

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

**DONALD R. FOSHEE, and CAROLYN L.
FOSHEE, MARILYN R. WILLIS, SYLVIA
J. YEWELL, MERVIN D. YEWELL,
MERVIN DWIGHT YEWELL, LOIS I.
YEWELL,**

PLAINTIFFS,

V.

**FORETHOUGHT FEDERAL SAVINGS
BANK, FORETHOUGHT LIFE INSURANCE
COMPANY, and COMMUNITY TRUST
AND INVESTMENT COMPANY,**

DEFENDANTS.

CIVIL ACTION NO.: _____

JURY DEMAND

CLASS ACTION COMPLAINT

Come now the Plaintiffs, Donald R. Foshee, and Carolyn L. Foshee Marilyn R. Willis, Sylvia J. Yewell, Mervin D. Yewell, Mervin Dwight Yewell, Lois I. Yewell, on behalf of themselves and for all other persons similarly situated and file this, their Class Action Complaint against the Defendants alleging as follows:

PRELIMINARY STATEMENT

1. Plaintiffs file this Class Action Complaint seeking damages on behalf of themselves and all others similarly situated for violations of Tennessee law related to provision of life insurance in connection with contracts for future burial and/or funeral services (“pre-need contracts”) and for carelessly allowing monies held in trust to be improperly withdrawn from the trust.

2. The Defendants in this action are Forethought Federal Savings Bank, Forethought Life Insurance Company, and Community Trust and Investment Company.

3. The Defendants are liable for damages and penalties under Tennessee common and statutory law because the Defendants engaged in a scheme by which life insurance policies were obtained without the knowledge or consent of the insured in connection with certain pre-need contracts to which the insureds were parties. This scheme violated various provisions of Tennessee law, including but not limited to *T.C.A.* §§ 62-5-401. Defendant Community is liable for damages for allowing monies held in trust to be improperly withdrawn in violation of its duties and *T.C.A.* § 62-5-408(a).

4. Unnamed co-conspirators Forest Hill Funeral Home and Memorial Park-East, LLC (Forest Hill) is a limited liability company organized and doing business in and pursuant to the laws of the State of Tennessee. Forest Hill also operates under the assumed names of Forest Hill Funeral Home and Memorial Park-South and Forest Hill and Memorial Park-Mid-Town.

5. Unnamed co-conspirator Tennessee Cemeteries, Inc. is a corporation organized and doing business and pursuant to the laws of the state of Tennessee.

6. Unnamed co-conspirators Forest Hill and Tennessee Cemeteries will be hereinafter collectively referred to as the “Funeral Homes.”

7. The Defendant, Forethought Federal Savings Bank (Forethought Federal), is a federally chartered savings and loan bank organized and having its principal place of business within the State of Indiana. Forethought Federal Savings Bank does business within the state of Tennessee. Forethought Federal Savings Bank may be served at Forethought Center, Batesville, Indiana 47006.

8. The Defendant, Forethought Life Insurance Company (Forethought Life), is a corporation organized and having its principal place of business within the State of Indiana. Forethought Life does business within the State of Tennessee. Forethought Life may be served at Forethought Center, Batesville, Indiana 47006.

9. The Defendant, Community Trust and Investment Company (Community), is a trust company chartered and having its principal place of business within the State of Indiana. Community does business with the State of Tennessee. Community may be served at 50 North 9th Street, Noblesville, Indiana 46060.

10. The Plaintiffs, Donald R. and Carolyn L. Foshee, are adult residents of Drummonds, Tennessee, and at all times herein were parties to pre-need contracts entered into in Shelby County, Tennessee and were insured under policies of insurance issued by the Defendant, Forethought Life.

11. The Plaintiff, Marilyn R. Willis, is an adult resident of Bartlett, Tennessee, and at all times herein was party to pre-need contracts entered into in Shelby County, Tennessee and was insured under policies of insurance issued by the Defendant, Forethought Life.

12. The Plaintiffs, Sylvia J. and Mervin D. Yewell, are adult residents of Bartlett, Tennessee, and at all times herein were parties to pre-need contracts entered into in Shelby County, Tennessee and were insured under policies of insurance issued by the Defendant, Forethought Life.

