v. Corning Bank & Trust Co.* (Ark. 1932), 48 S.W.2d 1102, 1102–03; *Lamar v. Taylor* (Ga. 1914), 80 S.E. 1085, 1092; *Tagawa v. Karimoto* (Haw. 1958), 43 Haw. 1, 14; *People ex rel. Barrett* (Ill. 1938), 20 N.E.2d at 505 (noting that, while “interest could not be allowed in the ordinary case where the assets are not sufficient to pay the debts in full, . . . here there was a surplus of assets over the bank’s liabilities and interest was chargeable and payable”); *Bates v. Farmers Sav. Bank* (Iowa 1942), 3 N.W.2d 517, 519 (“[T]here cannot be any question that the first responsibility and duty of the receiver in this case is to pay the depositor-claimants in full, including interest, before there can be any payments to the stockholders.”); *Emerald Inv. Co. v. A.J. Harwi Hardware Co.*

(Kan. 1937), 64 P.2d 16, 17–18; *State Banking Comm'r* (Mich. 1940), 291 N.W. at 230; *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 (refusing to read statutory silence on this specific issue as a prohibition on the payment of interest, as the statutes otherwise provided that “the superintendent shall pay all claims in full before recognizing the right of stockholders of a bank to resume control of its property”); *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.

Similarly, the Missouri Supreme Court has found that interest may be paid in these circumstances in the liquidator’s discretion, in view of her broad power to “compound, compromise, and negotiate” claims. *Wenzel v. Holland-Am. Ins. Co. Trust* (Mo. 2000), 13 S.W.3d 643, 646 (noting that “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,” and thus “the receiver was authorized to request the payment of prejudgment interest and the trial court was authorized to approve the request”). Ohio has a virtually identical statute—under R.C. 3903.43(A), the Superintendent “may compound, compromise, or in any other manner negotiate the amount for which claims will be recommended to the court.” See also *Ratchford v. Proprietors’ Ins. Co.* (1989), 47 Ohio St. 3d 1, 3 (recognizing the Superintendent’s extensive authority to set the terms by which debts will be repaid).

Thirteen States (California, Connecticut, Kentucky, Maine, Minnesota, Nevada, New Hampshire, New Mexico, Oklahoma, Rhode Island, Texas, Utah, and Wisconsin) have codified the right to recover interest in these circumstances, providing that such payments must occur

before shareholders are paid the remainder of the liquidated estate.<sup>2</sup> Most other States, like Ohio, fail to provide specifically for the payment of interest in these circumstances; only New York has affirmatively stated that interest may not be recovered in such proceedings. See N.Y. Ins. Law 7434(b).

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 Tenth District here identified only two States that have come to the contrary conclusion—Colorado and Texas (in a banking liquidation case). Both decisions relied heavily on the fact that the applicable priority statutes did not provide explicitly for the payment of interest. See *Stephens v. Colaiannia* (Colo. App. 1997), 942 P.2d 1374, 1376; *Huston v. FDIC* (Tex. 1990), 800 S.W.2d 845, 849; but see *Huston*, 800 S.W.2d at 850–53 (Hecht, J., dissenting) (noting that the majority's conclusion runs contrary to the rule adopted by virtually every other court to have considered the issue). The Texas case has lost some weight in this

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<sup>2</sup> California's statute provides that no payment shall be made to shareholders unless all creditors and other debt-holders have been paid in full with interest from the beginning of the proceeding or from when the claim became liquidated, whichever is later. See Cal. Ins. Code 1033(f). The other statutes place interest on previously paid claims in a class above shareholder claims. See Conn. Gen. Stat. 38a-944(a)(8); Ky. Rev. Stat. 304.33-430(8); 24-A Me. Rev. Stat. 4379(7); Minn. Stat. 60B.44(8); Nev. Rev. Stat. Ann. 696B.420(1)(i); N.H. Rev. Stat. Ann. 402-C:44(VII); N.M. Stat. Ann. 59A-41-44(G); 36 Okl. Stat. 1927.1(B)(9); R.I. Gen. Laws 27-14.3-46(a)(8); Tex. Ins. Code 443.301(j); Utah Code Ann. 31A-27a-701(2)(l); Wis. Stat. 645.68(7).

