FILED
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
CONSECO, INC., *et al.*,	)	Case No. 02-49672
	)	(Jointly Administered)
Debtors.	)	
	)	Hearing Date: December 17, 2003
	)	Hearing Time: 11:00 a.m.
	)	Honorable Carol A. Doyle

RESPONSE OF LYNN W. BAZZLE, BURT A. BAZZLE, DANIEL B. LACKEY, GEORGE BUGGS, FLORINE BUGGS, AND ANDRE C. FLEMINGS TO CFC ESTATES'S MOTION FOR AN ORDER APPROVING ESTIMATION PROCEDURES

Plaintiffs Lynn W. Bazzle, Burt A. Bazzle, Daniel B. Lackey, George Buggs, Florine Buggs, and Andre C. Flemings, *et al.*, individually and in their representative capacities (the "Objectors"), respectfully submit this Response (this "Response") setting forth their general objection to the CFC Estate's Motion (the "Estimation Motion") for an Order Approving Estimation Procedures (Docket No. 409) (the "Estimation Procedures"), filed by the CFC Estate on or about December 30, 2003. In support of this Response, the Objectors respectfully state as follows:

Introduction

1. Based upon statements made by the CFC Estate's attorneys at the December 17, 2003, hearing on the Objectors' Motion to Proceed in the Underlying Action to the effect that the Objectors' claims (the Claims") either have been or would be liquidated in the underlying state court action (the "Underlying Action"), the Objectors believe that the CFC Estate would agree with them that the Estimation Procedures would not apply to their Claims. Nevertheless, the Objectors have been unable to confirm this with the CFC Estate's attorneys since receiving the Estimation Motion last week. Since the terms of the Estimation Procedures do not appear to give a claimant the opportunity to object to being included in the Estimation Procedures once the CFC

Estate unilaterally concludes that the Estimation Procedures should apply, the Objectors reiterate the arguments they made during the plan confirmation hearings that Estimation Procedures could not possibly apply to their liquidated Claims because estimation does not apply to liquidated claims and estimation of a claim that arises out of a state court judgment would violate the *Rooker-Feldman* Doctrine.

Response

2. The principal background facts of the dispute between CFC and the Objectors have been repeated in no less than a dozen pleadings filed with this Court, and, in the interest of brevity, the Objectors respectfully refer to and incorporate the background statements set forth in the Motion to Abstain or Dismiss filed by the Bazzle/Lackey Plaintiffs and Motion to Lift Stay filed by the Flemings Plaintiffs, as permitted by Rule 10(c) of the Federal Rules of Civil Procedure, made applicable here by Rule 7010 of the Federal Rules of Bankruptcy Procedure.

3. All events giving rise to the Objectors Claims and the liability of the CFC Estate occurred prior to the filing of CFC's bankruptcy petition. Among other things, arbitral awards and judgments have been entered by the arbitrator and the state courts of South Carolina, respectively, in favor of the Objectors.

4. On December 17, 2003, this Court granted the Bazzle/Lackey Plaintiffs leave to proceed in the South Carolina state courts in accordance with the mandate of the United States Supreme Court. At that hearing, the CFC Estate's attorneys conceded that the Bazzle/Lackey Plaintiffs' Claims either had been or would be liquidated in the state court proceedings, and this Court's order (the "12/03 Order") granting the Bazzle/Lackey Plaintiff's Motion to Proceed in the Underlying Action provided that the Plan's injunction would be lifted to permit the Bazzle/Lackey Plaintiffs to "conclude all state court litigation in those Cases." With regard to the Flemings Plaintiffs, the South Carolina Circuit Court also has rendered a judgment of

liability in their favor.[1]

