

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

SANDRA RYAN PARENT and WILLIE)	
E. RYAN, JR., on behalf of)	
themselves and all others)	
similarly situated,)	No. <u>06-2612</u> M1/P
)	
Plaintiffs,)	Consolidated with:
)	No. <u>06-2617</u> M1/P
v.)	No. <u>06-2619</u> M1/P
)	No. <u>07-2003</u> M1/P
TENNESSEE CEMETERIES, INC., et)	
al.)	
)	
Defendants.)	

ORDER GRANTING RECEIVER'S MOTION FOR STAY OF PROCEEDINGS

Before the court, by order of reference, is the Motion for Stay of Proceedings filed by Max Shelton, Esq., the receiver appointed by the Chancery Court of Tennessee for defendant Forest Hill Funeral Home and Memorial Park-East, LLC (the "Receiver"), on April 10, 2007 (D.E. 102). The plaintiffs filed a response in opposition to this motion on April 30, 2007. On that same day, defendants Forethought Federal Savings Bank and Forethought Life Insurance Company filed a response stating that they joined in the Receiver's motion to stay. With leave of court, the Receiver filed a reply on May 16, 2007. On July 12, 2007, the court held a hearing on the motion. Counsel for all parties were present and heard, and at the conclusion of the hearing, the court took the

matter under advisement.

On July 19, 2007, the court entered an order Permitting Parties and Receiver to File Supplemental Memoranda of Law on Receiver's Motion to Stay. On July 27, 2007, the plaintiffs filed their Supplemental Memorandum in Opposition to Receiver's Motion to Stay Proceedings, and the Receiver filed a Supplemental Brief in Support of Receiver's Motion to Stay Proceedings and a Second Supplemental Declaration of Max Shelton. In addition, with leave of court, the State of Tennessee filed a Brief Amicus Curiae With Respect to the Motion for Stay of Proceedings.

Based on the entire record in this case, and for the reasons below, the motion to stay is granted.¹

I. BACKGROUND

A. The Federal Complaints

The consolidated class actions before the court arise from the activities of Forest Hill Funeral Home and Memorial Park, LLC ("Forest Hill"), a limited liability company formed in Tennessee, consisting of three cemeteries, three funeral homes, and three mausoleums located in Memphis, Tennessee, and four cemeteries

¹Because the Receiver does not seek dismissal of the federal action, but rather only asks this court to temporarily stay this litigation until the conclusion of the Receiver's state action, the court enters this order pursuant to 28 U.S.C. § 636(b)(1)(A). See Adrian Energy Assocs. v. Michigan Public Service Commission, 481 F.3d 414, 424-25 (6th Cir. 2007); Bates v. Van Buren Township, 122 Fed. Appx. 803, 808 (6th Cir. 2004) (unpublished); Frame Engineering Co., Inc. v. Citadel Corp., No. 1:92-CV-393, 1993 WL 186562, at *3-4 (W.D. Mich. May 20, 1993) (unpublished).

located in Arkansas. As part of its business, Forest Hill sold pre-need funeral and burial policies, and approximately 13,500 individuals held or currently hold such policies.

Funeral homes are a highly regulated business in Tennessee, and in October 2005, the Tennessee Department of Commerce and Insurance ("TDCI") began a routine audit of Forest Hill's trust assets. Investigators found that Forest Hill had lost a significant amount of its assets through risky investments, and in July 2006, Forest Hill announced that it could no longer afford to honor the policies it had sold. In August 2006, the TDCI issued a report detailing the financial mismanagement at Forest Hill, and in December 2006, the TDCI issued an order of conditional suspension of Forest Hill's operations.

The first of the four cases before the court was filed in this district on September 16, 2006, by plaintiffs Sandra Ryan Parent and Willie E. Ryan, Jr., on behalf of all purchasers of pre-need contracts and asserts claims against Forest Hill, Tennessee Cemeteries, Inc. ("TCI"), Forethought Federal Savings Bank ("Forethought Federal"), Forethought Life Insurance Company ("Forethought Life"), Community Trust & Investment Co., Inc. ("Community Trust"), Indian Nation, LLC ("Indian Nation"), Clayton Smart ("Smart"), Stephen W. Smith ("Smith"), Quest Minerals & Exploration, Inc. ("Quest Materials"), and Doe defendants. The Parent complaint contains twelve counts alleging causes of action for breach of contract, breach of contractual duty of good faith

and fair dealing, breach of fiduciary duty, conspiracy to breach fiduciary duties, conversion, civil conspiracy, violation of the Tennessee Consumer Protection Act, T.C.A. §§ 47-18-101 et seq. ("TCPA"), violation of the Tennessee Pre-Need Funeral Services Contract statute, T.C.A. §§ 62-5-401 et seq. ("TPNFSC"), and unlawful purchase of insurance contracts. Subsequently, three other related class action complaints were filed in or removed to this court: William LaPradd, et al. v. Tennessee Cemeteries, Inc., et al., Case No. 06-cv-2617 Ml/P, filed September 20, 2006 ("LaPradd"); Donald R. Foshee and Carolyn L. Foshee, et al. v. Forest Hill, et al., 06-cv-2619 Ml/P, which was removed to this court from Chancery Court of Shelby County on September 20, 2006 ("Foshee"); and Elizabeth Harris, et al. v. Forest Hill, et al., 07-cv-2003 Ml/P, filed January 5, 2007 ("Harris"). By orders entered January 30 and February 2, 2007, these four cases were consolidated for pre-trial purposes only. The court subsequently appointed interim lead and liaison class counsel.