context, given that that State's legislature embraced the payment of interest in these circumstances in the insurance liquidation context after that decision. See Tex. Ins. Code 443.301(j). But, in any event, the ambiguity argument provides little reason to abandon the driving purpose of Ohio's liquidation statutes or to break away from the overwhelming consensus on this issue. This Court should adopt the majority view and allow creditors and other debt-holders to recover fully before shareholders take the remainder of the estate.

**B. Allowing creditors and other debt-holders to recover interest on their claims before shareholders' claims are paid does not prejudice shareholder rights; rather, it preserves the fundamental distinctions between these groups.**

The Tenth District premised its decision not to allow interest in these circumstances in part on the perceived unfairness of drawing a line between the claims of creditors and other debt-holders for repayment and those of shareholders to the remainder of the estate: “[W]hether or not interest is an inherent part of each claim, there is no justification in the statutory language for the trial court’s differential treatment of Class 9 shareholder claims.” *Petrosurance, Inc.*, 2009-Ohio-4307, at ¶ 32. While this argument ignores, among other things, that shareholder claims have the lowest priority, and thus may be paid only after all other claims have been paid in “full or adequate funds,” see R.C. 3903.42, it also fails to appreciate the critical differences between shareholders on the one hand and creditors and other debt-holders on the other.

As this Court recognized over a century ago, a shareholder “takes a risk in the concerns of the company, not only as to dividends and a proportion of assets on the dissolution of the company, but as to the statutory liability for debts in case the corporation becomes insolvent.” *Miller v. Ratterman* (1890), 47 Ohio St. 141, 154. A creditor, by contrast, “takes no interest in the company’s affairs, is not concerned in its property, or profits as such, but his whole right is to receive agreed compensation for the use of the money he furnishes, and the return of the principal when due.” *Id.* at 155; see also *Rouse*, 46 Ohio St. at 502–03. And, of course, when

the principal is not returned when due, a creditor has the right to the interest that accrues on the debt. See *Sogg*, 121 Ohio St. 3d 449, 2009-Ohio-1526, at ¶ 7.

Regardless of whether an explicit statutory line exists between creditor and shareholder claims, these claims are fundamentally different, and this fact cannot be ignored in the liquidation process. In the analogous banking liquidation context, the Third Circuit recognized that these distinct positions tilt the balance in favor of paying creditors and other debt-holders interest ahead of paying shareholders anything:

“It is clear that the contracts, debts, and engagements of the bank have not been fulfilled so long as interest is unpaid. 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. Within the statutory limits the stockholder is bound for the whole debt and not part of it.”

*Stein*, 121 F.2d at 979 (quoting *Zollmann Banks and Banking*, Perm. Ed., § 1781). In short, creditors have a legal right to receive both principal and interest; the shareholders, as owners of the company-debtor, have an obligation to pay these debts in full before recouping on their investment. No principled reason exists to elevate the claims of shareholders over the rights of their creditors and other debt-holders who remain injured by the company’s insolvency.

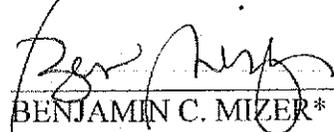
The Tenth District’s conclusion upends the well-settled distinctions between these groups. This Court should reverse that decision to maintain this order and ensure that creditors and other debt-holders remain fully protected under the law.

## CONCLUSION

For the above reasons, this Court should reverse the decision below and remand this case to the trial court for further proceedings.

