UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

BLUEHIPPO FUNDING, LLC,
a Maryland limited liability corporation and
BLUEHIPPO CAPITAL, L.L.C.,
a Nevada limited liability corporation, and

Plaintiffs

v. **CIVIL ACTION NO. 2:07-0399**

DARRELL V. MCGRAW, JR.,
in his official capacity as
Attorney General of the
State of West Virginia, and
JAMES ROBERT ALSOP,
in his official capacity as
Secretary of the
Department of Revenue of the
State of West Virginia,

Defendants

MEMORANDUM OPINION AND ORDER

Pending are motions to dismiss filed by defendant Secretary of the Department of Revenue James Robert Alsop ("Secretary") and defendant Attorney General Darrell V. McGraw, Jr. ("Attorney General"), filed respectively on July 16 and 18, 2007. Pending also is the plaintiffs' motion to submit a

surreply, filed August 22, 2007,[1] which is hereby ORDERED granted.

I.

Defendant BlueHippo Funding LLC is a Maryland citizen. (Compl. ¶ 5). Defendant BlueHippo Capital LLC is a Nevada corporation, with its principal place of business in Maryland. (Id. ¶ 6).[2]

BlueHippo offers computers and other electronic products for sale to the public, facilitating its sales through consumer financing. (Id. ¶ 9; AG Compl. ¶¶ 18, 19). When a

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[1]This case is related to State of West Virginia v. BlueHippo Funding, LLC, No. 2:07-00220 (S.D. W. Va. Apr. 4, 2007) ("BlueHippo I"), a civil action remanded to the Circuit Court of Kanawha County ("circuit court") on July 23, 2007. A familiarity with both BlueHippo I and this action ("BlueHippo II") will supply the facts necessary for a complete understanding of the court's rulings herein. A review of the pleadings in both actions is thus necessary. References to the complaint in BlueHippo I are cited as "AG Compl." Citations to the complaint in BlueHippo II will appear as "Compl."

References to the complaint in BlueHippo I are solely provided for context and a comparison of both actions. References to the complaint in BlueHippo II, however, are treated as true in accordance with the standards governing the disposition of motions filed pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6).

[2]The defendants are hereinafter referred to collectively as "BlueHippo."

consumer enters a transaction with BlueHippo, the parties execute a financing or lay away agreement. (AG Compl. ¶ 23). When the terms of the parties' agreements have been fulfilled, BlueHippo orders the consumer's requested merchandise from a supplier, who then ships the goods to the consumer. (Id. ¶¶ 23, 25).

The Attorney General challenges a number of practices arising out of BlueHippo's contacts with West Virginia consumers, contending, inter alia, (1) the entity does not disclose the total cost of the purchased goods and their financing, (2) the payments are non-refundable until after the consumer transaction has been verified and BlueHippo has obtained the consumer's approval of an electronic debiting arrangement, (3) the terms of the written agreements that the consumer is required to sign are not disclosed, (4) the right to cancel the transaction within seven days is not disclosed, (5) at least one of the computers marketed as "the finest . . . on the market" was in actuality "below the industry standard" at the time, (6) it is not disclosed that if the consumer pays late even once, he will be required to advance at least 66% of the total cost of the computer before it will be shipped, (7) some computer models offered by BlueHippo were, during the same period of time as advertised for sale, readily available in retail stores for less

than half the amount charged by BlueHippo, and (8) BlueHippo's chosen arbitrator, the National Arbitration Forum, has entered at least one award in BlueHippo's favor in a proceeding where the consumer received no notice of the arbitration. (Id. ¶¶ 40, 45, 52, 56, 61(c), 63, 81, 105(jj)(1)).

On March 12, 2007, based upon these and other allegations, the Attorney General instituted BlueHippo I against defendants and one of their principals, Joseph K. Rensin, in the circuit court, alleging the following claims:

Count 1: Acting as a telemarketer without first registering with the Department of Tax and Revenue in violation of West Virginia Code sections 46A-6F-301(a) and 46A-6-104 (Id. ¶¶ 125-26).

Count 2: Acting as a telemarketer without filing a bond with the Department of Tax and Revenue in violation of 46A-6F-301(a) and 46A-6-104 (Id. ¶¶ 130-31).

Count 3: Taking payment from consumer accounts before clearly and conspicuously disclosing all material aspects of the transaction in violation of numerous stated provisions of the West Virginia Code (Id. ¶¶ 136-45).

Count 4: Refusing to restore payment to consumers within 30 days of cancellation in violation of West Virginia Code sections 46A-6F-402 and 46A-6-104 (Id. ¶¶ 148-49).

Count 5: Misrepresenting and omitting material facts concerning the transactions with consumers in violation of West Virginia Code sections 46A-6-102(7)(M), 46A-6F-501(8), 46A-6-104, and 46A-6F-101 et seq. (Id. ¶¶ 154-66, 169).

Count 6: False advertising of goods and services in violation of West Virginia Code sections 46A-6-102(7)(N), 46A-6-104, and 46A-6F-101 et seq. (Id. ¶¶ 172-74).

