

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

Oklahoma Department of Securities )  
ex rel., Irving L. Faught, Administrator, )  
)  
Plaintiff, )  
v. )  
)  
Accelerated Benefits Corporation, a Florida )  
corporation, et al., )  
)  
Defendants. )  
)  
v. )  
)  
John A. Fleming and Howard Richey, )  
Individuals )  
)  
Third Party Plaintiffs and )  
Proposed Class Representatives, )  
v. )  
)  
Accelerated Benefits Corporation, a Florida )  
Corporation, )  
)  
Defendant. )

HRG. 3/5/04  
@ 9:00

FILED '02/05/04

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

**PLAINTIFF'S MOTION TO CERTIFY  
THIRD-PARTY PLAINTIFF CLASS AND BRIEF IN SUPPORT**

Individual ABC investors, John A. Fleming and Howard Richey, hereby move the Court, pursuant to 12 O.S. §2023(B)(3), for the following:

1. The entry of an order providing that this action shall be maintained as a class action and certifying the following class:

Persons who contracted with the company, Accelerated Benefits Corporation ("ABC") for the purchase of investments in viatical settlements.

2. The class to be defined as:

Those persons who contracted with ABC during the period from the inception of the corporation to 09/30/00 (or some other date as the court may determine), for the purchase of investments in viatical settlements, which was evidenced by a Purchase Request Agreement through which the purchaser contracts for the right to receive from ABC a sum of money equal to a designated percentage of the death benefits payable from one or more life insurance policies on the life of one or more persons (a "viator") who have a catastrophic or life threatening illness or condition, in exchange for the performance of certain services by ABC (Such individuals so identified as members of the proposed class shall be referred to herein as the "ABC Investors").

3. The designation of John A. Fleming and Howard Ritchie as Third-Party Plaintiffs and representatives of the class (hereafter "Proposed Class Representatives").

4. The entry of an order of the proposed notice, attached hereto as Exhibit "A" and designating that the notice be sent to all the ABC Investors.

Proposed Class Representatives submit this brief in support of their motion for class certification pursuant to 12 O.S. § 2023(B)(3).

#### **STATEMENT OF FACTS IN SUPPORT OF MOTION**

1. ABC is a Florida corporation which offered and sold investments in viatical settlements to the ABC Investors. A viatical settlement contract is a written agreement for the purchase of the life insurance policy of an individual ("viator") by a viatical settlement company such as ABC. Traditionally, the viator is terminally ill and has a life expectancy of only a few years or less. However, some are not terminally ill but may be elderly or have a limited life expectancy.

2. ABC offered and sold interests in the viatical settlements to many investors around the country and internationally. ABC Investors were required to sign a Purchase Request

Agreement with ABC, which appointed ABC to act as agent of ABC Investors in the negotiation and making of viatical settlement agreements. The agreements provided ABC Investors with the right to receive from ABC a sum of money equal to a designated percentage of the death benefits payable from one or more life insurance policies on the life of one or more viator.

3. By the terms of the contract, ABC was to identify, qualify, and purchase, on behalf of the purchaser, death benefits of life insurance policies from viators. ABC Investors had no role in the evaluation of a viator's medical condition or life expectancy or the actual selection of a life insurance policy.

4. The "Purchase Request Agreement" stated that ABC Investors would not incur costs of any type beyond the amount tendered as the policy purchase deposit. However, ABC Investors were later required to make premium payments to prevent the policies from lapsing prior to the viator's death.

5. ABC contracted with the individual brokers to solicit and take orders for the investments. ABC paid commissions, bonuses and overrides to the individual brokers. The brokers acted on behalf of ABC to effect the offer and sale of investment opportunities to the ABC Investors.

6. ABC was responsible for: (a) holding investor funds in an escrow account; requiring the viator to sign a waiver of confidentiality for the viator's medical records; (b) reviewing the viator's medical history and medical records; (c) determining if the viator was of sound mind; (d) estimating the life expectancy of the viator; (e) determining the rating of the issuing insurance company; (f) determining the contestibility of the life insurance policy; (g) purchasing the policy of the viator; (h) assuming responsibility for payment of premiums on the life insurance policy for a specified period of time; (i) tracking the health status of the viator; (j)

filing the death benefits claim when the viator died; (k) collecting the death benefits from the insurance company; and (l) distributing the life insurance proceeds to the ABC Investors.

