STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CA 1577

JAMES H. "JIM" BROWN, AS COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA

VERSUS

ASSOCIATED INSURANCE CONSULTANTS, INC., ASSOCIATED AUDITORS, INC., JOHN O'BRIEN, GARY BENNETT & ERIC SCHMIDT

Consolidated With

2007 CA 1578

JAMES H. "JIM" BROWN, AS COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA

VERSUS

PHYSICIANS MEDICAL INDEMNITY ASSOCIATION, INC., PHYSICIANS MEDICAL INDEMNITY ASSOCIATION (A RISK RETENTION GROUP), A/K/A PHYSICIANS MUTUAL INDEMNITY ASSOCIATION

Consolidated With

2007 CA 1579

JAMES H. "JIM" BROWN, AS COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA

VERSUS

LEME REINSURANCE LIMITED; NUMA, INC.; ERIC T. SCHMIDT; JOHN O'BRIEN & GARY BENNETT

Judgment rendered: APR 0 9 2008

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On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, State of Louisiana
Suit Numbers 401,897 c/w 401,898 c/w 401,899; Division I (24)
The Honorable R. Michael Caldwell, Judge Presiding

Anna E. Dow
Gonzales, LA

Mazie M. Doomes
Baton Rouge, LA

L. Dean Fryday, Jr.
Baton Rouge, LA

Michael David Ferachi
Baton Rouge, LA

Counsel for Plaintiff/Appellee
James H. "Jim" Brown, Commissioner of Insurance for the State of Louisiana

Arthur A. Lemann, III
New Orleans, LA

Counsel for Defendant/1st Appellant
Michael O'Keefe, Jr.

Richard T. Simmons, Jr.
Metairie, LA

Counsel for Defendants/2nd Appellants
Michael O'Keefe, Sr., John O'Brien & Gary Bennett

John O'Brien
Pensacola, FL

Counsel for Defendant/2nd Appellant
John O'Brien

Arthur J. O'Keefe, Sr.
Metairie, LA

Counsel for Defendants/2nd Appellants
John O'Brien & Gary Bennett

Additional Counsel for Plaintiff:

James R. Lewis
V. Thomas Clark, Jr.
Baton Rouge, LA

David S. Fos
Kenner, LA

Joseph F. Durio
Baton Rouge, LA

Raymond Morgan Allen
Lafayette, LA

Mervine L. Jankower
Lafayette, LA

Counsel for Plaintiff/Appellee
James H. "Jim" Brown, Commissioner of Insurance for the State of Louisiana

Additional Counsel for Defendant:

Michael Charles Guy **Baton Rouge, LA**	**Counsel for Defendant/Appellee** **Barry Karnes, Receiver of Lloyds Assurance Insurance Company, a Single Business Enterprise in Liquidation**
Dominique Jones Sam **Charlotte A. Hayes** **Charles C. Foti, Jr.** **Baton Rouge, LA**	
Henry G. Terhoeve **Baton Rouge, LA**	
Jerry F. Pepper **Baton Rouge, LA**	**Counsel for Defendant/Appellee** **Associated Auditors, Inc.**
Brace E. Godfrey, Jr. **Richard O. Kingrea** **Baton Rouge, LA**	**Counsel for Defendant/Appellee** **Robert A. Bourgeois**
Emile Joseph, Jr. **Lafayette, LA**	**Counsel for Defendant/Appellee** **Associated Liquidator**
David L. Guerry **Baton Rouge, LA**	**Counsel for Defendant/Appellee** **Del Norte, Inc.**
Daniel A. Reese **Breaux Bridge, LA**	**Counsel for Defendant/Appellee** **Home Insurance Company**
H. Alston Johnson, III **Baton Rouge, LA**	**Counsel for Defendant/Appellee** **Builders & Contractors Inc. Ltd.**

Leon H. Rittenberg, Jr.
New Orleans, LA

<u>Counsel for Defendants/Appellees</u>
George J. Dimitri & Dianne Gomez Dimitri

Celeste Brustowicz
Metairie, LA

<u>Counsel for Defendant/Appellee</u>
Liquidator of Lloyds Estate

Peter D. Derbes
Patrick F. McGrew
Baton Rouge, LA

<u>Counsel for Defendant/Appellee</u>
Enterprise Corp. Services & Estate of Lloyds

Arlene D. Knighten
Jackie Harris, Jr.
Judy Cockerham
Cassandra A. Simms
Baton Rouge, LA

<u>Counsel for Defendant/Appellee</u>
Richard Ieyoub

BEFORE: PARRO, KUHN AND DOWNING, JJ.

DOWNING, J.

