

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT OF)
SECURITIES, *ex rel.*, IRVING L. FAUGHT,)
ADMINISTRATOR,)

Plaintiff/Appellee,)

v.)

ACCELERATED BENEFITS)
CORPORATION;and AMERICAN TITLE)
COMPANY OF ORLANDO,)

Defendants/Appellants,)

v.)

TOM MORAN,)

Court-Appointed Conservator/)
Appellee.)

Case No. 98854

Oklahoma County
Case No. CJ-99-2500-66

Honorable Daniel L. Owens

CONSERVATOR/APPELLEE TOM MORAN'S
ANSWER BRIEF

ACTION FOR VIOLATION OF THE OKLAHOMA SECURITIES ACT

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INTRODUCTION

Defendants/Appellants allege that the Oklahoma District Court lacked jurisdiction, exceeded its authority and violated the due process of non-party investors (the "Investors") in the case below when it entered an Order Approving Sale of Conservatorship Assets on January 16, 2003, and an Order Modifying the Court's Order Approving Sale of Conservatorship Assets on January 24, 2003 (collectively, the "Sale Orders"). Defendants/Appellants further contend that this Court's Order in Case No. 98083 constitutes "the settled law of the case" requiring that the Sale Orders be vacated. None of these arguments are compelling because, *inter alia*, the challenged sale has been consummated making this appeal moot.

The Sale Orders authorized the court-appointed Conservator to sell to Infinity Capital Services, Inc. ("Infinity"), the viated life insurance policies (the "Viatical Policies") described in Case Nos. 98083 and 98663 previously filed by Defendants/Appellants. The District Court approved the Sale Orders upon motion filed by the Conservator under the authority set forth in the Order Appointing Conservator and Transferring Assets (the "Conservatorship Order") entered on February 6, 2002, which directs the Conservator to:

take necessary steps to protect the ABC Investors' interests including, but not limited to, the liquidation or sale of the Policies to institutional buyers . . . (emphasis added)

Defendants/Appellants negotiated and approved the terms of the Conservatorship Order prior to its entry, and did not appeal the Conservatorship Order within the time provided by this Court's rules. Further, Defendants/Appellants represented to this Court in Case No. 98663 that they transferred all right, title and interest in the Viatical Policies to the Conservator "during the initial months" of the Conservatorship,

thereby divesting them of any pecuniary or other interest in the Viatical Policies well before the Sale Orders were entered.

The Conservator's Motion for Order Approving Sale of Conservatorship Assets (the "Motion to Sell") described in detail the offers made by Infinity and Life Alliance.¹ Notice of the Motion to Sell was sent to Investors via certified mail, return receipt requested, approximately 60 days prior to the hearing on the Motion.

At the hearing, the District Court approved Infinity's offer and thereafter entered the Sale Orders directing the Conservator and Infinity to "consummate a purchase agreement." The District Court determined that the offers to purchase the Viatical Policies which would pay to the Investors a significant portion of their investment was in their best interest, since insufficient assets were available in the Conservatorship to continue to pay the premiums and keep the Viatical Policies in force. Should the premiums not be paid, the Viatical Policies would begin to lapse and the Investors would likely lose their entire investments.

The District Court approved the agreements (the "Purchase Contracts") negotiated by the Conservator and Infinity memorializing the terms of the sale by order entered March 12, 2003 (the "Purchase Contract Order"). Defendants/Appellants did not object to the terms of the Purchase Contracts. Although Defendants/Appellants asked the District Court, in its discretion, to stay the Purchase Contract Order, the District Court denied the request for a stay and **the sale to Infinity closed on March 17, 2003.**²

¹ The Conservator also received an offer from Mercurius Capital Management, Ltd. after the deadline for submission of offers had passed which was also presented to the District Court at the hearing on the Motion to Sell.

² Defendants/Appellants did not file a supersedeas bond with the District Court to effect an automatic stay, nor did they seek a stay or writ of prohibition from this Court to avoid consummation of the sale.

Since March 2003, Infinity has tendered to the Conservator all sums currently due under the Purchase Contracts, and has assumed payment of all monthly premiums and servicing costs for the Viatical Policies.³ Accordingly, the Investors no longer have to pay any part of the policy premiums. Further, since the sale, the Conservator has distributed to the Investors payments aggregating more than \$9,792,000.00 in proceeds from the sale. None of the Investors has refused receipt of any such payments.

Defendants/Appellants, without appeal of the Conservatorship Order; without posting a supersedeas bond; without seeking a writ of prohibition; and, without objecting to the terms of the Purchase Contracts, now ask this Court to reverse the Sale Orders. However, the sale of the Viatical Policies to Infinity closed nearly seven (7) months ago and Infinity has been paying premiums and distributing maturities to Investors, and it is therefore impossible to "unwind" the sale of the Viatical Policies. Consequently, no effective relief can be granted and this appeal should be dismissed.

SUMMARY OF THE RECORD

The core litigation underlying this matter was a fraud action brought by the Oklahoma Department of Securities against Defendants/Appellants, Accelerated Benefits Corporation ("ABC"), American Title Company of Orlando ("ATCO"), C. Keith LaMonda and David S. Piercefield (collectively "Defendants/Appellants"), and three Oklahoma residents (the "Oklahoma Defendants") who offered and sold investments in the Viatical Policies on Defendants' behalf. *See* Motion to Sell at p. 1 (R. 1-26).

The Viatical Policies represent interests in the proceeds of unmatured life insurance policies transferred by their original owners (the "Viators") to Defendants/Appellants in

³ To date, Infinity has paid approximately \$5,500,000.00 in non-refundable funds, premiums and servicing costs under the Purchase Contracts.

exchange for cash. *See* Motion to Sell at p. 1 (R. 1-26). Defendants/Appellants then solicited investments from Investors, many of whom were elderly and/or unsophisticated individuals who invested their life savings based upon the representations of ABC and its agents of high rates of returns in a short period of time. The Investors entered into Purchase Request Agreements with ABC, which promised them a specified return on their investment upon maturity of the Viatical with which they were "matched." *See* Motion to Sell at p. 1 (R. 1-26). The Purchase Request Agreements entered into between ABC and the Investors fraudulently represented that the premiums on the Viatical Policies were "guaranteed" and would be paid by the Defendants/Appellants without further charge to the Investors. *See* Motion to Sell at p. 2 (R. 1-26). Title to the Viatical Policies was held by ATCO as escrow agent for ABC.⁴ *See* Brief in Chief of Defendants/Appellants at p. 4. The Investors acquired no ownership interest in the policies. *See* Transcript of Proceedings had on the 20th day of December, 2002 at p. 19 (R. *605).

On December 17, 1999, the District Court entered an agreed order and judgment finding that the Oklahoma Defendants, acting as unregistered broker-dealers or agents, had sold unregistered securities in and from Oklahoma. *See* Brief in Chief of Defendants/Appellants at pp. 5-6. Thereafter, the District Court held a non-jury trial of the claims against Defendants/Appellants and adopted Findings of Fact and Conclusions of Law, which among other things: (i) enumerated the misstatements and omissions of material facts Defendants/Appellants made to the Investors in connection with the offer and sale of the Viatical Policies; and (ii) stated that Defendants/Appellants committed fraud in the sale of such securities. *See* Brief in Chief of Defendants/Appellants at pp. 5-6. The facts

⁴ After purchase from the Viators, the owner was changed to ATCO. In addition, on all but 63 of the approximately 1,400 policies, ATCO was also named as beneficiary.

misrepresented by Defendants/Appellants in the Purchase Request Agreements included, without limitation, those relating to the "guaranteed payment of premiums" on the life insurance policies underlying the Viatical Policies.⁵ *See* Motion to Sell at p. 2 (R. 1-26).

Defendants/Appellants state in their brief that as a result of Viators living well past their life expectancy, premium reserves were depleted. *See* Brief in Chief of Defendants/Appellants at pp. 4, 7-8. Defendants/Appellants go on to say that "ABC was forced to begin billing the purchasers for premiums in order to prevent the policies from expiring or "lapsing" and protect the total loss of the purchasers' investments. *See* Brief in Chief of Defendants/Appellants at pp. 7-8. If a purchaser refused to pay his share of the premiums, ABC advanced the necessary funds as a loan against the policy so that the other purchasers who purchased interests in the particular policy would not lose their investments."⁶ *See* Brief in Chief of Defendants/Appellants at pp. 7-8.

At the conclusion of the trial, the District Court entered an Order of Permanent Injunction against Defendants/Appellants. *See* Brief in Chief of Defendants/Appellants at pp. 5-6. Defendants/Appellants did not appeal the judgment or injunction entered by the District Court. *See* Brief in Chief of Defendants/Appellants at p. 6. Instead, in order to avoid an order of restitution, Defendants/Appellants negotiated with the Oklahoma Department of

⁵ Defendants/Appellants purported to set aside funds for the payment of such premiums according to a formula based on Defendants/Appellants' estimates of the Viators' life expectancies, which proved very inaccurate and which allegedly resulted in premium shortfalls. *See* Brief in Chief of Defendants/Appellants at p. 4.

⁶ Despite repeated requests, Defendants/Appellants have never accounted to the Conservator for the funds allegedly escrowed as premium reserves. Further, while many of the Viatical Policies were within the estimated life expectancies, no escrowed funds were ever turned over to the Conservator by Defendants/Appellants for these policies.

