

FILED IN THE DISTRICT COURT  
OKLAHOMA COUNTY, OKLA.  
IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

JAN 23 2004

PATRICIA PRESLEY, COURT CLERK

Oklahoma Department of Securities, )  
ex rel. Irving L. Faught, Administrator, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Accelerated Benefits Corporation, a Florida )  
corporation, et al., )  
 )  
Defendants. )

Case No. CJ-99-2500-66  
Judge Daniel Owens

**MOTION FOR ORDER RESCINDING IRREVOCABLE  
BENEFICIARY STATUS AND BRIEF IN SUPPORT**

Conservator, Tom Moran (the "Conservator") hereby respectfully moves the Court for entry of an Order revoking the irrevocable beneficiary status of investors on certain viatical policies which are part of the Conservatorship assets. In support thereof, the Conservator offers the following Brief in Support.

**BRIEF IN SUPPORT**

**Introduction**

The core litigation underlying this matter was a fraud action brought by the Oklahoma Department of Securities against Defendants, Accelerated Benefits Corporation ("ABC"), American Title Company of Orlando ("ATCO"), C. Keith LaMonda and David S. Piercefield (collectively "Defendants"), and three Oklahoma residents (the "Oklahoma Defendants") who offered and sold investments in life insurance policies ("Viaticals") on Defendants' behalf.

The Viaticals were unmaturing life insurance policies sold by their original owners (the

"Viators") to Defendants in exchange for cash. Defendants then solicited investments from investors (the "Investors"), many of whom were elderly and/or unsophisticated. The Investors entered into Purchase Request Agreements with ABC, which promised them a specified return on their investment upon maturity of the Viatical upon which they were "matched." The Purchase Request Agreements entered into between ABC and the Investors fraudulently represented that the premiums on the Viaticals were "guaranteed" and would be paid by Defendants without further charge to the Investors. After purchase of the Viaticals from the Viators, the ownership of the Viaticals was changed to ATCO as escrow agent for ABC. In addition, according to the records of ABC, on all but sixty-three (63) of the approximately one thousand four hundred (1400) Viaticals, ATCO was also named as sole beneficiary.

On December 17, 1999, the 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. Thereafter, the Court held a non-jury trial of Defendants and adopted Findings of Fact and Conclusions of Law, which among other things: (i) enumerated the misstatements and omissions of material facts Defendants made to the Investors in connection with the offer and sale of investments in the Viaticals; and (ii) stated that Defendants committed fraud in the sale of such securities. The facts misrepresented by Defendants in the Purchase Request Agreements included, without limitation, those relating to the "guaranteed payment of premiums" on the Viaticals. Defendants purported to set aside funds for the payment of such premiums according to a formula based on Defendants' estimates of the life expectancies of the insureds named in the Viaticals, which proved very inaccurate resulting in premium shortfalls. At the conclusion of the trial, the Court entered an Order of Permanent Injunction against Defendants. In order to avoid an order of restitution, Defendants negotiated with the Oklahoma

Department of Securities for an order appointing a conservator of the Viaticals. On February 6, 2002, the Court, sitting in equity, entered the Conservatorship Order and appointed Tom Moran as Conservator to administer the Viaticals.

The Conservatorship Order directed that certain assets of ABC and its agents, including LaMonda, ATCO and Piercefield, (the "Conservatorship Assets"), be transferred to the Conservator. As a result, in nearly all instances, the Conservator became both the owner and beneficiary of the Viaticals. Therefore, except in a few instances, the Investors have no ownership, beneficiary or other interest in the Viaticals. Instead, they have only an unsecured contract claim against ABC for the amounts of their investments and the guaranteed returns.

The Conservatorship Assets include without limitation:

- a. All life insurance policies owned or held beneficially, directly or indirectly, by or for the benefit of ABC and/or ABC Investors, that were purchased prior to October 1, 2000 (the "Policies"); . . .

