

**IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE  
 TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III**

LESLIE NEWMAN, Commissioner of )  
 the Tennessee Department of )  
 Commerce and Insurance, )

Petitioner, )

VS. )

NO. 10-507-III

SMART DATA SOLUTIONS, LLC, a )  
 Tennessee limited liability company, )  
 AMERICAN TRADE ASSOCIATION, )  
 INC., an Indiana nonprofit corporation )  
 with its principal place of business in )  
 Tennessee, AMERICAN TRADE )  
 ASSOCIATION, LLC, an Arkansas )  
 limited liability company, SERVE )  
 AMERICA ASSURANCE, a corporation )  
 with an unknown location, BART S. )  
 POSEY, SR., ANGIE POSEY, OBED W. )  
 KIRKPATRICK, SR., LINDA )  
 KIRKPATRICK, RICHARD H. )  
 BACHMAN, KRISTY WRIGHT, )  
 WILLIAM M. WORTHY, II, and )  
 COLIN YOEUELL, )

Respondents. )

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 CHANCERY COURT  
 DAVIDSON COUNTY, TENNESSEE  
 D. G. SMITH

**MEMORANDUM AND ORDER**

In May of 2010, this Court entered a Final Order of Liquidation of Smart Data Solutions, LLC (“SDS”) and American Trade Association, Inc. and American Trade Association, LLC (collectively “ATA”), based upon the Court’s findings that these Businesses were transacting insurance in Tennessee, posed a significant hazard to the public,

and were insolvent. The Businesses appealed that decision. Subsequently, the Court denied the motion of the Businesses to stay the liquidation during the pendency of the appeal. The status of this matter, then, is that the Liquidator is proceeding with liquidation of the Businesses as per the terms of the Liquidation Act and the May 2010 Liquidation Order.

By statute (Tennessee Code Annotated section 56-9-307(f)(1)), one of the possible interim measures a Court can take in a liquidation is entry of an "Appeal Pendency Plan." Although the label is broad, the measure is a very narrow one. It addresses the insular issue of how performance and payment of policy claims are to be addressed while an insurance company is appealing an order of liquidation. As section 56-9-307(f)(1) states, its purpose is to "provide for the continued performance and payment of policy claims in the normal course of events," while an unstayed order of liquidation is being appealed. In this case, on August 12, 2010, the Liquidator filed a proposed Appeal Pendency Plan and motion for approval of the same.

After reviewing the papers filed in support and in opposition and after studying the law, the Court concludes that the statutory provision at section 56-9-307(f)(1) for an Appeal Pendency Plan does not apply to this case.

The core issue in this case is whether SDS and ATA come within the State's regulatory liquidation power. They claim they do not because they did not enter into insurance contracts with policyholders. The Court has rejected that argument and, instead, has ruled, as a matter of law, that the conduct of these Businesses in facilitating nonexistent

insurance coverage months after they knew the coverage did not exist constitutes transacting insurance business in Tennessee and subjects the Businesses to regulation, including the liquidation power of the State. That issue is now on appeal.

The relevance of these unique facts to the issue before the Court is that the circumstances of this case do not come within the purview of the Appeal Pendency Plan provision of section 56-9-307(f)(1) which by its own terms applies to “continued performance and payment of policy claim obligations in the normal course of events.” In that this case stems from the absence of any insurance coverage and the liquidated entities claim that they did not provide insurance coverage, there is no “normal course of events” on which to premise performance and payment of claims. Also, practically speaking, there is little need for an Appeal Pendency Plan as this Court ordered that no new policies were to be issued after the March 23, 2010 order of seizure, and by May 31, 2010 all coverage had been cancelled.

In addition to the inapplicability of the Appeal Pendency Plan statute, another reason the Court concludes that such a plan should not be entered in this case is that the Liquidator has determined that no policy claims obligations or interim distributions shall be paid, given the minimal assets of the Businesses, and, instead, that the Liquidator shall proceed with adjudicating proofs of claim in accordance with the May 2010 Liquidation Order entered by this Court and the terms of the Liquidation Act, sections 56-9-323 – 333.

For all of these reasons, the Court concludes that no Appeal Pendency Plan shall be entered in this case.

In addition to an Appeal Pendency Plan, the Liquidator's motion seeks Court approval of certain actions of the Liquidator while this case is on appeal. Now that the August 31, 2010 deadline for filing claims in this matter has ended, the Liquidator proposes that during the pendency of the appeal of this case, the Liquidator shall continue processing and adjudicating claims in accordance with paragraphs 1 and 22 of the May 2010 Liquidation Order and the claims procedures set out in the Act at sections 56-9-323 and 333, and shall pursue asset recovery actions from third parties pursuant to paragraphs 10-12, 16 and 17 of the May 2010 Liquidation Order and section 56-9-310(a)(14), (15). In particular, the Liquidator proposes, with respect to claims, the following:

During the appeal pendency period, the Liquidator will continue with the proof of claim process that has been established in accordance with Tenn. Code Ann. § 56-9-323. All proof of claim forms are to be received by the Liquidator on or before 4:30 p.m. Central Time on August 31, 2010, in order to be deemed timely filed. The Liquidator will review the proofs of claim received and adopt a systematic approach for determining the claims amounts. Notices of determination will be issued in accordance with Tenn. Code Ann. § 56-9-327 as soon as practical. The statutory adjudication of those notices of determination can proceed where necessary.

