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August 8, 2005

Charles Riecke
SEYFARTH SHAW

In re: Conseco, Inc., 02 B 49672
August 3, 2005

Transcript of proceedings before the Honorable Carol A. Doyle in the above-entitled cause

$50.00

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

In the Matter of:	)	No. 02 B 49672
	)	
CONSECO, INC.,	)	August 3, 2005
	)	11:00 a.m.
Debtor.	)	
	)	
CONSECO FINANCE CORP.	)	No. 02 B 49675
	)	
Debtor.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CAROL DOYLE

APPEARANCES:

MR. ROGER HIGGINS
MR. ANUP SATHY
MR. ROBERT W. LANNAN
on behalf of the debtors;

MR. CHARLES S. RIECKE
MR. GEORGE OLIVER
on behalf of Calvary;

MR. CHRISTOPHER HORVAY
MR. TED KOMMERS
on behalf of Garn & Gomer;

MR. JEREMY KLEINMAN
on behalf of Textron;

MR. ALAN EHRENBERG
on behalf of EMCC;

MR. JOHN BROM.

APPEARANCES:

PRESENT TELEPHONICALLY:

MR. ANDREW FRIEDMAN
MR. TIMOTHY DILLON
MR. DAVID RODES
on behalf of Garn & Gomer.

ALSO PRESENT:
Mr. Art Dellano.

Court Reporter: Carol Raber
219 S. Dearborn, #667
Chicago, IL 60604
(312) 446-6926

THE CLERK: Calling Conseco and related cases.

MR. HIGGINS: Good morning, your Honor. Roger Higgins for Conseco and also for the Conseco Finance estate.

We have one matter going forward for Conseco and we have four matters going forward for Conseco Finance and we would leave it to your Honor as to which matter you would like to hear first.

THE COURT: I think what we should save for the end is Calvary because I'm doing an oral opinion that I'm going to put into the record and it might take 10 or more minutes.

11:06AM

Other than that, I don't think it makes much difference which one goes first. They're all fairly brief.

MR. HIGGINS: Your Honor, I would then yield the podium to my colleague Mr. Sathy concerning Conseco and the Schwartz matter.

THE COURT: Okay.

11:06AM

MR. SATHY: Good morning, your Honor. Anup Sathy, from Kirkland, on behalf of new Conseco.

MR. HORVAY: Good morning, your Honor. Chris Horvay and Ted Kommers from Gould & Radner, appearing on behalf of Garn & Gomer.

And with me on the phone should be Tim

Dillon, lead counsel -- one of our lead counsel and I suspect Mr. Louik may be on there as well.

THE COURT: Right.

Is Timothy Dillon on the phone?

UNIDENTIFIED WOMAN: No, your Honor.

THE COURT: Okay. I have them listed. I've got a list of three people here.

THE CLERK: He hasn't called in yet.

THE COURT: Oh, okay. I guess Mr. Dillon is

11:07AM expected, but he doesn't seem to be on line.

UNIDENTIFIED MAN: Mr. Dillon and Mr. Friedman are here telephonically, your Honor.

THE COURT: Oh, okay. That's what I was wondering. I had Mr. Dillon, Timothy Dillon and Andrew Friedman, on my list as well as a David Rodes for Mr. Schwartz.

MR. RODES: This is David Rodes, I am here.

THE COURT: All right. Well, we have vast piles of briefs and more briefs. And, as you all know, I

11:07AM asked you to brief the jurisdictional issue as well as the substantive issue of whether or not the claims have been discharged that are being prosecuted in these actions of the Schwartz adversary and, obviously, the same issue has already been decided by the district court in the Garn & Gomer proceedings, the MDL

proceedings there.

I'm not going to give an opinion today on the whole big matter, all the issues. I'm going to tell you that I have decided I have jurisdiction to decide this and that I have also decided -- I guess I should do it in reverse order. First, there is a case of controversy that comes logically before the bankruptcy jurisdiction issue.