Respectfully submitted,

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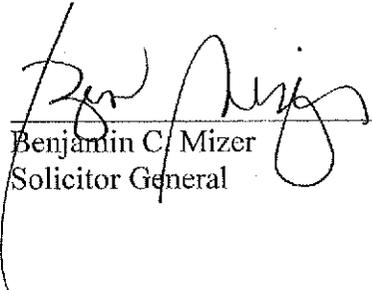
Mary Jo Hudson, Superintendent of  
Insurance, State of Ohio, acting in her  
capacity as Liquidator of The Oil & Gas  
Insurance Company

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Merit Brief of Plaintiff-Appellant Mary Jo Hudson, Superintendent of Insurance, was served by U.S. mail this 8<sup>th</sup> day of March, 2010, on the following counsel:

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Counsel for Defendant-Appellee,  
Petrosurance, Inc.

  
\_\_\_\_\_  
Benjamin C. Mizer  
Solicitor General

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

NOTICE OF APPEAL OF PLAINTIFF-APPELLANT  
MARY JO HUDSON, SUPERINTENDENT OF INSURANCE

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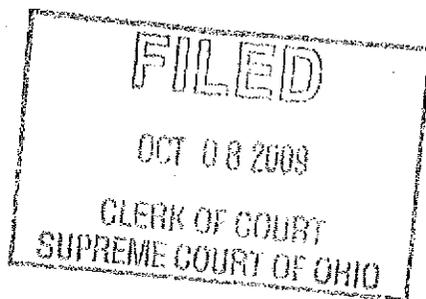
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Insurance Company



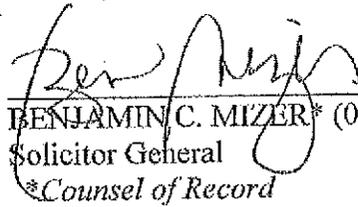
**NOTICE OF APPEAL OF PLAINTIFF-APPELLANT  
MARY JO HUDSON, SUPERINTENDENT OF INSURANCE**

Plaintiff-Appellant Mary Jo Hudson, Superintendent of Insurance, gives notice of her discretionary appeal to this Court, pursuant to Ohio Supreme Court Rule II, Section 1(A)(3), from a decision of the Franklin County Court of Appeals, Tenth Appellate District, journalized in Case No. 08AP-1030 on August 25, 2009. Date-stamped copies of the Judgment Entries and Decisions of the Tenth District and the Franklin County Court of Common Pleas are attached as Exhibits 1 and 2, respectively, to the Memorandum in Support of Jurisdiction.

For the reasons set forth in the accompanying memorandum, this case is one of public and great general interest.

Respectfully submitted,

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Attorney General of Ohio



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Solicitor General  
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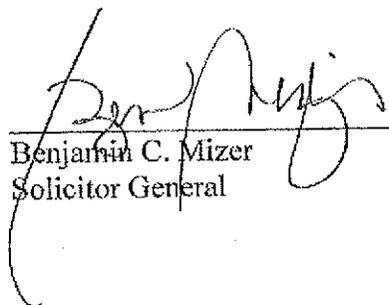
Counsel for Plaintiff-Appellant,  
Mary Jo Hudson, Superintendent of  
Insurance, State of Ohio, acting in her  
capacity as Liquidator of The Oil & Gas  
Insurance Company

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal of Appellant Mary Jo Hudson, Superintendent of Insurance, has been served upon the following counsel of record by depositing it in ordinary United States mail, postage prepaid, this 8th day of October, 2009:

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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  
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 *Judith L. French*  
\_\_\_\_\_  
Judge Judith L. French, P.J.

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)

D E C I S I O N

Rendered on August 25, 2009

*Richard Cordray, Attorney General, by Outside Counsel  
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*Beckman Weil Shepardson LLC, Peter L. Cassady, Laurie A.  
Lamb, and John Li, for defendant-appellant.*

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

<sup>1</sup> The Supreme Court of Ohio addressed the relationship between OGICO, Petrosurance, and Hardy in *Fabo 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]] 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>

<sup>2</sup> R.C. 3903.39(B) states that "[w]henver 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. Colaianna* (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.Cmwlth.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 unfilled, 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

<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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TERMINATION NO.	18
BY:	<i>gvyj</i>

