

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

LAWYERS TITLE INSURANCE CORP.

V.

CIVIL ACTION NO. 1:09-170-JMR

**PRESTIGE TITLE, INC.,ADVANCED TITLE
& ESCROW, LLC, TITLE 1, INC., PRESTIGE
TITLE OF ALABAMA, LLC, STEPHEN R. COLSON,
TED A. MARTIN AND JOHN DOES # 1-10**

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

Movants, A&O Bonded Life Assets Management, LLC, et al. (hereafter “Movants”)¹ submit this Memorandum in Support of Motion to Intervene, pursuant to Fed. R. Civ. P. 24, and state:

I. INTRODUCTION

Movants are the beneficial owners of certain life insurance policies (the “Policies”) insuring the lives of various individuals. As the Policies mature, Movants distribute the funds realized from the relevant policies to numerous individual investors. Movants purchased all of the Policies as investments from brokers or other third parties who, in turn, had purchased the policies from individual policyholders. This arrangement is known as a “viatical” or “life settlement.”

¹ The Movants herein are: A&O Bonded Life Assets Management, LLC; A&O Bonded Life Assets, LLC; A&O Bonded Life Settlements Management, LLC; A&O Bonded Life Settlements, LLC; A&O Capital Management, LLC ; A&O Capital Management, LLC; A&O Life Fund Management, LLC; A&O Life Fund, LLC; A&O Life Funds Management, LLC; A&O Life Funds, LLC; A&O Resource Management, Ltd.; Houston Tanglewood Partners, LLC; Life Fund 5.1 Management, LLC; Life Fund 5.1, LLC; Life Fund 5.2 Management, LLC; and Life Fund 5.2, LLC, all of which have a direct, substantial and legally cognizable interests in the subject matter of the instant suit.

Viatical settlements typically involve a terminally or chronically ill person selling his or her life insurance policy to an investor in return for an up-front, lump-sum payment. The investor takes over payment of premiums on the policy and is named beneficiary of the policy upon the death of the insured. Although the process can initially seem morbid, it is often a rational transaction for ill people, providing them with funds to pay medical expenses and other debts. Such settlements may also be entered into by generally-healthy senior citizens who, for one or another reason, wish to access their life insurance proceeds during their lifetimes. Viatical or life settlements are purely financial transactions between two parties which are intended to meet a need for the seller and produce a reasonable profit for the buyer or investor.

In 1989, there were only three investment companies specializing in meeting the financial needs of seniors and the terminally ill through viatical settlements. Today, there are over fifty such entities, and viatical settlements comprise a billion-dollar industry. Movants herein are included within that group. As set forth below, however, Movants' ability to continue the Policies in force depends on their ability to intervene in this action and protect their interests in the policy premium funds that Movants deposited with Prestige Title and related entities.

II. BACKGROUND

For the Movants' Policies to remain in full force until maturity, periodic premiums must be paid on the Policies. In order to ensure proper and timely payment of Policy premiums for the benefit of their investors, Movants entered into an Escrow Management Services Agreement (the "Agreement") with Prestige Title on February 15, 2008. See Exhibit A.

Under the terms of the Agreement, Prestige Title acted as escrow agent for the Movants and accepted deposits of funds from Movants, from which funds Prestige Title agreed to pay premiums

on the Policies as they came due, and to discharge other duties in connection with the Policies for a period of six (6) years. In exchange, Prestige Title was paid a flat fee One Hundred Fifty Thousand Dollars (\$150,000.00), and was required to increase to Ten Million Dollars (\$10,000,000.00) its “errors and omissions” insurance and its “officers and directors” insurance during the term of the Agreement. See Exhibit A.

In accordance with the Agreement, on February 29, 2008, Movants deposited Four Million Six Hundred Thousand Dollars (**\$4,600,000.00**) with Prestige Title as escrow agent for Movants.² See Exhibit B. These funds were for the purpose of paying premiums on the Policies as they came due. Pursuant to the Agreement, these funds were to be deposited by Prestige Title in separate, federally insured interest-bearing accounts for the purpose of paying premiums on the Policies. See Agreement, Exhibit A, page 1. The funds were received and verified by an independent accounting firm as of March 31, 2008. See Exhibit C. During calendar year 2008, Movants continued to have periodic audits conducted by an independent accounting firm to assure that required premiums were being paid as agreed on all policies audited. See Exhibit C.

However, in late February 2009, Movants were alerted to potential irregularities in Prestige Title’s handling of the funds under the Agreement, Movants subsequently began inquiries to assure the Agreement was being properly performed, that all Policies remained in force, and that all Policy premiums were being paid when due. In the course of their investigation, Movants discovered that the instant suit had been filed against Prestige Title and others, and that the funds Movants had deposited with Prestige Title had been sequestered by this Court. Further, Movants discovered that

² The Complaint incorrectly alleges that only Three Million Six Hundred Thousand Dollars (\$3,600,000.00) was deposited with Prestige Title. Compare Complaint paragraph 30 with Exhibit B attached hereto.

premiums for several of its Policies had not been paid when due, and said Policies were in immediate danger of lapsing. As an emergency measure, some of the former principals arranged to lend their own personal funds to the Movants in order to address the policies that were (at that time) most imminently in danger of lapsing. However, other policy premiums continue to come due.