But where there is still a case of controversy and that the filing of an amended complaint to remove new Conseco from the Schwartz lawsuit with the acknowledged and undisputed threat that it's simply going to be re-filed at some point does not affect my jurisdiction. And, in fact, there is a case of controversy under the voluntary cessation doctrine that has been discussed by many courts including the Supreme Court. So that means there is a live issue for me to decide.

11:08AM

I had hoped I would be able -- if I came to the conclusion there is a case of controversy and that I had jurisdiction that I would have been able to have resolved the fundamental bankruptcy issue that's presented hereby today. But I don't think I promised I would do that, and in any event I have not gotten all of the way through it. I'm right in the thick of it

11:09AM

and was reading cases before I came out here trying to make sure that I've covered everything. And I certainly intended to do it, but I'm not going to tell you what it is and I'm simply going to keep working.

And what we should do, I think, is continue this to the next omnibus date. Which is what, Tina?

THE CLERK: September 7th, at 2:00.

THE COURT: September 7th, at 2:00. That is a Wednesday after Labor Day.

11:10AM And my personal goal is -- because I'm out all next week -- is to finish it before I leave. I haven't quite decided if I'm going to do it orally or in writing. I think it's a very interesting and, in fact, important issue. But I'm not sure I'm going to have the time to write something up that I want to actually sign my name to versus give an oral opinion that will serve as my reasons on the record.

So there's a small chance that I will just call the parties up before September 7th and say, 11:10AM Here's my oral ruling, I'm just going to put it on the record and give you a day's notice. Nobody has to be here. You can just order the transcript or appear by phone, whatever.

Otherwise, I will give the oral opinion. I certainly expect to, anyway, on the 7th. Or if I'm

going to do it in writing, you'll all know that and I will give it to you then or as soon as I can have it ready. So that's where we stand.

I don't want to put all my reasons on the record for the jurisdictional decisions today because I just think then you've got to go over in one place and either a potential second oral ruling or a written ruling and I'm just going to do it all at one time. But that is in effect where I'm at right now.

11:11AM So...

MR. Horvay: Your Honor, we have a piece of housekeeping --

MR. RODES: Your Honor, this is David Rodes for Mr. Schwartz.

I would like to just state for the record that it is not admitted and undisputed that we have plans to reinstate the complaint against Conseco, Inc., in our adversary action.

We are weighing and we were candid with
11:11AM Conseco's counsel that we're weighing a different type of action based on different legal theories against them.

We haven't worked our way through it yet because we don't have a good enough grasp of the facts to know exactly what that theory is or if we think it's

sufficiently supportable to file it. But it's categorically untrue that we have any intention of reinstating the complaint that we had before. And we don't expect to file anything that resembles that complaint, your Honor.

THE COURT: Well, I was going to say this: The state of the pleadings is what the state -- I shouldn't say pleadings, the state of the briefing is what it is. There has not been any denial that I have ever seen

11:12AM that these plaintiffs intend, in fact, to pursue new Conseco in the future. And unless I see some sort of a dismissal with prejudice or that says that there really is no issue here with respect to new Conseco, there is a live issue as far as I'm concerned. So I'm not going to accept your statement as creating or as taking away the case of controversy that I think exists today based on the record before me.

So I know Mr. Sathy has been shaking his head various ways, but I don't think that you need to

11:13AM say anything on the record at this point.

Mr. Horvay was trying to tell me there is some housekeeping issue.

MR. Horvay: There was a venue transfer motion that we entered into a stipulation with Kirkland & Ellis concerning its withdrawal without prejudice. Ms.

Devine has that for you.

THE COURT: On the venue? On the venue?

MR. Horvay: This was on the Garn & Gomer adversary. We had previously filed a motion to transfer venue and we've simply agreed to withdraw without prejudice. It was noticed for today.

THE COURT: All right.

MR. Horvay: And just so we're reasonably clear, I'm trying to clarify a little bit. Does your Honor

11:14AM expect to announce your rationale on the jurisdiction issue at the same time that you announce your rationale as to the other issues?