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

FINAL APPEALABLE ORDER

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

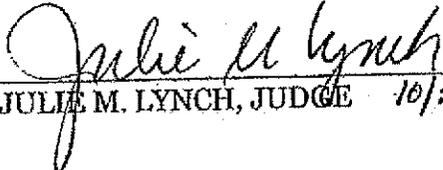
JUDGMENT ENTRY AND ORDER

This is to serve as a final judgment in the case bearing number 07CVH04-5862 upon the docket of this court. In that action, the court considered motions for summary judgment filed by plaintiff and defendant Petrosurance, Inc. For the reasons set forth in the amended decision filed herein on August 13, 2008, the court finds the issues in favor of plaintiff and grants her motion for summary judgment against defendant Petrosurance. With respect to defendant Petrosurance's motion, the court grants it in part and denies it in part as set forth in the court's mentioned amended decision.

Concerning case number 90CVH05-3409, plaintiff is directed to submit a plan for the payment of interest to creditors whose claims have been allowed. The court will consider the proposed plan and any reasoned and supported objections thereto, but will defer issuing an order with respect to amounts of payments and related issues until a decision is made in an appeal that may be taken in case number 07CVH04-5862.

FILED  
COMMON PLEAS COURT  
FRANKLIN CO. OHIO  
AUG 19 9 20  
CLERK OF COURTS

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 10/23/08

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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.

II  
□  
II  
□

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.

II  
□  
II  
□

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.

<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.

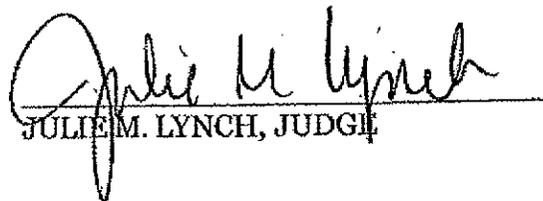
V

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.



LEXSTAT ORC ANN 3903.02

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*ORC Ann. 3903.02 (2010)*

§ 3903.02. Citation, construction and purpose of act

(A) *Sections 3903.01 to 3903.59 of the Revised Code* may be cited as "the insurers supervision, rehabilitation, and liquidation act."

(B) *Sections 3903.01 to 3903.59 of the Revised Code* do not limit the powers granted the superintendent of insurance under any other section of the Revised Code.

(C) *Sections 3903.01 to 3903.59 of the Revised Code* shall be liberally construed to effect the purpose stated in division (D) of this section.

(D) The purpose of *sections 3903.01 to 3903.59 of the Revised Code* 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, through all of the following:

- (1) Early detection of any potentially dangerous condition in an insurer, and prompt application of appropriate corrective measures;
- (2) Improved methods for rehabilitating insurers, involving the cooperation and management expertise of the insurance industry;
- (3) Enhanced efficiency and economy of liquidation, through clarification of the law, to minimize legal uncertainty and litigation;
- (4) Equitable apportionment of any unavoidable loss;
- (5) Lessening the problems of interstate rehabilitation and liquidation by facilitating cooperation between states in

the liquidation process, and by extending the scope of personal jurisdiction over debtors of the insurer outside this state;

(6) Regulation of the insurance business by the impact of the law relating to delinquency procedures and substantive rules on the entire insurance business.

**HISTORY:**

139 v H 830. Eff 3-7-83.

**NOTES:**

Section Notes

*Not analogous to former RC § 3903.02 (GC § 628-1; 118 v 303; Bureau of Code Revision, 10-1-53), repealed 139 v H 830, § 2, eff 3-7-83.*

Related Statutes & Rules

Cross-References to Related Statutes

Controlling insurance producer; remedies for noncompliance with liquidation or rehabilitation order, *RC § 3905.65.*

Credit union guaranty corporations, *RC § 1761.01 et seq.*

Fraudulent acts concerning impairment or insolvency of insurer, *RC § 3999.37.*

Health insuring corporation; rehabilitation, liquidation, suspension or conservation, *RC § 1751.42.*

Life or sickness and accident insurers may pay claims unpaid due to insolvency of certain insurers, *RC § 3901.47.*