5. Prior to Plan confirmation, CFC filed its Third, Fourth, and Fifth Omnibus Objection to Claims in which CFC objected to the Objectors claims on the generic ground of "no liability." While the parties have sought to resolve various other issues pertaining to the Underlying Action, the hearing on the CFC Estate's objections to Objector's claims have been continued several times. As contemplated by the 12/03 Order, the CFC Estate would file a supplemental objection to the claims in the event it believes it has any legally tenable objection "no later than thirty (30) days after entry" of an order that the Supersedeas Bonds are to be paid out to the Bazzle/Lackey Plaintiffs. Consequently, until the proceedings are concluded in South Carolina in accordance with this Court's 12/03 Order and either the prior liquidation of the claims is confirmed or the claims are liquidated, the Objectors believe that the claims hearing should be continued. The next hearing on the Claims already has been continued to February 18, 2004.

6. Though Objectors believe differently, based on the definition of the "Unresolved Disputed Claims" in the Estimation Procedures Motion, the Objectors believe that the CFC Estate could argue that the Objectors' Claims are subject to the Estimation Procedures. This would be contrary to the Plan and Section 502(c) of the Bankruptcy Code, both of which require a claim to be "unliquidated" to be subject to estimation procedures:

> There shall be estimated for purpose of allowance under this section –
>
> (1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case;

11 U.S.C. § 502(c). Thus, under the plain language of Section 502, the Objectors' Claims could

[1] At the time the petition was filed, the only remaining issue to be decided by the Circuit Court in Flemings was a determination of attorneys fees. All briefs had been filed, oral arguments had been made and Orders had been submitted prior to the petition.

not subject to estimation since this Court has already ordered that litigation should be completed in the Underlying Action.

7. The Rooker Feldman doctrine also would prevent a bankruptcy court from estimating or disallowing claims based on a state court judgment, regardless if the judgment is on appeal or from the highest state court. See, e.g., In re Audre, 216 B.R. 19 (9th BAP 1997); In re Nugent, 254 B. R. 14 (Bankr. D.N.J. 1998); In re Keenan, 201 B.R. 263 (Bkrtcy. S.D. Cal. 1996).

8. Objectors' claims are not contingent nor unliquidated. Because the liability of the CFC Estate has been determined in the state courts prior to the bankruptcy petition, the Claims are not contingent. Keenan, 201 B.R. at (citing In re Fostvedt, 823 F. 2d 305, 206 (9th Cir. 1987)). The Claims are for a sum certain as determined by the state courts and the arbitrator, and, therefore, are liquidated. Id. See also In re Olajuwon Interests, Inc., No. 02-17684, 2003 U.S. Dist. LEXIS 365 (N.D. Tex. Jan. 10, 2003) (finding that a prepetition arbitral award liquidates a claim for bankruptcy purposes even if no court judgment is entered).

9. No cause exists to treat Objectors' Claims outside the provisions of Rule 9014.

10. The Estimation procedures are not applicable to Objectors' Claims and the CFC Estate's Motion should be denied to the extent the CFC Estate attempts to make those procedures applicable to Objectors' Claims.

Conclusion

WHEREFORE, for all of the foregoing reasons, the Objectors' respectfully requests that the Court enter an Order denying the Estimation Procedures Motion to the extent that it would apply to any of Objectors' Claims.

Dated: January 12, 2004

LYNN W. BAZZLE, *et al.*

By: _____
One of Their Attorneys

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CERTIFICATE OF SERVICE

I, Bruce E. Lithgow, an attorney, certify that on January 12, 2004, I caused [a] true and correct copy[s] of the attached **RESPONSE OF LYNN W. BAZZLE, BURT A. BAZZLE, DANIEL B. LACKEY, GEORGE BUGGS, FLORINE BUGGS, AND ANDRE C. FLEMINGS TO CFC ESTATES'S MOTION FOR AN ORDER APPROVING ESTIMATION PROCEDURES** to be served upon the persons identified on the attached Service List by electronic transmission via the internet at the email designations set forth on the Service List, and, in addition, by first-class U.S. mail.

Bruce E. Lithgow

SERVICE LIST
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