[Cite as *Hudson v. Petrosurance, Inc.*, 2009-Ohio-4307.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Mary Jo Hudson, Superintendent of Insurance, State of Ohio, acting in her capacity as Liquidator of The Oil & Gas Insurance Company,	:	
Plaintiff-Appellee,	:	No. 08AP-1030 (C.P.C. No. 07CVH04-5862)
v.	:	(REGULAR CALENDAR)
Petrosurance, Incorporated,	:	
Defendant-Appellant,	:	
Mark G. Hardy,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on August 25, 2009

Richard Cordray, Attorney General, by Outside Counsel *McNamara and McNamara, LLP, Keith McNamara*, and *Jonathan M. Bryan*, for plaintiff-appellee.

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.[1] 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.

[1] The Supreme Court of Ohio addressed the relationship between OGICO, Petrosurance, and Hardy in *Fabe 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]ll related corporate entities come under the ultimate control of Hardy." Id.

{¶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 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).[2]

{¶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.[3] 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

[2] R.C. 3903.39(B) states that "[w]henever 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."

[3] 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.

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.

{¶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 clam; (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. Colaiannia* (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 unfiled, 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."[4] 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

[4] 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.