Michael O'Keefe, Jr., Michael O'Keefe, Sr., John O'Brien and Gary Bennett (collectively, "O'Keefe") appeal a judgment that approved and implemented the receiver's final dissolution plan for payment of claims, distribution of assets, and dissolution of Lloyds Assurance Insurance Company Single Business Enterprise (Lloyds SBE). They also appeal the trial court's denial of their motions for new trial.[1] In entering judgment, the trial court implicitly denied O'Keefe's oppositions to the final dissolution and liquidation plan of Lloyds SBE and their requests for reexamination of insolvency. For the following reasons, we affirm the judgment of the trial court.

PERTINENT FACTS AND PROCEDURAL HISTORY

The underlying litigation involves the liquidation of Lloyds SBE. Prior litigation in this matter sets out the underlying facts, parties and earlier procedural history.[2] Pursuant to his duties, the receiver of Lloyds SBE filed a "Petition for Payment of Claims, Distribution of Assets and for Dissolution of Insurance Company."[3] Attached to the petition was a final plan of distribution with exhibits.

O'Keefe is the residual owner of the insurance companies that were ordered into liquidation. O'Keefe filed oppositions to the final dissolution and distribution, claiming that their rights were not being protected.

The matters came on for hearing on August 14, 2006, after a few continuances. After considering the evidence and arguments of counsel, the trial court rendered judgment that day, found in favor of the receiver, and approved the

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[1] The denial of a motion for new trial is an interlocutory, non-appealable judgment. *See* La. C.C.P. art. 2083. The Louisiana Supreme Court, however, has instructed appellate courts to consider an appeal from the denial of a motion for new trial as an appeal of the judgment on the merits when it is clear from appellant's brief that the appeal was intended to be an appeal of the final judgment on the merits. **Shultz v. Shultz**, 02-2534, p. 3 (La.App. 1 Cir. 11/7/03), 867 So.2d 745, 746-47 (quoting **Carpenter v. Hannan**, 01-0467 (La.App. 1 Cir. 3/28/02), 818 So.2d 226, 228-29.) We have considered the judgment on the merits.

[2] *See* **Brown v. Associated Ins. Consultants, Inc.**, 97-1396 (La. App. 1 Cir. 6/29/98), 714 So.2d 939; **Brown v. Associated Ins. Consultants, Inc.**, 95-1451 (La. App. 1 Cir. 4/4/96), 672 So.2d 324; and **Brown v. Associated Ins. Consultants, Inc.**, 94-2216 (La. App. 1 Cir. 6/23/95), 658 So.2d 843.

[3] The petition was amended once to include the words "in liquidation" behind "Lloyds Assurance Insurance Company Single Business Enterprise."

final plan. Judgment was signed accordingly on February 5, 2007. The judgment did not specifically rule on O'Keefe's opposition.[4]

O'Keefe filed motions for new trial in August 2006, which were denied. O'Keefe filed motions for suspensive appeal in September 2006. The trial court granted these in February 2007, after it signed the final judgment.[5]

O'Keefe now appeals, asserting one assignment of error: "The lower court erred in approving the Commissioner's Plan, and in not granting a new trial."[6]

DISCUSSION

O'Keefe's arguments are based on two factual assertions not supported by the record: 1) that the Commissioner of Insurance (Commissioner), through the court-appointed receiver, is attempting to pay a prescribed debt; and 2) that Lloyds SBE is presently solvent. O'Keefe states the issue on appeal as, "[w]hether, consistent with the Due Process Clause of the Fourteenth Amendment, the Commissioner can use the pretext of paying a prescribed debt in order to deprive residual owners of their equity interest in a presently solvent insurance company without notice and a meaningful hearing?"

In making this argument, O'Keefe points to Exhibit A of the "Final Dissolution and Liquidation Plan of Lloyds Single Business Enterprise" entitled, "Comparative Balance Sheets as of Date Shown." This exhibit shows untimely filed claims listed as a liability in the amount of $124,436.35 as of December 31, 2005. It also shows equity of $3,777,148.83. This is the amount by which O'Keefe claims Lloyds SBE is solvent. The final dissolution plan refers to this exhibit, together with Exhibit B, as an accounting that outlines "the financial activities of the estate over the course of the litigation."

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[4] "Silence in a judgment on any issue that has been placed before the court is deemed a rejection of the claim." **Brown v. ANA Ins. Group**, 06-0626, p. 8 n.10 (La.App. 1 Cir. 7/18/07), 965 So.2d 902, 909, *writ granted*, ________, ___ So.2d ___.

[5] Michael O'Keefe, Jr., subsequently converted his appeal to a devolutive one.

[6] Michael O'Keefe, Jr., filed a full appellant's brief. The other appellants adopted his brief as their own.

Also contained in the dissolution plan, however, is Exhibit C, entitled, "Proposed Final Distribution Schedule, Assets Available as of December 31, 2005." The final dissolution plan states in Section 4.1 that "[a]ll remaining funds will be used for a Final Distribution to claimants in the order of priority as established by La R.S. 22:746." This section further provides:

> Attached as **Exhibit C** is the proposed Final Distribution Schedule. This schedule summarizes assets available in the company, expenses to be incurred by the Receiver, the claims of the creditors and the proportionate share of funds to be distributed to the claimants.