Count 7: Misrepresenting the quality of goods and services in violation of West Virginia Code sections 46A-6-102(7)(G), 46A-6-104, and 46A-6F-101 et seq. (Id. ¶ 178).

Count 8: Creating a likelihood of confusion or misunderstanding in violation of West Virginia Code sections 46A-6-102(7)(L), 46A-6-104, and 46A-6F-101 et seq. (Id. ¶ 182).

Count 9: Misrepresenting that BlueHippo has special affiliations with computer manufacturers in violation of West Virginia Code sections 46A-6-102(7)(E), 46A-6-104, and 46A-6F-101 et seq. (Id. ¶ 188).

Count 10: Failing to provide written periodic receipts and statements of account in violation of West Virginia Code sections 46A-2-114(2), 46A-1-107, 46A-6F-501(8) 46A-6-104, and 46A-6F-101 et seq. (Id. ¶¶ 195-97).

Count 11: Charging unlawful penalties upon default in violation of West Virginia Code sections 46A-2-115, 46A-1-107, 46A-6F-501(8), 46A-6-104, and 46A-6F-101 et seq. (Id. ¶¶ 201, 208-09).

Count 12: Charging late fees that exceed the maximum excess charges allowed in violation of West Virginia Code sections 46A-7-111(1), 46A-6F-501(8), 46A-6-104, and 46A-6F-101 et seq. (Id. ¶¶ 216-17).

Count 13: Using unfair or unconscionable means of debt collection in violation of West Virginia Code sections 46A-2-128(c), 46A-2-128(d), 46A-6F-501(8), 46A-6-104, and 46A-6F-101 et seq. (Id. ¶¶ 223-25).

Count 14: Unlawfully accelerating a debt in violation of West Virginia Code sections 46A-2-106, 46A-6F-

501(8), 46A-6-104, and 46A-6F-101 et seq. (Id. ¶¶ 228-29).[3]

Count 15: Using fraudulent, deceptive, or misleading representations in debt collection in violation of West Virginia Code sections 46A-2-127(d), 46A-2-127(g), 46A-6F-501(8), 46A-6-104, and 46A-6F-101 et seq. (Id. ¶¶ 236-39).

Count 16: Participating in unconscionable agreements and conduct in violation of West Virginia Code sections 46A-2-121, 46A-7-109(1)(a)-(c), 46A-6F-501(8), 46A-6-104, and 46A-6F-101 et seq. (Id. ¶¶ 241-44).

Count 17: Making or collecting excess charges in violation of West Virginia Code sections 46A-7-111 (Id. ¶ 246).

Count 18: Using unfair or unconscionable means of debt collection in violation of West Virginia Code sections 46A-2-128, 46A-6F-501(8), 46A-6-104, and 46A-6F-101 et seq. (Id. ¶¶ 257-58).

On April 4, 2007, defendants removed and answered in BlueHippo I, asserting "the [BlueHippo I] Complaint alleges federal questions." (Not. of Remov. ¶ 6). Defendants did not allege federal subject matter jurisdiction respecting any of the allegations found in Counts 1-18 of the BlueHippo I complaint, inasmuch as those claims appeared to arise solely from state law and not "under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331; see also Id. § 1441(a). Defendants

[3]This claim is mis-labeled in the BlueHippo I complaint as the "SIXTEENTH CAUSE OF ACTION." (Id. at 42).

relied instead for removal jurisdiction upon the following, discrete components of the BlueHippo I complaint's 19 separate requests in its prayer for relief:

> A. That this Court schedule a hearing on its petition for preliminary injunction and enter an order that:
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> . . . .
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> 3. Temporarily restrains the defendants/respondents from entering any arbitration awards as judgments in any state or federal court as to transactions involving West Virginia consumers.
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> 4. Temporarily restrains the defendants/respondents from using any state or federal court to enforce [sic] collect debts or enforce any other obligations arising from transactions involving West Virginia consumers.
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> . . . .
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> K. An Order further setting forth that the civil penalties shall be deemed to be the result of an enforcement action brought pursuant to the Attorney General's police or regulatory powers under the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-1-101, et seq. and are therefore nondischargeable in bankruptcy pursuant to 11 U.S.C. § 523(a)(7). See U.S. Dep't of Housing & Urban Development v. Cost Control Marketing & Sales Management of Virginia, 64 F.3d 920 (1995); Board of Governors of the Federal Reserve System v. Mcorp Financial, 502 U.S. 32 (1991) . . . .

(Id. prayer for relief at A.3, A.4, and K.) (emphasis supplied)).

On June 25, 2007, BlueHippo II was instituted in this court. The six-count BlueHippo II complaint seeks a declaration

that certain provisions in Article 6F of the West Virginia Consumer Credit and Protection Act ("WVCCPA"), relied upon heavily by the Attorney General in BlueHippo I, violate the First Amendment, the Fourteenth Amendment's Equal Protection Clause, and the Commerce Clause. (Compl. ¶¶ 1-2).