Securities (the "Department") for an order appointing a conservator⁷ of the Viatical Policies.⁸ On February 7, 2002, the Court entered its Conservatorship Order and appointed Tom Moran as Conservator. *See* Brief in Chief of Defendants/Appellants at p. 6. The District Court entered the Conservatorship Order upon the joint application of Defendant/Appellant ABC and the Department, and Defendants/Appellants ATCO, LaMonda and Piercefield signed the Conservatorship Order, evidencing their agreement to its terms. *See* Brief in Chief of Defendants/Appellants at p. 6.

On or about March 6, 2002, the Conservator sent the Investors a copy of the Conservatorship Order by regular mail, and the Department posted the Conservatorship Order on its website. *See* Transcript of Proceedings had on the 20th day of December, 2002 at p. 27 (R. *605). Defendants/Appellants did not appeal the Conservatorship Order within the time permitted by state statute or the rules of this Court, and none of the Investors sought to intervene or otherwise prevent the Conservator from assuming his duties as directed by the Conservatorship Order.

The Conservatorship Order directed Defendants/Appellants to transfer their interest in certain assets of ABC and its agents, including LaMonda, ATCO and Piercefield (the "Conservatorship Assets"), which included the Viatical Policies, to the Conservator. As a result, the Conservator became the owner and beneficiary of the Viatical Policies. *See* Motion to Sell, Exhibit "C," Notice to Investors at p. 2 (R. 1-26). Except in a few instances,

⁷ The term conservator is synonymous with the term receiver when used in the context of the preservation of corporate assets.

⁸ Mr. LaMonda personally negotiated the terms of the Conservatorship Order on behalf of Defendants/Appellants after he dismissed his counsel. *See* Brief in Chief of Defendants/Appellants at p. 6.

the Investors have no ownership, beneficiary or other interest in the Viatical Policies.⁹ Instead, they have only a contract claim against ABC for amounts guaranteed as a return on their investments. *See* Transcript of Proceedings had on the 20th day of December, 2002 at p. 19 (R. *605). The Viatical Policies subject to the Conservatorship Order have a face value of approximately \$141,000,000. Collectively, the Investors paid more than \$107.5 million for their right to receive a percentage of the maturities payable from the Viatical Policies. *See* Transcript of Proceedings had on the 20th day of December, 2002 at p. 19 (R. *605).

The Conservatorship Order also directed ABC to pay all costs of the Conservatorship until 75% of the Conservatorship Assets were transferred to the conservator. Despite being ordered by the Court to reimburse the Conservator for his expenses, including premium shortfalls, ABC refused to comply, causing a significant drain on the limited cash assets available to the Conservator to keep the Viatical Policies in force. *See* Transcript of Proceedings had on the 20th day of December, 2002 at p. 21-22 (R. *605).¹⁰ Although Defendants/Appellants had been billing Investors for those premiums, some Investors were unable or unwilling to pay their *pro rata* share of premiums, resulting in an historic "premium shortfall" of approximately forty percent (40%) (the "Premium Shortfall") of the total cost of the premiums. *See* Transcript of Proceedings had on the 20th day of December, 2002 at p. 22 (R. *605).

During the course of the Conservatorship, the Conservator was authorized by the District Court to bill Investors for their pro rata share of premiums on the Viatical Policies. *See* Motion to Sell (R. 1-26); *See* Transcript of Proceedings had on the 20th day of

⁹ The Viatical Policies in which an investor has an ownership or beneficiary interest were excluded from the Motion to Sell.

¹⁰ In October 2002 when the Conservator filed the Motion to Sell, annual premiums on the Viatical Policies were approximately \$2,200,000. *See* Motion to Sell (R. 1-26).

December, 2002 at pp. 21-24 (R. *605). However, many Investors were still either unable, or unwilling, to contribute any additional funds, and the Conservator was only able to collect approximately sixty percent of the required premiums from the Investors. *See* Motion to Sell (R. 1-26); *See* Transcript of Proceedings had on the 20th day of December, 2002 at pp. 21-24 (R. *605). With no source of income and only limited cash assets, it quickly became apparent to the Conservator that unless some other source of funds was obtained, the Viatical Policies would soon begin to lapse. *See* Transcript of Proceedings had on the 20th day of December, 2002 at p. 23-24 (R. *605). Should that occur, the Investors matched to the lapsed policies would lose their entire investment.¹¹ *See* Motion to Sell at pp. 3-4 (R. 1-26).

Therefore, on May 22, 2002, the Conservator filed an application with the District Court seeking to withhold 6% of future maturities to cover anticipated future premium shortfalls (the "6% Application"). *See* Motion to Sell at pp. 3-4 (R. 1-26). The 6% Application was mailed, via regular mail, to all Investors notifying them of the Conservator's action. *See* Transcript of Proceedings had on the 16th day of December, 2002 at pp. 7-8 (R. *604). The hearing on the 6% Application was held approximately 30 days after the filing of the 6% Application, at which time the District Court granted the application and entered an order allowing the Conservator to withhold 6% from the proceeds of any maturities on the Viaticals (the "6% Order"). *See* Motion to Sell (R. 1-26); *See* Transcript of Proceedings had on the 16th day of December, 2002 at pp. 7-8 (R. *604). Defendants/Appellants filed an Application to Assume Original Jurisdiction and Application for Writ of Prohibition based upon the 6% Order. The Supreme Court granted

¹¹ As noted above, Defendants/Appellants remained obligated to pay Conservatorship expenses, including premium shortfalls, until 75% of the Conservatorship Assets were transferred. However, despite being ordered to do so by the District Court, ABC steadfastly refused to comply with the District Court's order, thereby creating a significant drain on the Conservatorship's liquid assets.

Defendants/Appellants Application to Assume Original Jurisdiction and issued a Writ of Prohibition prohibiting the enforcement of the 6% Order. *See* Order dated October 3, 2002 in Case No. 98083.

Defendants/Appellants state that the "Supreme Court held, in a seven-to-two decision, that because the "Purchasers" were never joined as parties to the district court proceedings, the order was jurisdictionally flawed and of no effect for lack of personal jurisdiction." *See* Defendants/Appellants' Brief in Chief, p. 2. This statement mischaracterizes the holding of the Court. The Court stated:

First, since the order directly affects the interests of over 6,000 in-state and out-of-state residents, who are not made parties to this action, who were not given legal notice and a meaningful opportunity to be heard, the order is void for lack of due process and the court's lack of jurisdiction to affect the interests of these persons.

See Order dated October 3, 2002 in Case No. 98083.

Following the issuance of the Writ of Prohibition on the 6% Order, and after determining that the liquid Conservatorship Assets plus estimated investor *pro rata* premium payments would not be sufficient to pay Premium Shortfalls for more than approximately six (6) months, the Conservator, in order to "protect the ABC Investors' interests," contacted a number of potential institutional buyers to determine whether the portfolio of Viatical Policies was marketable. *See* Motion to Sell at pp. 3-4 (R. 1-26). The actions of the Conservator in seeking to liquidate or sell the Viatical portfolio is specifically authorized by the Conservatorship Order.

The Conservatorship Order, agreed to by the parties, authorized the Conservator to:

take necessary steps to protect the ABC Investors' interests including, but not limited to, the liquidation or **sale of the Policies to institutional buyers** . . . (emphasis added)

See Motion to Sell at p. 4 (R. 1-26).

Only seven (7) of the institutions contacted elected to examine the portfolio. From those the Conservator received only two viable offers.¹² *See* Motion to Sell at p. 5 (R. 1-26).

In his Motion to Sell, the Conservator presented the offers from Infinity and Life Alliance to the District Court. *See* Motion to Sell at p. 5 (R. 1-26). In order to address the due process and jurisdictional issues raised by the Court in its Order in Case No. 98083, dated October 3, 2002, on October 25, 2002, the Conservator sent each of the Investors a copy of the Motion to Sell and a detailed Notice of the Motion to Sell by certified mail, return receipt requested.¹³ *See* Certificate of Service (R. 7-211); *see also* Transcript of Proceedings had on the 16th day of December, 2002 at pp. 7-8 (R. *604). The Notice sent to the Investors summarized the offers presented to the District Court, discussed certain alternatives to the sale, and advised the Investors of their right to object to the Motion to Sell

¹² The Conservator received a third offer, but because it was for only \$5,000,000, the Conservator did not present that offer to the District Court for consideration. An offer received after the deadline from Mercurius Capital Management, Ltd. was presented to the District Court at the hearing on the Motion to Sell. *See* Transcript of Proceedings had on the 20th day of December, 2002 at pp. 38-39 (R. *605).

¹³ Defendants/Appellants allege that the "Conservator spent a small fortune mailing its Motion to Purchasers without first seeking permission from the district court (or the parties and purchasers)." *See* Defendants/Appellants' Brief in Chief, pp. 12-13. There is nothing in the Conservatorship Order which would have required the Conservator to seek the district court's (or the parties' and Investors') approval prior to such mailing. Further, time was of the essence in getting the matter before the court. The Conservator did not have the luxury to sit back for an indefinite period of time because it was apparent that the Conservatorship's liquid assets would be insufficient to continue to keep the policies in force for any extended period. Further, in direct disregard of the language of the Conservatorship Order, which they negotiated and approved, and subsequent orders of the district court, Defendants/Appellants refused to reimburse the Conservator for his expenses. In addition, the offers for purchase of the viatical portfolio were time sensitive, with purchasers evaluating other possible options as well. Without a prompt decision by the court, the purchasers told the Conservator that they would have to look at other investment alternatives. *See* Motion to Sell (R. 1-26).

in writing or to appear at the hearing scheduled for December 13, 2002.¹⁴ *See* Notice to Investors attached as Exhibit C to Motion to Sell (R. 1-26).