THE COURT: Yes, yes. I just don't think it makes sense to take a lot of time here today when I'm probably going to take a lot of time some other time on the other issues.

MR. Horvay: I understand.

THE COURT: So let's schedule it for the next omnibus on September 7th. But as I say, you may hear

11:14AM from me before then at some time.

MR. Horvay: That's at 2:00 p.m. on that date?

THE COURT: Yes.

MR. Horvay: Thank you.

MR. HIGGINS: Good morning, your Honor, Roger Higgins again.

That is all the matters for Conseco that we have going forward for today. And we would like to proceed with the Conseco Finance estate.

The first matter up is an objection to the claims filed by Roger Comins. And I would yield the podium to Mr. Lannan.

MR. LANNAN: Good morning, your Honor. Bob Lannan for the CFC estate. I don't know if Mr. Comins' attorney made an appearance today on the phone or otherwise.

11:15AM

THE COURT: I don't see anyone appearing for him by phone. Who is that counsel?

MR. LANNAN: It's Mr. Grenville Clark.

THE COURT: No, we don't -- I certainly don't see anyone here in the courtroom and they're not on the phone.

MR. LANNAN: If Mr. Comins is not represented at the hearing today, your Honor, we're going to request that this claim be disallowed.

11:15AM

Over a year ago we filed a no liability objection to Mr. Comins' claim. He afterward filed a very brief response and then later filed bankruptcy himself in the bankruptcy court for the District of New Hampshire. We filed a motion to modify the automatic stay in that case in order to go forward with our

objection in this case and that motion was not opposed.

And for several weeks, indeed several months, we have not been able to get in touch with Mr. Comins counsel. He hasn't responded to our phone calls, our correspondence, or our pleadings either in the bankruptcy case or in New Hampshire where the bankruptcy case was lifted without objection, or in this case.

11:16AM We notified Mr. Comins' attorney of record that we would be going forward today with this objection and have heard nothing from him and he's not here today. On those grounds, we would request that the Court disallow Mr. Comins 'claim.

THE COURT: Well, I know that you say you lifted the stay in that case, but isn't the party in interest really the trustee? This is a claim that's now -- the claim of Mr. Comins is against the CFC estate.

MR. LANNAN: Well, it's a chapter 13 case.

11:16AM THE COURT: It's a chapter 13?

MR. LANNAN: It's a chapter 13 case. We filed a motion to modify the automatic stay in the chapter 13 case and notified three attorneys: the chapter 13 trustee; Mr. Comins' attorney of record in the bankruptcy case; and Mr. Clark, who is Mr. Comins'

attorney of record in this case and who we understood to be handling the claim in this case.

All of them were notified. No one filed an objection. And the bankruptcy court in New Hampshire decided to enter an order modifying the automatic stay based on there being no objection.

I have a copy of that order if you would like one, your Honor.

THE COURT: Well, if it was a chapter 7 I would say you need to notice the chapter 7 trustee of this proceeding basically of your claim objection because it would be a claim of the estate, of his bankruptcy estate.

11:17AM

In a 13 it's different. Now different districts handle 13s in differently ways. But...

MR. LANNAN: Judge, I believe we did notify the chapter 13 trustee of our intent to go forward today.

THE COURT: How did you do that?

MR. LANNAN: By mail.

11:18AM

THE COURT: Oh. Is there anything in the record on that?

MR. LANNAN: By mail of the agenda. We sent him a copy.

THE COURT: Okay.

MR. LANNAN: I will check the certificate of

service just to make sure.

THE COURT: And I had expected that this order -- I think that this has been up, I don't know, a number of times I've read these pleadings and each time it seems as though it says going forward on the agenda.

MR. LANNAN: I can confirm that we did notify both of Mr. Comins' attorneys as well as the chapter 13 trustee of our intent to go forward today.

THE COURT: Okay. Well, we have a written response. We have I think what are several claim objections that relate to this claim if I'm correct. Aren't there?

11:18AM

MR. LANNAN: There are.

THE COURT: One of them is insufficient documentation which frankly doesn't work if you're basing it on a contract. But that's about it, and that's not a basis for saying that you don't owe the money.

