

**NO. D-1-GV-08-002014**

**STATE OF TEXAS,  
Plaintiff**

**v.**

**AMERITRUST TITLE COMPANY,  
Defendant**

§  
§  
§  
§  
§  
§  
§

**IN THE DISTRICT COURT OF**

**TRAVIS COUNTY, TEXAS**

**261st JUDICIAL DISTRICT**

**SPECIAL DEPUTY RECEIVER’S RESPONSE TO OBJECTIONS TO TURNOVER  
APPLICATION [ENTERPRISE BANK]**

**TO THE HONORABLE JUDGE OF SAID COURT:**

CANTILO & BENNETT, L.L.P., solely in its capacity as Special Deputy Receiver of Ameritrust Title Company, (the “SDR” and “Ameritrust” respectively), files this Response to the Objections to Turnover Application [Enterprise Bank] (the “Response”).

**I. INTRODUCTION**

1.1 The Special Deputy Receiver filed the Turnover Application to require Enterprise Bank to turnover to the receivership estate certain funds that it holds on behalf of Ameritrust Title Company and to declare that Respondents Jose Villelas and Leydi Villelas (the “Villelases”) and Commonwealth Insurance Company (“Commonwealth”) have no claim to the funds. Enterprise Bank makes no claim to the money and has agreed to interplead the funds in question into the Registry of the Court. The funds at issue are referred to as the “Cashier’s Check Proceeds.”

1.2 Commonwealth Land Title Insurance Company (“Commonwealth”) and Jose Villelas filed Objections to the Application.<sup>1</sup> The Texas Title Guaranty Association (“TTIGA”)

---

<sup>1</sup> Leydi Villelas, who has appeared as a movant in this receivership, although served with the Application, did not file an Objection.

supports this Application.

1.3 The facts are uncontested. Ameritrust, as the purchaser of the now lost cashier's check, is entitled to the money unless Commonwealth and/or Mr. Villelas can establish an interest enforceable in receivership. Compass Bank, the named payee, refused the check. Enterprise Bank, the issuing bank, makes no claims to the funds. Resolution of the Application turns on the provisions of the *Insurer Receivership Act* (the "Act") and Texas law governing cashier's checks.

## II. RESPONSE TO COMMONWEALTH'S OBJECTION

2.1 Commonwealth contends that it has a subrogation interest in the Cashier's Check Proceeds because it paid a claim to the Villelas' lender, Encore Credit Corporation ("ECC"). Commonwealth cites various statutory definitions in the Act regarding categories of property interests as the legal basis for its alleged right to the funds.

2.2 An analysis of Commonwealth's claims starts with Act, §443.151 (a) "As of the entry of the final order of liquidation, the liquidator is vested by operation of law with the title to all of the property, contracts, rights of action, and books and records of the insurer ordered liquidated, wherever located. ..". "**Property of the insurer**" is broadly defined as:

(A) all right, title, and interest of the insurer in property, whether legal or equitable, tangible or intangible, choate or inchoate, and includes choses in action, contract rights, and any other interest recognized under the laws of this state; Act, §443.004

2.3 A "**General Asset**" is:

(A) all property of the estate that is not:

(i) subject to a secured claim or a valid and existing express trust for the security or benefit of specified persons or classes of persons; or

- (ii) required by the insurance laws of this state or any other state to be held for the benefit of specified persons or classes of persons; and
- (B) all property of the estate and the proceeds of that property in excess of the amount necessary to discharge any secured claims described by Paragraph (A). Act, § 443.004 (9).

2.4 The Cashier's Check Proceeds are "General Assets" because 1) they are "property of the estate [§443.004 (20) (A)], and 2) there is no "secured claim or a valid and existing express trust for the security or benefit of specified persons or classes of persons," against the funds, as required by Section 443.004 (9). There is no "express trust" because there is no written trust agreement naming Commonwealth as a beneficiary. *See Longoria v. Lasater*, 292 S.W.3d 156 (Tex. App.-San Antonio, 2009, writ den'd) ("To create a trust by a written instrument, the beneficiary, the *res*, and the trust purpose must be identified... The existence of a beneficiary is an indispensable element of an **express trust**; in the absence of a beneficiary, the effort to create such trust aborts.") 292 S.W.3d at 166-67 [emphasis in original]. *See also* TEX. PROP. CODE § 112.001. Commonwealth further concedes, by omission, that it does not have a "secured claim" because the Act does not recognize "a claim arising from a constructive or resulting trust". See Section 443.004 (26).

2.5 Likewise, the Cashier's Check Proceeds are not a "Special Deposit" as defined in Section 443.404 of the Act, which states:

(27) "Special deposit" means a deposit established pursuant to statute for the security or benefit of a limited class or limited classes of persons.