A comparative analysis of the counts of the BlueHippo II complaint with the BlueHippo I affirmative defenses found in answer to the Attorney General's BlueHippo I complaint illustrates significant substantive overlap. While the BlueHippo II complaint nominally pleads six counts, it practically alleges only three. The first three counts are constitutional claims pled using the Declaratory Judgment Act as a vehicle, and the final three, relying upon the same substance, utilize the remedy offered by section 1983. It appears that the set of Counts I, II, and III and the set of Counts IV, V, and VI of the BlueHippo II complaint each line up, respectively, with the set of affirmative defenses, being 2, 1, and 3, found in BlueHippo's answer in BlueHippo I. Each set alleges that Article 6F is a prohibited prior restraint (Counts I, IV and Aff. Def. 2), is violative of the First Amendment and the Fourteenth Amendment Equal Protection Clause (Counts II, V and Aff. Def. 1), and unduly burdens interstate commerce (Counts III, VI and Aff. Def. 3).

On July 16, 2007, the Secretary moved for dismissal from BlueHippo II, contending (1) Bluehippo fails to allege the Secretary is engaging in an ongoing violation of federal law and he has, in any event, deferred to the Attorney General's exercise of jurisdiction under the WVCCPA, (2) there is no case or controversy respecting BlueHippo and the Secretary inasmuch as the BlueHippo II complaint alleges no action or threatened action taken by the Secretary against BlueHippo, and (3) the pending litigation between the Attorney General and BlueHippo is sufficient to bind all state officers who might enforce the WVCCPA against BlueHippo.

On July 18, 2007, the Attorney General likewise moved to dismiss the BlueHippo II complaint. In his opening brief, the Attorney General asserted only that the claims in BlueHippo II were compulsory counterclaims already alleged as affirmative defenses in BlueHippo I and subject to dismissal for that reason. Following BlueHippo's response to that argument, the Attorney General mounted in reply a substantial argument based upon Younger v. Harris, 401 U.S. 37 (1971), and one of its offspring, Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). BlueHippo moved to file a surreply in view of this new contention.

As noted, on July 23, 2007, the court remanded BlueHippo I to the circuit court. The court did so based upon the lack of a federal question that might support removal jurisdiction. On July 27, 2007, the circuit court held an evidentiary hearing respecting the Attorney General's motion for a preliminary injunction against BlueHippo. The parties reached an amicable resolution on several matters raised in the Attorney General's preliminary injunction motion.

In sum, the parties agreed, inter alia, that BlueHippo (1) would not enter into new transactions with West Virginia consumers but would continue to receive funds from existing customers in the state, and (2) would establish an escrow account in West Virginia into which it would deposit the funds received from its customers here. (Agd. Ord. at 2). The parties failed to reach agreement on two other issues, requiring the circuit court to (1) direct BlueHippo to provide the Attorney General certain West Virginia customer information, and (2) refuse the Attorney General's request that BlueHippo be commanded to post a $200,000 bond. (Id. at 3).

II.

A. Standards Governing Motions Pursuant to Rules 12(b)(6) and 12(b)(1)

A motion to dismiss pursuant to Rule 12(b)(6) should not be granted "unless it appears certain that the plaintiff can prove no set of facts which would support . . . [his] claim and would entitle . . . [him] to relief." Greenhouse v. MCG Capital Corp., 392 F.3d 650, 655 (4th Cir. 2004) (quoting Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993)). Additionally, the "complaint [is viewed] in the light most favorable to the plaintiff and . . . all well-pleaded allegations" are accepted as true. South Carolina Dept. of Health & Environ. Control v. Commerce & Industry Ins. Co., 372 F.3d 245, 255 (4th Cir. 2004) (quoting Franks v. Ross, 313 F.3d 184, 192 (4th Cir. 2002)). Further, beyond the facts alleged, the court is required to "draw[] all reasonable . . . inferences from those facts in the plaintiff's favor . . . ." Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999).

A complaint need not "make a case" against a defendant or "forecast evidence sufficient to prove an element" of the claim. Chao v. Rivendell Woods, Inc., 415 F.3d 342, 349 (4th

Cir. 2005) (quoting Iodice v. United States, 289 F.3d 270, 281 (4th Cir. 2002)). Rather, it need only "allege facts sufficient to state elements" of the claim. Id.; Bass v. E.I. Dupont de Nemours & Co., 324 F.3d 761, 765 (4th Cir. 2003).

A motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) may be presented in one of two ways. United States v. North Carolina, 180 F.3d 574, 580 (4th Cir. 1999). The one chosen by defendants here is a challenge to the complaint for failure to allege facts upon which subject matter jurisdiction can be based. Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982). In such a situation, the facts alleged by a plaintiff are assumed to be true, giving him the same procedural protection as he would be accorded by Rule 12(b)(6). Id.

B. The Secretary's Motion to Dismiss

As noted, the Secretary contends he is entitled to dismissal at this early juncture inasmuch as (1) BlueHippo fails to allege he is engaged in an ongoing violation of federal law, (2) there is no case or controversy respecting BlueHippo and the Secretary inasmuch as the BlueHippo II complaint alleges no

action or threatened action taken by the Secretary against BlueHippo, and (3) the pending litigation between the Attorney General and BlueHippo is sufficient to bind all state officers who might enforce the WVCCPA against BlueHippo.