The Notice to Investors also asked each Investor to complete and return to the Conservator a Claim Form indicating their preference with regard to the Conservator's sale or retention of the Viatical Policies. *See* Notice to Investors attached as Exhibit C to Motion to Sell (R. 1-26). The Conservator received returned receipts of the Notice from approximately 97% of the Investors, and more than 55% of all Investors remitted Claim Forms before the December 20, 2002 hearing. *See* Supplemental Information for the Court Regarding Conservator's Motion for Order Approving Sale of Conservatorship Assets ("Supplement to Motion to Sell") (R. 408-481). More than 87% of the Investors that remitted Claim Forms before the hearing indicated that they favored the sale of the Viatical Policies to Infinity. *See* Supplement to Motion to Sell (R. 408-481).

Although more than 97% of the Investors returned receipt of the certified mail, confirming that they had notice of the hearing, fewer than 2% filed written objections or appeared at the hearing on the Motion to Sell in person or through counsel. *See* Letter and Objections filed by Investors (R. 212-404; 544; 550-553; 575; 595-597). Those Investors who did appear at the hearing were given the opportunity to testify, question the Conservator and examine witnesses.¹⁵ *See* Transcript of Proceedings had on the 20th day of December, 2002 at pp. 151-157 (R. 605).

¹⁴ The hearing on the Motion to Sell was continued by the District Court to December 16, 2002, at which time the District Court set the Motion to Sell for evidentiary hearing on December 20, 2002.

¹⁵ At the hearing on the Motion to Sell, one attorney purporting to represent an investor was not allowed to question the Conservator, or otherwise participate in the hearing. Prior to the hearing, counsel for the Oklahoma Department of Securities discovered that the attorney had, in fact, been hired by ABC. When this fact was brought to the District

Defendants/Appellants claim that the Investors were never offered any opportunity to continue the status quo, and that "the [Investors] were never told that ABC had pledged to continue to fund any shortfall in premium collections so that the policies would not lapse, thereby preserving the possibility of the [Investors] recouping their entire investments plus a reasonable rate of return." *See* Defendants/Appellants' Brief in Chief, p. 16. This representation to the Court by Defendant/Appellants finds no evidentiary support in the record. Defendants/Appellants had ample opportunity to present such evidence at the hearing on the Motion to Sell. However, Defendants/Appellants offered no evidence whatsoever in support of this contention. During the hearing on the Motion to Sell, Defendants/Appellants' counsel did allude to a potential offer by Defendants/Appellants to pay the premiums, but when confronted by the Court on whether Defendants/Appellants were "willing to guarantee premium payment until the time these policies mature and they pay out to investors," Defendants/Appellants' counsel was unable to commit to such a guarantee. *See* Transcript of Hearing dated December 20, 2002 at pp. 98-99 (R. *605).

At the conclusion of the hearing on December 20, 2002, the District Court indicated that a ruling would be made by Monday, December 23, 2002, and that counsel could call for the ruling after 10:00 a.m. *See* Transcript of Hearing dated December 20, 2002 at pp. 162-163 (R. *605). On December 23, 2002, the day of the District Court's ruling, Defendants/Appellants filed Defendants' Supplemental Objection (the "Supplemental Objection"), in which they purport to make an offer to continue to fund the policies. Since this Supplemental Objection was never offered as evidence at the hearing, and therefore

Court's attention, the District Court ruled that because the attorney had been hired by ABC, he was in fact there to represent the interests of ABC, and not the investor, and since ABC was already adequately represented by counsel, his participation was improper. *See* Transcript of December 20, 2002 Hearing p. 126-130 (R. *606).

never properly made part of the record, it should be disregarded by the Court.¹⁶ Additionally, the purported offer falls well short of the unconditional guarantee sought by the District Court. *See* Defendants/Appellants' Brief in Chief, p. 16.

On December 23, 2002, the District Court announced its decision approving the sale of the Conservatorship Assets to Infinity. The Order approving the sale was filed January 16, 2003, and subsequently modified on January 24, 2003 to include additional provisions clarifying the the Court's decision relating to maturities occurring since December 23, 2002. *See* Sale Orders (R. 588-594, 598-603). The Court also ordered the Conservator and Infinity to negotiate the specific terms of the Purchase Contracts. *See* Sale Orders (R. 588-594, 598-603).

On March 12, 2003, the District Court approved the Purchase Contracts negotiated by the Conservator and Infinity memorializing the terms of the Purchase Contract Order. *See* Order Approving Option Purchase Contract (Supp. R. 162-166). Although Defendants/Appellants asked the District Court, in its discretion, to stay the Purchase Contract Order, the District Court denied the request for a stay. On March 17, 2003, the Conservator and Infinity closed the sale of the Viatical Policies under the Purchase Contracts. *See* Conservator's Report to the Court Regarding Closing on the Sale of Conservatorship Assets (the "Conservator's Report") (Supp. R. 167-172).

The Purchase Contracts require Infinity to pay an aggregate \$59,000,000 for the Viatical Policies (representing a return to Investors of approximately 55% of their initial investment) and to assume liability for paying 100% of all future premiums and servicing costs for the Viatical Policies, thereby eliminating the need for Investors to make voluntary

¹⁶ The Supplemental Objection is also not part of the record designated by any party in this appeal. Defendants/Appellants attachment of this pleading as an appendix to their brief is improper.

pro rata premium payments, and the Conservator funding the premium shortfalls, to keep the policies in force. *See* Purchase Contract Order (Supp. R. 162-166).

As of June 3, 2003, Infinity had paid approximately \$4,300,000.00 in non-refundable funds, premiums and servicing costs under the Purchase Contracts. *See* Conservator's Report (Supp. R. 167-172). In addition, to date the Conservator has distributed sales proceeds to Investors totaling \$9,792,696.91. *See* Conservator's Report To the Court Regarding Disbursement of Sale Proceeds To Investors filed October 14, 2003 (Supp. R. 1-5). Not a single Investor has refused to accept these payments. *See* Affidavit attached as Exhibit "B" to Conservator's Report to the Court Regarding Disbursement of Sale Proceeds to Investors filed October 14, 2003 (Supp. R. 1-6).

II. ARGUMENT AND AUTHORITIES.

A. **This Appeal Should Be Dismissed Because Defendants/Appellants Lack Standing to Challenge the Sale Orders.**

In order for the instant appeal to be justiciable Defendants/Appellants must have standing to challenge the Sale Orders. *Application of State ex rel. Dept. of Transp.*, 1982 OK 36, ¶6, 646 P.2d 605, 609. This Court has stated that the components of standing are:

(1) a legally protected interest which must have been injured in fact -- i.e., an injury which is actual, concrete and not conjectural in nature, (2) a causal nexus between the injury and the complained of conduct, and (3) a likelihood, as opposed to mere speculation, that the injury will be redressed by a favorable decision.

Cities Service Co. v. Gulf Oil Corp., 1999 OK 16, ¶3, 976 P.2d 545, 547. This Court further stated that "[a]ggrieved status is limited to those persons (a) whose pecuniary interest in a protected right is directly and injuriously affected or (b) whose rights in property are either "established or divested" by the trial court's rulings." *Id.*, 976 P.2d at 547 (¶4).

The Sale Orders did not divest Defendants/Appellants of their rights in, or directly

and injuriously affect, any pecuniary interest in the Viatical Policies because Defendants/Appellants transferred ownership of 100% of the policies to the Conservator well before December 2002. Further, Defendants/Appellants are estopped to argue that the Sale Orders resulted in their injury because they negotiated and agreed to the terms of the Conservatorship Order, including the unambiguous provision authorizing the Conservator to:

take necessary steps to protect the ABC Investors' interests including, but not limited to, the liquidation or **sale of the Policies to institutional buyers** . . . (emphasis added)

Because Defendants/Appellants have no "direct, immediate and substantial" interest in the Viatical Policies, they lack the requisite injury to possess standing.¹⁷ *See Independent School District No. 9 v. Glass*, 1982 OK 2, ¶8, 639 P.2d 1233, 1237; *Democratic Party v. Estep*, 1982 OK 106, ¶7, 652 P.2d 271, 274; *Application of State ex rel. Dept. of Transp.*, 1982 OK 36, ¶6, 646 P.2d 605, 609.

It is clear that Defendants/Appellants' only motivation is to try and drag the Conservatorship out while taking action to drain the assets of the Conservatorship to the extent that policies begin to lapse, thereby giving Defendants/Appellants the opportunity to attempt to shift the blame for the Investors' loss from themselves to the Conservator.