(28) "Special deposit claim" means any claim secured by a special deposit. The term does not include any claim secured by the general assets of the insurer.

Commonwealth cites no "statute" establishing the Cashier's Check Proceeds or creating a limited class.

2.6 At best, Commonwealth may have an equitable claim, although even that status is suspect given the statutory nature of the relationship created by the purchase of a cashier's check under Texas law. Commonwealth is simply not a party to the contractual relationship between Ameritrust and Enterprise. Unrecorded equitable interests are not recognized under the Act. Commonwealth is a general creditor of the Ameritrust estate.

2.7 In sole support of its position, Commonwealth cites two Bankruptcy Court decisions from the 1980s dealing with the trust funds under the federal Perishable Agricultural Commodities Act ("PACA")-*In re Fresh Approach, Inc.*, 51 B.R. 412 (Bkrcty. N.D. Tex. 1985) and *In re Monterey House, Inc.*, 71 B.R. 244 (Bkrcty. S.D. Tex. 1986). Bankruptcy case law has limited relevance in cases under the Act unless the statutes mirror each other's provisions. Here, the cited cases are particularly not relevant. They both discuss complicated federal statutes, legislative history and specific Bankruptcy Code provisions. The federal law, PACA, created an express trust for the benefit of the creditors in question. Neither the laws, nor the facts, are applicable here.

2.8 To the extent that the Cashier's Check Proceeds are "escrow funds," then the SDR will turn them over to TTIGA pursuant to this Court's August 7, 2009 *Order Granting Texas Title Insurance Guaranty Association's Application for Transfer of Escrow Funds and Request for Claims Filing Deadline*.

### **III. RESPONSE TO THE VILLELAS OBJECTION**

3.1 Mr. Villelas contends that he is entitled to the Cashier's Check Proceeds because he "borrowed" the money that was used to purchase the check. However, he admits that the loan was repaid by Commonwealth and that he does not owe the original lender, ECC, any money. He presents no admissible evidence establishing any legally

recognizable claims to the Cashier's Check Proceeds. Mr. Villelas was not a party to the transaction in October 2006 in which Ameritrust purchased the cashier's check from Enterprise Bank. He is not a "secured creditor" or claimant against a "special deposit." He is not the identified beneficiary of an express trust. Instead, Mr. Villelas, like Commonwealth, is a general creditor against the estate.

3.2 In his Response in Opposition, Mr. Villelas relies on the same cases cited by Commonwealth. The SDR incorporates, by reference, its response to Commonwealth's Objection regarding the relevance of the case law.

#### **IV. CONCLUSION**

4.1 The Cashier's Check Proceeds belong to the Ameritrust estate and should be administered pursuant to the Act. Ameritrust purchased the cashier's check from Enterprise, which makes no claims to the funds. The payee on the check, Compass Bank, rejected the check and makes no claims to the funds. There are no recorded liens, financing statements or other written security interests in the cashier's check or its proceeds. Commonwealth has filed a proof of claim with the SDR and TTIGA. The Villelas have filed a POC with TTIGA and the deadline to file a claim with the SDR is July 15, 2010. Their claims should be treated like the many other creditors of this estate. *See Bard v. Meyers*, 839 S.W.2d 791, 796-97 (Tex. 1991) ("..all claims against the insolvent insurer's estate be adjudicated in the receivership proceedings to ensure the fair and consistent treatment of *all* claims.").

#### **X. NOTICE**

5.1 The SDR has served this Response on counsel for Enterprise Bank, Commonwealth, the Villelases, TTIGA and all other known parties at interest by email.

## **PRAYER**

WHEREFORE, PREMISES CONSIDERED, CANTILO & BENNETT, L.L.P., solely in its capacity as Special Deputy Receiver of Ameritrust Title Company respectfully request that this Court:

1. Grant the Application;
2. Enforce the Liquidation Order against Commonwealth and Mr. Villelas enjoining them from asserting any claims to the cashier's check, funds paid for the cashier's check and/or Cashier's Check Proceeds in any forum other than the Receivership Court;
3. Declaring that the cashier's check, funds paid for the cashier's check and/or Cashier's Check Proceeds are "property of the estate" and not subject to any liens or trust, express, constructive or implied and, further declaring that no other parties, including but not limited to Commonwealth and Mr. Villelas, have any claims to the cashier's check, funds paid for the cashier's check and/or Cashier's Check Proceeds;
4. Order the Clerk of the Court to pay the interplead funds, the Cashier's Check Proceeds, to the SDR;
5. Awarding the SDR its reasonable and necessary attorneys fees as are equitable and just; and
6. Granting such other and further relief to which the SDR may be justly entitled.