B. The State Complaint

On January 8, 2007, the State of Tennessee *ex rel.* William L. Gibbons, District Attorney General for the 30th Judicial District, and Paula A. Flowers, Commissioner of the TDCI, filed an action in the Chancery Court of Shelby County, Tennessee, styled State of Tennessee ex rel. Gibbons, et al. vs. Clayton Smart, et al., Case No. CH-07-0050-2, against defendants Forest Hill, Smart, Smith, Indian Nation, and Redbud Tree Investments, LLC ("Redbud"), under

the Tennessee General Cemetery Act of 1968 and the Tennessee Cemetery Merchandise and Services Act of 1979. The plaintiffs in the state action asked the Chancery Court to appoint a receiver for Forest Hill because its statutory trust funds allegedly had been misappropriated and depleted by approximately \$20,000,000.

On March 27, 2007, the Chancery Court entered an Order Restraining Forest Hill and Setting Hearing on Motion for Temporary Injunction and Appointment of Receiver in the Receivership Proceeding. On April 4, 2007, the Chancery Court appointed Max Shelton as the Receiver for Forest Hill.² The order authorized the Receiver to trace, recover, and marshal Forest Hill's trust funds from various sources, and directed the Receiver to safeguard, collect, and manage the trust funds or the proceeds of such funds. The Receiver was directed to take exclusive custody, control, and possession of all bank accounts, causes of action, credits, monies, investments, stocks, shares, books and records of account, and other papers and property, and all interests, with full power to sue for, collect, receive, and take possession of such properties and assets, and to conserve and administer them under the general supervision of the Chancery Court.

²On January 22, 2007, Forest Hill filed a voluntary petition under the provisions of Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Oklahoma, Case No. 07-80056. On March 26, 2007, the Bankruptcy Court issued an order dismissing Forest Hill's bankruptcy petition, and thus terminated the automatic stay pursuant to 11 U.S.C. § 362(c).

C. The Receiver's Complaint and Recovery of Trust Funds

Upon receiving his appointment by the Chancery Court, the Receiver immediately took steps to locate and recover Forest Hill's funds and assets. On March 23, 2007, on the Receiver's motion, the Chancery Court entered an order Directing First Hope Bank, N.A. to Make Payment of Trust Funds into Registry of the Court, which resulted in the recovery of \$1,759,358.80. (Shelton 5/16/2007 Decl. ¶ 5). On that same date, the court entered an Order Directing Citigroup Global Markets, Inc. d/b/a Smith Barney to Make Payments of Trust Funds into Registry of the Court, which resulted in the recovery of \$5,926,795.³ (Id.)

On April 25, 2007, the Receiver applied for, and the Chancery Court granted, a Temporary Restraining Order restraining Matthew Heisey, MDH V, LLC, and Mark Singer from transferring, concealing, destroying, or making any other disposition of any personal or corporate assets, including, but not limited to funds in banks or brokerage accounts, automobiles, or any other real or personal property owned, possessed or controlled by any of them without prior authorization from the Chancery Court. (Id. ¶ 7).

On May 2, 2007, the Chancery Court granted a petition filed on April 10, 2007 by the Receiver and the State for an order allowing certain Forest Hill trust funds previously invested in life

³According to the Receiver, those funds had been invested in the Topiary Fund, a hedge fund managed by Citigroup Global Markets, Inc. d/b/a Smith Barney. (Id.).

insurance policies with a face value of \$1,634,051.95 to remain in the possession of Forethought Federal, as trustee.⁴ (Id. ¶ 8). On May 7, the Receiver filed a First Amended Verified Complaint to Recover Trust Funds and for Injunctive Relief in Chancery Court. This ancillary state action filed by the Receiver names twenty-one defendants, including Smart, Smith, Indian Nation, and Quest, and brings causes of action for fraudulent transfer, conspiracy to defraud, conversion, and breach of fiduciary duty.⁵ (Id. ¶ 9). On May 10, the Chancery Court entered a Temporary Injunction Order on an application of the Receiver enjoining Matthew Heisey, MDH V, LLC, and Mark Singer from transferring, concealing, destroying, or making any other disposition of any personal or corporate assets, including, but not limited to funds in banks or brokerage accounts, automobiles, or any other real or personal property owned, possessed or controlled by any of them without prior authorization from the Chancery Court. (Id. ¶ 10). Pursuant to that order, the sum of \$1,305,496.67 that previously was held in a MDH V, LLC account at Citigroup Global Markets, Inc. was paid over to the

⁴The Chancery Court found that allowing Forethought Federal to continue to act as trustee over such policies, as opposed to liquidating those policies at the cash surrender value, was in the best interest of the pre-need contract purchasers. (Id.).

⁵On May 31, the Receiver filed a Second Amended Verified Complaint, adding several other defendants to the action. The Receiver stated at the July 12, 2007 hearing on the motion to stay that he has entered into a tolling agreement with the Forethought defendants and Community Trust.