¹⁷ Defendants/Appellants purport to be looking out for the interests of the Investors in this appeal. However, their actions speak differently. A case in point is the Isaac policy. Prior to the Conservatorship, these Defendants/Appellants allowed this \$9.5 million policy to lapse for failure to pay premiums. In fact, the Defendants/Appellants allowed the Isaac policy to lapse even though the Viator had not yet reached the life expectancy estimated by ABC. Under ABC's own formula, funds should have been escrowed sufficient to pay the premiums due until the Viator reached life expectancy. This atrocity was further exacerbated by the fact that Defendants/Appellants never gave the investors an opportunity to pay the premiums to keep the policy in force. Instead, Defendants/Appellants allowed the policy to lapse and then attempted to hide this fact from the investors by failing to advise them that the policy had lapsed. It was not until the Conservator was appointed, and the lapse was discovered, that the investors were notified of the lapse by the Conservator. *See* Conservator's Response Brief filed in Case No. 98083, pp. 6-7.

Because Defendants/Appellants lack standing, this appeal should be dismissed.

B. This Appeal is Moot and Should be Dismissed Because the Sale of the Viatical Policies Has Been Substantially Completed.

The Purchase Contracts resulting from the Sale Orders have been substantially performed. As this Court held in *Westinghouse Electric Corp. v. Grand River Dam Auth.*, 1986 OK 20, ¶18, 720 P.2d 713, 721, "[w]hen an act which is sought to be enjoined has been already performed, or can never be performed, the appeal is moot. Under such circumstances, a long line of legal precedent dictates dismissal of the appeal." *See Id.* and cases cited therein at fn. 24. *See also Sanders v. City of Tulsa*, 1922 OK 320, ¶4, 210 P. 724, 725 ("where the issues have become moot, and no practicable relief will be afforded by reversal, the case will be dismissed"); *Resler v. Green*, 1936 OK 563, ¶4, 61 P.2d 191 (where pending appeal of the denial of an injunction against a resale of real property for taxes, the resale tax sale was held, the appeal must be dismissed because the question of enjoining the resale had become moot).¹⁸

As further noted by this Court in *Westinghouse*, "[i]f a person seeking injunctive relief does not take advantage of the procedures available for preserving the status quo, and the conduct which is sought to be prevented is thus permitted to take place, we cannot provide any relief." *Westinghouse*, 720 P.2d at 721. In *Westinghouse*, appellants failed to secure a post-judgment stay to prevent execution of the judgment and preserve the controversy by preventing the substantial performance of the challenged contract. Similarly,

¹⁸ Other states have applied this rule in the context of the appeal of a receiver's sale. *See Securities and Exchange Commission v. Whitworth Energy Resources Ltd.*, 2002 WL 500543 (9th Cir. 2002) (appeals from orders authorizing receiver's sale of assets dismissed as moot after sale had been completed), copy attached hereto as Appendix "A"; *Kandalepas v. Economou*, 645 N.E.2d 543, 547 (N.D. Ill. 1994) (appeal of receiver's sale rendered moot where the real property was sold pending the appeal and the funds from the sale had been distributed).

in *Lawrence v. Cleveland County Home Loan Authority*, 1981 OK 28, ¶7, 626 P.2d 314, 315, this Court dismissed an appeal seeking the injunction of a revenue bond sale on the grounds that the appeal was rendered moot where no stay was sought, the bonds were sold and the totality of the proceeds was committed to a home loan program.

As in *Westinghouse* and *Lawrence*, Defendants/Appellants failed to prevent the substantial completion of the Purchase Contracts in the case below by filing a supersedeas bond to obtain a non-discretionary stay from the District Court, or by seeking a writ of prohibition from this Court. In March 2003 the Conservator closed the sale of the Viatical Policies to Infinity. Since that time Infinity has paid more than \$5,539,000.00 in non-refundable funds, insurance premiums and servicing costs, and the Conservator has distributed more than \$9,792,000.00 in sale proceeds to Investors.

Defendants/Appellants ask this Court to ignore the substantial completion of the Purchase Contracts and to reverse or vacate the Sale Orders. However, because they failed to preserve the issues presented and the sale of the Viatical Policies has been substantially performed, the relief sought is not practicable because there is no way to return Infinity, the Investors and the insurance companies to their pre-sale positions. Consequently, this appeal is moot and should be dismissed.

C. The Writ of Prohibition Entered in Case No. 98083 is not the Settled Law of this Case Because the Facts and Issues are Different.

Defendants/Appellants' argument that the District Court violated the writ of prohibition issued by this Court in Case No. 98083 by entering the Sale Orders is also not compelling. The "settled-law-of-the-case" doctrine, which provides that where an appellate court rules upon an issue that ruling becomes the law of the case for all subsequent

proceedings, is not controlling where the facts and issues are different in subsequent proceedings. *See In re Appl. of Eaton Enterprises to Vacate*, 2003 OK 14, 65 P.3d 277; *Lockhart v. Loosen*, 1997 OK 103, 943 P.2d 1074; *Wilson v. Harlow*, 1993 OK 98, 860 P.2d 793.

Defendants/Appellants insinuate in their argument that the 6% Order was voided by the Supreme Court because the Investors were not made parties to the action. However, this was not the case. In Case No. 98083, the Court found that the 6% Order authorizing the Conservator to use 6% of the proceeds from the Viatical Policies as they matured to pay premium shortfalls on other unmatured policies (as well as certain other expenses of the Conservatorship) was void because the Investors were not given legal notice and a meaningful opportunity to appear and be heard. With regard to the Application for Order Authorizing the Conservator to Retain Percentage of Proceeds from Matured Insurance Policies and Policy Sales to Cover Premiums and Conservatorship Fees and Expenses filed on May 24, 2002, which gave rise to the 6% Order, the Investors were given notice by regular mail approximately 30 days prior to the hearing.

As discussed below, the Conservator cured this Court's concerns by giving the Investors detailed notice of their rights and the opportunity to appear at the hearing on the Motion to Sell by certified mail return receipt requested approximately fifty (50) days prior to the hearing. More than 97% of the Investors received the Notice, more than 50% remitted a Claim Form to the Conservator, and only 2% of the investors filed written objections or appeared in person at the hearing.

Because the facts and issues surrounding the District Court's entry of the Sale Orders are different from those that existed in connection with the 6% Order, the "settled-law-of-the-

case" doctrine is inapplicable.

D. The District Court Has Jurisdiction to Order the Sale of the Viatical Policies.

Defendants/Appellants' argument that the District Court was without authority to order the sale of the Viatical Policies is simply contrary to Oklahoma law. The District Court, sitting in equity, appointed the Conservator to administer the Viatical Policies that Defendants/Appellants sold to Investors by means of fraud and misrepresentation. As this Court stated in *Hunt v. Liberty Investors Life Ins. Co.*, 1975 OK 165, ¶27, 543 P.2d 1390, 1396, "[i]n an equitable proceeding such as the present receivership action, the jurisdiction of the Trial Court is based primarily upon the *Res* which is in the possession and control of the receivership court. A receivership court which has acquired possession of particular items of property . . . is vested, while it holds possession, with the power to hear and determine all controversies relating thereto." (emphasis added). *See also Lewis v. Schafer*, 1933 OK 203, ¶23, 20 P.2d 1048, 1052 ("Courts of equity are vested with broad powers in dealing with transactions . . . involving fraud, fiduciary relationship, and all other unconscionable transactions.").

This rule has been applied by at least one other court in the context of litigation involving a receiver of viatical policies. *See Liberte Capital Group v. Capwill*, 229 F. Supp. 2d 799, 802 (N.D. Ohio 2002). In *Liberte* a group of investors filed a class action alleging an escrow agent misappropriated funds that were supposed to be used to pay viatical policy premiums. A receiver was appointed to administer the viaticals and, following a judicial review, was directed to sell the policies. Pending the sale the receiver was forced to use the maturities from certain policies to pay premiums on other policies which were at risk of lapsing. A group of non-class investors challenged the receiver's proposed *pro rata*

distribution of the sale proceeds, claiming that instead the sale proceeds should be "traced" to the investors claiming an interest in the particular policies that were sold. In denying the non-class investors' challenge, the court in that case stated "[i]t is widely acknowledged that the district court has 'broad powers and wide discretion' in crafting 'relief in an equity receivership proceeding.' As noted by this Circuit and other courts, the district court's discretion is derived 'from the inherent powers of an equity court to fashion relief.'" *Liberte*, 229 F.Supp.2d at 802 (internal citations omitted).

As in *Liberte*, the District Court under Oklahoma law had broad authority to direct the Conservator's possession, administration and liquidation of the Viatical Policies. Consistent with such authority, the District Court entered the Conservatorship Order which clearly empowers the Conservator to sell the Viatical Policies to an institutional buyer.

Likewise, as provided in 12 O.S. § 1554:

A receiver has, under the control of the court, power . . . to make transfers, and generally to do such acts respecting the property as the courts may authorize.

It is also important that, except for a few instances, the Investors have no ownership, beneficiary or other property interest in the Viatical Policies. Instead, they have only a contract claim against ABC for amounts guaranteed as a return on their investments. Had the Viatical Policies not been sold, the Investors would potentially have lost their entire investment since the Viatical Policies were likely to lapse prior to maturity, and the proceeds from the maturities were potentially the only source of return on their investments. The sale, which will pay the Investors a significant portion of their original investment, is certainly better than a loss of their entire investment.

Because the District Court sitting in equity had the power to direct the Conservator to sell the Viatical Policies, and because the Conservator is authorized by statute to transfer or otherwise deal with the Viatical Policies as authorized by the District Court, the Sale Orders are valid and enforceable.