13. The Plaintiffs, Mervin Dwight and Lois I. Yewell, are adult residents of Bartlett, Tennessee, and at all times herein were parties to pre-need contracts entered into in Shelby County, Tennessee and were insured under policies of insurance issued by the Defendant, Forethought Life.

14. The Plaintiffs are members of the class as defined hereinafter.

JURISDICTION AND VENUE

15. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d) because the matter in controversy exceeds the sum or value of \$5,000,000 exclusive of interest

and costs and because it is a class action in which at least one plaintiff is a citizen of a state different from at least one defendant.

16. Venue is proper in this Court and in this division under 28 U.S.C. § 1391 because substantial events giving rise to the claims occurred in this division and because all of the defendants reside in this division.

CLASS ALLEGATIONS

17. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs as if set forth *in extenso*.

18. This suit is brought as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of a class defined as:

All residents of the State of Tennessee, who purchased or had purchased for them a pre-need funeral contract from the Funeral Homes (as defined above) and upon whose lives a policy of life insurance was issued by Forethought Life Insurance Company and later cash surrendered to Community Trust and Investment Company as trustee.

19. Although the precise size of the class is unknown, upon information and belief, Plaintiffs aver that there are several thousand class members and that such class members are disbursed throughout the state of Tennessee. Joinder of all members of the class, therefore, is not practical. However, members of the class are readily identifiable from the information or records in the possession or control of the Defendants.

20. The Plaintiffs are members of the class.

21. All of the Plaintiffs' claims are made pursuant to the laws of the State of Tennessee. No claim is brought pursuant to any Federal law.

22. Upon information and belief, all of the class members as defined above are residents of the State of Tennessee.

23. There are questions of law and fact common to the class that predominate over any questions that may affect only individual members of the class. These common questions of law and fact include but are not limited to:

- a. Whether the Defendants violated T.C.A. § 62-5-401, *et seq.*;
- b. Whether Defendant Community violated T.C.A. § 62-5-408(a);
- c. Whether the conduct of the Defendants violated Tennessee Common Law;
- d. Whether the Defendants issued or caused to be issued insurance contracts upon the lives of the class members in violation of Tennessee law;
- e. Whether the Defendants caused or abetted the cash surrender of life insurance policies with the corresponding accrual of cash surrender charges in violation of their fiduciary duties to class members;
- f. Whether Defendant Community breached any common law duties or violated any Tennessee statutory laws by allowing the trust monies held for the benefit of the Plaintiffs and the Community Class to be withdrawn from the trust;
- g. Whether the Defendants conspired and/or combined together and/or with others, including unnamed co-conspirators, to reduce, deplete and/or defraud class members from the accrued cash values, funds and/or life insurance benefits;
- h. Whether the Defendants violated the Tennessee Consumer Protection Act, Tenn. Code § 47-18-101, *et seq.*;
- i. The type and measure of damages suffered by the Plaintiffs and members of the class.

24. The named Plaintiffs will fairly and adequately protect the interest of the class and their claims are typical and representative of the claims of all members of the class, all of whom are victims of the Defendants' unlawful, unfair, and/or deceptive practices.

25. There are no defenses of a unique nature which may be asserted against Plaintiffs individually as distinguished from other members of the class, and the relief sought is common to all of the class. Plaintiffs do not have any interest that is in conflict with or antagonistic to the

interests of other members of the class. Plaintiffs have retained competent counsel experienced in class action litigation to represent them and the entire class.

26. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy. The wrongs suffered and remedies sought by representative Plaintiffs and the other members of the putative class are the same. The prosecution of a class action is in the interest of judicially economy as it will limit the likelihood of repetitious litigation. On the other hand, the prosecution of separate actions by individual members of the class would create a risk of:

- a. Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the Defendants; or
- b. Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interest of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests.

27. Because of the relatively small size of the damages available to individual class members, and the expense associated with prosecuting an individual case of this type, individual members of the putative class are not likely to be in a position to prosecute individual suits against the Defendants. However, the certification of this action as a class action will allow the economical prosecution of this litigation and the vindication of the rights of all members of the putative class.