The Conservatorship Order gave the Conservator the direction and authority to:

- a. [T]ake custody, possession and control of the Conservatorship Assets as they are transferred to the Conservator;
- b. [M]anage all Conservatorship Assets pending further action by the Court including, but not limited to, the evaluation of the Policies, and 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 and the assessment to ABC Investors of the future premium payments;
- c. Receive and collect any and all sums of money due or owing on the Policies to ABC or its agents;

\* \* \*

- e. Make such payments and disbursements as may be necessary and advisable for the preservation of the Conservatorship Assets and as may be necessary and advisable in discharging his duties as Conservator including, but not limited to, the timely payment of all premiums for Policies that have not yet matured;

- f. Monitor the viators of the Policies by tracking the location of the viators and periodically checking the health of the viators;
  - g. Receive notice of the death of viators, file death claims on the viators, and collect the proceeds paid on the Policies as such mature;
  - h. Disburse to each ABC Investor his proportionate share of the proceeds, after deducting premiums advanced, paid in [on] matured Policies;
- \* \* \*
- m. Exercise those powers necessary to implement the Conservator(s) conclusions with regard to the disposition of the Conservatorship [Assets] pursuant to the orders and directives of the Court.

Since being appointed, the Conservator has diligently sought to transfer of ownership and beneficiary status on the Viaticals from ATCO to the Conservator, as directed by the Conservatorship Order. During this process, the Conservator discovered that according to the records of ABC, 63 Viaticals with a face value of \$6,987,477 had certain Investors designated as irrevocable beneficiaries of the policies.<sup>1</sup>

Based upon this discovery, on February 18, 2003, the Conservator filed his previous Application for Instructions from the Court Regarding Handling of Policies with Irrevocable Beneficiaries (the "Application"). The Conservator was concerned about the ability to effectively manage the Viaticals containing irrevocable beneficiaries because of the inability to collect and disburse maturity proceeds, or recoup premium advances made to keep such Viaticals from lapsing, since proceeds from such matured Viaticals were to be paid directly to the irrevocable beneficiaries. Further, the Conservator was, in accordance with the direction and

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<sup>1</sup> There does not appear to be any rational basis why the Investors matched to these policies were designated as "irrevocable beneficiaries", while the Investors matched to the remaining policies were not named beneficiaries.

authority granted by the Court, attempting to sell the Viaticals and needed guidance on whether to include such Viaticals in any sale of the portfolio of Viaticals. Finally, in some instances, the insurance companies that issued the Viaticals did not recognize any legal duty to disclose to the Conservator information regarding the Viaticals, the status of premium payments, or other pertinent information since the Conservator was not the owner and beneficiary of such Viaticals. As a result of the Application, the Court directed the Conservator to send notice to all irrevocable beneficiary Investors informing them of their options with regard to the Viaticals upon which they were named irrevocable beneficiaries. The options included (i) assigning their irrevocable beneficiary status to the Conservator resulting in electing to have the Viaticals being included in the sale of Conservatorship Assets, or (ii) electing to have the Viaticals abandoned by the Conservator to the Investors named as irrevocable beneficiaries on the Viaticals.

The Conservator was directed to sell the portfolio of Viaticals to an institutional investor by that certain Order Approving Option Purchase Contract and Escrow and Service Agreement with Infinity Capital Services, Inc. issued by the Court on March 12, 2003 (the "Sale Order"). The Option Purchase Agreement approved by the Court to effectuate such sale separately listed the 63 policies with irrevocable beneficiaries with the notation of "possible transfer". The Option Purchase Contract also included a purchase price adjustment to apply if all or a portion of such 63 Viaticals were not included in the sale.

Subsequently, in an effort to maximize the Viaticals subject to the Sale Order, the Conservator submitted change of beneficiary forms to the various insurance carriers which issued these 63 Viaticals to determine if, in fact, such insurance carriers regarded the beneficiaries named on the Viaticals as irrevocable. As a result of such submittals, the various insurance carriers with respect to 38 of such Viaticals changed the beneficiary designations to the

Conservator. With respect to the remaining 25 Viaticals (the "Irrevocable Policies"), the insurance carriers refused to change the beneficiaries named on these Irrevocable Policies without the consent of the irrevocable beneficiary Investors. These 25 Irrevocable Policies have a total face value of \$1,947,054.00, and a total of 201 Investors (the "Irrevocable Beneficiary Investors") matched to these Irrevocable Policies.

Based upon the Application and the Court's instructions, notice was sent to all 201 Irrevocable Beneficiary Investors, via certified mail return receipt requested. In addition to explaining the options available to them, the notices also contained an election form, which allowed the Irrevocable Beneficiary Investors to elect to assign their beneficiary rights to the Conservator resulting in their respective Irrevocable Policies to be included in the sale of the Viatical portfolio approved by the Court pursuant to the Sale Order, or have the Viatical abandoned by the Conservator to the Irrevocable Beneficiary Investors.