7. The sale of investments to ABC Investors was made with the use of promotional literature, newspaper advertisements and oral and written communications that contained untrue statements of material facts. The materials encouraged ABC Investors to compare the purchase of an investment opportunity with ABC with other types of investments, such as stocks, bonds, or mutual funds, in terms of risk and expected profit.

8. ABC through its agents made the following misstatements in connection with their offers and sales of investments: (a) that ABC offered and sold "No Risk Insured" investments in viatical settlements when in fact ABC did not; (b) that the return on the investments was tax free when in fact the return was not tax free; and (c) that the investments are "the perfect, no risk investment" with "Quick profit, guaranteed" when in fact there were risks associated with the investments and quick profits could not be guaranteed.

9. The misstated facts were material to the investment decisions of ABC Investors. ABC further misrepresented that ABC Investors would "be named as absolute, irrevocable, non transferable and direct beneficiary on all Policies Purchased" when in fact they were not; American Title was named as the beneficiary.

10. ABC stated, in correspondence with certain ABC Investors that: the return on the investment was "GUARANTEED" when in fact it was not; and the "the ownership and beneficial rights for [life insurance policies] have been secured FOR the BENEFIT OF (F.B.O.) all purchasers . . ." when, in fact, such designations were never made; ABC stated in sales literature distributed to ABC agents and ABC Investors: (a) that viatical settlements are "fully-backed" when in fact there was no securitization, other form of collateralization or any ownership

interest to support the investments; and (b) that "policy(ies) are purchased directly from the viator(s) by the Purchasers . . ." when in fact the ABC Investors did not purchase the viators' insurance policies.

11. All of these misstated facts were material to the investment decisions of ABC Investors.

12. ABC omitted to state the following facts necessary to make the statements that were made not misleading: (a) that any coverage provided by the Insurance Guarantee Fund referred to in the Purchase Request Agreement does not apply to life insurance policies, but only to property and casualty insurance policies; (b) that the guaranteed payment of premiums referenced in the Purchase Request Agreement is limited to the amount of funds from the purchase of investments that is set aside according to a predetermined formula of one and one half times the life expectancy of the viator; (c) an explanation of how ABC Investors returns are calculated and in what sense the returns are guaranteed; and (d) the impact on the ABC Investors rate of return if premium payments are not maintained or if the viator lives beyond his estimated life expectancy.

13. The facts that were omitted were material to the investment decisions of ABC Investors.

14. American Title Company of Orlando, Florida, (hereinafter "American Title") acted as an escrow company on behalf of and at the direction of ABC. American Title received and held funds from the purchase of the investments. Each of the ABC Investors remitted a check to ABC, payable to American Title, for the full amount of the investment. ABC deposited the checks into a bank account in the name of American Title.

15. Upon the death of the viator, ABC was to (a) receive notice of death and notify the purchasers of the investment to which the viator's policy was matched; and (b) obtain a copy of the death certificate and forward same to American Title for filing of the death claim. American Title would then receive the death benefit from the insurance carrier.

16. ABC documented to American Title the names of the purchasers of the investment to receive checks and the amounts of the checks. ABC directed American Title to issue checks made payable to purchasers of the investment in the amounts designated by ABC. American Title delivered checks directly to ABC, who would send them to the purchasers of the investment. Upon notifying purchasers of the viator's death, ABC routinely provided purchasers the opportunity to reinvest their proceeds in another investment opportunity.

17. Participation by ABC Investors was limited to executing the Purchase Request Agreement and designating a life expectancy range for the viator with the stated return, and provided funds for the right to receive a sum of money equal to a designated percentage of the death benefits payable from one or more life insurance policies on the life of one or more viators.

18. The ABC Investors did not obtain ownership of the life insurance policies of the viators as promised.

19. The ABC Investors were not named as beneficiaries on the life insurance policies of the viators and had no access to, or opportunity to, review the medical records or insurance policies of the victors.