Regarding the first and second contentions, the Secretary administers the telemarketing registration and bonding requirements that plaintiffs seek to have declared unconstitutional. (Compl. ¶¶ 4, 8, 19-20). Also, as the Secretary candidly concedes, "Counts IV, V and VI . . . assert that the 'Defendants' . . . are attempting to deprive the Plaintiffs of certain constitutional rights." (Sec'y's Reply at 1 n.2). BlueHippo additionally contends that "irrespective of the outcome of their dispute with the Attorney General, plaintiffs have a strong interest in obtaining declaratory relief against . . . [the Secretary] given his central role in administering the unconstitutional statutory provisions." (Pls.' Resp. at 4).

The allegations in the BlueHippo II complaint are not a model of clarity. Counts I through VI, however, along with BlueHippo's further explication of its theory of action against the Secretary, minimally suffice at this early juncture to withstand the Secretary's Rule 12(b)(1) challenge.

The court, accordingly, ORDERS that the Secretary's motion to dismiss be, and it hereby is, denied.

C. The Attorney General's Motion to Dismiss

As noted, the Attorney General primarily contends the court should abstain from considering, and dismiss, BlueHippo II.[4]

1. General Standards Governing the Abstention Inquiry

The doctrine of abstention has its modern roots in Railroad Comm. of Tex. v. Pullman Co., 312 U.S. 496 (1941). In Pullman, the Supreme Court stayed its hand on federal

[4]The Attorney General's other contention is worthy of summary treatment, namely, that BlueHippo II should be dismissed as a compulsory counterclaim pursuable only within BlueHippo I. The Attorney General cites no authority supporting dismissal of independent constitutional claims pled under 42 U.S.C. § 1983 in a federal action that are also the subject of affirmative defenses in a state action. Although the prospect of duplicative litigation is not particularly palatable, the court believes the more appropriate analytical framework for addressing that concern is found within the Attorney General's abstention argument. The court also notes the general proposition, stated more fully within, that parallel federal and state actions may proceed to judgment until one becomes preclusive of the other. Great American Ins. Co. v. Gross, 468 F.3d 199, 205-06 (4th Cir. 2006).

constitutional issues pending clarification of state law by state courts. Since Pullman, the Supreme Court has extended abstention principles to multiple situations where "federal courts should not exercise expansive remedial powers when to do so would damage principles of federalism and comity [.]" Johnson v. Collins Entertainment Co., 204 F.3d 573, 577 (4th Cir. 2000) (opinion accompanying denial of petition for rehearing en banc).[5]

Abstention, however, remains the exception to the rule that federal courts should exercise jurisdiction granted by Congress. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 728 (1996) (citations omitted). As noted by our court of appeals:

> It is well-settled that "our dual system of federal and state governments allows parallel actions to proceed to judgment until one becomes preclusive of the other." Id. at 462. Indeed, "[d]espite what may appear to result in a duplication of judicial resources, '[t]he

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[5]See, e.g., Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941) (cases in which the resolution of a federal constitutional question might be mooted if the state courts were given the opportunity to interpret ambiguous state law); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (interference with certain types of state civil proceedings); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959) (cases raising issues "intimately involved with [the States'] sovereign prerogative," the proper adjudication of which might be impaired by unsettled questions of state law); Great Lakes Dredge and Dock Co. v. Huffman, 319 U.S. 293 (1943) (cases whose resolution might interfere with state schemes for the collection of taxes); Burford v. Sun Oil Co., 319 U.S. 315 (1943) (cases involving complex state administrative procedures).

> rule is well recognized that the pendency of an action in the state [system] is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" Moreover, the Supreme Court has cautioned that federal courts are bound by a "virtually unflagging obligation . . . to exercise the jurisdiction given them." As we noted in Chase Brexton[Health Services, Inc. v. Maryland, 411 F.3d 457 (4th Cir. 2005)], "[f]ederal courts' have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not.'"

Great American, 468 F.3d at 205-06 (citations omitted); see also Martin v. Stewart, No. 06-1829, slip op. at 5 (4th Cir. Aug. 29, 2007).

One ground for abstention is found in Younger v. Harris, 401 U.S. 37 (1971), described in detail by a noted commentator whom our court of appeals has cited with some frequency[6]:

> In 1971 . . . the Supreme Court held that federal courts may not enjoin pending state court criminal proceedings. The Court expressly declared that its decision was not based on the Anti-Injunction Act . . . . Rather, the Court fashioned a separate abstention doctrine preventing federal courts from interfering with pending state criminal prosecutions, even if there is an allegation of a constitutional violation and even though all jurisdictional and justiciability requirements are met.

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[6]See, e.g., Miller v. Brown, 462 F.3d 312, 319 (4th Cir. 2006); Stewart v. North Carolina, 393 F.3d 484, 490 n.4 (2005); American Legion Post 7 of Durham v. City of Durham, 239 F.3d 601, 606(4th Cir. 2001); Litman v. George Mason University, 186 F.3d 544, 550 (4th Cir. 1999).