28. This action qualifies for certification pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure because questions of law and fact common to the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

GENERAL ALLEGATIONS

29. All of the Plaintiffs entered into pre-need funeral and burial service contracts with the Funeral Homes.

30. Under the terms of these pre-need contracts, the Plaintiffs agreed to pre-pay for funeral expenses. In return, the Funeral Homes agreed to provide funeral and/or burial services and/or funeral and/or funeral merchandise at the time of death.

31. Pre-need contracts of the type signed by the Plaintiffs are regulated by Tennessee law, in particular, T.C.A. § 62-5-401, *et seq.*, which, among other things, provides as follows:

Any agreement, contract or plan requiring the payment of money in advance, whether in a lump sum or installments, which is made or entered into with any person, association, partnership, firm or corporation for the final disposition of a dead human body, or for funeral or burial services, or for the furnishing of personal property or funeral or burial merchandise, wherein the use of the personal property or the funeral or burial merchandise or the furnishing of professional services by a funeral director or embalmer is not immediately required, is hereby declared to be against public policy and void, unless all money paid thereunder shall be paid to and held by a bank or federally insured savings bank, and subject to the terms of an agreement for the benefit of the purchaser of the agreement, contract or plan. For the purpose of this part, "personal property" does not include cemetery lots or permanent grave markers.

32. Upon information and belief, the Plaintiffs aver that in compliance with their contractual obligations and this Code section, the original owners and/or managers of the Funeral Homes deposited all money paid for such pre-need contracts (hereinafter the "trust money") to one or more of such trust companies and/or banks.

33. In or about February, 1998, the Funeral Homes caused the trust monies to be transferred to the Defendant Forethought Federal.

34. Forethought Federal thereafter used portions of the trust money to purchase life insurance from its subsidiary, Forethought Life, upon the lives of the pre-need contract holders. Sales commissions were assessed upon these sales and, thus, depleted the trust monies.

35. Upon information and belief, Plaintiffs aver that these purchases of life insurance and payment of sales commissions were made without the consent or knowledge of the pre-need contract holders.

36. Under Tennessee law, a life insurance policy may not be procured absent the consent of the person whose life is insured. *See, e.g., Branson v. National Life & Accident Ins. Co.* 4 Tenn. App. 576, 1927 WL2089 (Tenn. Court App. 1927).

37. Upon information and belief, Plaintiffs aver that on or about December 7, 2004, the Funeral Homes claimed ownership of the subject trust funds and insurance policies and substituted Defendant Community Trust and Investment as Trustee for the trust money in place of Forethought Federal.

38. Subsequent to this substitution, all of the corpus of the trust money was transferred in kind to the successor Trustee Community by Forethought.¹

39. Thereafter, in or about February, 2005, Community caused and Forethought Life allowed the life insurance policies issued by Forethought Life to be cash surrendered. The money received by virtue of the surrender of these insurance policies was transferred to Community.

40. Upon information and belief, Forethought Life imposed substantial surrender charges at the time the policies were surrendered. These cash surrender charges caused further depletion of the trust monies.

41. Community thereafter allowed the trust monies to be withdrawn by one or more individuals, unnamed co-conspirators who stole or otherwise absconded with the trust monies to the detriment of the Plaintiffs and members of the class.

¹ Upon information and belief, the trust corpus though composed primarily of insurance policies was partially held in the form of cash and other securities.

42. As a result of (1) the unlawful purchase and issuance of the life insurance policies, (2) the cash surrender of the policies, and (3) the subsequent withdrawal of the trust monies from Community, there is not sufficient trust monies remaining to provide for the funeral and burial services and merchandise as contracted for by the Plaintiffs and the members of the class.

COUNT ONE

COMPLAINT FOR BREACH OF FIDUCIARY DUTY

43. Plaintiffs reallege and incorporate by reference herein the preceding paragraphs as if set forth *in extenso*.

44. A fiduciary duty and/or a confidential relationship existed between the Defendants and the Plaintiff class representatives and members of the class.

45. The Defendants breached the fiduciary duty and/or confidential relationship by allowing trust monies to be improperly used to purchase life insurance policies, by subsequently causing or permitting the cash surrender of those policies, and by allowing the trust monies to be withdrawn from Community.

46. The Plaintiffs and other members of the class have been damaged as a result of these breaches of fiduciary duty and/or breaches of confidential relationships.