20. ABC's efforts affected the success or failure of the investment opportunities. ABC had the expertise, knowledge or ability to perform such efforts; the ABC Investors did not.

21. The various risks associated with the investments, included but were not limited to the following: (a) that the viator could live longer than the estimated life expectancy; (b) that

the insurer could become insolvent before the death benefit is paid and the purchaser of the investment could lose all or a portion of his or her investment funds; and (c) that the purchaser's annualized return could be significantly reduced if ABC failed to properly evaluate the viator's health and insurance policy.

22. ABC marketed itself as a reputable company operating under the highest of standards. ABC engaged in acts, practices, or a course of business that operated as a fraud or deceit upon ABC Investors.

23. The Oklahoma Department of Securities filed suit against ABC and the individual Defendants herein for offering and selling securities in violation of the Oklahoma Securities Act and for fraud in connection with the sale of the investments. Judgment was entered against ABC on March 13, 2001, for violation of the Oklahoma Securities Act and fraud. A conservator was appointed on February 6, 2002, and the assets were transferred to the conservatorship. The assets of the conservatorship were sold for much less than their face value.

24. This reduction in value represents a substantial monetary loss for the ABC Investors, as a result of the actions of ABC.

## **ARGUMENT AND AUTHORITIES**

### **I. Certification of the Class is Appropriate under Oklahoma Class Action Statutes**

The requirements that must be met before a proposed class can be certified are set forth in 12 O.S. § 2023(A). As the Oklahoma class certification statute was derived from its federal counterpart, in determining whether the requirements have been met, the Court may look to federal authority. *Black Hawk Oil Co. v. Exxon Corp.*, 1980 OK 70 ¶ 11, 969 P.2d 337 (Okla.). For the reasons which follow, all of the requirements for class certification have been satisfied, and the proposed third-party plaintiff class should be certified.

**A. Numerosity**

12 O.S. § 2023(A)(1) requires the “class be so numerous that that joinder of all members be impracticable.” There can be no dispute herein that the joinder of all class members as parties would be impracticable. The plaintiff class consists of over 4000 purchasers of investments in viatical settlement contracts from ABC. The members of the proposed class reside in States across the United States and international. Joinder of thousands of individual plaintiffs would be impracticable. *Shores v. First City Bank Corp.*, 1984 OK 67, ¶7, 689 P.2d 299; *see also* 3B MOORE'S FEDERAL PRACTICE, ¶23.05[1] at 23-151 through 23-155 (2d Ed. 1980), and cases cited therein. When the size of the class is in the hundreds, the numerosity requirement is satisfied on numbers alone. *Black Hawk Oil Co. v. Exxon Corp.*, *supra*. Herein, the potential class numbers in the thousands. Based upon the number of potential class members and the impracticality of joining them in the litigation, ABC Investors submit that the numerosity requirement of 12 O.S. § 2023(A)(1) is satisfied.

**B. Common Questions of Law and Fact**

12 O.S. § 2023(A)(2) requires that there be "questions of law and fact common to the class." Proposed Class Representatives are not required to establish that the factual and legal questions in common predominate, but rather must merely establish whether questions exist at all. *Adamson v. Bowen*, 855 F.2d 668, 676 (10<sup>th</sup> Cir. 1988). Herein, all ABC Investors purchased investments in viatical settlement contracts from ABC. All ABC Investors relied upon the misrepresentations and omissions made by ABC and the individual Defendants in making their decisions to invest in the contracts. All ABC Investors lost the majority of their investments. Accordingly, the commonality requirement of 12 O.S. § 2023(A)(2) is satisfied herein.