E. The Investors Received Legal Notice and a Meaningful Opportunity to Be Heard In Connection with the Motion to Sell.

To cure the due process concerns raised by this Court in its Order entered on October 8, 2002, in Case No. 98083, the Conservator mailed a Notice to Investors to each Investor by certified mail, return receipt requested. That Notice was delivered nearly 50 days prior to the hearing on the Motion to Sell. The Notice included detailed information regarding the potential purchasers and their offers, as well as the alternatives to a sale. In addition, the Notice asked each Investor to complete a Claim Form indicating their respective preference as to the retention and/or sale of the Viatical Policies. Finally, the Notice clearly advised Investors in bold print:

YOU HAVE THE RIGHT TO FILE A WRITTEN OBJECTION TO THE MOTION [TO SELL] ON OR BEFORE DECEMBER 8, 2002, OR TO APPEAR BEFORE THE COURT IN PERSON OR THROUGH LEGAL COUNSEL AT THE HEARING SET FOR DECEMBER 13, 2002.

See Motion to Sell (R. 1-26).

Approximately 97% of the Investors returned receipt of the Notice, and more than 55% of the Investors returned their Claim Forms to the Conservator before the hearing. Approximately 87% of the Investors that remitted Claim Forms prior to the hearing favored the sale to Infinity. Of the approximately 4,700 Investors, less than 100 Investors, including non-resident Investors, filed written objections or appeared at the hearing *pro se* or by

counsel. The Investors and their counsel who appeared at the hearing on the Motion to Sell were permitted to testify and to examine witnesses.

Recently, courts hearing cases involving viatical policy receiverships in Texas and Ohio have stated that non-party investors who receive notice of proceedings in connection with the proposed sale of a viatical portfolio and have "an opportunity to present their respective positions and [are] afforded due consideration" will be afforded due process. *See Liberte*, 229 F.Supp.2d at 802-3; *Securities and Exchange Commission v. Tyler*, 2003 WL 21281646 slip op. at *6 (N.D. Tex. 2003), copy attached as Appendix "B." In commenting that the non-class investors received due process in *Liberte*, the Court noted that all investors, including the non-class investors, "were made aware that they could lodge objections as to the method of disbursement and employ their own counsel. The [non-class] investors retained their own counsel and . . . stated their objections . . . As the [non-class] investors availed themselves of the opportunity to present their position on the issued of allocation for consideration, they were afforded due process in this case." *Liberte*, 229 F.Supp. at 803.

Likewise, the Tenth Circuit has recognized in the context of a shareholder derivative action that a non-party shareholder who had notice of a settlement hearing and the significant opportunity to be heard by submitting his objections to the settlement "received the full panopoly of due process." *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 325 (10th Cir. 1984).

In light of the thousands of Investors having a contractual interest in the proceeds payable upon maturity of the Viatical Policies, mailing notice to the Investors by certified mail was the best practicable notice under the circumstances. *See Cate v. Archon Oil Company, Inc.*, 1985 OK 15, ¶8, 695 P.2d 1352, 1356 ("[i]f the names of those affected by a

proceeding are available, the reasons disappear for resorting to means less likely than the mails to apprise them of the pending sale"). More than 97% of those Investors acknowledged receipt of the Notice, more than half returned Claim Forms, and only 100 filed written objections or appeared at the hearing. Accordingly, as in *Liberte*, the Investors unquestionably received "legal notice and a meaningful opportunity to appear and be heard" with regard to the Motion to Sell.

F. Defendants/Appellants are Estopped to Assert Lack of *In Personam* Jurisdiction Over Non-Resident Investors Because Those Investors have Submitted to the District Court's Jurisdiction.

Defendants/Appellants argue that the District Court was without jurisdiction to order the sale of the Viatical Policies because the non-resident Investors were not parties to the action below. "It has long been settled that claims to property or funds of which a court has taken possession and control through a receiver or like officer may be dealt with as ancillary to the suit wherein the possession is taken and the control exercised -- and this although independent suits to enforce the claims could not be entertained in that court." *Oklahoma v. Texas*, 258 U.S. 574, 581, 42 S.Ct. 406, 409 (1922). A corollary to that rule recognized by the U.S. Supreme Court is that the court which appoints a receiver to wind up a corporation's affairs has jurisdiction of nonresidents' claims, and that those nonresidents need not be parties to the controversy but in filing claims against the receiver submit themselves to the court's jurisdiction. *Alexander v. Hillman*, 296 U.S. 222, 238-9, 56 S.Ct. 204, 209-10 (1935). *See also Perilstein Glass Corp. v. Shield-Well Aluminum Corp.*, 185 A.2d 417, 420 (N.J. 1962) (non-resident creditors who file claims with receiver impliedly consent to jurisdiction of state court).

The Investors matched to Viatical Policies subject to the Motion to Sell are not named owners or beneficiaries of such Viatical Policies, but are merely Defendants/Appellants' unsecured contract creditors. The Investors' only right to receive any part of the policy proceeds arose from the Purchase Request Agreements executed and subsequently breached by Defendants/Appellants prior to the Conservator's appointment. Those Purchase Request Agreements are not subject to the Conservatorship Order and the District Court has taken no action to impair the rights of the Investors to pursue claims against Defendants/Appellants for the breach of those contracts.

Because the Investors were neither legal nor beneficial owners of the Viatical Policies, the District Court was not compelled to exercise *in personam* jurisdiction over each one of them as a prerequisite to ordering the sale of the Viatical Policies. Although this issue has not been specifically addressed in the context of a viatical receivership, courts in Texas and Ohio have in fact approved the sale of viatical portfolios in cases where the investors were not parties to the action. *See Securities and Exchange Commission v. Tyler*, 2003 WL 21281646 slip op. (N.D. Tex. 2003)(approving Receiver's Motion to Market and Sell Insurance Policies and Transact Business of the Policies after hearing arguments for the affected parties and non-party investors); *Liberte Capital Group v. Capwill*, 229 F. Supp. 2d 799, 801 (N.D. Ohio 2002) (investor class action challenging the pro rata disbursement of viatical policy maturities and sale proceeds following a court-ordered sale of the viatical policies held by a receiver).

Notwithstanding the foregoing, more than half of the Investors impliedly submitted to the jurisdiction of the District Court by remitting Claim Forms advocating the sale of the Viatical Policies to Infinity and each of the Investors has accepted payments from the District Court through the Conservator.

Because the Investors have submitted to the District Court's jurisdiction by filing Claim Forms and accepting payments from the Conservator, Defendants/Appellants are estopped to claim that the District Court lacked jurisdiction to enter the Sale Orders.

G. Defendants/Appellants' Attempt to Attack the Judgment Against Them By Way of This Appeal is Untimely and Improper.

Defendants/Appellants did not appeal the underlying fraud judgment in the action brought against them by the Oklahoma Department of Securities. However, they now attempt to mount an impermissible collateral attack on the judgment by asserting in their Brief in Chief that the trial court's finding that the sale of interests in Viaticals constitutes the sale of securities was inconsistent with federal law based on dictum found in *Securities and Exchange Commission v. Life Partners*, 102 F.3d 587 (D.C. Cir. 1996). See Appellants' Brief in Chief, p. 5.

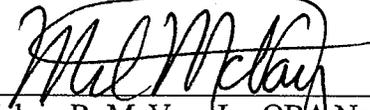
The court's reasoning in *Life Partners* was renounced by the Securities and Exchange Commission, which filed a petition for rehearing in that case, and the appellate courts of Arizona and Indiana have disagreed with the application of the Howey test in that case, and the case has been widely criticized by other courts. See *Siporin v. Carrington*, 23 P.39 92 (Ariz. App. Div. 1, 2001); *Securities and Exchange Commission v. ETS Payphones, Inc.*, 300 F.3d 1381 (11th Cir. 2002); *Joseph v. Viatica Management, LLC*, 55 P.3d 264 (Colo. App. 2002); *Poyser v. Flora*, 2003 WL 77262 (Ind. App. 2003). Further, since the holding in *Life Partners* many states have amended their securities laws to expressly provide that interests in Viaticals are securities as a matter of law.

Because, Defendants/Appellants' did not timely appeal the underlying judgment against them, their attempt to attack the judgment at this time is improper.

CONCLUSION

Based on the foregoing, the Conservator, Tom Moran, respectfully requests this Court deny all relief requested by Defendants/Appellants.

Respectfully submitted,



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CERTIFICATE OF MAILING

The undersigned certifies that on the 14th day of October, 2003, a true and correct copy of the foregoing Answer Brief was sent postage prepaid by first-class mail, to:

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With a copy hand delivered to
the Honorable Daniel L. Owens



A handwritten signature in cursive script, appearing to read "Mark McKay", is written over a horizontal line.

EXHIBIT

A

H
Briefs and Other Related Documents

This case was not selected for publication in the Federal Reporter.

Please use FIND to look at the applicable circuit court rule before citing this opinion. (FIND CTA9 Rule 36-3.)

United States Court of Appeals,
Ninth Circuit.

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff--Appellee,
Eugene Austin; et al., Appellants,
and

Elaine S. Tosti, Petitioner,
v.

WHITWORTH ENERGY RESOURCES LTD;
Peter Sacker; Jerry W. Anderson; Robert M.
Kerns; Williston Basin Holding Corp.; Amerivest
Financial Group Inc.,
Defendants,

Thomas F. Lennon, Receiver--Appellee.
Securities and Exchange Commission, Plaintiff-
Appellee,
Oxford Investors, Eugene Austin, et al., Appellants,
v.