Registry of the Chancery Court. (Id. ¶ 10). On May 14, the Chancery Court entered a Temporary Injunction Order as to Mark Singer on the application of the Receiver, enjoining Mark Singer and all persons acting in concert with him from transferring, concealing, or destroying any personal or corporate assets without prior authorization from the Chancery Court. (Id. ¶ 11). On May 28, after the Forest Hill bankruptcy proceedings were dismissed, the Chancery Court entered an Amended Order Restraining Forest Hill Funeral Home and Memorial Park - East, LLC and Setting Hearing on Motion for Temporary Injunction and Appointment of Receiver. (Shelton 7/27/2007 Decl. ¶ 9). On May 31, a Temporary Injunction Order was entered in the Receiver's action enjoining the defendants and persons acting in concert with them from transferring or otherwise disposing of any of the assets that they received from the trust funds of Forest Hill. (Shelton 7/12/2007 Decl. ¶ 4). The Temporary Injunction Order further ordered the transfer of funds held in certain accounts of defendant Kimberly Singer at Citigroup Global Markets, Inc. d/b/a Smith Barney, and as a result, \$520,527.31 from those accounts were deposited into the Registry of the Chancery Court. (Id.) The Receiver also obtained an order from the Chancery Court that resulted in Greenlight Capital, LP paying the sum of \$5,266,811.71 into the court's Registry. (Id. ¶ 5).

In addition, the Receiver initiated contempt proceedings

against defendants Clayton Smart, Stephen Smith, Indian Nation, LLC and Redbud Tree Investments, LLC for failure to comply with the Chancery Court's February 2, 2007 order, which directed those defendants to submit personal and corporate financial information to the Receiver. (Id. ¶ 6). The Receiver also filed Motions for Partial Default Judgment as to defendants Trailer World of America, LLC d/b/a Horsemen Interiors, Quest Mineral and Exploration, Inc., Tennessee Granite and Bronze, LLC, Fine Line Tuning, LLC, Clayton Smart, and MDH V, LLC, and is in the process of seeking leave from the Chancery Court to file a Third Amended Complaint to add other defendants. (Id. ¶ 8).

The Receiver notified the public, including the holders of pre-need contracts, that he intends to honor the pre-need contracts at issue in the Chancery Court and in the federal actions. (Id. ¶ 9). He developed and implemented a claims procedure - approved and monitored by the Chancery Court - through which pre-need contract holders may receive reimbursement as funds become available.⁶ (Id.; Shelton 7/27/2007 Decl. ¶ 2). Under this claims procedure, the Receiver is required to provide notice of the procedure and the need to file timely claims to all identified pre-need contract holders at their last known address as well as through advertisements in the newspaper and on TDCI's internet

⁶Copies of the order and claim form are attached as exhibits to the Receiver's Second Supplemental Declaration filed July 27, 2007.

website. (Id. ¶ 5). The order directs all pre-need contract holders to submit their claims to the Receiver by no later than December 1, 2007, and warns that failure to file a claim by the deadline shall constitute a sufficient basis to deny the claim. (Id. ¶ 6). The Receiver is required to report to the Chancery Court regarding whether claims have been approved or denied in whole or in part, and the reasons for denying any claims. (Id. ¶ 7). To date, a total of 225 claimants have been identified, and 132 of those claimants have submitted claims pursuant to the claims procedure. (Id. ¶ 3). The Receiver has also received an additional 19 claims from other persons whose funeral services were provided by other funeral homes. (Id. ¶ 4). According to the Receiver's statement to the court at the July 12 hearing, thus far he has recovered approximately \$17,500,000 in Forest Hill's funds, and believes there is another \$12,000,000 still to be located and recovered.

D. The Receiver's Motion to Stay

At the Chancery Court's direction, the Receiver filed the present motion to stay asking this court to stay the federal action until such time that the Receiver's state action is resolved. In support of his motion, the Receiver relies on the abstention principles established in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). In his reply filed May 16, 2007, and at the July 12 hearing on this motion, the Receiver also

asked the court to stay the federal litigation based on the court's "inherent powers."⁷ The Receiver contends that a stay of the federal action would facilitate his efforts by preserving his limited resources and allowing him to focus on recovering trust funds instead of devoting those resources to engaging in federal class action discovery.⁸ In opposing the motion, plaintiffs argue that the Colorado River doctrine does not apply because the federal and state actions are not parallel, and in any event, the eight-factor Colorado River analysis established in the Sixth Circuit weighs heavily against a stay under the facts of this case. In light of the various federal-state comity concerns raised at the July 12 hearing, the court entered an order permitting the parties to provide supplemental briefs addressing the applicability of other abstention doctrines, and in particular, abstention under Burford v. Sun Oil Co., 319 U.S. 315 (1943). On July 27, the plaintiffs and the Receiver filed their supplemental briefs, the Receiver filed his Second Supplemental Declaration, and the State of Tennessee filed its amicus brief.

II. ANALYSIS

As the Sixth Circuit has stated, "considerations of judicial economy and federal-state comity may justify abstention in

⁷The Receiver stated at the July 12 hearing that he believes the Receiver's state action could be resolved in six months.