You do have, I think, one of these generic no liability claim objections. And we have this answer or a response to one of the other -- let's see, he filed his response in June of 2004, and this is -- "he" being Mr. Comins' attorney which is Grenville Clark. So he filed a case, and then Conseco wanted it to be arbitrated under some arbitration clause. So that's

11:19AM

what's going to happen.

But we don't seem to have anyone. By the way, I don't think that arbitration would be a bad way to resolve this if someone were really going to be pursuing the merits of this.

But I suppose since we don't seem to have anybody who is actively pursuing the merits of the claim anymore on behalf of Mr. Comins, I guess I'm going to treat this basically as a default and

11:20AM therefore find that the claim should be disallowed. Even though otherwise I think they would have been entitled to go forward with their claim and I wouldn't disallow it for insufficient documentation, I would have to make a determination of liability.

My thought was that this would be through an arbitrator as requested by Conseco in the first place for a quick resolution. But since there doesn't seem to be anybody who would be prosecuting it on behalf of the claimant, I'm not going to do that because they

11:20AM don't seem to be pursuing their claim anymore. And I certainly couldn't determine liability based solely on what's in the claim itself. So I will disallow the claim.

MR. LANNAN: Thank you, your Honor.

I will yield the podium to Mr. Higgins.

MR. HIGGINS: Good morning again, your Honor. Roger Higgins for the CFC estate.

The next matter up on the CFC estate agenda is Calvary. You indicated that you wanted to leave that until last.

The next matter is the Woodward objection which is continued until the hearing. Of course, the date on that hearing has been changed since we filed this agenda.

11:21AM THE COURT: Okay.

MR. HIGGINS: The next matter is Textron and Cadle. And Mr. Kleinman, for Textron, is here in the courtroom. But Mr. Drum, for Cadle is not.

What I'm able to report is that the parties are continuing to negotiate a resolution to this issue.

THE COURT: There's a mediator who was hired, correct?

MR. HIGGINS: We have a mediator hired and the mediator is so-to-speak on stand-by, your Honor, as the

11:22AM parties are drafting with negotiating a satisfactory resolution of this matter.

THE COURT: Okay. Well, is everybody happy with the pace of things in this adversary that seems to have been pending for what, several years now?

MR. HIGGINS: That is correct, your Honor, it has

been pending for about two years.

MR. KLEINMAN: Good morning, your Honor. Jeremy Kleinman on behalf of Textron Financial Corporation.

I am pleased to report that the parties are having substantive conversations that are finally, we feel, moving the ball forward towards a resolution.

The parties are expected to speak again on the status of those efforts on the 8th. The mediation process has really been held in abeyance while the

11:22AM parties consider a proposal that Textron had made to the parties somewhat outside of what was previously contemplated in the scope of the mediator's position.

We should know within the next couple of weeks whether or not that will prove to be fruitful. And in the event that it is not, obviously, I think both Mr. Higgins and myself will be applying all pressure to get the mediation rolling so that we can get this matter resolved and off your docket.

THE COURT: All right. I'm pondering the timing

11:23AM on this. By the 8th, you mean August 8th, I presume?

MR. HIGGINS: That is correct, your Honor.

THE COURT: Why don't we set this for another status at the October date and the mediation should be commenced if not completed by then. That would give you, say, a month to either resolve it on your own or

get the mediation going.

But this has been going on way too long. I think mediation was a great idea. It's nice to save the money if you can. But now is the time.

Well, I think that we'll enter that kind of an order that the mediation should be commenced prior to, if not completed prior to the next omnibus hearing date -- I'm sorry, the October date.

What date is that?

11:24AM (Court conferring with clerk.)

THE COURT: All right, how about October 12th for an omnibus date? Mr. Higgins, do you have any issue with that?

MR. HIGGINS: No, your Honor. I believe October 12th is a Wednesday.

THE COURT: It's a Wednesday. Okay, why don't we do that? Shall we do it at 11:00 or 2:00? All right, we can do it at 11:00.