### **C. Typicality**

The authorities on the typicality requirement of Fed.R.Civ.P. 23(a)(3), from which its identical Oklahoma counterpart (12 O.S. § 2023(A)(3)) has been derived, have given it a liberal construction, holding that, at most, it requires merely that there be no express conflict between the representative party and the class "over the very issue in litigation" and that the representative party have "interest not antagonistic to the class." *Mersay v. First Republic Corp.*, 43 F.R.D. 465, 468-69 (S.D.N.Y. 1968); *Weiss v. Tenney Corp.*, 47 F.R.D. 283, 290 (S.D.N.Y. 1969). Moreover, to be "typical" the ABC Investors' claims or defenses need not be identical to those of other class members but need only be "similar enough to permit the court to conclude the absent members' claims [or defenses] will be fully presented." *Cohen v. Uniroyal, Inc.*, 77 F.R.D. 685, 691 (E.D. Pa. 1977). As long as the central proof of the claims or defenses of the representative and the absent class members is coextensive, courts have tolerated wide factual variances in their respective positions. *Sley v. Jamaica Water and Util., Inc.*, 77 F.R.D. 391, 394 (E.D. Pa. 1977).

Herein, the Proposed Class Representatives possess the same interests and have suffered the same injuries as the class of ABC Investors. All were defrauded by ABC and the individual Defendants into purchasing the viatical settlement contracts. All have lost a significant amount of their investments. Accordingly, the typicality requirement is satisfied.

### **D. Fair Representation**

Adequate representation depends on two factors: (a) the class representative's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the class representative must not have interests antagonistic to those of the class. *Eisen v. Carlisle*, 391 F.2d 555, 562 (2d Cir. 1968).

Both factors have been met here. The ABC Investors are represented by attorneys Jon McLanahan, Shannon Davies and Juliana Reimer of the firm Lester, Loving & Davies. Counsel is experienced in insurance matters, securities and class action litigation.

Further the class members are not in conflict with the Proposed Class Representatives. The Proposed Class Representatives have employed counsel experienced in the areas of insurance, securities and class action litigation. The size of the class can be handled adequately by the resources of the law firm, Lester, Loving & Davies.

**E. The Questions of Law and Fact Common to the Members of Each Class Predominate Over Any Questions Affecting Only Individual Members**

In order to meet the first requirement of 12 O.S. § 2023(B)(3), the class representative need not show that there are no questions that affect only individual members of each class; they need only show that the common questions are the predominant ones in the action. The common issues need not be dispositive of the entire litigation. The fact that questions peculiar to each individual member of the class may remain after the common questions have been resolved does not dictate the conclusion that a class action is not permissible. *Dolgow v. Anderson*, 43 F.R.D. 472, 490 (E.D.N.Y. 1968).

Herein, all ABC Investors purchased investments in viatical settlement contracts from ABC and relied upon the misrepresentations and omissions made by ABC and the individual Defendants in making their decisions to invest and suffered the loss of a majority of their investment.

**F. A Class Action is Superior to Other Available Methods for the Fair and Efficient Adjudication of this Controversy**

A class action is superior to other available methods for the fair and efficient adjudication of a controversy involving large numbers of investors injured by securities laws violations. In the instant action, individual class members have no particular interest in prosecuting separate actions.

In addition, since the class is readily identifiable, there should be no difficulty in managing the class action. Accordingly, the superiority requirement is satisfied.

## **II. Notice to Class Members**

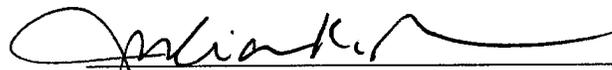
Since the present action is maintained under 12 O.S. § 2023(B)(3), this Court must direct that individual notice be mailed to all identifiable class members. Although notice is not necessary to direct individual notice to more than five hundred members, 12 O.S. §2023(C)(2), the present number of class members is not so onerous as to preclude actual notice to each member

Notice to those members of the class who do not receive individual notice may be made in such a manner as this Court shall direct. 12 O.S. § 2023(C)(2). Such notice may include publishing notice in newspapers, magazines, trade journals or other publications, posting it in the appropriate places or taking other steps that are reasonably calculated to bring the notice to the attention of the class members, provided that the cost of giving such notice is reasonable in view of the amounts that may be recovered by the class members who are notified. 12 O.S. § 2023(C)(2).

## **CONCLUSION**

For the foregoing reasons, the Proposed Class Representatives move for an order certifying the proposed plaintiff class, defining the class, designating Proposed Class Representatives as the representatives for the class of individuals defined by this Court, and approving and directing notice to class members.