Of the 201 notices sent, only 10 were returned unclaimed or undeliverable.<sup>2</sup> The Conservator received 178 election form responses from the Irrevocable Beneficiary Investors. Of these responses, 177 Irrevocable Beneficiary Investors were in favor of having their Irrevocable Policy included in the sale of the Viatical Portfolio, and only 1 Irrevocable Beneficiary Investor elected to reject the sale and have the Viatical abandoned. Thirteen (13) Irrevocable Beneficiary Investors did not respond to the notice, despite being served.

One hundred percent (100%) of the Irrevocable Beneficiary Investors on 14 of the 25 Irrevocable Policies elected to assign their rights to the Conservator and have their Viaticals included in the sale (the "100 Percent Policies"). The insurance companies have required that the

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<sup>2</sup> The Conservator received certified mail return receipts on 191 of the mailings. The Conservator has made additional attempts to contact the 10 individuals whose notices had been returned, which included calling the last known phone numbers or other contacts, but the Conservator has been unable to identify these Investors' current locations.

Irrevocable Beneficiary Investors execute change of beneficiary authorizations before they will change the beneficiaries listed on these Irrevocable Policies. The Conservator provided change of beneficiary authorizations to the Irrevocable Beneficiary Investors matched to these 100 Percent Policies, but as of the date of this motion, the Conservator has not received all of the change of beneficiary forms back on 3 of the 100 Percent Policies.<sup>3</sup> An Investor summary and copies of the Irrevocable Beneficiary Investor Consent Forms for these three 100 Percent Policies are attached hereto as Exhibit "A." The Conservator believes that it would be in the best interest of these Investors for the Court to immediately rescind the irrevocable beneficiary status on the 3 remaining 100 Percent Policies for the reason that it would allow these 100 Percent Policies to be assigned to the Conservator and included in the sale resulting in these Investors immediately receiving distributions of sale proceeds from the Conservator in accordance with their election and the Court's order.<sup>4</sup>

Only one Irrevocable Beneficiary Investor elected to have the Irrevocable Policy abandoned to him by the Conservator. This Investor was the sole beneficiary of the Irrevocable Policy he was matched to and could control the payment of premiums. In accordance with such Investor's election, the Conservator sent notice to the insurance carrier to reflect this Irrevocable Beneficiary as the owner of his Irrevocable Policy and direct all future premium bills and correspondence related to this Irrevocable Policy to this Irrevocable Beneficiary Investor. Accordingly, the only Irrevocable Beneficiary Investor who elected to reject the assignment and sale has now been satisfied by the abandonment of the applicable Irrevocable Policy in his favor.

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<sup>3</sup> The Conservator has forwarded the change of beneficiary forms to the insurance companies on the policies for which all of the change of beneficiary forms have been received and accordingly, the Conservator is in the process of being recognized as the named beneficiary on 11 of the 100 Percent Policies.

<sup>4</sup> The Conservator has learned that some of the Investors have passed away after giving their consent and there is no guarantee that all Investors with respect to the 3 remaining 100 Percent Policies will return the change of beneficiary forms, which will further delay or prevent the distribution of funds to the other Investors on these Viaticals.

The responses received by the Conservator for the remaining 10 Irrevocable Policies are detailed in the attached Exhibit "B" and can be summarized as follows:

- 5 Irrevocable Policies in which more than one Irrevocable Beneficiary Investor did not respond or could not be located, with all other Irrevocable Beneficiary Investors on each Irrevocable Policy electing to have the Irrevocable Policy assigned to the Conservator and included in the sale of Conservatorship Assets.
- 5 Irrevocable Policies in which only one Irrevocable Beneficiary Investor did not respond or could not be located, with all other Irrevocable Beneficiary Investors on each Irrevocable Policy electing to have the Irrevocable Policy assigned to the Conservator and included in the sale of Conservatorship Assets.

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10 Total Remaining Irrevocable Policies (the "Majority Policies").