Erwin Chemerinsky, Federal Jurisdiction § 13.1 (4th Ed. 2003). From its rather unheralded inception, however, over "the course of the next 16 years seven major decisions . . . carried the Younger rules into . . . civil litigation and even administrative proceedings." 17A Charles A. Wright et al., Federal Practice and Procedure § 4254 (2d ed. 1988). It is thus not surprising our court of appeals has extended Younger "to noncriminal judicial proceedings when important state interests are involved." Martin Marietta Corp. v. Maryland Comm'n on Human Relations, 38 F.3d 1392, 1396 (4th Cir. 1994).

Under certain circumstances, however, the court of appeals has tread more carefully. This is so in particular when there is a strong federal interest placed alongside the important state interest examined at the second step of the Younger abstention analysis. See Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982) (establishing a three-part test for Younger abstention requests). That tripartite Younger/Middlesex analysis, and the exceptions to Younger abstention, are re-stated in Nivens v. Gilchrist, 319 F.3d 151 (4th Cir. 2003):

> [A] federal court should abstain from interfering in a state proceeding, even though it has jurisdiction to reach the merits, if there is (1) an ongoing state judicial proceeding, instituted prior to any

> substantial progress in the federal proceeding; that (2) implicates important, substantial, or vital state interests; and (3) provides an adequate opportunity for the plaintiff to raise the federal constitutional claim advanced in the federal lawsuit. Id. at 432, 102 S.Ct. 2515 . . . .
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> . . . .
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> The Supreme Court has recognized that in "extraordinary circumstances," federal courts have discretion to disregard the "strong federal policy against federal court interference with pending state judicial proceedings." Middlesex County Ethics Comm., 457 U.S. at 431, 102 S.Ct. 2515. . . . [but], a federal court must abstain from interfering with an ongoing state proceeding where a litigant has "an 'opportunity to raise and have timely decided by a competent state tribunal the federal issues involved' and . . . no bad faith, harassment, or other exceptional circumstances dictate to the contrary." Middlesex, 457 U.S. at 437, 102 S.Ct. 2515 (quoting Gibson v. Berryhill, 411 U.S. 564, 577, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973)).

Id. at 153-54 (some citations omitted); Moore v. City of Asheville, 396 F.3d 385, 390 (4th Cir. 2005).

Three recent decisions from our court of appeals provide the analytical framework for resolving the Attorney General's abstention request.

a. Harper v. Public Service Commission -- An Important State Interest Counterbalanced by the Commerce Clause

First, in Harper v. Public Service Commission, 396 F.3d 348 (4th Cir. 2005), the court of appeals examined "the effect of

the [federal] commerce power on a federal court's discretion to abstain" under Younger. Id. at 349-50. In Harper, an out-of-state waste disposal service, Southern Ohio Disposal LLC ("SOD"), contended it was barred from competing in West Virginia with waste removers whom the state Public Service Commission ("PSC") had effectively licensed with an exclusive franchise.[7] SOD instituted suit in the district court to enjoin the PSC from enforcing a cease-and-desist order against SOD.

In preface to its thorough discussion of the second Younger/Middlesex factor, the court of appeals observed as follows:

> The list of areas in which federal judicial interference would "disregard the comity" that Our Federalism requires is lengthy. It encompasses those

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[7]The rather unusual regulatory scheme was described by the court of appeals as follows:

> West Virginia requires common carriers engaged in businesses like SOD's to obtain a "certificate of convenience and necessity" from the PSC. W. Va. Code Ann. § 24A-2-5(a) (Michie 2004). Without the certificate, it is "unlawful for any contract carrier by motor vehicle to operate" in West Virginia. Id. § 24A-3-3(a). But obtaining the certificate requires demonstrating that those who already are certified to provide service for a given geographic area are not "adequately serving the same territory." Id. In the absence of such a showing, the PSC "shall not grant such certificate" to any applicant. Id. § 24A-2-5(a).

Id. at 350.

> interests that the Constitution and our traditions assign primarily to the states. Functions which make our states self-governing sovereigns, rather than "mere political subdivisions" or "regional offices" of the federal government, New York v. United States, 505 U.S. 144, 188, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), are inherently "important state interests" that may warrant Younger abstention.

Id. at 352. In undertaking a non-exclusive listing of the types of important state interests counseling in favor of federal-court restraint, the panel observed as follows:

> Many interests beyond criminal law . . . are core sources of state authority. For instance, enforcing state court judgments cuts to the state's ability to operate its own judicial system, a vital interest for Younger purposes.
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> . . . .
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> For . . . reason[s] of comity, we hold fast to the notion that when an interest central to a case implicates the sovereignty and dignity of a state . . . federal courts should abstain. Interests like education, land use law, family law, and criminal law lie at the heart of state sovereignty, and a failure to abstain in the face of ongoing state proceedings would disrespect the allocation of authority laid in place by the Framers. In other words, that which must be respected through "comity" is identical to the traditional "areas of paramount state concern," . . . and also the same as the "important state interests" test of Middlesex County . . . . When a state interest does not fit one of these characterizations, it will likely fail to satisfy any other, for they all are shorthand for the structural values of "Our Federalism" that Justice Black described.

Id. at 352-53, 354 (citations omitted).