11:24AM MR. HIGGINS: Your Honor, would you like to have a form order entered or submitted or would you --

THE COURT: Actually, it would be helpful if you would do it.

MR. HIGGINS: We would be happy to do that. We will circulate a form of order this afternoon and get

it to chambers as quickly as possible.

THE COURT: All right.

MR. KLEIMAN: Thank you, your Honor.

MR. HIGGINS: Your Honor, that brings us to item No. 5 on the agenda which is a motion by EMCC-MH Homes to enforce a purchase agreement.

We have submitted pleadings there. I do not know if counsel for EMCC is here.

I guess that you are here in court.

11:25AM MR. EHRENBERG: Good morning, your Honor. Alan Ehrenberg, on behalf of EMCC.

THE COURT: Good morning.

I read the motion and I read Conseco's response which is, It's not us.

So I'm not sure if you agree with that or not. But if they're right, then --

MR. EHRENBERG: I really don't agree with that. I believe they're litigating the Delano (phonetic) matter in South Carolina. That's the person who I

11:26AM guess they're trying to enforce --

THE COURT: Right. Who is the they though? Who is the they that is litigating?

MR. HIGGINS: That is not CFC estate. That is Green Tree Servicing, LLC.

THE COURT: If it's Green Tree, that's not the

debtor. That's someone who bought it. And I don't have anything to do with that and I would not be interfering in that. The place to argue about that is --

MR. EHRENBERG: Well, according to the caption in that case -- I mean the caption of that case is Conseco Finance. It's not Green Tree.

THE COURT: Well, I guess it would depend when it was filed. The sale was what?

11:26AM MR. EHRENBERG: It was filed in '04, your Honor.

THE COURT: '04.

MR. HIGGINS: Which was subsequent to the sale of June 23rd of '03.

One of the provisions of the Asset Purchase Agreement with Green Tree/CFN was that for limited purposes such as this, Green Tree was permitted to use the CFC name to pursue certain actions and to enforce liens, so on and so forth. And as I understand, that is within the realm of -- that use of the name.

11:27AM THE COURT: All right.

MR. EHRENBERG: And then there's a provision in our agreement, your Honor, that says that if there is a dispute that it would be adjudicated in this court, in the bankruptcy court.

THE COURT: Well, you may have such a provision,

but that doesn't give me jurisdiction.

I didn't look too carefully at that. But this was my first question: Is this something that the bankruptcy court should be deciding a year-and-a-half or more after confirmation of plans or is it really a dispute between two nondebtor entities in which case I don't think I would probably have jurisdiction.

And it could be in an agreement, it could even be in a court order, and that does not matter in the Seventh Circuit. Either I have jurisdiction or I don't. And the parties can't create it and I can't create it by simply by putting in some retention of jurisdiction clause in an order or certainly not in a contract between the parties.

But as I say, I think that it's highly unlikely that the estate is doing this. Do you know who the lawyers are who are handling the matter?

MR. EHRENBERG: Handling the matter in North Carolina?

THE COURT: Yes.

MR. EHRENBERG: Yes, I do. In fact, I attached -- it was attached to our motion -- some exhibits from that case. And actually there was an affidavit of the attorney who is handling it for Conseco or Green Tree.

THE COURT: You know, the bottom line is I could

just -- it is certainly my understanding that CFC didn't keep any real assets here.

MR. HIGGINS: Your Honor, we have no assets. We're willing to stipulate to that and we have certainly communicated that to counsel for EMCC.

We would respectfully submit that the only action, possible action, that EMCC could take is to file a claim against the estate. We're not suggesting that there would be any basis for such a claim nor are we suggesting that such a claim would be timely, but that is the only thing that they could do. And there is simply no issue concerning the enforcement of this sales agreement that they could go forward in this court for the reasons that the Court has indicated that it's related to --

THE COURT: Well, obviously to the extent that you really have a complaint against the debtor or now the estate, I would have potential jurisdiction over that. But really what you should be doing is going into the state court proceeding and saying, you know, we can't to do this because we own the rights to this, whatever it is, whatever it is, a lien on the property or whatever the right, the contractual right, to payment.