Mandatory control level event defined for health insuring corporations, *RC § 3903.86.*

Mutual insurance holding company; rehabilitation, liquidation and dissolution proceedings, *RC § 3913.35.*

Risk-based capital: authorized control level events, *RC § 1753.35.*

Comparative Legislation

INSURERS SUPERVISION, REHABILITATION AND LIQUIDATION MODEL ACT: IN--Burns *Ind. Code Ann. § 27-9-1-1 et seq*

KY--*KRS § 304.33-010 et seq*

MI--*MCLS § 500.8101 et seq*

NY--*NY CLS Ins § 7408 et seq*



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*ORC Ann. 3903.21 (2010)*

§ 3903.21. Powers of liquidator

(A) The liquidator may do any of the following:

(1) Appoint one or more special deputies to act for him under *sections 3903.01 to 3903.59 of the Revised Code*, and determine the deputies' reasonable compensation. Special deputies have all the powers of the liquidator granted by this section. Special deputies shall serve at the pleasure of the liquidator.

(2) Employ employees and agents, actuaries, accountants, appraisers, consultants, and such other personnel as he may consider necessary to assist in the liquidation;

(3) Fix the reasonable compensation of employees and agents, actuaries, accountants, appraisers, and consultants with the approval of the court;

(4) Pay reasonable compensation to persons appointed and defray from the funds or assets of the insurer all expenses of taking possession of, conserving, conducting, liquidating, disposing of, or otherwise dealing with the business and property of the insurer. In the event that the property of the insurer does not contain sufficient cash or liquid assets to defray the costs incurred, the superintendent of insurance may advance the costs so incurred out of any appropriation for the maintenance of the department of insurance. Any amounts so advanced for expenses of administration shall be repaid to the superintendent for the use of the department out of the first available money of the insurer.

(5) Hold hearings, subpoena witnesses to compel their attendance, administer oaths, examine any person under oath, and compel any person to subscribe to his testimony after it has been correctly reduced to writing, and in connection therewith require the production of any books, papers, records, or other documents which he considers relevant to the inquiry;

(6) Collect all debts and moneys due and claims belonging to the insurer, wherever located. For this purpose, the liquidator may do any of the following:

(a) Institute timely action in other jurisdictions, in order to forestall garnishment and attachment proceedings against such debts;

(b) Do such other acts as are necessary or expedient to collect, conserve, or protect its assets or property, including the power to sell, compound, compromise, or assign debts for purposes of collection upon such terms and conditions as he considers best;

(c) Pursue any creditor's remedies available to enforce his claims.

(7) Conduct public and private sales of the property of the insurer;

(8) Use assets of the estate of an insurer under a liquidation order to transfer policy obligations to a solvent assuming insurer, if the transfer can be arranged without prejudice to applicable priorities under *section 3903.42 of the Revised Code*.

(9) Acquire, hypothecate, encumber, lease, improve, sell, transfer, abandon, or otherwise dispose of or deal with, any property of the insurer at its market value or upon such terms and conditions as are fair and reasonable. The liquidator may execute, acknowledge, and deliver any and all deeds, assignments, releases, and other instruments necessary or proper to effectuate any sale of property or other transaction in connection with the liquidation.

(10) Borrow money on the security of the insurer's assets or without security and to execute and deliver all documents necessary to that transaction for the purpose of facilitating the liquidation;

(11) Enter into such contracts as are necessary to carry out the order to liquidate, and to affirm or disavow any contracts to which the insurer is a party;

(12) Continue to prosecute and to commence in the name of the insurer or in his own name any and all suits and other legal proceedings, in this state or elsewhere, and to abandon the prosecution of claims he considers unprofitable to pursue further. If the insurer is dissolved under *section 3903.20 of the Revised Code*, he shall have the power to apply to any court in this state or elsewhere for leave to substitute himself for the insurer as plaintiff.