Whitworth Energy Resources Ltd, et al., Defendants,
and
Peter Sacker, et al., Defendants--Appellants,
Thomas F. Lennon, Receiver--Appellee.

Nos. 00-55999, 01-55352.
D.C. No. CV-97-06980-CAS.

Argued and Submitted Dec. 3, 2001.
Decided Jan. 2, 2002.

Securities and Exchange Commission (SEC) brought civil enforcement action against corporation and individuals. The United States District Court for the Central District of California, Christina A. Snyder, J., approved settlement and authorized sale of assets. Appeals were taken. The Court of Appeals held that orders were either not appealable or moot.

Appeals dismissed.

West Headnotes

[1] Federal Courts  724
170Bk724 Most Cited Cases

Appeals from orders authorizing receiver's sale of assets would be dismissed as moot after sale had been completed.

[2] Federal Courts  585.1
170Bk585.1 Most Cited Cases

Order denying request for ruling on debtors' ordinary and necessary living expenses did not finally resolve issue of parties' rights to assets, and thus was not appealable. 28 U.S.C.A. § 1291.

[3] Federal Courts  724
170Bk724 Most Cited Cases

Appeal from order approving settlement would be dismissed as moot where settlement had been consummated and other party to settlement was not before appellate court.

*840 Appeal from the United States District Court For the Central District of California Western Division, Christina A. Snyder, District Judge, Presiding.

Before BEEZER and WARDLAW, Circuit Judges,
and SCHWARZER, District Judge. [FN*]

FN* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

ORDER [FN**]

FN** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as 9th Cir. R. 36-3 may provide.

**1 For the purposes of disposition, the following appeals are no longer consolidated with the appeals in *SEC v. Tosti*, Nos. 00-55799 and 01-55533.

[1] Nos. 00-55999, 00-56002, and 00-56297 involve appeals from the following district court orders: (1) the April 26, 2000 Order granting Receiver's Motion

to Establish Sale Procedures and denying the Defendants' Objections and Motion to Strike the Receiver's January 20, 2000 Recommendations and Accounting Report; and (2) the July 17, 2000 Order Granting Receiver's Motion to Sell Property Free and Clear of Liens. Because the sale of property has been completed, these appeals are dismissed as moot. See SEC v. Am. Capital Invs., Inc., 98 F.3d 1133, 1142 (9th Cir.1996) (dismissing as moot appeals from a sale confirmation order in a receivership proceeding).

END OF DOCUMENT

[2] Also appealed in No. 00-56002 is the April 26, 2000 Order denying the Motion to Request a Ruling on Defendants' Ordinary and Necessary Living Expenses. We lack jurisdiction over this appeal because the order does not finally resolve Appellants' rights to assets in receivership. See FTC v. Overseas Unlimited Agency, Inc., 205 F.3d 1107, 1112 (9th Cir.2000) (order must finally resolve parties' rights to assets to be appealable as a final order under 28 U.S.C. § 1291).

[3] In No. 01-55352, Appellants challenge the district court's order granting the receiver's motion to approve the settlement of Insured Energy Drilling Program 1986, et al. v. Trust Company of the West, et al., Los Angeles County Superior Court, Case No. BC108297. Because the settlement has been consummated, the state action dismissed, and Trust Company of the West is not a party to the appeal, this appeal is moot. See In re Combined Metals Reduction Co., 557 F.2d 179, 194 (9th Cir.1977) (dismissing as moot the appeal of an order approving settlement where the settlement was implemented and the other party to the settlement was not before the court).

Thus, because we lack jurisdiction over the appeals in Nos. 00-55999, 00- 56002, 00-56297, and 01-55352, they are each hereby ordered **DISMISSED**.

33 Fed.Appx. 839, 2002 WL 500543 (9th Cir.(Cal.))

Briefs and Other Related Documents ([Back to top](#))

- [2001 WL 34107610 \(Appellate Brief\) Appellants' Reply Brief \(Sep. 21, 2001\)](#)
- [2001 WL 34097529 \(Appellate Brief\) Brief of the Securities and Exchange Commission, Appellee \(Mar. 05, 2001\)](#)
- [2000 WL 33985603 \(Appellate Brief\) Appellants' Opening Brief \(Dec. 08, 2000\)](#)

EXHIBIT

B

Only the Westlaw citation is currently available.

United States District Court,
N.D. Texas, Dallas Division.

SECURITIES AND EXCHANGE COMMISSION

v.

Larry W. TYLER, et al

No. 3-02-CV-282-P.

May 28, 2003.

*REPORT AND RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE*

SANDERSON, Magistrate J.

*1 Pursuant to the District Court's order filed on April 28, 2003, as amended by the District Court's order filed on May 21, 2003, and the provisions of 28 U.S.C. § 636(b)(1)(B) and (C) on May 23, 2003, came on to be heard Receiver's Motion to Market and Sell Insurance Policies and to Transact the Business of the Policies filed on April 28, 2003, and having considered the testimony and evidence presented at the hearing, the statements and arguments of counsel for the affected parties and investors and the objections, responses and answers to the independent examiner's questionnaire, the magistrate judge finds and recommends as follows:

*OVERVIEW OF THE VIATICAL SETTLEMENT
INDUSTRY*

This action rises out of and relates to investments in the viatical settlement industry. It is appropriate to briefly outline the principles which apply to this aspect of the insurance industry. The concept is based upon the sale of an insured-beneficiary's interest in a life insurance policy. The insureds who are solicited for such transfers fall generally within a group of persons who have diagnosed terminal illnesses in which such persons' life expectancies are substantially shortened--usually persons whose life expectancies are five years or less--and a second group of elderly insureds who by reason of their advanced ages have shortened life expectancies. Such persons are commonly referred to as viators. In consideration for the transfer of an insured-beneficiary's interest in the policy the insured receives a portion of the face amount of the policy which will be due upon the insured's death. The sum

of money received by the insured is then available to be spent in the insured's discretion. After the purchaser of the insurance policy pays the insured the agreed upon amount, upon the insured's death, to wit: the date of maturity of the policy, the purchaser receives the face amount of the policy. The purchaser, usually a corporate entity, in turn must tender premiums due during the remainder of the insured's life to keep the policy in effect. To insure that funds for future policy premiums are available a purchaser frequently will market the policies to investors either directly or through brokers. Upon the death of the insured the policy payment is tendered by the insurance company to the purchaser. In the case where the purchaser has sold interests in a policy to investors, the purchaser tenders to each investor the agreed amount of return. Although some risk is involved if the covered insured lives beyond his anticipated life expectancy, an investor ordinarily will realize a return of their principal as well as an additional return as part of the investor's share of the face amount of the policy.

THE FACTS PRESENTED AT THE HEARING

Under the facts related in the Receiver's testimony at the hearing together with the exhibits, papers and pleadings received by the court a company by the name of Kelco, Inc. (KELCO) and related entities purchased policies from terminally ill and elderly insured individuals. KELCO in turn marketed its interests to third parties including Trade Partners, Inc. located in Grand Rapids, Michigan. As part of the sales transaction between KELCO and purchasers of fractional or whole interests in specific insurance policies, KELCO was required to effect a change of name of the beneficiary under each policy with the company which issued the underlying life insurance policy.

*2 Trade Partners purchased ownership in some of the policies and assigned its interests in others to entities related to Trade Partners. In other instances Trade Partners marketed portions of the purchased insurance contracts to investors through brokers. Defendant Advanced Financial Services, Inc. (AFS) was one of the entities which acted as a broker in selling fractional interests in the insurance policies to investors. In soliciting brokers and to attract potential investors Trade Partners provided information concerning the marketing of viatical settlement contracts *See* Receiver's Hearing Exhibit 5. One of the representations in these materials was that funds would be escrowed to insure that premium payments due during the life of a viator would be available and paid by Trade Partners.

The Receiver has identified 1700 persons who purchased interests in viatical settlement contracts from Trade Partners through AFS, Larry W. Tyler, and representatives of AFS. Once an investor purchased an interest in a viatical settlement contract from Trade Partners through AFS, Trade Partners and the investor (purchaser) entered into an agreement which provided *inter alia* that the policy(s) would be maintained in the name of TPI Grand Trust with the investor (purchaser) named as a unit-holder of the trust. The agreement further recited that the investor (purchaser), Trade Partners and Grand Bank, [FN1] a Michigan banking corporation, had entered into an escrow agreement which governed the deposit and release of purchase funds (See Receiver's Hearing Exhibit 6 at pages 012-18) and further recited that Trade Partners and Grand Bank had entered into an escrow agreement which governed the use of released purchase funds for the payment of premiums due on the policy(s) in which the purchaser invested. (See Receiver's Hearing Exhibit 6 at pages 008-11).

FN1. Macatawa Bank Corp., a Michigan banking corporation, is the successor by merger to Grand Bank.