Of the five Majority Policies in which only Investor did not respond or could not be located and all other Investors affirmatively elected to have their matched policy included in the sale: 1) on two policies, the non-voting investor has not been located; 2) on one policy the non-voting investor did not return his election form, but when contacted by phone indicated that "he had written it off and did not care what happened" and for the Conservator not to contact him again; and 3) on the remaining two policies, the single non-responding investor was the Vice-President of Operations for ABC, Anthony Speroni ("Speroni"), who holds only a minute investment in these policies. The responses from these five policies are detailed as follows:

1. Dobbins policy (\$25,000.00 face value) – total of two Investors matched. Speroni did not respond and is shown as having only a \$6.25 investment (0.032% interest in the policy). The only other investor on the policy, with a \$19,525.00 investment (99.968% interest in the policy), has indicated that he wants policy included in sale;
2. Morris policy (\$95,500.00 face value) – total of ten Investors matched. Speroni did not respond and is shown as having only a \$521.89 investment (0.57% interest in the policy). The remaining Investors on the policy, with investments totaling \$91,478.64 (99.43% interest in the policy), have indicated that they want the policy included in sale;

3. Pugh policy (\$72,000.00 face value) – total of fifteen Investors matched. The Conservator has not been able to locate a single Investor (Gladys S. Allen) with a \$1906.53 investment (2.965713% interest in the policy). The remaining fourteen Investors on the policy, with investments totaling \$61,379.18 (97.034289% interest in the policy), have indicated that they want the policy included in sale;
4. Sprague policy (\$70,000.00 face value) – total of twelve Investors matched. The Conservator has not received an election form from a single Investor (Harold Gunlock) with a \$10,000.00 investment (14.2% interest in the policy).<sup>5</sup> The remaining eleven Investors on the policy, with investments totaling \$116,824.21 (85.8% interest in the policy), have indicated that they want the policy included in sale; and,
5. Chevrette policy (\$25,000.00 face value) – total of five Investors matched. The Conservator has not been able to locate a single Investor (Patricia Mendez) with a \$1000.00 investment (4.84% interest in the policy). The remaining four Investors on the policy, with investments totaling \$19,661.16 (96.16% interest in the policy), have indicated that they want the policy included in sale.

Of the five Majority Policies in which more than one Investor did not respond or could not be located, the overwhelming majority of all other Investors elected to have their matched policy included in the Sale. Of the eighty-seven total Investors on these five policies, sixty-nine Investors (79.31%) elected to have their policies included in the sale, ten Investors (11.49%) did not return their election forms, and eight Investors (9.20%) could not be located. The responses from these five policies are detailed as follows:

1. Wynkoop policy (\$318,000.00 face value) – total of twenty-five Investors with investments totaling \$223,943.66, of which twenty Investors with investments totaling \$192,943.67 (86.16% interest in the policy) elected to have the policy included in the sale. Two Investors, including Anthony Speroni,<sup>6</sup> with investments totaling \$12,999.99 (5.81% interest in the policy) did not return election forms. Three Investors with investments totaling \$18,000.00 (8.03% interest in the policy) could not be located;

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<sup>5</sup> The Conservator's office has contacted Mr. Gunlock by telephone and was informed that he had written off the investment, did not care what happened with the investment and did not want to be contacted again.

<sup>6</sup> Speroni is shown as having a \$499.99 investment (0.0223267% interest) in the Wynkoop policy.

2. Bach policy (\$50,000.00 face value) - total of fourteen Investors with investments totaling \$44,642.86, of which eleven Investors with investments totaling \$36,882.49 (82.62% interest in the policy) elected to have the policy included in the sale and three Investors with investments totaling \$7,760.37 (17.38% interest in the policy) did not return election forms;
3. Graham policy (\$214,000.00 face value) total of twenty-six Investors with investments totaling \$191,071.42, of which twenty-three Investors with investments totaling \$165,342.92 (86.53% interest in the policy) elected to have the policy included in the sale. One Investor with investments totaling \$10,728.50 (6.62% interest in the policy) did not return an election form, and two Investors with investments totaling \$15,000.00 (7.85% interest in the policy) could not be located;
4. Lipsih policy (\$100,000.00 face value) - total of twelve Investors matched with investments totaling \$78,125.00, of which eight Investors with investments totaling \$37,942.14 (48.57% interest in the policy) elected to have the policy included in the sale. Two Investors with investments totaling \$4,932.86 (6.31% interest in the policy) did not return election forms, and two Investors with investments totaling \$35,250.00 (45.12% interest in the policy) could not be located; and,
5. Leone policy (\$90,000.00 face value) - total of ten Investors matched with investments totaling \$63,380.29, of which seven Investors with investments totaling \$47,427.20 (74.83% interest in the policy) elected to have the policy included in the sale. Two Investors with investments totaling \$12,500.00 (19.72% interest in the policy) did not return election forms, and one Investor with an investment totaling \$3,453.09 (5.45% interest in the policy) could not be located.

