

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-60573-CIV-MORENO

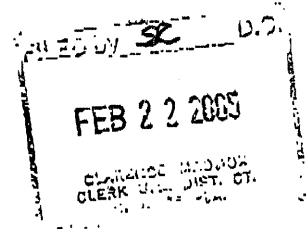
SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

MUTUAL BENEFITS CORP., et al.,

Defendants



ORDER REQUIRING UNION PLANTERS BANK TO DISBURSE FUNDS

After conducting an independent review of the record, the Court adopts the Report and Recommendation issued by Magistrate Judge Barry Garber on December 17, 2004 and orders the Receiver to return to the pre-closing purchase plaintiffs the funds which they deposited in accounts at Union Planters Bank which were never used to purchase viatical settlements. In adopting the Report and Recommendation, the Court specifically finds that those funds are not part of the Receivership because the intent to the parties was to hold them in escrow. The Court holds that the pre-closing purchasers are legally entitled to such funds presently in the Union Planters Accounts.

The Court invites all parties to submit in writing their proposals for distribution of such funds in response to the issues raised by the Receiver on pages 12 and 13 of the Receiver's Supplemental Brief on purchasers' escrow accounts filed on February 16, 2005. Such proposals must be submitted in writing no later than March 15, 2005.¹ It appears that any proposal must include the appointment

¹All counsel are notified to file all pleadings under only one case number and not multiple case numbers.

of a claims administrator unrelated to the parties to review the claims from pre-purchasers. The cost of such administration shall be borne by the pre-purchaser claimants.

In adopting the Magistrate's Report and Recommendation, the Court has also conducted an independent review of all matters raised since the date the Report was issued, including the transcripts of the depositions of Patricia Quintan Abrams, Felipe Larcada and Sandra Traxler. The Court specifically disagrees with the Receiver's suggestion that the funds in the purchasers' escrow accounts be included in the Receivership in order to divide the funds among the pre-closing potential purchasers and the actual Mutual Benefits Corporation Investors. The discovery taken after the Report and Recommendation, rather than supporting the Receiver's position, undercuts it. It is clear that the intent to the parties was that the money in the Union Planters Bank Account was for the benefit of the purchasers who could withdraw the money prior to the actual closing. Simply put, the money was there to purchase the life insurance policies. If the policies were not purchased, then the money must be returned to the potential purchasers and not to be used to alleviate the harm done to the prior investors.

Much in life is a question of timing. Those whose time to actually close on their purchases did not arrive shall reap the benefit of the freeze order. As a result, those purchasers whose money had not actually been used to purchase the viatical settlements are entitled to the return of their funds, while those who had already closed on their investments will be part of the Receivership.

The fact that Mutual Benefits Corporation (MBC) was provided with monthly statements and that the bank did not comply with some of the technicalities of an escrow account would elevate form over substance and be inconsistent with the intent of the owners of the money. If the money was not used as the parties intended (i.e., the purchase of viatical settlements) for whatever reason,

then the funds were not Mutual Benefits Corporation's funds. If they were not MBC's funds then they are not the Receiver's funds. The account at Union Planters Bank was in essence an escrow account for the purchasers' benefit and will continue to be treated as such by the Court.² See *Johnson v. United States*, 336 F.2d 809, 815 (5th Cir. 1964); *In re Scanlon*, 239 F.3d 1195, 1198 (11th Cir.2001); *Dickerson v. Central Florida Radiation Oncology Group*, 225 B.R. 241, 244 (MD Fla. 1998).

Therefore, the Court directs that Union Planters Bank return to the pre-closing investors the funds in accordance with a plan to be designed in the future by this Court. As the Receiver points out there are other accounts in Bank of America, RBC Centura Bank and Northern Trust Bank of Florida. If the conditions under which those funds were held are similar to those in the Union Planters Bank pre-purchase account then that money should also be returned consistent with this order without the necessity of further litigation costs. If, however, there are distinctions, then it is the Receiver's burden to point out why those funds should not be returned. The Court expects the Receiver to bring out those differences, if any, not later than March 15, 2005.

DONE and ORDERED this 22nd day of February 2005 in Miami, Dade County, Florida.


FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

²Even if not technically escrow accounts, a creation of a "resulting trust" in favor of the pre-closing plaintiffs is appropriate in order to comply with the intent of the purchasers.

Copies furnished to:

Service list of February 3, 2005

Honorable Barry Garber