Currently, there are fifty-seven (57) active policies with a total payout value of **One Hundred Seventy-nine Million Twenty-Five Thousand Dollars (\$179,025,000.00)**. See Exhibit D. Of these fifty-seven policies, at least ten (10) policies with a total payout value of **Twenty-nine Million Dollars (\$29,000,000.00)** are in imminent danger of lapsing unless the respective premium payments are timely made. See Exhibit E; see also Affidavit of Russell Mackert, Exhibit F.³

Despite amicable demand, Prestige Title has failed and refused to either pay the premiums that are due or to return to the Movants the balance of the funds initially deposited with Prestige Title as escrow agents for the Movants, which balance totals approximately \$3 million. Movants are therefore entitled to the return of all funds deposited with Prestige Title that have not been properly disbursed according to the Agreement. Moreover, in the interim Movants are in dire need of obtaining release of a portion of the funds in order to avoid lapse of some of the policies and the concomitant loss of the face value of those policies.

Pursuant to Fed. R. Civ. Proc. 24(a)(2), therefore, Movants submit that they have a direct, substantial, legally cognizable interest in the instant proceedings, that disposition of this matter without the Movants' intervention will impair the Movants' ability to protect those interests, and that the Movants' interests will not be adequately protected by any of the parties currently involved in

³ Several of the policies have technically lapsed, but are currently in a "grace period" during which they may be re-activated by payment of the premiums due.

this suit. Accordingly, Movants should be allowed to intervene as plaintiffs in the pending matter in order to adequately protect said interests. Alternatively, Movants should be allowed permission to intervene pursuant to Fed. R. Civ. P. 24(b)(1)(B).

III. ARGUMENT

Federal Rule of Civil Procedure 24 provides:

(a) **Intervention of Right.** On timely motion, the court must permit anyone to intervene who:

...

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention

(1) In General. On timely motion, the court may permit anyone to intervene who:

...

(B) has a claim or defense that shares with the main action a common question of law or fact.

Intervention under Fed. R. Civ. P. 24 is intended to “foster economy of judicial administration and to protect non-parties from having their interests adversely affected by litigation and to protect non-parties from having their interests adversely affected by litigation conducted without their participation.” Stallworth v. Monsanto Co., 558 F.2d 257, 265 (5th Cir. 1977). Intervention should generally be allowed where no party would be prejudiced and greater justice may be attained. Ross v. Marshall, 426 F.3d 745, 753 (5th Cir. 2005). For the reasons set forth below,

Movants submit they are entitled to intervene as of right under Rule 24(a)(2). Alternatively, in the event the Court finds that Movants are not entitled to intervene as of right, Movants submit that the ends of justice and judicial efficiency dictate they should be permitted to intervene under Rule 24(b)(1)(B).

A. Movants are Entitled to Intervene as of Right:

Pursuant to Rule 24 (a)(2), any party “must” be permitted to intervene in an ongoing action if four requirements are met: (a) the applicant files a timely application; (a) the applicant claims an interest relating to the property or transaction that is the subject of the ongoing action, (3) the applicant is so situated that the disposition of the action in his absence may impair or impede his ability to protect that interest, and (4) the applicant’s interest is not adequately represented by existing parties. Fed. R. Civ. P. 24(a)(2); New Orleans Public Service, Inc. v. United Gas Pipeline Co., 732 F.2d 452, 463 (5th Cir. 1984). Movants meet each of these requirements.

1. Movants’ Motion to Intervene is Timely

In determining whether an applicant’s motion to intervene is timely, courts consider (1) the length of time the intervenor knew or should have known of his interest in the case; (2) any prejudice to the existing parties resulting from the intervenor’s failure to apply for intervention sooner; (3) any prejudice to the intervenor if its application is denied; and (4) the existence of unusual circumstances. Stallworth, 558 F.2d at 264-66; Hodges, Grant & Kaufman v. United States, 762 F.2d 1299, 1302-03 (5th Cir. 1985).

Movants’ motion to intervene is timely. Suit was filed just a few weeks ago on February 13, 2009. Movants (not being parties) did not learn of the suit’s existence until early March 2009. Moreover, the case is still at the pleading stage. Although some written discovery has been

propounded, the docket does not appear to reflect that any discovery has yet been answered and no scheduling order or trial date has been set by this Court. Movants' entry into this case will not cause any delay or prejudice the rights of any of the parties. To the contrary, to deny intervention would deprive Movants of the opportunity to exercise their "legal rights associated with formal intervention, namely the briefing of issues, presentation of evidence and the ability to appeal." Edwards v. City of Harahan, 78 F.3d 983, 1003 (5th Cir. 1996).