COUNT TWO

COMPLAINT FOR NEGLIGENCE OR WANTONNESS

47. Plaintiffs reallege and incorporate by reference herein the preceding paragraphs as if set forth *in extenso*.

48. The Defendants owed the Plaintiff class representatives and other class members duties imposed by Tennessee common law and T.C.A. § 62-5-401 *et seq.*

49. The Defendants breached the duty as aforesaid by (1) causing the trust money on deposit at Forethought Federal to be used for purchase of insurance from Forethought Life, (2) allowing the life insurance policies to be cash surrendered causing addition charges to the trust monies, and (3) allowing the trust monies to be withdrawn from Community.

50. As a result of the Defendants' said negligence or wantonness, Plaintiff representatives and class members were caused to incur various charges, including insurance commissions and surrender charges and were deprived of interest that should have accrued on the trust monies, and now have insufficient trust monies to provide for the funeral and burial services and merchandise as contracted for by Plaintiffs and class members.

51. By reason of the foregoing, Plaintiff class representatives and the other members of the class have been damaged.

COUNT THREE

COMPLAINT FOR CONVERSION

52. Plaintiffs reallege and incorporate by reference herein the preceding paragraphs as if set forth *in extenso*.

53. The Defendants converted the trust funds by intentionally causing such funds to be utilized for the purchase of life insurance or by receiving such funds in exchange for the issuance of life insurance upon the lives of the Plaintiffs and class members and/or by causing or allowing the cash surrender of such policies.

54. As a result of the Defendants' acts of conversion, the Plaintiff class representatives and other members of the class have been damaged.

COUNT FOUR

COMPLAINT FOR CONCEALMENT OR FRAUD BY SUPPRESSION

55. Plaintiffs reallege and incorporate by reference herein the preceding paragraphs as if set forth *in extenso*.

56. The Defendants were under a duty to disclose to the Plaintiff class representatives and the other members of the class that:

- a. Trust monies had been used to purchase polices of life insurance;
- b. That policies of life insurance had been obtained without the knowledge, consent, or acquiescence of the pre-need contract holders;
- c. That a sales commission had been paid upon the sale of the aforesaid insurance policies;
- d. That a cash surrender charge had been imposed at the time the policies were surrendered; and
- e. That Community had allowed the trust monies to be withdrawn.

57. The aforesaid duty to disclose arose by virtue of a fiduciary relationship between the Plaintiffs and the Defendants and/or because pre-need contracts, giving rise to the trust monies, are intrinsically fiduciary contracts calling for the exercise of perfect good faith.

58. The Defendants breached their fiduciary duties to the Plaintiffs and suppressed and concealed knowledge that the trust monies had been used to purchase insurance polices, that the insurance policies had been purchased without the knowledge, consent, or acquiescence of the Plaintiffs, that commissions had been paid at the time of the insurance policy purchases, and that cash surrender charges had been imposed at the time the policies were surrendered.

59. The Plaintiff class representatives and all other class members have been damaged as a result of this suppression.

COUNT FIVE

COMPLAINT FOR CIVIL CONSPIRACY

60. Plaintiffs reallage and incorporate by reference herein the preceding paragraphs as set forth *in extenso*.

61. The Defendants have contrived, combined, federated and conspired to the following overt act and or acts:

- a. to transfer trust money to the Defendant, Forethought Federal, and to thereafter use those monies for the purchase of policies of life insurance upon the Plaintiff class representatives and other members of the class in violation of law and without the consent, knowledge, or acquiescence of the Plaintiffs;
- b. to misapply, retain, or convert payments made upon pre-need contracts;
- c. to cash surrender such policies; and
- d. to profit from the deceptive practices as described above.

62. In furtherance of the aforesaid conspiracy, the Defendants jointly and/or severally committed an overt act and/or acts as described above that proximately resulted in injury or damages to the Plaintiffs.

63. As a proximate result of the Defendants' aforesaid conspiracy or conspiracies, each of the Plaintiff class representatives and the other members of the class have suffered injuries and damages.

COUNT SIX

UNJUST ENRICHMENT

64. Plaintiffs reallage and incorporate by reference herein the preceding paragraphs as set forth *in extenso*.

65. Defendants Forethought Federal and Forethought Life have been unjustly enriched by virtue of the charges and fees paid to them in connection (1) with the issuance of the

aforementioned life insurance policies on the Plaintiffs and members of the class and (2) the subsequent cash surrender of those policies. Defendant Community has been unjustly enriched by the fees it collected in connection with its role as trustee for the trust monies.