Respectfully submitted,

By: /s/Christopher Fuller  
Christopher Fuller  
Texas Bar No. 07515500  
4612 Ridge Oak Drive, Austin, Texas  
78731  
Tel. (512)470-9544  
Fax (512)374-0957  
cfuller@fullerlaw.org  
Attorney for Cantilo & Bennett, L.L.P.,  
solely in its capacity as the  
Special Deputy Receiver of Ameritrust Title  
Company

### **CERTIFICATE OF SERVICE**

I certify that on July 12, 2010, a true and correct copy of this Response was served pursuant to the Order of Reference, the Texas Rules of Civil Procedure and TEX. INS. CODE ANN. SEC. 443.007(d) on the following by email, except as specifically noted.

/s/Christopher Fuller  
Christopher Fuller

Tom Collins, Special Master  
c/o Ms. Jean Sustaita  
P.O. Box 149104  
Mail Code 305-1D  
Austin, TX 78701  
Jean.Sustaita@tdi.state.tx.us

Joshua Godbey  
Assistant Attorney General  
P.O. Box 12548  
Austin, TX 78711-2548  
joshua.godbey@oag.state.tx.us

Mitchell, Williams, Selig, Gates & Woodyard, PLLC  
Attorneys for the Texas Title Guaranty  
Association  
P.O. Box 2212

Austin, TX 78768-2212  
bburner@mvlaw.com  
bmccandless@mvlaw.com

Carlos A. Leon  
The Leon Law Firm, P.C.  
Comerica Bank Building  
One Sugar Creek Center Blvd., Suite 980  
Sugar Land, Texas 77478  
cleon@theleonlawfirm.com

Alison H. Moore  
Thompson, Coe, Cousins & Irons, L.L.P.  
700 N. Pearl St., 25th floor  
Dallas, TX 75201  
amoore@thompsoncoe.com

Claire W. Parsons  
Attorney at Law  
Wilson Elser Moskowitz Edelman & Dicker LLP  
5847 San Felipe, Suite 2300  
Houston, TX 77057-4033  
claire.parsons@wilsonelser.com

Norman Riedmueller  
Norman Riedmueller PC & Associates  
6800 West Loop South, Suite 325  
Bellaire, TX 77401-4528  
riedmueller@covad.net

Paul J. McConnell, III  
DeLange, Hudspeth, McConnell & Tibbets, L.L.P.  
1177 West Loop South, Suite 1700  
Houston, Texas 77027  
Fax (713) 871-2020  
pmcconnell@dhmtlaw.com

Internal Revenue Service  
Special Procedures Branch  
P.O. Box 250  
300 East 8th St., Ste. 352, Mail Stop 5022A  
Austin, TX 78701

Angel Garrett  
Texas Department of Insurance  
Financial/Rehabilitation & Liquidation Oversight Division

333 Guadalupe, Mail Code 305-1D  
Austin, TX 78701  
Angel.Garrett@tdi.state.tx.us

Rachel Giani  
Texas Department of Insurance  
Financial/Rehabilitation & Liquidation Oversight Division  
333 Guadalupe Mail, Code 305-1D  
Austin, TX 78701  
Rachel.Giani@tdi.state.tx.us

Leanne Layne  
Texas Department of Insurance  
Financial/Rehabilitation & Liquidation Oversight Division  
333 Guadalupe, Mail Code 305-1D  
Austin, TX 78701  
Leanne.Layne@tdi.state.tx.us

Myra Garrett  
Texas Department of Insurance  
Financial/Rehabilitation & Liquidation Oversight Division  
333 Guadalupe, Mail Code 305-1D  
Austin, TX 78701  
Myra.Garrett@tdi.state.tx.us

Kathy Gartner  
Texas Department of Insurance  
Financial/Rehabilitation & Liquidation Oversight Division  
333 Guadalupe, Mail Code 305-1D  
Austin, TX 78701  
Kathy.Gartner@tdi.state.tx.us

Felicia Kyle  
Sutherland Asbill & Brennan LLP  
909 Fannin Street, Suite 2200  
Houston, TX 77010  
felicia.kyle@sutherland.com

Enterprise Bank  
William Woodby  
CEO, Enterprise Bank  
4600 Gulf Freeway  
Houston, Texas 77023.

Paul Colley, Jr.  
Hopkins Law, P.L.L.C

3821 Juniper Trace, Ste 107  
Austin TX 78738  
kelley@colleylaw.net  
Attorney for Commonwealth

Glenn P. Valentine  
Hughes Watters Askanase, LLP  
Three Allen Center  
333 Clay, 29th Floor  
Houston, Texas 77002  
Via email: [gvalentine@hwa.com](mailto:gvalentine@hwa.com)  
Attorney for Enterprise Bank