The Receiver's investigation into the acts, omissions and conduct of KELCO, Trade Partners and AFS, following his appointment reflect the following:

KELCO and its principal have been prosecuted and convicted of mail fraud and other federal fraud violations and are currently awaiting sentencing. For all intents and purposes KELCO is defunct and has ceased all operations. KELCO representations to the contrary notwithstanding, it appears that KELCO often failed to properly notify the underwriting insurance companies of the fact that Trade Partners had purchased underlying policies. Therefore, KELCO remains as the registered owner of most of the policies on the books and records of the insurance companies which issued the life insurance policies. As a result of this circumstance, the Receiver is unable to obtain information regarding the status of when premiums are due and whether death benefits have matured on policies which are part of the estate of AFS and Larry W. Tyler. [FN2]

FN2. Under the Receiver's separate motion, pending before the District Court and filed on April 25, 2003, the Receiver seeks additional relief to resolve the impasse

between himself and representatives of the insurance companies which issued the policies.

In an effort to identify the assets of AFS the Receiver has endeavored to investigate the affairs of Trade Partners as they relate to viatical settlement contracts in which investors made purchases through AFS and its representatives. The Receiver's efforts have been hampered by a lack of cooperation on the part of Trade Partner's principals, Thomas J. Smith and Christine M. Zmudka, both of whom are the subject of civil and criminal fraud investigations, and both of whom have filed personal bankruptcy petitions.

*3 In or about November 2002, the Receiver was informed by a former employee and/or representative of Trade Partners that the escrow account (See Receiver's Hearing Exhibit 6, *supra*) was not properly funded and administered and that Trade Partners had no assets with which to pay on-going premiums as such premiums became due on viatical settlement contracts sold to investors by AFS.

The Receiver also determined that Trade Partners had been sued by other investors, that Trade Partners was taking no action to defend such suits and that default judgments were being entered against Trade Partners which imperiled funds available to Trade Partners to satisfy obligations owed to AFS investors.

As a result of these disclosures and revelations, the Receiver filed an action in this court styled *Michael J. Quilling, Receiver of Advanced Financial Services, Inc. v. Trade Partners, Inc., et al*, in No. 3-03-CV-645-P. See Receiver's Hearing Exhibit 7. [FN3] On March 31, 2003, the District Court filed its temporary restraining order as prayed for by the Receiver. [FN4] Prior to the hearing for preliminary injunction the Receiver agreed to non-suit the case and refile it in the Western District of Michigan, which was filed on April 8, 2003. Receiver's Hearing Exhibit 9.

FN3. The Receiver's complaint contains an informative overview of the circumstances existing at the time the complaint was filed. *Id.* at pages 5-13.

FN4. In addition to the conduct, acts and omissions on the part of the KELCO entities, and Trade Partners and their principals, agents and employees the action

of AFS and Larry Tyler further eroded the viability of the securities purchased by AFS investors. However, this additional course of conduct was not presented by the Receiver at the May 23, 2003, hearing and need not be addressed by the magistrate judge since it has already been presented to the District Court in the hearing which resulted in the entry of the preliminary injunction in this case on February 21, 2002.

Following the Receiver's filing of the Michigan action the Michigan court appointed Bruce S. Kramer of Memphis, Tennessee, as the receiver for the assets of Trade Partners, Inc.

Through the independent investigation of Michael J. Quilling, Receiver, and with the assistance of Mr. Kramer, 140 insurance policies have been identified in which investors solicited by AFS have purchased interests in viatical settlement contracts sold by Trade Partners. *E.g. see* Receiver's Hearing Exhibit 4. AFS owns interests in an additional 12 policies held in its own name. *Id.*, Exhibit 3. The Receiver has determined that some of the policies have lapsed due to the nonpayment of premiums. In other instances the Receiver, in the exercise of discretion, has declined to pay premiums where the premiums owed exceed the percentage interests owned in the policies by AFS investors.

Pursuant to the District Court's order filed on April 28, 2003, as amended on May 21, 2003, the Receiver notified 1700 AFS investors of the fact that he had filed the subject motion and that any objection/response to the motion was to be served on the Receiver on or before Monday, May 19, 2003. Subsequent to the entry of this order in excess of 350 responses were received as of noon May 19, 2003, and an additional 111 responses were received by the independent examiner by noon May 22, 2003. [FN5]

FN5. The responses from investors include responses received by the magistrate judge by letter or FAX, objections filed with the District Clerk (e.g. Objection as Gerald Abraham, M.D. filed on May 16, 2003), responses received by the Receiver and objections and responses to the questionnaire of the independent examiner, Steven A. Harr, appointed by the District Court on May 7, 2003. These responses/objections are tendered to the District Court for its consideration in

entering its order with respect to the magistrate judge's findings and recommendation. The questionnaire responses have been filed under seal due to the fact that they contain additional privileged and/or confidential information of the respondents.

The magistrate judge will address additional objections/ responses *infra*, but at this juncture it is pertinent to address the substance of one aspect of the responses. It is clear from the responses of many of the investors-- particularly those who have responded *pro se*--that they believe that they lack sufficient information to meaningfully respond to the Receiver's motion. A large group of the responding investors also believe that the Receiver's motion to market and sell insurance policies is premature. Many have attached to their responses a letter co-signed by Trade Partner's receiver, Bruce S. Kramer, dated May 5, 2003, indicating that Trade Partners's assets are sufficient to pay policy premiums as they become due. *See* Receiver's Hearing Exhibit 19.

*4 As explained in the testimony of Mr. Quilling, the statements contained in the letter dated May 5, 2003, to AFS investors were at best overly optimistic and as of the date of the hearing were inaccurate. Trade Partners is no longer an on-going business. Its owners have filed bankruptcy petitions and are currently subject to on-going criminal investigations. Its currently owned inventory of interests in life insurance policies is unavailable for sale and funds from third party sources to pay premiums coming due on policies owned by Trade Partners and those in which AFS and AFS investors own interests will not be forthcoming. Further, Mr. Kramer's first interim report filed as receiver for Trade Partners in the Western District of Michigan (Receiver's Hearing Exhibit No. 2) expressly refutes the representations made in the May 5, 2003, letter to AFS investors. Thus, while the May 5, 2003, letter undoubtedly has produced confusion in the minds of those investors to whom it was sent, it is clear that assets available to pay premiums on policies as such premiums come due are unavailable from Mr. Quilling as receiver or from Mr. Kramer as receiver for Trade Partners.

The magistrate judge notes that a large number of persons attended the hearing on May 23, 2003, most of whom it is believed were investors in viatical settlement contracts sold by AFS. The magistrate judge offered them an opportunity to address the court or to rely on their written responses/objections. None chose to make a statement. However, with the

information presented by Mr. Quilling, those who did attend the hearing surely understand the peril to the viability of their investments.

States District Court for the Western District of Michigan were addressed by Mr. Quilling in the course of his presentation at the hearing on May 23, 2003.

THE RECEIVER'S MOTION ON THE MERITS

In addressing the question of whether the relief sought by the Receiver should be granted, it is pertinent to address several issues which have been raised in AFS investors' responses and objections.

1. *Jurisdiction.* In this court's order entered on February 21, 2002, appointing Michael J. Quilling as Receiver, this court took exclusive jurisdiction and possession of the assets of AFS and Larry W. Tyler and those of the relief defendants *wherever situated*. It further ordered that Quilling, as Receiver, was authorized to take possession of such assets with complete and exclusive control, possession and custody of all such assets. *See* Receiver's Hearing Exhibit 1, page 2 ¶¶ 1 and 2. Thereafter, on March 4, 2002, Quilling filed copies of the complaint and his order of appointment in the Western District of Michigan, where Trade Partners was located and in the Southern District of Ohio, where the KELCO entities offices were located. *See* Receiver's Hearing Exhibit 2.

28 U.S.C. § 754 provides that under such circumstances a receiver shall be vested with complete jurisdiction and control of all real, personal or mixed property *in any district* in which property is located. It is clear that the insurance policies in which AFS and AFS investors own interests, which are currently located in the State of Michigan come within the purview of the District Court's order filed on February 21, 2002, defining the assets over which this court exercised exclusive jurisdiction and possession. Although Mr. Quilling's subsequent action in filing a separate action in the Western District of Michigan and obtaining an order appointing a receiver over the assets of Trade Partners arguably gives rise to that court's concurrent jurisdiction over assets owned by Trade Partners and its operatives, that fact in no way divests this court of jurisdiction to grant the relief sought in the present motion. [FN6] *See also* the cases collected in Mr. Harr's supplemental brief, i.e. Examiner's Supplement to Preliminary Report Regarding Jurisdiction filed on May 23, 2002. The Securities and Exchange Commission's counsel likewise agreed with Mr. Harr's assessment of the jurisdictional issue.

[FN6]. The difficulties in seeking and obtaining expedited relief in the United

*5 2. *Treatment of the individual AFS purchasers' investments.* In his motion Receiver seeks authority to market and sell insurance policies which constitute assets of ATF, Tyler and the relief defendants. He further seeks authority to transact the business of the insurance policies which in insurance parlance means to permit him, *inter alia*, to file death claims and receive death benefits on those policies in which the insureds died while the policy was in force. The proceeds from the sale of policies and any death benefits obtained will initially be used to pay premiums on those viators' policies which have not yet matured, i.e. in which the insureds have not died. The purpose of such contemplated course of dealings is to maximize the assets and property of AFS for the ultimate benefit of AFS investors. Based upon previous conduct, described above, it is unlikely in the extreme that the investors will recover a substantial portion of their investments in the viatical contracts.

A number of investors have complained of the mechanics of any sale of insurance contracts, an issue which is addressed below. In addition some investors have argued that they should be allowed to pay premiums which are due on specific policies of insurance in which they invested and thereafter to recover their contracted for share in the benefits under such policies upon the death of each insured.