⁸The Receiver and three other attorneys in his law firm have worked and continue to work almost full-time on the Receiver action.

situations involving the contemporaneous exercise of jurisdiction by state and federal courts." Romine v. Compuserve Corp., 160 F.3d 337, 339 (6th Cir. 1998). However, "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule, because federal courts have a virtually unflagging obligation to exercise the jurisdiction given them." Painewebber v. Cohen, 276 F.3d 197, 206 (6th Cir. 2001) (quoting Colorado River, 424 U.S. at 813; Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 15 (1983)) (internal quotations omitted).

In Colorado River, the Supreme Court held that federal courts may abstain from hearing a case if there is similar litigation pending in state court. Colorado River, 424 U.S. at 818. The threshold question under Colorado River is whether the federal and state proceedings are actually parallel. See Crawley v. Hamilton County Commissioners, 744 F.2d 28, 31 (6th Cir. 1984); Romine, 160 F.3d at 339. The cases need not be identical, however, and "[t]he presence of additional parties or additional claims will not necessarily preclude a finding that the actions are parallel." Szabo v. CGU Int'l Ins., 199 F. Supp. 2d 715, 719 (S.D. Ohio 2002) (citing Romine, 160 F.3d at 340). Nevertheless, "the parties and issues must be substantially the same." Carter v. Ledraplastic Spa, 313 F. Supp. 2d 736, 739 n.3 (M.D. Tenn. 2004) (citing Crawley, 744 F.2d at 31). An important consideration is "whether there is a substantial likelihood that the foreign litigation will

dispose of all claims presented in the federal case." Szabo, 199 F. Supp. 2d at 719 (quoting AAR Int'l, Inc. v. Nimelias Enters. S.A., 250 F.3d 510, 518 (7th Cir. 2001)).

If the court determines that the cases are parallel, the court must then consider eight factors in determining whether Colorado River abstention is warranted. These factors are (1) whether the state court has assumed jurisdiction over any res or property; (2) whether the federal forum is less convenient to the parties; (3) avoidance of piecemeal litigation; (4) the order in which jurisdiction was obtained; (5) whether the source of governing law is state or federal; (6) the adequacy of the state court action to protect the federal plaintiff's rights; (7) the relative progress of the state and federal proceedings; and (8) the presence or absence of concurrent jurisdiction. Romine, 160 F.3d at 341 (citing Colorado River, 424 U.S. at 818-19; Moses H. Cone, 460 U.S. at 23-26). These factors must be analyzed with "the balance heavily weighted in favor of the exercise of jurisdiction." Moses H. Cone, 460 U.S. at 16.

The court finds that the federal action and the Receiver's state action are not "parallel proceedings." While the Receiver's Second Amended Verified Complaint and the federal action both include claims for breach of fiduciary duty, conversion, and conspiracy, the federal action includes several other causes of action not alleged in the Receiver's action (and vice versa). More

importantly, the pre-need contract holders who form the class in the federal action are only a subset of the parties represented by the Receiver, who is charged by the Chancery Court to also represent the interests of Forest Hill's creditors and investors, as well as the general public. (Receiver's Mem. in Support of Mot. to Stay at 4). Because the federal class members have different claims, different strategies, and possibly divergent goals from the Receiver, the class members' interests are not aligned with those of the Receiver, and thus, their interests cannot be protected by the Receiver in the state action. Lastly, given the differences between the two actions, there is not a substantial likelihood that the Receiver's action "will dispose of all claims presented in the federal case." Szabo, 199 F. Supp. 2d at 719. In sum, although the cases are similar and arise from the same set of facts, they are not "parallel" as required under Colorado River.

Even though Colorado River abstention does not apply here, the court nevertheless concludes that a stay of the federal action is warranted under the abstention principles invoked in Burford v. Sun Oil Co., 319 U.S. 315 (1943), which "requires a federal court to abstain from jurisdiction where to assume jurisdiction would be 'disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" Adrian Energy Assocs. v. Mich. Public Service Comm'n, 481 F.3d 414, 423 (6th Cir. 2007) (quoting Colorado River, 424 U.S. at 814). In Burford, the

Supreme Court applied the doctrine of abstention to a Fourteenth Amendment due process claim against an order of the Texas Railroad Commission ("TRC") granting a permit to drill a well in an east Texas oil field. Burford, 319 U.S. at 316-17. The order was issued as part of the general regulatory system for the conservation of oil and gas in Texas, which the Court found to be "an aspect of 'as thorny a problem as has challenged the ingenuity and wisdom of legislatures.'" Id. at 318 (quoting R.R. Comm'n v. Rowan & Nichols Oil Co., 310 U.S. 573, 579 (1940)). Under this regulatory system, the Texas legislature had vested the TRC with exclusive regulatory authority over oil and gas in the state in order to avoid "potentially overlapping claims of the many parties who might have an interest in a common pool of oil" and to meet "the need for uniform regulation of the oil industry." Id. at 326. Additionally, the Texas legislature had placed the authority to review the TRC's orders in a single set of state courts to prevent the confusion of multiple review. Id. at 326.