66. In equity and good conscience and/or because of the fraudulent and unlawful conduct of these Defendants, all such charges and fees paid to Forethought Federal, Forethought Life, Community and/or any of their agents or affiliates should be disgorged and returned to the Plaintiffs and the class members, plus interest.

COUNT SEVEN

MONEY HAD AND RECEIVED

67. Plaintiffs reallege and incorporate by reference herein the preceding paragraphs as set forth *in extenso*.

68. Defendants hold money which in equity and good conscience belongs to the Plaintiffs and members of the class and which was paid to these Defendants because of mistake or the Defendants' wrongful conduct.

69. The Plaintiffs and members of the class are entitled to restitution of all charges and fees paid to Defendants and/or any of their agents or affiliates, plus interest.

COUNT EIGHT

TENNESSEE CONSUMER PROTECTION ACT TENNESSEE CODE ANNOTATED § 47-18-101, *ET SEQ.*

70. Plaintiffs reallege and incorporate by reference herein the preceding paragraphs as set forth *in extenso*.

71. Defendants' actions, as described herein, violate the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101, *et seq.* ("the Act").

72. The Plaintiffs and members of the class are “consumers” pursuant to the Act, § 47-18-103, and are entitled to protection under the Act.

73. The Defendants have violated § 47-18-104 through, among others, the following prohibited actions:

(2) Causing likelihood of confusion or misunderstanding as to the source, sponsorship, approval or certification of goods or services. This subdivision (b)(2) does not prohibit the private labeling of goods and services;

(3) Causing likelihood of confusion or misunderstanding as to affiliation, connection or association with, or certification by, another. This subdivision (b)(3) does not prohibit the private labeling of goods or services;

* * *

(5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship approval, status, affiliation or connection that such person does not have;

* * *

(12) Representing that a consumer transaction confers or involves rights, remedies or obligations that it does not have or involve or which are prohibited by law;

* * *

(27) Engaging in any other act or practice which is deceptive to the consumer or to any other person;

74. The Defendants’ violations of the Act were done “knowingly” as defined by Tenn. Code § 47-18-103(6).

75. As a result of the Defendants’ violations of the Act, the Plaintiffs and members of the class have suffered damages.

76. Plaintiffs and members of the class seek actual damages pursuant to the Act, § 47-18-109(a)(1); treble damages pursuant to § 47-18-109(a)(3); attorneys fees and costs pursuant to § 47-18-109(e)(1); and all other relief pursuant to the Act deemed appropriate by the Court.

DEMAND FOR JUDGMENT

WHEREFORE, THE PREMISES CONSIDERED, the Plaintiff class representatives on behalf of themselves and all others similarly situated pray that this court:

- A. Certify this case as a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure;
- B. Award the representative Plaintiffs and members of the class the costs of suit including such discretionary costs as may be awarded under the law;
- C. Award the Plaintiff class representatives and other members of the class their actual and punitive damages in an amount to be determined at trial and consistent with this Complaint, for the wrongful and deceptive acts of the Defendants;
- D. Award the Plaintiffs and other members of the class pre-judgment and post-judgment interest;
- E. Award the Plaintiffs and other members of the class such attorneys fees as may be permissible; and
- F. Award such other and further relief as this court deems just and proper.

THE PLAINTIFFS DEMAND A TRIAL OF THIS ACTION BY STRUCK JURY.

s/Bruce D. Brooke, Esq.

Bruce D. Brooke, Esq.

OF COUNSEL:

Fargarson & Brooke

254 Court Avenue

Suite 300

Memphis, Tennessee 38103

s/Albert G. Lewis, III

Albert G. Lewis, III (021963)

OF COUNSEL:

Lewis & Smyth, LLC
611 Helen Keller Blvd.
Tuscaloosa, Alabama 35404
Phone: (205) 553-5353

OF COUNSEL:

BADHAM & BUCK, LLC
2585 Wachovia Tower
420 20th Street North
Birmingham, Alabama 35203
Phone: (205) 521-0036