Exhibit C does show an incurred debt for certain untimely filed claims in the amount of $124,836.35.[7] It shows, however, that there are no assets available to pay these claims after payment of interest. Exhibit C also shows that $3,790,852.49 is available to pay interest on timely filed claims. Exhibit D shows how every penny of this sum is to be paid toward accrued interest. This sum equals 41.79% of the interest accrued. The trial court approved the final dissolution and liquidation plan, which included Exhibit C and Exhibit D as the plan for the payment of claims against Lloyds SBE's assets.

Without citation to authority, O'Keefe argues that interest is not a component of a timely filed claim because the insurance liquidation articles do not specifically allow for interest payments. We can find no support for this proposition, and La. R.S. 22:748B specifically contemplates the payment of interest on claims. This section provides as follows:

> Proofs of claim may be filed subsequent to the date specified, but, no such claim shall share in the distribution of the assets until all allowed claims, proofs of which have been filed before said date, **have been paid in full with interest**. (Emphasis added.)

O'Keefe seems to interpret this section to mean that interest payments cannot be made unless untimely claims are paid. If so, such interpretation is clearly unsupported by the plain meaning of the words.

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[7] We note, but are unable to reconcile, the small discrepancies between the amounts stated on the balance sheet and the proposed distribution schedule.

Further, the record shows that as part of one of its settlements with a claimant, Lloyds SBE agreed to petition the court to pay legal interest to claimants. Accordingly, we conclude that this argument is without merit.

O'Keefe claims that they were denied a hearing pursuant to La. R.S. 22:755G, which provides as follows:

> If subsequent to an adjudication of insolvency, pursuant to R.S. 22:748, **a surplus is found to exist** ***after the payment <u>in full</u> of all allowed claims*** **which have been duly filed prior to the last date fixed for the filing thereof** and the setting aside of a reserve for all costs and expenses of the proceeding, the court shall set a new date for the filing of claims. After the expiration of said new date, **the solvency of such insurer shall be reexamined** and if such insurer is then found to be solvent on the basis of all claims then filed and allowed, any surplus existing shall be distributed in accordance with the direction of the court. (Emphasis added.)

Here, however, no surplus has been found to exist, and all allowed claims (particularly, for interest) have not been paid in full, nor will they be. Therefore, O'Keefe has shown no entitlement under this statute to a hearing to have the solvency of Lloyds SBC reexamined.

O'Keefe argues that the Commissioner has breached his fiduciary duty to them by failing to protect their interest in the alleged surplus. While the Commissioner may have a fiduciary duty towards residual owners, **Brown v. ANA Ins. Group**, 06-0626, p. 11 (La.App. 1 Cir. 7/18/07) 965 So.2d 902, 911, *writ granted*, _________, ___ So.2d ___, the duty is not implicated under La. R.S. 22:755G unless and until a surplus exists after all allowed claims are paid.

O'Keefe also argues that they were not provided with notice and a meaningful hearing, including discovery. Nothing in the Insurance Code requires notice to residual owners who have not filed claims or requested notice pursuant to La. C.C.P. art. 1572. Nor does it provide for discovery by residual owners. While O'Keefe's due process rights may have been implicated had there actually been a surplus, we see no violation of due process where their residual rights were at best

remote. Besides, O'Keefe did appear at the hearing, and their counsel vigorously argued their position.

And while O'Keefe asserts that they are not seeking to collaterally attack the final dissolution and liquidation order, they claim in brief that they are "merely seeking a meaningful opportunity ... to object to [the Commissioner's] final plan for the distribution of surplus assets and to hold him accountable on his bond for any mismanagement of the estate before he is judicially discharged from his 'highest obligation required by law.'" But, as this court stated in **Brown v. Associated Ins. Consultants, Inc.**, 97-1396, p. 5 (La.App. 1 Cir. 6/29/98), 714 So.2d 939, 942, "[t]o allow the very entities which the Commissioner is charged with liquidating to object to the actions of the Commissioner in furtherance of the liquidation order would clearly allow these entities, through their shareholders, to **interfere** with the powers and duties of the Commissioner in liquidation, and, in effect, to collaterally attack the liquidation order." O'Keefe may have a cause of action against the Commissioner for mismanagement, *see* **Brown v. ANA Ins. Group**, 06-0626 at p. 14, 965 So.2d at 913, but they cannot interfere with the powers and duties of the Commissioner in liquidation.

We find no merit in O'Keefe's assignment of error.

DECREE

Concluding that the trial court did not err in approving the final dissolution and distribution plan, we affirm the judgment of the trial court. Costs are assessed to Michael O'Keefe, Jr., Michael O'Keefe, Sr., John O'Brien and Gary Bennett.

AFFIRMED