And then it seems like that is the place to

go rather than if -- if, assuming that the CFC estate was not in fact the client of these lawyers down there, then it's --

MR. EHRENBERG: Well, perhaps Conseco can let me know what is the correct entity that I should be suing in this matter. Then I can file a federal court action to enforce the settlement agreement against the correct entity.

THE COURT: Enforce the settlement agreement?

11:30AM MR. EHRENBERG: I mean, if it's going to be Green Tree, I guess I should pursue Green Tree.

But I just want to make sure that I'm not spinning my wheels and filing against another entity that's not the correct entity. So if they can enlighten me as to who is the proper party. After all, they assigned whatever they did to a party. And if they let me know who that party is, then I can bring the appropriate action in the appropriate forum.

MR. HIGGINS: Your Honor, there was a sale of

11:30AM most of assets to CFN and to now Green Tree Servicing, LLC.

We have informed counsel for EMCC that you know, the APA and the Schedules, there is also a sale to General Electric or GE Capital again supported by an Asset Purchase Agreement that is part of the public

record and schedules that are part of the public record. Between those two documents and the accompanying sales orders, we would respectfully submit they should be able to ascertain what, if any, party they can go after.

THE COURT: Well, have you looked at these documents? I mean does it call out to you in the midst of these transactions who got what kind of assets?

MR. HIGGINS: Without venturing a legal opinion, your Honor, it is our understanding that Green Tree is the proper party for them to be in communication with. But beyond that -- and we have previously informed counsel of EMCC of that fact.

MR. EHRENBERG: Well, they sent me a bunch of documents, your Honor, that -- probably thousands and thousands of pages that I would have to go through. Fortunately, this is not the only case I'm handling, and I just didn't have time to go through all of these documents and try to retrieve who the proper party is. I figured I would come into court and counsel or Kirkland & Ellis would be kind enough to let me know who the proper party is inasmuch as they are contending that it's not Conseco or the debtor in this case.

So I just want to file whatever I have to do without perusing thousands and thousands of documents.

I think that's only fair.

THE COURT: All right. Well, I think that you've gotten mostly an answer to that question.

MR. EHRENBERG: Okay.

THE COURT: And I'm going to deny your motion because I think that if you want to stop somebody from taking what you think you're entitled to, you should sue that person and not the seller. At least that is certainly my take on it. I'm not saying that you don't have any potential claim against Conseco. I have no idea why this other party thinks they have rights to what you think you own.

11:33AM

MR. EHRENBERG: That denial would be without prejudice?

THE COURT: Well, it's certainly without prejudice as to resolving any issues as to whether or not your client would have some potential claim against the debtor, the estate. And, of course, I'm not in any way addressing time limits, you know, etc., or suggesting that there are time limits and that that would be an issue.

11:33AM

But, yes, I am certainly willing to deny this without prejudice and that you will be figure out who it is that is the correct party --

MR. EHRENBERG: I hope so.

THE COURT: -- that you should pursue on this issue.

MR. EHRENBERG: Thank you your Honor.

MR. HIGGINS: Your Honor, item No. 6 is Rayette Garage objections. Those are being withdrawn. They will be part of the omnibus order that we will hand up.

I would say, your Honor, that we'll hand that order up this afternoon based upon your conclusions in the Calvary estate matter.

11:34AM But we do have one stipulation that we would finally like to hand up which we announced a while back that we thought that we had done. That is the stipulation concerning the claims of Monica Lazano (phonetic). The economics of that matter have not changed, it's just some language that took some time.

THE COURT: All right, that's fine.

MR. HIGGINS: Thank you, your Honor.

Then the last item on the agenda is Calvary.

THE COURT: Okay.

11:34AM MR. OLIVER: Good morning, your Honor. George Oliver, from North Carolina. With me is counsel Charles Riecke; and Art Dellano, who is here from Calvary.