In an attempt to guide the inquiry for those interests falling outside those explicitly mentioned above, the court of

appeals noted as follows:

> The Court's clear insistence that the interests be "important" requires us to recognize some limits.
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> One limit comes naturally, upon proper characterization of the state interest. Were we to permit a lofty level of generality as to how we identify the interests at stake, we would find that nearly anything could at least touch on something like the "general welfare," "the public good," or "public safety." This would render a nullity the requirement that we ensure that the state interest be important. . . .
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> Neither may we grind the state interest too finely, however . . . . In short, the characterization of state interests should not be general to the point of rendering the Middlesex . . . test meaningless, or specific to the point of rendering the state interest trivial.
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> A second aid in testing the significance of state interests comes from recognizing that the "central idea [in abstention analysis] has always been one of simple comity." Johnson, 199 F.3d at 719. Since Younger itself, it has been understood that the interests of both the national and state governments are advanced when federal courts abstain from interfering with the kind of ongoing state proceedings which, simply stated, make a state a state. In a word, this itself is comity. See Younger, 401 U.S. at 44, 91 S.Ct. 746. This principle represents the structural nature of our Constitution, which -- through federalism -- has reserved many functions to the states even as it has allocated others, for the benefit of all states, to the national government.

Id. at 353-54.

As noted, however, it is incumbent upon the federal court to weigh on the scales not only the state interest involved

in a particular case but also the federal interest that might outbalance it in a given case. Of utmost importance presently is the Harper decision's discussion of the Younger/Middlesex inquiry in the midst of a federal-court Commerce Clause challenge to a state rule for which enforcement is sought by the state within a parallel proceeding in state court. The analysis is worth quoting at length:

> [T]he PSC requirement challenged here does not concern "improper disposal of solid waste." It concerns who has the right to contract with towns, businesses, and individuals in West Virginia to remove that waste, not the manner in which that waste is removed. Thus, the state interest at stake here is its interest in limiting interstate access to the waste removal market. While neutral health, safety, and environmental regulations are one thing, limitation on market access to maintain exclusive franchises for existing enterprises is another.
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> . . . .
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> Because the interest advanced here is one that by its very nature serves to impede interstate commerce, we must evaluate the effect of the dormant Commerce Clause upon the decision to abstain.
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> . . . .
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> The commerce power plays a role in abstention analysis quite different from many of the other provisions of the Constitution. The dormant Commerce Clause demonstrates a difference of kind, not merely of degree. By its very nature, it implicates interstate interests. It protects all states by ensuring that no state erects the kind of barriers to trade and economic activity that threatened the survival of a fledgling country under the Articles of Confederation. . . .

> Giving the power over commerce to Congress was easily seen as structurally creating an interstate interest. . . . Our "national common market," . . . does not allow states -- even inadvertently -- to impede commerce and sow disunity. . . .
>
> When there is an overwhelming federal interest -- an interest that is as much a core attribute of the national government as the list of important state interests are attributes of state sovereignty in our constitutional tradition -- no state interest, for abstention purposes, can be nearly as strong at the same time. . . .

Id. at 355-56.

Unlike that which appears to be at issue at this stage of the case, Harper involved a state's somewhat transparent attempt to restrict market entry. Were that not the case, however, the court of appeals stressed that "the commerce power itself justifies a narrower view of state interests in the abstention context." Id. at 357.

b. Life Partners, Inc. v. Morrison -- The State's Interest in Consumer Protection Counterbalanced by the Commerce Clause

The second case informing the present inquiry, like Harper, also illustrates how the federal commerce power will often trump a competing state interest no matter how important and well defined by the state sovereign. In Life Partners, Inc. v. Morrison, 484 F.3d 284 (4th Cir. 2007), a terminally ill

Virginia resident sold her life insurance policy to a viatical settlement company at a deep discount to provide her with the cash needed for the remaining months of her life. Virginia purported to regulate such settlements to protect its residents who, in the vulnerable circumstance of a terminal illness, might find it necessary to sell their life insurance policies.

After consummating the sale to the company, the Virginia resident attempted to improve the agreed-upon price by invoking the minimum pricing guarantees found in the Virginia Viatical Settlements Act ("Act"). After the company refused to comply with her demands, she instituted an action before the Virginia Bureau of Insurance. After the Bureau of Insurance concluded the company was an unlicensed viatical settlement provider, the Virginia State Corporation Commission issued a rule to show cause against the company commanding it to explain why it was conducting business without proper licensure. The company was additionally warned that unless it complied with the Act, it would be barred from further business ventures in the state and face the specter of prosecution.

In response, the company instituted suit in federal court designed to upend the Act as violative of the dormant Commerce Clause. Virginia defended the Act as serving a

legitimate and important local interest in regulating viatical settlements with its residents. Of particular note were the Act's customary consumer protection provisions, which (1) prohibited false or misleading advertising, (2) prohibited fraud in connection with viatical settlements, and (3) and made violations of the Act unfair trade practices. A host of other protections were designed as well to protect Virginia viators.[8] Based upon the important state interest of protecting its vulnerable, in extremis consumers from unscrupulous and predatory actions, Virginia contended that the district court should have abstained under Younger in favor of the pending commission proceedings.