In determining that abstention was appropriate, the Burford Court found that the TRC's decisions were economically significant and that they were made with "due regard for the factors of full utilization of the oil supply, market demand, and protection of the individual operators, as well as protection of the public interest." Id. at 320-21, 324. Additionally, the Court found that the Texas legislature's thorough system of judicial review had

allowed the state courts to develop a "specialized knowledge" of oil and gas regulation that was absent in the federal courts. Id. at 325, 327. The Court observed that the federal courts' review of the TRC's orders had led to contradictory adjudications by the state and federal courts, and the availability of an alternative, federal forum threatened to frustrate the purpose of the complex administrative system that Texas had established. Id. at 319-32. In summary, the Court stated that

The state provides a unified method for the formation of policy and determination of cases by the [TRC] and by the state courts. The judicial review of the [TRC's] decisions in the state courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts.

Id. at 333-34. The Court held that "a sound respect for the independence of state action" required abstention. Id. at 334. As the Court later explained in New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350 (1989) ("NOPSI"):

Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

NOPSI, 491 U.S. at 361 (quoting Colorado River, 424 U.S. at 814).

In NOPSI, the Court declined to apply Burford abstention for several reasons. Id. at 362-64. The Court noted that while the purpose of Burford is to protect "complex state administrative processes from undue federal influence, it does not require abstention whenever there exists such a process" or in cases "where there is a 'potential for conflict' with state regulatory law or policy." Id. at 362 (quoting Colorado River, 424 U.S. at 815-16). Accordingly, the Court found that adjudication of the preemption issue in NOPSI "would not disrupt the State's attempt to ensure uniformity in the treatment of an 'essentially local problem.'" NOPSI, 491 U.S. at 362 (quoting Alabama Pub. Serv. Comm'n v. Southern R. Co., 341 U.S. 341, 347 (1951)). The Court also found that "no inquiry beyond the four corners of the Council's . . . order is needed" to determine the issue in the case, and such a limited inquiry "would not unduly intrude into the processes of state government or undermine the State's ability to maintain desired uniformity." NOPSI, 491 U.S. at 363. Finally, the Court opined that the issue in the case involved neither "difficult questions of state law bearing on policy problems . . . whose importance transcends the case at bar" nor issues affecting a "predominantly local market." Id. at 361. Therefore, the Court concluded that resolving the case in the federal forum would not "demand significant familiarity with, and [would] not disrupt state resolution of, distinctively local regulatory facts or policies."

Id. at 363-64.

In Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996), the Supreme Court held that under Burford, "federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary." Id. at 709. In that case, the Insurance Commissioner ("IC") of California had been appointed as the trustee for the assets of the Mission Insurance Company and its affiliates pursuant to a liquidation order by a California state court. Id. at 709. The IC had filed suit in state court against Allstate Insurance Company ("Allstate") for contract and tort damages. Id. Allstate then filed motions for removal to federal court and to compel arbitration under the Federal Arbitration Act. Id. In response, the IC sought remand to state court under Burford. Id. The district court remanded the case, holding that "California has an overriding interest in regulating insurance insolvencies and liquidations in a uniform and orderly manner" that "could be undermined by inconsistent rulings from the federal and state courts." Id. at 709-10. However, on appeal, the Ninth Circuit held that abstention was not appropriate because the IC sought legal, not equitable, relief, and that Burford applies only to cases based in equity. Id. at 710-11.

The Supreme Court held that abstention, a discretionary doctrine, did not apply because the relief sought in Quackenbush

was "neither equitable nor otherwise committed to the discretion of the court." Id. at 730. However, the Court left open the possibility that "Burford might support a federal court's decision to postpone adjudication of a damages action pending the resolution by the state courts of a disputed question of state law." Id. at 730-31. Moreover, the Court stated that its holding pertained only to the district court's remand order and that it would not determine whether a more limited abstention-based stay order would have been appropriate. Id. at 731.

Several federal appellate and district courts have considered the applicability of Burford abstention under circumstances similar to the case at bar and have stayed or dismissed the federal litigation. In First Penn-Pacific Life Ins. Co. v. Evans, 304 F.3d 345 (4th Cir. 2002), the Fourth Circuit upheld a district court's decision to grant a motion to dismiss under Burford in an action involving rescission of a life insurance policy. Id. at 346. The Maryland Securities Commissioner ("MSC") had brought an action against Answer Care, the insolvent insurer, and its owner in state court alleging statutory violations, fraud, and mismanagement of life insurance policies. Id. at 347. The state court froze Answer Care's assets, enjoined the company from selling interests in life insurance policies, and appointed a receiver to manage the company's business for the purpose of protecting, distributing, and recovering its assets. Id. After the action in federal court was

filed, the state court-appointed receiver filed a motion to dismiss the federal case based on principles of abstention, which the district court granted. Id. at 346-47.

On appeal, the court noted that the determination of whether to abstain "must reflect principles of federalism and comity," id. at 348 (quoting Quackenbush, 517 U.S. at 728), and that the abstention determination requires federal courts to "exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." First Penn-Pacific, 304 F.3d at 348 (quoting Burford, 319 U.S. at 318). The court cited NOPSI for the principle that "Courts should abstain from deciding cases presenting 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar,' or whose adjudication in a federal forum 'would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" First Penn-Pacific, 304 F.2d at 348 (quoting NOPSI, 491 U.S. at 361). The court also recognized that application of Burford abstention in part reflects a federal court's decision that "the State's interests are paramount and that a dispute would best be adjudicated in a state forum." First Penn-Pacific, 304 F.2d at 348.