Respectfully submitted,



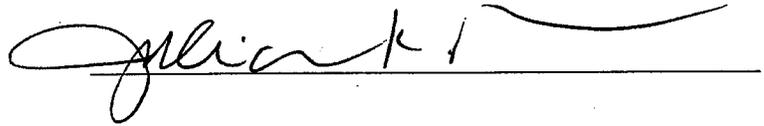
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Jon McLanahan, OBA #12777  
Shannon F. Davies, OBA #13565  
Juliana K. Reimer, OBA #16153  
Lester, Loving & Davies, P.C.  
1701 S. Kelly Avenue  
Edmond, Oklahoma 73013

Telephone: (405) 844-9900  
Facsimile: (405) 844-9958  
Attorneys Proposed Class Representatives

**CERTIFICATE OF MAILING**

I hereby certify that on the 5 day of February, 2004, a true and correct copy of the above and foregoing was mailed by United States mail, postage prepaid, to all parties of record.

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

**IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA**

Oklahoma Department of Securities )  
ex rel. Irving L. Faught, Administrator, )  
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Plaintiff, )  
v. )  
Accelerated Benefits Corporation, a Florida )  
corporation, et al., )  
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Defendants. )  
 )  
v. )  
Howard Richey, )  
 )  
Third Party Plaintiff and Class )  
Representative )  
v. )  
Accelerated Benefits Corporation, a Florida )  
Corporation, )  
 )  
Defendant )

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

**NOTICE OF PENDENCY OF CLASS ACTION**

TO: ALL PERSONS WHO contracted with Accelerated Benefits Corporation ("ABC")  
for the purchase of investments in viatical settlements.

**PLEASE READ THIS NOTICE CAREFULLY**

Pursuant to 12 O.S. §2023, Oklahoma Statutes, and pursuant to an order of the District  
Court of the State of Oklahoma for the County of Oklahoma, dated, \_\_\_\_\_,  
2004, YOU ARE NOTIFIED AS FOLLOWS:

1. The above-captioned civil action is now pending in the District Court of Oklahoma  
for Oklahoma County (the "Court").

2. This is an action (the "Action") for breach of contract and fraud.

### **THE PARTIES AND THE NATURE OF THE ACTION**

3. This notice is not intended to be, and should not be construed as, an expression of any opinion by the Court with respect to the merits of the allegations in the petition. This notice is merely to advise you of the pendency of the action and of your rights with respect to it.

4. The plaintiff in this lawsuit is the Oklahoma Department of Securities. The Defendant is Accelerated Benefits Corporation. The Third-party Plaintiff and class representatives are John Fleming and Howard Richey.

5. Briefly, the Third Party Plaintiff alleges that ABC committed fraud and breach of contract when they induced individuals to enter into investments in viatical settlements. These individual investors entered into a Purchase Request Agreement with ABC which supposedly gave them the right to receive from ABC a sum of money equal to a designated percentage of the death benefits payable from one or more life insurance policies on the life of one or more persons (a "viator") who had a catastrophic or life threatening illness or condition, in exchange for the performance of certain services by ABC. Among other things, the Purchase Agreement stated investors would not incur costs of any type beyond the amount of the original policy purchase deposit. However, investors were later required to make premium payments to prevent the policies from lapsing prior to the Viator's death. The sale of investments was made with the use of promotional literature, newspaper advertisements and oral and written communications that contained untrue statements of material facts. The materials encouraged investors to compare the purchase of an investment opportunity with ABC with other types of investments, such as stocks, bonds, or mutual funds, in terms of risk and expected profit. ABC through its agents made misstatements in connection with their offers and sales of investments and omitted certain

information. The misrepresentations, included but were not limited to promises that the investments were risk free and tax free. The misrepresentations and omissions were relied upon by the investors in making the decision to purchase the investments. The Oklahoma Department of Securities filed suit against ABC and the individual defendants herein for offering and selling securities in violation of the Oklahoma Securities Act, and for fraud in connection with the sale of the investments. Judgment was entered against ABC on March 13, 2001, for violation of the Oklahoma Securities Act and fraud. A conservator was appointed on February 6, 2002 and the assets were transferred to the conservatorship. The assets of the conservatorship were sold for a value much less (as much as fifty percent less) than the face amount of the investment viaticals. Third Party Plaintiffs seek damages for breach of contract and fraud.