As reflected above, none of the Irrevocable Beneficiary Investors with respect to the Majority Policies elected to have such policies abandoned; instead, they simply failed to respond or could not be located. Given this failure with respect to a few Irrevocable Beneficiaries, coupled with the fact that all those Irrevocable Beneficiary Investors who did respond unanimously elected to assign their beneficiary rights to the Conservator and have the Irrevocable Policies included in the sale of the Viatical portfolio, the Conservator has been reluctant to abandon these Majority Policies. Such abandonment would almost certainly result in a total loss by all Irrevocable Beneficiary Investors because of the difficulty in coordinating the

timely payment of premiums and policy tracking. Accordingly, rather than immediately abandoning the Majority Policies, the Conservator has continued to pay premiums on these Irrevocable Policies<sup>7</sup>, (none of which have matured) and sought guidance from the Court on whether it would be in the Irrevocable Beneficiary Investors' best interests to seek alternative relief in the form of an order revoking the irrevocable beneficiary status in the remaining Irrevocable Policies.

In addition to the issues with respect to the Irrevocable Policies, the Conservator has learned that 1 of the insurance carriers with respect to the 38 Viaticals in which beneficiary designations were changed to the Conservator,<sup>8</sup> has advised that it now believes it changed the beneficiary designations in error because each of the prior named irrevocable beneficiaries did not consent to such changes. This insurance company, Prudential Insurance Company of America ("Prudential") has advised the Conservator that as a result of its purported error, it will on a maturity, file an interpleader action, deposit the maturity proceeds and name all Investors previously regarded as irrevocable beneficiaries and the Conservator as owner and possible beneficiary for a judicial determination of the proper parties to receive such maturity proceeds. Presently, there are 2 policies within such 38 Viaticals, which were issued by Prudential (the "Prudential Policies")<sup>9</sup> and remain unmatured, which the Conservator believes should be subject to an order rescinding the irrevocable beneficiary status hereunder.

On October 17, 2003, the Conservator filed his Application for Additional Instructions from the Court Regarding Handling of Policies with Irrevocable Beneficiaries (the "Second

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<sup>7</sup> As of January 21, 2004, premiums in the amount of \$42,828.85 have been paid by the Conservator on the Irrevocable Policies. See Exhibit "C", Affidavit of H. Thomas Moran.

<sup>8</sup> See page 5 *inter alia*.

<sup>9</sup> Prudential Policy # 97000 was issued on the life of Richard Lyman with death benefits of \$128,000 and 12 matched Investors. Prudential Policy # 61396786 was issued on the life of Dennis Dean with death benefits of \$25,000 and 2 matched Investors.

Application"). The Second Application came on for hearing on November 21, 2003, at which time the Court ordered the Conservator to file a motion for order seeking to revoke the irrevocable beneficiary status of the Irrevocable Beneficiary Investors, and to have the motion set for hearing after proper notice to the Irrevocable Beneficiary Investors.

Copies of this motion and a separate "Notice to Investors" are being provided to the Irrevocable Beneficiary Investors with respect to the 3 remaining 100 Percent Policies, the Majority Policies and the Prudential Policies. (*See* Exhibit "D", Notice to Investors attached hereto).

### Argument and Authority

#### A. **The Court Has the Authority To Issue An Order Affecting the Rights of the Investors In the Viaticals.**

As the Oklahoma Supreme 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*, under Oklahoma law the Court has broad equitable authority to direct the Conservator's possession, administration and liquidation of the Viaticals. Consistent with such authority, the Court entered the Sale Order which directed and empowered the Conservator to sell the portfolio of Viaticals to an institutional buyer because such sale was found to be in the best interests of the Investors. Likewise the Court should enter an order revoking the irrevocable beneficiary status of the Irrevocable Beneficiary Investors matched to the 3 remaining 100 Percent Policies, the Majority Policies and the Prudential Policies. Such an order is consistent with the express election of all such Investors who have responded to the notices previously sent by the Conservator to the Investors matched to the 100 Percent Policies and the Majority Policies. All such Investors, together with the Investors matched to the Prudential Policy will be served with this Motion and have an adequate opportunity to respond. Importantly, such an order will prevent all such Viaticals from lapsing thereby resulting in greater protection for the best interests of such Investors.