The court found that Answer Care was "subject to a highly regulated state process involving the liquidation of its assets."

Id. The court observed that the MSC was vested with the authority to enforce the Maryland Securities Act, which included the authority "to bring an action in state court whenever any person has violated or is about to violate the Act or its implementing regulations." Id. The regulatory scheme also governed the powers of the receiver, who provides notice to creditors, settles claims relating to the estate with court approval, files reports with the court, and makes final distributions to creditors. Id. The court also found that the state had a "substantial interest in preventing further harm to the public" and "in providing investors with some compensation" so that they are not left empty handed. Id. Additionally, the court noted that "[a]llowing the action to continue in federal court would severely complicate the efficient dissolution of Answer Care's estate" and invite litigation across the country, resulting in inefficiencies. Id. These inefficiencies posed a particular threat because the receiver's funding for litigation expenses came from the estate. Id. Therefore, "as the litigation and administrative costs mount, the size of Answer Care's assets shrinks," and "the time may come when the victims of the company's fraud will not be able to obtain their due." Id.

The court recognized that "[t]he liquidation process in particular is one which would be greatly impeded by the involvement of more than one decision-making authority," which is "a critical

reason why federal courts have frequently abstained to avoid interfering with state receivership proceedings." Id. at 349-50. In fact, the court indicated that "[s]uch cases are legion." Id. at 350 (citing Feige v. Sechrest, 90 F.3d 846 (3d Cir. 1996); Wolfson v. Mut. Ben. Life Ins. Co., 51 F.3d 141 (8th Cir. 1995); Grimes v. Crown Life Ins. Co., 857 F.2d 699 (10th Cir. 1988); Law Enforcement Ins. Co. v. Corcoran, 807 F.2d 38 (2d Cir. 1986); Easter v. Am. W. Fin., 202 F. Supp. 2d 1150 (W.D. Wash. 2002); Rewerts v. Reliance Ins. Co., 170 F. Supp. 2d 847 (C.D. Ill. 2001); In re Universe Life Ins. Co., 35 F. Supp. 2d 1297 (D. Kan. 1999)).⁹ According to the court, federal courts also often abstain to allow for the consistent dissolution of receivership where federal proceedings would infringe on state court orders and where conflicts between the state and federal courts were possible. Id.

⁹For example, in Law Enforcement Ins. Co., Ltd. v. Corcoran, 807 F.2d 38, 43-44 (2d Cir. 1986), the Superintendent of Insurance ("Superintendent") had commenced an insolvency proceeding against Ideal Mutual Insurance Company. Id. at 39. Subsequently, Law Enforcement Insurance Company ("LEIC") filed an action in federal court against the Superintendent, and the Superintendent filed a motion to dismiss the action under Burford. Id. at 40. The court granted the motion, finding that New York had a comprehensive regulatory scheme governing insurance companies that included detailed provisions on rehabilitation and liquidation and that the state courts had been active partners in the state's regulatory plan. Id. at 43. The court found that the state courts engaged in detailed review of the propriety of liquidators' decisions and implemented the state's policy of "unified adjudication by requiring all claims and challenges to be centralized in the court supervising the liquidation or rehabilitation." Id. at 43. The court also noted the state's "strong interest in centralizing claims against an insolvent insurer into a single forum where they can be efficiently and consistently disposed of." Id. at 44.

at 350. In light of all of these factors, the court upheld the district court's decision to abstain under Burford. Id. at 351.

Similarly, in Clark v. Fitzgibbons, 105 F.3d 1049 (5th Cir. 1997), the Fifth Circuit applied Burford abstention in a case involving an insurance company placed in receivership by order of the Arizona Supreme Court. Id. at 1050. In that case, American Bonding Company ("ABC") had lapsed in paying its obligations to Texas insurance policy holders. Id. The putative class action suit in federal court alleged claims for breach of contract, indemnification, breach of fiduciary duty, and breach of the duty of good faith and fair dealing against ABC and the Arizona special deputy receiver. Id. at 1050-51. The court, in applying Burford, noted that insolvent insurers in Arizona were subject to the comprehensive oversight of state administrative agencies and courts, and that Arizona had developed "a coherent state policy to manage insolvent insurance companies" under which a state regulatory investigation may lead to "appointment of a receiver for the rehabilitation of the company, the orderly processing of claims against it, and, if necessary, its liquidation." Id. As such, allowing a case to proceed against an insolvent insurer in federal court while an Arizona insolvency proceeding was pending would "'usurp [the state's] control over the liquidation proceeding by allowing [the claimant] to preempt others in the distribution of [the insurance company's] assets.'" Id. at 1051 (quoting Barnhardt

Marine Ins., Inc. v. New England Int'l Sur. of Am., Inc., 961 F.2d 529, 532 (5th Cir. 1992)). Further, the court found that if it allowed the federal case to proceed, it would undermine not only the comity rationale behind Burford, but also "the comprehensive apparatus established by the state of Arizona for the orderly disposition of claims against insolvent insurance companies," and it would "start a race to the courthouse in any jurisdiction where claims against ABC might have arisen." Clark, 105 F.3d at 1051. The court held that, because Arizona had a comprehensive scheme for the consistent, orderly and fair resolution of all claims against insolvent insurers by a receiver, the district court did not abuse its discretion by abstaining under Burford. Id. at 1052.