2. Movants Have Direct, Substantial Interests In This Action

"The interest 'test' is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." Ross v. Marchall, 426 F.3d at 757. This case involves claims by plaintiff Lawyers Title to funds which were in the Defendants' possession. The Complaint filed by Lawyers Title admits that some of the funds in question were deposited with the Defendants by Movants herein. See Complaint, Record Document 1, at paragraph 30. Movants have also submitted wire transfer authorizations confirming the receipt and deposit of the funds. See Exhibit B. Without question, therefore, Movants have direct, substantial, and legally protectable interests in this case.

3. Movants' Interests Will Be Impaired By The Disposition Of The Action In Their Absence

Movants have the exclusive rights to certain funds at issue based on deposits made by Movants with defendant Prestige Title. See Exhibit B. Plaintiff Lawyers Title has a competing claim to the funds which is adverse to the Movants' claims. Thus, the disposition of this action in Movants' absence would impair or impede Movants' ability to protect their interests. If Movants are not allowed to protect their interests and the interests of their investors in the sequestered funds,

the Court may declare that Plaintiff Lawyers Title has exclusive rights in these funds. As such, the second requirement for intervention under Rule 24(a)(2) is met, and Movants should be allowed to participate in the discovery and trial of this case so that their interests and the interests of their investors are adequately represented. See, e.g., Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 528 (9th Cir. 1983) (finding intervention of right where original parties' claims are adverse to intervenor).

4. Movants' Interests Are Not Already Represented by Existing Parties

Movants' burden to show that its interests are not adequately represented is "minimal" and is satisfied if Movants establish that representation of its interests "may be" inadequate. Haspel & Davis Milling & Planting Co. Ltd. v. Board of Levee Commissioners of the Orleans Levee Dist. and State of Louisiana, 493 F.3d 570, 578 (5th Cir. 2007).

In paragraph 30 of its Complaint, Lawyers Title acknowledges that "the Funding Accounts received a Three Million Six Hundred Thousand Dollar (\$3,600,000.00) and No/100 deposit intended for another account maintained by Colson, which upon information and belief was intended to hold viatical insurance product premiums." See Complaint, Record Document 1, at paragraph 30. Movants affirmatively state that not only did they deposit the \$3.6 million acknowledged by Lawyers Title in its Complaint, they actually deposited a total of \$4.6 million. See Exhibit B.

Movants are the only entities having a legal right to the \$4.6 million in funds Movants deposited with defendant Prestige Title. Plaintiff's complaint alleges an adverse, competing claim to the funds sequestered by the Court. If Movants are not allowed to intervene, then plaintiff Lawyers Title or other parties may stake a claim to such funds and the Court may award Lawyers Title rights to these monies instead of to the Movants. Accordingly, the final requirement for intervention of right is met, and Movants' request for leave to intervene of right in this action should

be granted.¹

B. Movants Also Meet The Requirements For Permissive Intervention.

Even if the Court determines that Movants are not entitled to intervene in this case as a matter of right, the Court should grant Movants permission to intervene. Pursuant to rule 24(b)(1)(B), a party may, in the court's discretion, be permitted to intervene in an ongoing action if that party has a claim or defense which presents a question of law or fact in common with the ongoing action. The applicant must also show that its interests will not be adequately represented unless it is permitted to intervene. League of United Latin American Citizens, Council No. 4434 v. Clements, 884 F.2d 185, 189 (5th Cir. 1989). Movants meet both of these requirements.

Movants' claim to the funds it deposited with Prestige Title is certainly a question of law or fact in common with the ongoing action, since Lawyers Title also claims an interest in the funds sequestered by the Court. Additionally, for the reasons set forth above, Movants' interests in this matter will not be adequately represented by any existing party to this action. Therefore, in the event the Court determines that Movants cannot intervene as of right under Rule 24(a)(2), they should nevertheless be permitted to intervene pursuant to Rule 24(b)(2).

¹ In addition to meeting the requirements for intervention of right in Fed R. Civ. P. 24(a), Movants are also a "required party under Fed. R. Civ. P. 19(a). Movants' interests in the subject matter of this action and their ability to protect these interests will be impaired if they are not permitted to intervene. Rule 19(a)(1) mandates that, where a person "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may (I) as a practical matter impair or impede his ability to protect that interest..." the person must be joined as a party. Thus, not only are Movants entitled to intervene in this action under Rule 24, but Rule 19 also instructs that Movants must be made a party.

IV. CONCLUSION

As demonstrated above, Movants have met all of the requirements for intervention as of right and for permissive intervention. Pursuant to Fed. R. Civ. P. 24, Movants respectfully request that they be allowed to intervene as of right or, alternatively, permissively, in order to protect their interests in this matter.

Respectfully submitted this the 4th day of May, 2009.

Respectfully submitted:

/s/ Donald C. Dornan

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Life Fund 5.1 Management, LLC
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Life Fund 5.2 Management, LLC
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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 5th day of May, 2009 served a copy of the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to counsel for all parties.

/s/ John M. Herke _____

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