Despite this arguably well-justified and substantial state interest, the court of appeals disagreed based upon Harper

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[8]Emphasizing the importance of the state's interest, the court of appeals additionally observed as follows:

> Not only are the parties to insurance contracts affected by viatical settlements, but the State too has interests, especially in ensuring (1) that its residents not be subjected to unscrupulous conduct by the viatical settlement providers who might defraud, harass, or abuse insureds in the State and (2) that its residents not defraud insurance companies in an effort to realize a quick financial return by entering into insurance contracts while hiding the fact that they will soon, within a determinable time, die.

Id. at 296.

and its Commerce-Clause counterbalance analysis:

> Younger abstention is a doctrine requiring federal courts to refrain from interfering with ongoing state judicial proceedings that implicate important state interests. When the federal case, however, involves "an overwhelming federal interest -- an interest that is . . . a core attribute of the national government . . . -- no state interest, for abstention purposes, can be nearly as strong at the same time."
>
> This case involves just such an interest, the commerce power. Thus, the issue in this case is not whether Virginia has an interest in regulating viatical settlements -- it most certainly does -- but whether Congress authorized Virginia to do so, and if not, whether Virginia's regulations violate the dormant Commerce Clause. In such cases, "the commerce power itself justifies a narrower view of state interests in the abstention context."
>
> Under these principles, we conclude that the district court did not abuse its discretion in declining to abstain under Younger v. Harris.

Id. at 300-01 (quoting Harper, 396 F.3d at 357).

c. Moore v. City of Asheville -- An Important State Interest Without a Federal Interest in Controversy

The third case, one in which the Commerce Clause was not implicated, is useful in comparison to Harper and Morrison. Moore v. City of Asheville, 396 F.3d 385 (4th Cir. 2005), involved a preacher who delivered evangelistic messages on street corners in Asheville, North Carolina. In 2003, Asheville

officials cited Moore for violations of the city's noise ordinance. Moore paid the fines but did not avail himself of his state appellate remedies. Rather, he instituted an action against the City and its officials. Moore alleged that his conduct was protected by the First and Fourteenth Amendments and that the noise ordinance was unconstitutional both on its face and as applied. The district court stayed the action pending the outcome of any further state proceedings. Quoting Younger, the court of appeals re-emphasized the vital role played by the decision in our system of dual sovereigns:

> This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.
>
> [Younger, 401 U.S.] at 44, 91 S.Ct. 746 (emphasis added).

Id. at 391 (quoting Younger as noted).

The court of appeals additionally discussed at length Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), a case relied upon heavily by the Attorney General:

> In extending Younger to prescribe abstention in favor of state civil actions, the Supreme Court in Huffman, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482, was mindful that the doctrine was originally applied to protect the state interests represented in criminal prosecutions. . . Thus, recognizing that the State's nuisance action [in Huffman] was a coercive civil proceeding to which the State was a party, the Supreme Court concluded that federal court interference would disrupt the State's efforts "to protect the very interests which underlie its criminal laws." Id. at 605, 95 S.Ct. 1200; see also Ohio Civil Rights Com'n, 477 U.S. at 628, 106 S.Ct. 2718 (holding that the "elimination of prohibited sex discrimination is a sufficiently important state interest" to bring state administrative proceedings by a civil rights commission within the ambit of Younger); Middlesex County Ethics Comm., 457 U.S. at 434, 102 S.Ct. 2515 (holding that Younger protects ongoing state disciplinary proceedings because the State "has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses").

Id. at 392-93.

Although there were other, weighty considerations for the court of appeals in Moore[9], the decision also arguably reflects a somewhat broader view of those state interests that might qualify for consideration under the second Younger/Middlesex factor:

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[9]The court of appeals' primary focus was Moore's failure to pursue state appellate remedies while attempting to collaterally attack the City's state enforcement efforts through an independent federal action. The court of appeals deemed this an apparent "effort[] to cast aspersion on state processes and to annul the results of administrative proceedings . . . ." Moore, 396 F.3d at 397.

> The case before us implicates not only concerns about avoiding duplicative litigation and respecting the appellate processes designed by Congress and the Asheville City Council, but also concerns about respecting Asheville's efforts to enforce its substantive policies against noise disturbances.

Id. at 393 (emphasis added).

In sum, the court of appeals affirmed the district court's decision to abstain from considering Moore's First and Fourteenth Amendment claim. This was so despite the fact that there remained "no avenues . . . open for Moore to exhaust state administrative and judicial appeals with respect to his two citations," resulting in "his federal complaint . . . be[ing] dismissed in its [then] present form." Id. at 397.

2. Analysis

As noted, BlueHippo challenges the constitutionality of some of the state laws underlying the Attorney General's civil enforcement action in BlueHippo I. The constitutional challenges are based upon alleged violations of the First Amendment, the Fourteenth Amendment, and the Commerce Clause.

As is often the case, there is little controversy concerning the first and third elements of the Younger/Middlesex

test. BlueHippo I qualifies as an ongoing state judicial proceeding instituted prior to any substantial progress in BlueHippo II. Additionally, BlueHippo I provides BlueHippo an adequate opportunity to raise its federal constitutional defenses in BlueHippo II as, in essence, affirmative claims for relief. See W. Va. Const. Art. 8, Sec. 6 ("Circuit courts shall have original and general jurisdiction . . . of all civil cases in equity . . . ."). The controversy thus centers around whether BlueHippo II, in whole or in part, implicates important state interests.