In additional to such equitable authority, 12 O.S. § 1554 provides:

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.

Therefore, under the authority cited above, the Court has the power to enter orders affecting the rights of the Irrevocable Beneficiary Investors in the Viaticals.

**B. It Would Be In the Best Interest of the Investors For The Court to Enter An Order Rescinding Irrevocable Beneficiary Designations.**

In this case, all of the Irrevocable Beneficiary Investors matched to the 100 Percent Policies and Majority Policies who have responded have elected to have their Irrevocable Policies assigned to the Conservator and included in the sale of Conservatorship Assets. Further, such electing Irrevocable Beneficiary Investors hold between 82.6 percent to 99.9 percent interest in each such Irrevocable Policy. This overwhelming majority has obviously determined that it is in their best interest to receive some return of their investment, rather than potentially lose it all should these Irrevocable Policies be abandoned by the Conservator. Further, the Investors matched to the Prudential Policies will have notice and an opportunity to be heard hereunder.

A Circuit Court in the State of Florida has addressed substantially the same issue in *State of Florida Department of Insurance v. Future First Financial Group, Inc.*, Seventh Judicial Circuit, in and for St. John's County, Florida, Case No. CA02-1598 in its Order Rescinding Irrevocable Beneficiary Designations filed August 7, 2003. In *Future First*, a viatical company was sued by the Florida Department of Insurance seeking to halt the practices of the viatical company which were in violation of Florida law. The court appointed a conservator to oversee the viatical portfolio and protect the interests of the investors. Pursuant to the order appointing him, the conservator solicited offers for the sale of the portfolio. Subsequent to the sale, the

court was asked to determine whether a small group of viatical policies subject to the conservatorship order should have their irrevocable beneficiary designations revoked in order to allow the policies to be included in a sale of the viatical portfolio by the conservator. The *Future First* court determined that it was in the best interest of the investors to revoke the irrevocable beneficiary designations to allow the policies to be sold. The similarities between this case and the *Future First* case are compelling.

In both cases, there exists only a very small percentage of the viatical portfolio which includes investors who were named as irrevocable beneficiaries and there does not appear to be any rationale why the investors on these few policies were named as irrevocable beneficiaries, while investors on other policies were not. In both cases, all of the investors had substantially the same investment agreements with the viatical company, (which indicated that the investor was to be named as an irrevocable beneficiary with maturity benefits to be paid directly to the investor by the insurance company; in both cases, this was contrary to what normally occurred). In both cases, the investment agreements also indicated that investors would never have to pay premiums on the policies. Instead, the premiums were to be paid from escrowed premium reserves. However, in both cases, the premium reserves proved to be insufficient to continue to pay the premiums on the policies to maturity and the policies were in danger of lapsing, which would result in a total loss of the investors' investments.

As in this case, the conservator in *Future First* sent to each irrevocable beneficiary investor an election form on whether to include the irrevocable policies in the sale, or have the policy removed from the conservatorship. Approximately 95% of the investors in the *Future First* case responding indicated their preference to have the policies included in the sale.<sup>10</sup>

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<sup>10</sup> In this case, 177 of the 178 investors responding (99%) indicated their preference of including their policy in the sale.

Upon motion by the conservator, the Future First court found that:

5. The vast majority of the Irrevocable Policies include multiple investors who have fractionalized interests in the policies and any attempt to assign these policies back to the investors will be extremely difficult, if not impossible. Furthermore, an attempt to assign these policies back to the investors will most certainly result in some of the investors receiving no return of their original investment.

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10. It is in the best interest of this estate and its creditors and investors to rescind the irrevocable beneficiary designations on the Irrevocable Policies and allow the Conservator to sell the Irrevocable Policies along with the remaining portfolio of policies.

*See* Exhibit "E," Order Rescinding Irrevocable Beneficiary Designations dated August 7, 2003.

In making its ruling, the *Future First* court considered the arguments of the conservator and various interested parties regarding jurisdiction and property interests, if any, the irrevocable beneficiary investors had in the policies. A copy of the brief filed by the Investor Steering Committee is attached hereto as Exhibit "F."