THE COURT: All right. Well, I had an oral ruling and I will put it on the record. You can sit

down. It's long and laborious.

But I will give you the bottom line which is that I have treated these pleadings, all the briefs that were filed, as in effect a motion to dismiss the claim. Even though the claim objection is a contested matter, it's governed by Rule 9014. And 9014 makes applicable certain rules of civil procedure which are incorporated into the bankruptcy rules. But not all. And it doesn't incorporate Rule 12 which provides for motions to dismiss.

11:35AM

But the bottom line is I have applied basically a motion to dismiss standard and found that two of these claims have no merit and really just can be dismissed summarily as having no basis of law.

But the other two I find really need some further adjudication under the Seventh Circuit standards for a motion to dismiss. I should not resolve those without some further proceeding, whether it's summary judgment or a trial, which I feel will not be necessary. In this case it seems to be calling out for summary judgment. But, you know, I can't guarantee that.

11:36AM

But certainly based on what is before me now, I would say this could be resolved on summary judgement on those two claims. I will tell you the two

claims that I think just have no merit as a matter of law are the usury claims and the unjust enrichment claim.

And the two claims that I think at least need some further briefing by the parties so that it's set up better, you know, in terms of is there is a factual dispute here or not are the breach of contract claim and the related claim for deceptive trade practices, etc.

11:37AM So with that, just let me just put my oral opinion on record and then we can figure out where to go from there.

This matter is before the court on a claim filed by Calvary Mobile Homes, Inc., which I will call Calvary. The court has treated the briefs submitted by the parties as a motion to dismiss Calvary's claims against Conseco. For the reasons stated below, Calvary's claims based on the North Carolina usury statute and for unjust enrichment have no merit as a 11:37AM matter of law. Calvary's claims on these counts will be disallowed.

However, based on the record as it stands, the court cannot decide the merits of the remaining two claims fully, for breach of contract and unfair or deceptive trade practices, and the court will not

disallow those portions of the claim at this stage of the proceedings.

Section 1: Issue and factual background.

The issue before the court is whether the multiple allegations against Conseco made by Calvary must stand or whether the claim must be disallowed as a matter of law.

Calvary asserts that Conseco owes it around $5 million for breaching its loan contract with Calvary and for violating various provisions of North Carolina law. Conseco argues that Calvary's claim should be disallowed because its arguments are unsupported and unsustainable. Because of the procedural posture of this contested matter, the court is unable to decide all issues raised by Calvary's claim.

Calvary is a North Carolina company that sells mobile homes. In November of 1997, Conseco (through Green Tree, its predecessor) and Calvary entered into an Inventory Financing Agreement, which I call the Financing Agreement, whereby Conseco financed Calvary's purchases of mobile homes by paying the manufacturer directly for Calvary's orders. Calvary would then pay Conseco interest until the home was sold, at which time Calvary would pay Conseco the balance owed on the home.

A few months after signing the Financing Agreement the parties amended the contract to include, among other things, a Stock Addendum to Inventory Financing and Security Agreement, which I will refer to as the Stock Addendum. A section of the Stock Addendum entitled "Pricing" states that interest is to be charged to Calvary "starting from the date of receipt by {Conseco} of the invoice." North Carolina law governs the contract.

11:39AM Calvary filed its own Chapter 11 bankruptcy petition in North Carolina on July 30th, 2001. In June, 2002, Calvary filed a four-count adversary proceeding in the North Carolina court against Conseco, alleging breach of contract, usury, unjust enrichment, and unfair and deceptive trade practices. Calvary attached this complaint to its claim in this case against Conseco, which was filed in March of 2003.

Conseco twice objected to Calvary's claim, first alleging insufficient documentation and then

11:40AM asserting that Conseco is not liable for the amount claimed.

Calvary, in turn, filed two responses and provided Conseco with several boxes of documents in support of its claim.

In May of 2003, Calvary filed a motion to

compel discovery pursuant to Rule 2004, but the parties represented to the court at the June omnibus hearing that the discovery dispute was not going forward, and the court may now rule on whether Calvary has stated a colorable claim.