It appears evident that West Virginia Code chapter 46A, article 6F was enacted, in part, to protect state consumers from predatory actions that might be taken against them by persons initiating or receiving telephone calls for solicitation purposes. See W. Va. Code § 46A-6F-103, -113. It is noteworthy that numerous courts have accepted the broader state interest in consumer protection as qualifying for consideration under the second step in the Younger/Middlesex test. See, e.g., Cedar Rapids Cellular Tel., L.P. v. Miller, 280 F.3d 874, 879-80 (8th Cir.2002) ("The State of Iowa has an important interest in enforcing its consumer protection statutes."); Williams v. State of Wash., 554 F.2d 369, 370 (9th Cir. 1977)("Because of Washington's governmental interest in enforcing its consumer

protection act, federal abstention is required . . . ."); Goleta Nat. Bank v. Lingerfelt, 211 F. Supp.2d 711, 716-17 (E.D.N.C. 2002) ("[T]he State does have a vital interest in protecting its citizens from predatory lending, usury, and other forms of deceptive trade practices"); Communications TeleSystems Int'l v. California Pub. Utils. Comm'n, 14 F. Supp.2d 1165, 1171 (N.D. Cal. 1998) ("[T]he State of California has significant interests in protecting consumers within its borders from unfair business practices . . . ."); State Farm Mut. Ins. Co. v. Metcalf, 902 F. Supp. 1216, 1218 (D. Haw. 1995) (noting Hawaii's interest "in protecting consumer[]s from unfair and deceptive trade practices by insurance carriers"). Indeed, as noted, our court of appeals observed in Morrison that the state had valid interests in protecting its residents from "unscrupulous conduct . . . [that] might defraud, harass, or abuse" consumers in the state. Morrison, 484 F.3d at 296.

In view of the important state interest at hand, and with no comparably weighted federal interest in counterbalance, Younger abstention appears appropriate with respect to Counts I and IV (First Amendment Prior Restraint claims), and II and V (First Amendment and Fourteenth Amendment claims), of the BlueHippo II complaint. These claims are presently in play

before the presiding state circuit judge, and settled notions of comity counsel in favor of not interfering with that court's disposition of BlueHippo's defenses.

A different result obtains, however, with respect to the Commerce Clause challenges found in Counts III and VI of the BlueHippo II complaint. Unlike the First and Fourteenth Amendment claims, BlueHippo's Commerce Clause challenge, as in Harper and Morrison, involves "'an overwhelming federal interest -- an interest that is . . . a core attribute of the national government . . . .' Consequently, 'no state interest, for abstention purposes, can be nearly as strong at the same time.'" (quoting Harper, 396 F.3d at 301). Abstention on Younger grounds would thus be inappropriate respecting Counts III and VI.[10]

The court, accordingly, ORDERS that the Attorney General's motion to dismiss be, and it hereby is, granted in part and denied in part as directed below.

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[10]While partial abstention is an infrequent occurrence, it is not without precedent. See Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 292 (1979); see also Red Bluff Drive-In, Inc. v. Vance, 648 F.2d 1020, 1025 n.3 (5th Cir. 1981) ("In reaching the merits of the judgments below to affirm the constitutionality of most of the Texas obscenity statute while abstaining from an adjudication of the three provisions discussed in Part II, infra, we reach a result analogous to the Supreme Court's partial abstention in Babbitt . . . .").

III.

Based upon the foregoing discussion, the court ORDERS as follows:

1. **That the Secretary's motion to dismiss be, and it hereby is, denied;**

2. **That the Attorney General's motion to dismiss be, and it hereby is, granted in part and denied in part;**

3. **That Counts I, II, IV, and V as to both defendants be, and they hereby are, dismissed in deference to the ongoing state proceeding in BlueHippo I[11]; and**

4. **That Counts III and VI as to both defendants be, and they hereby are, retained for further development and disposition in this action.**

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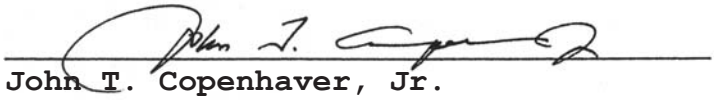
[11]**As noted, the Secretary did not seek dismissal on abstention grounds. That relief, sought and obtained by the Attorney General, is properly treated as redounding to the Secretary's benefit. Retaining the First and Fourteenth Amendment claims as to the Secretary alone would result in tension similar to that avoided by abstaining on the non-Commerce Clause claims alleged against the Attorney General. Additionally, should the state court ultimately declare portions of Article 6F unconstitutional, the declaration would presumably bind the Secretary as well despite the fact he is a non-party to that litigation.**

In any case involving parallel state and federal proceedings, there are risks of additional expense, delay, and duplication of effort. The parties, either jointly or individually, are thus given leave to move expeditiously for any relief that might avoid these undesirable consequences.

The Clerk is directed to forward copies of this written opinion and order to all counsel of record.

DATED: October 25, 2007



John T. Copenhaver, Jr.
United States District Judge