(13) Prosecute any action which may exist in behalf of the creditors, members, policyholders, or shareholders of the insurer against any officer of the insurer or any other person;

(14) Remove any or all records and property of the insurer to the offices of the superintendent or to such other place as may be convenient for the purposes of efficient and orderly execution of the liquidation. Guaranty associations and foreign guaranty associations shall have such reasonable access to the records of the insurer as is necessary for them to carry out their statutory obligations.

(15) Deposit in one or more banks in this state such sums as are required for meeting current administration expenses and dividend distributions;

(16) Invest all sums not currently needed, unless the court orders otherwise;

(17) File any necessary documents for record in the office of any recorder of deeds or record office in this state or elsewhere where property of the insurer is located;

(18) Assert all defenses available to the insurer as against third persons, including, but not limited to, statutes of limitation, statutes of frauds, and the defense of usury. A waiver of any defense by the insurer after a complaint in liquidation has been filed does not bind the liquidator. Whenever a guaranty association or foreign guaranty association

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has an obligation to defend any suit, the liquidator shall give precedence to such obligation and may defend only in the absence of a defense by such guaranty association.

(19) Exercise and enforce all the rights, remedies, and powers of any creditor, shareholder, policyholder, or member, including any power to avoid any transfer or lien that may be given by the general law and that is not included under *sections 3903.26 to 3903.28 of the Revised Code*;

(20) Intervene in any proceeding wherever instituted that might lead to the appointment of a receiver, conservator, rehabilitator, liquidator, or trustee, and to act as the receiver, conservator, rehabilitator, liquidator, or trustee whenever the appointment is offered;

(21) Enter into agreements with any receiver, conservator, rehabilitator, liquidator, or superintendent of any other state relating to the rehabilitation, liquidation, conservation, or dissolution of an insurer doing business in both states;

(22) Exercise all powers now held or hereafter conferred upon receivers, conservators, rehabilitators, or liquidators by the laws of this state not inconsistent with the provisions of *sections 3903.01 to 3903.59 of the Revised Code*;

(23) Apply to the court for permission to sell the insurer as a going concern. If the court determines that the sale of the insurer as a going concern is in the best interest of the estate and that the sale will not diminish the value of the claims of shareholders and creditors, the court shall order that the insurer be discharged from all of its liabilities, that the outstanding shares of the insurer be canceled, that for no additional consideration new shares of the insurer be issued in the name of the liquidator, that the liquidator be vested with the title to the new shares which shares shall be deemed validly issued, fully paid, and nonassessable pursuant to applicable law, and that the liquidator be authorized to sell the shares, together with such tax credits, of the insurer as the liquidator determines to be in the best interests of the estate. The sale may be at public or private sale and under such terms and conditions as the liquidator determines to be in the best interests of the estate. Upon confirmation of the sale by the court, the purchasers of the shares shall be vested with title to those shares, including any tax credits, of the insurer free and clear of all claims and defenses. The proceeds from the sale of the shares shall become a part of the estate in liquidation.

A sale under this division (A)(23) does not affect the rights and liabilities of the insurer and of its creditors, policyholders, shareholders, members, and all other persons interested in its estate as fixed under division (B) of *section 3903.18 of the Revised Code*. No person is entitled to any priority or preference rights in the proceeds of the sale except as so fixed.

As used in this division (A)(23), "shareholder" has the same meaning as in division (F) of *section 1701.01 of the Revised Code* and also includes any secured party or other person or holder who has or claims to have any interest of any kind in any shares of the insurer.

This division (A)(23) applies retrospectively and shall be liberally construed to accomplish its purpose to provide a more expeditious and effective procedure for marshalling the assets of the estate in order to realize the maximum amount possible from the sale of those assets and ensure that the purchasers receive clear and marketable titles.

(B) The enumeration, in this section, of the powers and authority of the liquidator shall not be construed as a limitation upon him, nor shall it exclude in any manner his right to do such other acts not herein specifically enumerated, or otherwise provided for, as may be necessary or appropriate for the accomplishment of or in aid of the purpose of liquidation.

**HISTORY:**

139 v H 830 (Eff 3-7-83); 142 v H 38. Eff 9-10-87.