Opposition to the foregoing proposal of the Liquidator has been filed by SDS, ATA, the Poseys, Richard Bachman and William M. Worthy II (the "Objecting Respondents"). The argument of the Objecting Respondents is that, for efficiency and to save costs, they seek

to investigate and challenge the Liquidator's claim processing and adjudication methods early on. The argument is that while the statute explicitly provides an opportunity to object to the Liquidator's denial of a claim, that opportunity under section 56-9-327 comes after the Liquidator has reviewed all the claims, applied its methodology and made a decision about claims. As well, section 56-9-331 implies an opportunity for dissent from an interested party in its provision for Court disapproval or modification of the Liquidator's claims recommendations but only, again, after the Liquidator has applied its methodology and made its determination.

In this case approximately 9,500 proofs of claims were filed before the August 31, 2010 deadline. The Objecting Respondents believe that the Liquidator will not correctly apply or take into account policy exclusions or coverage issues that the Objecting Respondents are knowledgeable about from their processing of claims before the liquidation and that will reduce the amount of the claims liability. With their assets at risk as they pursue their appeal, the Objecting Respondents seek to keep payment of claims down. Furthermore, the Objecting Respondents recommend to this Court that it appoint a "qualified" third party to adjudicate the claims to keep down the expense that will be incurred by the Liquidator. The Liquidator's position is that under *State of Tennessee v. Xantus Healthplan of Tennessee*, 2000 WL 630858 (Tenn. Ct. App. May 17, 2000), this Court does not have the authority to allow the respondents to investigate and challenge the Liquidator's claim processing and adjudication.

After studying *Xantus*, the Court concludes that it does not provide specific guidance on the issue. The Court, therefore, has studied the statutory sections 56-9-327 and 331 from which the Liquidator's claims adjudication powers emanate but which also provide opportunities for other parties to dissent. From these sections, the Court concludes that it has the power to allow the Objecting Respondents to challenge and take limited discovery on the Liquidator's claim processing and adjudication prior to the Liquidator making its determination under section 56-9-327(a) and its report under section 56-9-331.

The bases for this conclusion are the powers stated in sections 56-9-327(b) and 331. Section 56-9-327(b) provides for a court hearing with notice, not only to claimants, but to "any other persons directly affected," (which the Court determines includes the Objecting Respondents) of objections to denial of a claim by the Liquidator. The Court is then empowered to conduct a hearing and allow for limited prehearing discovery and dispose of the disputed claim. Section 56-9-331, as well, places the Court in the role of approving, disapproving or modifying the Liquidator's claims decisions, indicating that objection by an interested party may be filed with the Court. Both of these sections reveal to the Court that its role is not the removed "abuse of discretion" standard described in *Xantus*, but is, instead, an adjudicatory role with respect to claims with a short form adjudicatory method of an informal hearing and discovery (section 56-9-327(b)) and using a claims report for evidence for its decision (56-9-331). By allowing the Objecting Respondents to challenge the process before the opportunities specified for such challenges in sections 56-9-327 and 331, the

Court would not be creating new rights for the Objecting Respondents but simply altering the timing for such challenges for the reason of conserving resources.

Applying these conclusions of law to the issues at hand, the Court determines that the Objecting Respondents shall be permitted to challenge and, if demonstrated as needed, engage in limited discovery of the Liquidator's claims processing and adjudication before the Liquidator issues a denial under section 56-9-327(a) and/or before the Liquidator issues its report under section 56-9-331.

It is therefore ORDERED that the Liquidator's proposed Appeal Pendency Plan is not entered in this case as such a plan is inapplicable to the unique facts of this case.

It is additionally ORDERED that during the pendency of the appeal in this case, the Liquidator shall proceed in accordance with the provisions of the May 2010 Final Order of Liquidation and the Liquidation Act. To the extent that the Liquidator needs more specification or guidance with respect to the terms of that Final Order or Act in specific circumstances, it shall file a motion with the Court for the same.

It is also ORDERED that on or before January 31, 2011, when the Liquidator has completed its review of the claims, the Liquidator shall file with the Court a report on the number of claims and types of proof of claim received by the Liquidator. It is further ORDERED that when the Liquidator has determined the systematic approach it intends to use to decide the claims amounts, it shall communicate that approach to the Objecting

Respondents. The latter shall review the approach and notify the Court if there are objections and request a hearing. It is also ORDERED that the Liquidator shall not issue the notice of determination of claims, referred to in section 56-9-327(a) and/or the report referred to in 56-9-331 until the Court orders that those phases of the liquidation may proceed and after the Objecting Respondents have had an opportunity to submit their objections to the Court for determination.

It is additionally ORDERED that should the Liquidator complete the processing and determination of proofs of claims, as well as any hearings as contemplated by Tennessee Code Annotated section 56-9-327, and the appeal proceedings of the Liquidation Order still be on-going, the Liquidator will submit to the Court for approval a proposed distribution of assets, which will be in accordance with the claims priorities listed in Tennessee Code Annotated section 56-9-330. No payment of claims with lower priority than Class 1 will occur before the Liquidator files, and the Court approves, a motion setting forth the Liquidator's recommendation for the value of the claims and the amount to be distributed pro rata for each class of claims in accordance with Tennessee Code Annotated section 56-9-330. Payment of claims in accordance with Tennessee Code Annotated section 56-9-330 calls for preferring certain classes of claimants such as policyholders above other creditors, and this is permitted in the case at bar as a result of the financial condition of the Respondent companies.

It is finally ORDERED that paragraph 27 of the May 2010 Final Order Appointing the Commissioner as Receiver for Liquidation is amended to require quarterly (December, March, June, September) financial reports to the Court which shall include the assets and liabilities of the insurer and all funds received or disbursed by the Liquidator during the current period.

  
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ELLEN HOBBS LYLE  
CHANCELLOR

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