The Receiver's investigation has identified the insureds on each of the 140 policies [FN7] as well as the percentage of each policy owned by AFS investors. *See* Receiver's Hearing Exhibits 3 and 4. In turn each investor knows the identity of each policy in which he/she invested, the percentage of his/her ownership and the annual premiums charged. *E.g. see* Party-in-Interest Jewell Buie's response filed on May 16, 2003.

[FN7]. The policies are identified only by the insureds' initials to protect their names and their privacy.

In addressing the Receiver's motion the court is called on to decide whether the investments of AFS investors should be pooled in accordance with the request to market, sell and transact business or

whether the investments of each should be segregated using a tracing method entitling each investor to a constructive trust. See Restatement (First) of Restitution § 211(1) (1937) cited in *Liberte Capital Group v. Capwill*, 229 F.Supp. 2nd 799 (N.D.Ohio, 2002).

Notwithstanding an individual's ability to trace assets, where such a procedure places one victim in a position superior to that of other victims, equity dictates that tracing rules be suspended. *Cunningham v. Brown*, 265 U.S. 1, 44 S.Ct. 424 (1924). See also *Wilson v. Wall*, 73 U.S. 83, 90 (1867). These principles are further addressed in *S.E.C. v. Forex Asset Management, LLC*, 242 F.3d 325, 331-32 (5th Cir.2001), affirming a decision of this court, and in *Liberte Capital Group*, *supra*, a case which also involved failed viatical life insurance investment programs. [FN8]

[FN8. *Forex* and *Liberte Capital Group* both involve distribution of receivership assets to defrauded investors, a circumstance which has not yet occurred in the present action. However, it appears that the court in *Liberte Capital Group* had previously authorized the sale of insurance policies in a manner similar to that requested by Mr. Quilling in the present motion. See 229 F.Supp. 2nd at 801.

As reflected in the responses to the Examiner's questionnaire, the persons who invested in viatical settlement contracts sold by AFS run the full spectrum of financial resources and investor sophistication. Many of the investors are themselves retired, elderly persons who placed their life savings into their purchases, while other investors appreciated the risks involved based upon their knowledge and participation in other investment vehicles. The questionnaire answers further show that many investors simply have no additional funds to salvage their prior purchases, while others clearly have additional funds as well as a more realistic assessment of the actions contemplated by the Receiver.

*6 It is not clear how many investments have already been lost due to the lapses in the policies. However, it is clear that a number have been lost on such basis. All of the investors who purchased interests in insurance policies from AFS are in essentially a similar situation as victims of fraud. [FN9] All received the same "sales pitch" as embodied in

Receiver's Hearing Exhibit 5 as presented to them by AFS, its agents and employees, including Larry W. Tyler. All entered into the same agency/policy funding agreement with Trade Partners and the same tri-partite agreements between themselves, Trade Partners and Grand Bank, now known as Macatawa Bank Corp. Receiver's Hearing Exhibit 6. Finally, all have either lost their individual investments through the lapse of policies or have suffered substantial, if not irreparable impairment of their investments. Under such circumstances the property and assets of AFS, Larry W. Tyler and the relief defendants should be pooled for the benefit of all AFS investors. See also *United States v. Durham*, 86 F.3d 70, 71-73 (5th Cir.1996).

[FN9. However, Frank Tabor, for example, is an exception to this general statement. See his objection and response filed on May 19, 2003. See also Tabor Hearing Exhibit 1 reflecting that he and his wife did not purchase any interest through AFS, although a portion of the policy in which they purchased an interest was also sold to AFS investors. Further, he and/or his wife received an ownership interest in the Chubb Life policy recorded in the records of the insurer and the policy premiums have been paid through 2003 and beyond. The magistrate judge is of the opinion that at the present time such issues raised by Tabor need not be addressed and would only become relevant in the event the Receiver seeks permission to sell the policy denominated as WAL-L(3). See Receiver's Exhibit 4, Line 131.

3. *Receiver's Motion to Market and Sell Insurance Policies.* As the first aspect of his motion Quilling seeks authority to sell current policies in which AFS and AFS investors own interests. Prior to the filing of his motion Quilling sought assistance from National Viatical, Inc., in Woodstock, Georgia, to determine the feasibility of selling such policies. See Proposal and Marketing Plan, attached as Exhibit B to Receiver's motion. This proposal has generated investor objections raising allegations of conflicts of interest, under the assumption that National Viatical would be the sole purchaser of policies. Complaints were also made concerning National Viatical's compensation, i.e. 1% of the face value of each policy it sells. *Id.* at page 3.

In the intervening period prior to the hearing

Quilling submitted information to National Viatical on a number of the 140 policies listed in Receiver's Hearing Exhibit 3. At no cost to the receivership estate National Viatical was able to generate specific information with respect to each policy. *E.g. see* Receiver's Hearing Exhibit 23. As explained in Quilling's presentation because of the specialized knowledge of National Viatical and its relationship to insurers, it was able to generate information well beyond the capabilities of Mr. Quilling. [FN10]

FN10. Despite the absence of compensation for such efforts, Quilling surmised that National Viatical, a prominent player in the viatical settlement industry, was willing to perform this research in an effort to remove the specter overhanging the industry as a result of frauds perpetrated on investors, such as those which occurred in the present case and those described in the *Liberte Capital* memorandum opinion.

It is particularly important to note in the context of the present motion that National Viatical's offer to assist in the sale of policies is only a proposal. Further, its proposal was substantially modified to provide for compensation of 1% of sale price of a policy, rather than 1% of the face amount of the policy. *See* Receiver's Hearing Exhibit 24 at page 3.

It is equally important to note that the Receiver seeks authority to sell policies as a matter of last resort if no other sources of revenue are available to pay premiums on current policies. [FN11] Further, in the event that such authority is granted by the District Court, before seeking to sell a specific policy the Receiver will file a subsequent motion with notice to affected investors seeking permission to sell the policy. Such additional requests, if necessary, will provide an added measure of protection and provide the affected investors due process. [FN12]

FN11. Other possible sources of funds were suggested in the course of the hearing. However, none is presently available and the Receiver's funds available to pay premiums will be exhausted by the end of June 2003.

FN12. Such additional measures would allow further consideration of circumstances such as those related in n. 9, *supra*.

*7 It is undisputed that the remaining assets of AFS investors are at substantial risk of total loss if currently owned premium payments are not paid and the underlying viator policies lapse. For the reasons stated above, the Receiver's motion to market and seek insurance policies should be granted. [FN13]

FN13. Both the independent examiner, Steven Harr, and counsel for the S.E.C. agree with and support Receiver's motion.

4. *Receiver's Motion to Transact the Business of the Policies.* As set out above due to the fact that KELCO failed to notify the issuing insurance companies of the change in the name of the owner-beneficiary on many of the policies purchased by Trade Partners and Trade Partners' failure to require KELCO to comply, KELCO is shown as the owner of such policies in the books and records of the issuing insurers. As a result of this circumstance the insurance companies have refused to communicate with the Receiver on such matters as (1) cash surrender values in extant policies; (2) the premium schedules which apply and/or any effort to modify the premium schedules; (3) whether the policies have lapsed due to the failure to pay premiums; and (4) whether policies have matured, and death benefits are owing.

The responding investors have not objected to this aspect of the Receiver's motion although some of the above matters overlap issues presented in the Receiver's separate motion to which some insurers have objected. *See* n. 2, *supra*.

The magistrate judge discerns no principled reason why this aspect of the Receiver's motion should be denied. If granted, the Receiver will be able to obtain information to determine which policies may be the most marketable, to attempt to negotiate amended premium payment schedules, and to file death benefit claims on those policies which have matured. [FN14] Therefore, the magistrate judge finds and recommends that this aspect of the Receiver's motion be granted. [FN15]

FN14. In the event that death benefits are currently owing on any of the policies, the proceeds of such policies may be available to preserve currently unmatured policies. However, due to the delays in processing death benefit claims, it is unlikely that any

claims filed by the Receiver would be processed and paid prior to the end of June 2003, when funds available to pay premiums will have been exhausted.

FN15. For the sake of clarity and in the event that the District Court grants this aspect of the motion, it is recommended that a list of the policies to which the order applies be attached as an exhibit to the order.

RECOMMENDATION:

For the foregoing reasons it is recommended that the District Court enter its order granting Receiver's Motion to Market and Sell Insurance Policies and to Transact Business of the Policies in all respects.

A copy of this report and recommendation shall be transmitted to the parties and to the Receiver Michael J. Quilling. Mr. Quilling, in turn, will transmit copies of this recommendation to the investors (or their counsel) who were previously notified upon the filing of the above motion by the Receiver.

NOTICE

In the event that you wish to object to this recommendation, you are hereby notified that you must file your written objections within ten days after being served with a copy of this recommendation. Pursuant to Douglass v. United Servs. Auto Ass'n, 79 F.3d 1415 (5th Cir.1996) (*en banc*), a party's failure to file written objections to these proposed findings of fact and conclusions of law within such ten-day period may bar a *de novo* determination by the district judge of any finding of fact or conclusion of law and shall bar such party, except upon grounds of plain error, from attacking on appeal the unobjected to proposed findings of fact and conclusions of law accepted by the district court.

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