In another case involving state liquidation proceedings against an insurer, the Third Circuit held that the district court should have abstained under Burford. Lac D'Amiante du Quebec, LTEE v. Am. Home Ins. Co., 864 F.2d 1033, 1034 (3d Cir. 1988). In that case, a New York state court had ordered Midland Insurance Company ("Midland") into liquidation proceedings and appointed the New York Superintendent of Insurance ("Superintendent") as the receiver. Id. Subsequently, Lac D'Amiante du Quebec ("LAQ"), an asbestos seller, filed suit in federal court against Midland and LAQ's other insurers seeking indemnity for the amount it had paid out in connection with asbestos-related claims. Id. The district court denied Midland's motion to stay the federal action under Burford

based on its determination that the federal proceeding would not be disruptive of the state's efforts to establish a coherent policy with respect to Midland's liquidation. Id. at 1037.

The Third Circuit reversed the lower court's decision. Id. at 1039. The court found that New York's Uniform Insurer's Liquidation Act was a comprehensive insurance code that established the Superintendent's duties, which included monitoring the financial health of all in-state insurers and protecting those injured by insolvent insurance companies. Id. at 1036, 1039. The court opined that the Act also provided "a complex and thorough regulatory scheme to liquidate insolvent insurers," and that the Superintendent's authority included seeking liquidation or other appropriate order in state court. Id. at 1039. Under this regulatory scheme, the state court could direct the Superintendent to manage the insurer's property and the court could maintain continuing jurisdiction over the liquidation proceedings. Id. at 1039-40. Additionally, the LAQ court noted that the state Supreme Court could declare the insurer insolvent, dissolve its corporate existence if certain statutory requirements were met, and issue any injunctions necessary to prevent interference with the Superintendent or the proceedings. Id. at 1040. The Act also provided that all claims against an insurer's estate had to be presented to the liquidator within four months of the date of entry of the liquidation order. Id.

The Third Circuit explained that allowing the federal case to proceed "would be highly destructive" of this regulatory scheme and that consistent interpretation in the insurance liquidation context was important "because payments made to one claimant are frequently facilitated by reducing distributions to other claimants." Id. at 1045-46. Additional factors weighing in favor of abstention included "equitable adjustment of claims, reduction of administrative costs [and] proper management of the insolvent insurer's liabilities." Id. at 1048. Moreover, under the state's regulatory scheme, New York state courts had adopted "a strong . . . policy that the liquidation of insolvent insurers can best be accomplished through noninterference by outside courts." Id. at 1041. Finally, in holding that the district court should have abstained under Burford, the court emphasized that "most courts that have discussed this question have held abstention and stay or dismissal appropriate in the circumstance of a suit against an insurer in liquidation proceedings." Id.; see also Harleysville Mut. Ins. Co. v. Reliance Nat'l Ins. Co., 256 F. Supp. 2d 421, 422-23 (M.D.N.C. 2003) (applying Burford abstention and stating that "[u]nquestionably, the administration of the liquidation of an insurance company is a matter of paramount state concern," the State of Pennsylvania had a comprehensive scheme for liquidating insolvent state-chartered insurance carriers, and that the practical result of widespread litigation would be to "dissipate

the assets of the insolvent insurance company."); Glushakow v. Confederation Life Ins. Co., No. 94-4201, 1994 WL 803204, at *1,*9 (D.N.J. Dec. 5, 1994) (unpublished) (staying federal action under Burford based on concerns that federal suit brought by policy holders would thwart the rehabilitating states' attempts to draw all of the policyholders' claims into the state proceedings and "the rehabilitator would be distracted and the estate dissipated by defending" the federal proceeding).

In the present case, the court concludes that a stay is warranted under Burford. First, as in the cases discussed above, this case involves an entity placed into receivership by order of a state court, which is "a classic situation for Burford abstention." First Penn-Pacific Life, 304 F.3d at 348-49 (quoting Brandenburg v. Seidel, 859 F.2d 1179, 1191 (4th Cir. 1988)).

Second, the State of Tennessee has in place a comprehensive statutory scheme for regulating cemetery companies and pre-need funeral contracts, and the Receiver has implemented a claims procedures that has been approved and is monitored by the Chancery Court. See First Penn-Pacific Life, 304 F.3d at 349; Tenn. Code Ann. §§ 46-1-101 et seq.; Tenn. Code Ann. §§ 62-5-401 et seq. The statutory scheme provides for the establishment and maintenance of certain trust fund accounts and bestows enforcement power upon the Commissioner of Commerce and Insurance to seek state court relief against cemetery companies and sellers of pre-need funeral

contracts when they fail to establish and maintain these trust fund accounts. Id. Specifically, pre-need funeral contracts and the establishment of trust fund accounts for these contracts are governed by Tenn. Code Ann. §§ 62-5-401 et seq. Generally, a seller of a pre-need funeral contract is required to deposit all funds for a pre-need contract as soon as possible after receipt, and in no event later than thirty (30) days after receipt, into a trust account, and the trust company must be able to ascertain at all times the amount due to the beneficiary of the funds. All payments under the pre-need funeral contract are to remain with the trustee until the death of the beneficiary. In order to make a withdrawal from the pre-need funeral trust, a funeral home operator must supply the trustee with a certified copy of the death certificate together with a verified statement establishing that all terms and conditions of the pre-need funeral contract have been fully performed. Tenn. Code Ann. §§ 62-5-402 and 404.