6. The Defendant has denied the Third Party Plaintiff's allegations.

7. This description of the claims and defenses is general and does not purport to cover all of the claims and contentions of the parties. For a more detailed statement of the matters involved in this action, please refer to the pleadings and to the other papers filed in this action, Civil No. CJ-99-2500-66, which may be inspected at the office of the clerk of the District Court for Oklahoma County, Oklahoma.

**CLASS ACTION DETERMINATION  
AND RIGHTS OF CLASS MEMBERS**

8. By order dated \_\_\_\_\_, 2004, and pursuant to 12 O.S. §2023, Oklahoma Statutes, the Court determined that this action may be maintained as a plaintiff class action on behalf of:

Those persons who contracted with ABC during the period from the inception of the corporation to 09/30/00 (or some other date as the court may determine), for the purchase of investments in viatical settlements, which was evidenced by a Purchase Request Agreement through which the purchaser contracts for the right to receive from ABC a sum of money equal

to a designated percentage of the death benefits payable from one or more life insurance policies on the life of one or more persons (a "viator") who have a catastrophic or life threatening illness or condition, in exchange for the performance of certain services by ABC (Such individuals so identified as members of the proposed class shall be referred to herein as the "ABC Investors").

9. If you contracted with ABC for the purchase of investments in viatical settlements, from the date of inception of the corporation through September 30, 2002, you will be deemed to be a member of the class unless you request to be excluded. You may request that the Court exclude you from the class by filling out the enclosed Request for Exclusion and mailing it to the Clerk of the Court at the address given in the Request for Exclusion form. To be effective, a Request for Exclusion must be postmarked on or before midnight, \_\_\_\_\_, 2004. If you request exclusion, you will not be entitled to share in the benefits of any judgment favorable to plaintiff and the class, nor will you be bound by any judgment adverse to plaintiff and the class.

10. If you do not request exclusion, you will be bound by any judgment rendered in this action, whether favorable or unfavorable to plaintiff and the class. Thus, if you wish to remain in the class and to participate in any settlement or judgment, you need not do anything.

11. If you do not request exclusion from the class, you may if you so desire enter an appearance through legal counsel of your choice. Any such appearances must be filed with the Court on or before, \_\_\_\_\_, 2004.

12. If you do not exclude yourself as described in paragraph 9 above and do not appear through your own counsel, your interest will be represented by Third-Party Plaintiffs and their counsel, as counsel for the class. Third-Party Plaintiffs' counsel are Jon McLanahan, Shannon F. Davies, and Juliana K. Reimer, and the law firm of Lester, Loving & Davies.

13. If you remain in the class, you will not have to pay any of the cost of litigation, except, to the extent that any recovery is obtained on behalf of the class, your share of the recovery

will be assessed on a pro rata basis to cover the necessary and reasonable cost of this action, including such counsel fees as may be approved by the Court. If there is a recovery, you will be required to establish your membership in the class and the amount of your damages in such manner as the Court may direct.

**FURTHER INQUIRIES**

14. All inquiries (other than request for exclusion from the class) regarding the action should be addressed, in writing, to the following named attorneys for the plaintiff class representative, at the following address:

Jon McLanahan, Esq.  
Shannon F. Davies, Esq.  
Juliana K. Reimer, Esq.  
Lester, Loving & Davies, P.C.  
1701 S. Kelly Avenue  
Edmond, OK 73013  
Telephone: (405) 844-9900  
Facsimile: (405) 844-9958  
Attorneys for Third-Party Plaintiffs

DATED this \_\_\_\_ day of \_\_\_\_\_, 2004.

\_\_\_\_\_  
Judge of the District Court

APPROVED:

\_\_\_\_\_  
Attorney for Plaintiff

\_\_\_\_\_  
Attorney for Defendant

\_\_\_\_\_  
Attorney for Third-Party Plaintiffs