In accordance with the *Future First* ruling, it is in the best interests of the Investors to rescind and revoke the irrevocable beneficiary designations. Such revocation will not be applicable to the sole Investor who affirmatively objected thereto and who has been completely satisfied by the receipt of the Irrevocable Policy abandoned in his favor. Such revocation would be applicable to the 3 remaining 100 Percent Policies, consistent with the unanimous election of all Irrevocable Beneficiary Investors matched to such remaining 100 Percent Policies. Such revocation applicable to the 100 Percent Policies is only necessary as a result of the fact that not all such electing Investors signed the appropriate forms required by the various insurance companies.

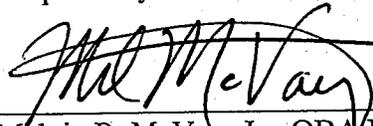
Importantly, the revocation would also be applicable to the Majority Policies. As noted above, all of the Irrevocable Beneficiary Investors with respect to these Majority Policies affirmatively elected to assign their respective Irrevocable Policies to the Conservator to be included in the sale of the Viatical portfolio. The other Irrevocable Beneficiary Investors with respect to the Majority Policies either failed to respond or could not be reached, despite the Conservator's significant efforts and use of all available information in mailing the election forms and trying to contact these Investors. Certainly, there is no realistic probability that the electing Irrevocable Beneficiary Investors would combine and coordinate with those who failed to respond or could not be reached in order to timely pay the premiums or coordinate policy tracking. Instead, the likely result would be that such Majority Policies would lapse, resulting in a total loss to all Irrevocable Beneficiary Investors. In accordance with the *Future First* holding, it would be inequitable to allow the electing Irrevocable Beneficiary Investors matched to the Majority Policies to incur a total loss as a result of the failure of a few Investors to respond or be reached, or to allow Investors holding only a miniscule interest in the Majority Policies to, by their inaction, prevent such electing Investors from sharing in the benefits of the sale.

The revocation should also be applicable to the Prudential Policies. The Investors matched to the Prudential Policies will have notice of this motion and an adequate opportunity to respond. If such Investors do not object, the beneficiary designations with respect to the Prudential Policies should be revoked and vested in the Conservator. This will enable the Conservator to ensure that the premiums will continue to be paid, thereby preventing the Prudential Policies from lapsing and allowing the Prudential Policies to be included in the sale of the portfolio of Viaticals to Infinity pursuant to the Sale Order. Inclusion in the sale will result in such Investors receiving their pro rata share of the sales proceeds pursuant to the Sale Order.

Based upon the preceding and in accordance with the *Future First* ruling, it would be in the Irrevocable Beneficiary Investors' best interest for the Court to enter an order rescinding the irrevocable beneficiary designations on the 3 remaining 100 Percent Policies, the Majority Policies, the Prudential Policies and any other Viaticals hereafter determined to have irrevocable beneficiaries so that such Viaticals can be assigned to the Conservator and included in the sale of the Viatical portfolio.

WHEREFORE, Conservator Tom Moran respectfully moves the Court for an order rescinding the irrevocable beneficiary status on the 3 remaining 100 Percent Policies, the Majority Policies, the Prudential Policy and any other Viaticals hereafter determined to have irrevocable beneficiaries which are part of the Conservatorship Assets for the reasons set forth herein.

Respectfully submitted,

  
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ATTORNEYS FOR CONSERVATOR,  
TOM MORAN

**ANY OBJECTION TO THIS MOTION MUST BE FILED WITH THE COURT CLERK AND A COPY DELIVERED TO JUDGE DANIEL OWENS AT LEAST 5 DAYS PRIOR TO THE HEARING DATE OF THIS MOTION. YOUR FAILURE TO TIMELY RAISE AN OBJECTION TO THIS MOTION MAY RESULT IN THE COURT ENTERING AN ORDER FOR THE RELIEF SOUGHT WITHOUT FURTHER NOTICE OR HEARING.**

CERTIFICATE OF MAILING

The undersigned certifies that on the 23rd day of January, 2004, a true and correct copy of the foregoing Application was sent postage prepaid by first-class mail, to:

Patricia A. Labarthe, Esq.  
Oklahoma Department of Securities  
First National Center, Suite 860  
120 North Robinson  
Oklahoma City, OK 73102  
Attorney for Plaintiff

Dino E. Viera, Esq.  
Fellers, Snider, Blankenship,  
Bailey & Tippens, P.C.  
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Attorney for Defendants,  
Accelerated Benefits Corporation and  
American Title Company of Orlando

and Via Certified Mail, Return Receipt  
Requested to the Addressees listed in the  
Mailing Matrix attached hereto.

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