LEXSTAT ORC ANN. 3903.42

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*ORC Ann. 3903.42 (2010)*

§ 3903.42. Priority of distribution of claims

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, including but not limited to the following:

- (1) The actual and necessary costs of preserving or recovering the assets of the insurer;
- (2) Compensation for all services rendered in the liquidation;
- (3) Any necessary filing fees;
- (4) The fees and mileage payable to witnesses;
- (5) Reasonable attorney's fees;
- (6) The reasonable expenses of a guaranty association or foreign guaranty association in handling claims.

(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. All claims under life

insurance and annuity policies, whether for death proceeds, annuity proceeds, or investment values, shall be treated as loss claims. That portion of any loss, indemnification for which is provided by other benefits or advantages recovered by the claimant, shall not be included in this class, other than benefits or advantages recovered or recoverable in discharge of familial obligations of support or by way of succession at death or as proceeds of life insurance, or as gratuities. No payment by an employer to an employee shall be treated as a gratuity. 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 to the extent that they do not exceed one thousand dollars and represent payment for services performed within one year before the filing of the complaint for liquidation. Officers and directors shall not be entitled to the benefit of this priority. Such priority shall be in lieu of any other similar priority that may be authorized by law as to wages or compensation of employees.

(E) Class 5. Claims of general creditors.

(F) Class 6. Claims of any state or local government. Claims, including those of any state or local governmental body for a penalty or forfeiture, shall be allowed in this class only to the extent of the pecuniary loss sustained from the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby. The remainder of such claims shall be postponed to the class of claims under division (I) of this section.

(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. Payments to members of domestic mutual insurance companies shall be limited in accordance with law.

(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.

(J) As used in *sections 3903.42 and 3903.421 [3903.42.1] of the Revised Code*, "contracted provider" and "medicaid recipient" have the same meanings as in *section 3903.14 of the Revised Code*.

#### HISTORY:

139 v H 830 (Eff 3-7-83); 146 v H 374. Eff 12-4-95; 151 v H 66, § 101.01, eff. 9-29-05.

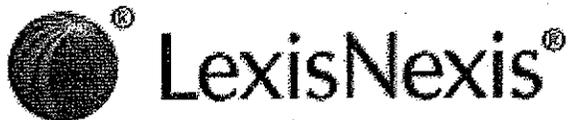
#### NOTES:

#### Section Notes

The effective date is set by § 612.03 of 151 v H 66.

The provisions of § 3 of HIB 374 (146 v --) read as follows:

SECTION 3. *Section 3903.42 of the Revised Code*, as amended by this act, shall apply to and govern all claims filed in any proceeding to liquidate an insurer that is pending on the effective date of this section and to all claims filed in any proceeding to liquidate an insurer that is commenced on or after the effective date of this section, notwithstanding any other provision of the Revised Code including, but not limited to, *section 3903.08 of the Revised*



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*ORC Ann. 3903.43 (2010)*

§ 3903.43. Review, investigation and negotiation of claims; report on claims

(A) 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 except where the liquidator is required by law to accept claims as settled by any person or organization, including any guaranty association or foreign guaranty association. Unresolved disputes shall be determined under *section 3903.39 of the Revised Code*. As soon as practicable, he shall present to the court a report of the claims against the insurer with his recommendations. The report shall include the name and address of each claimant and the amount of the claim finally recommended, if any. If the insurer has issued annuities or life insurance policies, the liquidator shall report the persons to whom, according to the records of the insurer, amounts are owed as cash surrender values or other investment value and the amounts owed.

(B) The court may approve, disapprove, or modify the report on claims by the liquidator. Such reports as are not modified by the court within a period of sixty days following submission by the liquidator shall be treated by the liquidator as allowed claims, subject thereafter to later modification or to rulings made by the court pursuant to *section 3903.39 of the Revised Code*. No claim under a policy of insurance shall be allowed for an amount in excess of the applicable policy limits.

**HISTORY:**

139 v H 830. Eff 3-7-83.

**NOTES:**