Under the Cemetery Act, there are two types of trust fund accounts that a cemetery company is required to establish and maintain. Tenn. Code Ann. §§ 46-1-204 requires a cemetery company to deposit into an improvement care trust fund for each of its geographic locations twenty percent (20%) of the sales price it receives for each grave space and ten percent (10%) of the sales price for each mausoleum. The principal in this trust may not be invaded, and the corpus of the trust is supposed to remain whole.

The cemetery company may use the earnings on the corpus for the payment of trustee fees and other related items, such as taxes or tax preparation fees. These expenses are netted against the income received from the trust corpus, and the cemetery company may receive net income only. The remaining net income is to be used for maintenance, repairs, upkeep, and beautification of the cemetery. In addition, Tenn. Code Ann. § 46-1-207 requires a cemetery company to maintain a pre-need merchandise and services trust fund for each of its locations. When a cemetery enters into a pre-need contract for merchandise and services, the company is required to deposit into trust an amount equal to one-hundred and twenty percent (120%) of the procurement cost of the merchandise. Id. A cemetery company may only receive funds from the merchandise and services trust fund upon certification that services or delivery of the merchandise specified in the sales contract have been completed. Tenn. Code Ann. § 46-1-208. Tenn. Code Ann. § 46-1-312(a) authorizes the Commissioner to petition the Chancery Court for the appointment of a receiver when a deficiency exists in a cemetery company's improvement care trust fund. Tenn. Code Ann. § 46-1-312(d) provides that if it is impossible to correct the deficiency in the improvement care trust fund, the court may proceed to order the sale of the cemetery as provided in Tenn. Code Ann. § 46-1-309. Under Tenn. Code Ann. § 309, the Commissioner and district attorney general are authorized to bring an action to

revoke the charter or certificate of authority of a corporate cemetery company that fails to comply with the provisions of Tenn. Code Ann. § 46-1-204. Tenn. Code Ann. § 46-1-309 also permits the court to order seizure and sale of the cemetery company's assets to the extent necessary to set up the improvement care trust fund. Furthermore, if the court revokes the charter or certificate of authority, it may order the sale of the whole company property. Id. Similarly, Tenn. Code Ann. § 46-1-307 provides that the Commissioner may order the liquidation of any deficiency existing in a cemetery's merchandise and services trust fund. If the deficiency is not liquidated as ordered, Tenn. Code Ann. § 46-1-307 then provides that the Commissioner may bring an action in Chancery Court to recover the amount of the deficiency. Upon finding that a deficiency exists, the court may appoint a receiver to operate the cemetery or, if necessary, order the seizure and sale of the assets of the cemetery company to make the trust whole. Tenn. Code Ann. § 46-1-307.

Third, the court finds that the highly regulated state process at issue here is a "matter of substantial public concern." First Penn-Pacific Life, 304 F.3d at 349 (quoting NOPSI, 491 U.S. at 361 and Colorado River, 424 U.S. at 814). The receivership proceedings in Chancery Court resulted from allegedly fraudulent conduct "of significant proportions" on the part of Forest Hill and its owners and operators. First Penn-Pacific Life, 304 F.3d at 349. To be

sure, the State of Tennessee has a substantial interest in protecting not only the many individuals who purchased these pre-need contracts, but also "has a substantial interest in preventing further harm to the public, and in providing investors with some compensation so that the scam does not leave them completely high and dry." Id.

Fourth, allowing the federal action to proceed would substantially complicate the Receiver's action. Id. Moving forward with the federal action at this time would not only require the Receiver to devote his limited resources to participating in the federal class action in addition to meeting his state court duties, but it would also reduce the size of the assets available since the Receiver's funding to cover litigation and administrative expenses comes from Forest Hill's assets. Id.

Finally, the Receiver stated at the July 12 hearing that he anticipates that the Receiver's state action will conclude in about six months, which would minimize the delay in the federal action. The court notes that the claims procedure approved by the Chancery Court requires claimants to submit their claims to the Receiver by no later than December 1, 2007. Although the court's decision to stay the federal litigation is not conditioned upon completion of the Receiver's action by a date certain, the court expects that the Receiver will take the steps necessary to expeditiously bring the state action to a conclusion in the near future.

III. CONCLUSION

For the reasons above, the motion to stay is granted. The consolidated federal actions shall be stayed until the conclusion of the Receiver's state action.

IT IS SO ORDERED.

s/ Tu M. Pham

TU M. PHAM

United States Magistrate Judge

August 20, 2007

Date