Section 2: Standard on claim objections.

A validly filed proof of claim constitutes prima facie evidence of the claim's validity. That is from Federal Bankruptcy Rule 3001(f) In re Knize, 210 B.R. 773, 778 Bankr. N.D. Ill in 1997. A debtor who objects to a claim must produce evidence to overcome this rebuttable presumption, from that same case, at 778 (collecting cases). Once this evidence is proffered by the debtor, the burden shifts back to the claimant to produce evidence meeting the objections and establishing the claim. Id. The "ultimate burden of persuasion always lies on the claimant to prove its entitlement to the claim." S.N.A. Nut Co. v. Tulare Nut Company, in the In re S.N.A. Nut Co. Case, 204 B.R. 537, 540 (Bankr. N.D. Ill. 1997.)

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Conseco has presented this matter as though the court may decide it based simply on briefs, without considering any evidence. However, a claim objection is a contested matter to which many of the Federal Rules of Civil Procedure apply via Rule 9014 of the

Federal Rules of Bankruptcy Procedure. Although Bankruptcy Rule 9014 does not incorporate Rule 12(b) of the Federal Rules of Civil Procedure regarding motions to dismiss, see Keck, Mahin & Cate, 237 B.R. 430 (Bankr. N.D. Ill 1999), it does incorporate Rule 56 of the Federal Rules of Civil Procedure regarding summary judgment. Also, the Seventh Circuit's strict standard regarding a motion to dismiss under Rule 12(b)(6) may be applied to a claim objection. See, e.g., In re Sevko, Inc., 143 B.R. 167 (Bankr. N.D. Ill. 1992.)

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In the Seventh Circuit, a trial court may not dismiss a claim if it can conceive of any set of facts that would support recovery by the plaintiff. Allient Energy Corp. v Bie, 277 F.3d 916, 919, (7th Cir. 2002). However, a court may dismiss a case where a plaintiff has alleged facts that are incompatible with its causes of action. See, e.g., Lekas v. Briley, 405 F.3d, 602, 614 (7th Cir. 2005) ("a plaintiff can plead himself out of court by alleging facts which show that he has no claim") (citation omitted). The court is "not required to ignore facts alleged in the complaint that undermine plaintiff's claim." Id. (citation omitted). With this tough standard in mind, for the reasons I shall discuss, the court concludes that Calvary's usuary and unjust enrichment claims are

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deficient as a matter of law based on the plaintiff's own pleadings. To the extent Calvary's claim is based on those causes of action, it will be disallowed.

However, Calvary's counts against Conseco for breach of contract and unfair and deceptive trade practices do not fail as a matter of law based on the pleadings alone and cannot be disposed of on a motion to dismiss. While simple claims are often resolved in bankruptcy by way of claim objections and accompanying briefs, the court is not willing to make factual findings in this case based on the sparse record before it. Motions for summary judgment or a trial are therefore the appropriate means of resolving the issues raised by Calvary's contract and deceptive trade practices claims.

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Section 3: Breach of contract.

By the way, this is going on for probably another 8 or 9 pages, so be forewarned.

The central allegation by Calvary, that Conseco breached the Financing Agreement, may not be dismissed as a matter of law because it is not "beyond a doubt that the plaintiff can prove no set of facts in support of their claims which would entitle it to relief." Lashbrook V. Oerkfitz, 65 F.3d 1339, 1343, (7th Cir. 1995). Under North Carolina law, the

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elements of a claim for breach of contract are: (1) existence of a valid contract; and (2) a breach of the terms of that contract. RD&J Properties v. Lauralea-Dilton Enterprises, LLC, 165 N.C.App. 737, 743, 600 S.E.2d 492, 497 (2004).

In this case, the parties agree that the governing contract is the financing agreement and its addendums. Calvary does not dispute that it agreed to paragraph 5 of the Stock Addendum to the Financing Agreement, which states that interest would be charged "starting from the date of receipt by {Conseco} of the invoice."

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Calvary's complaint against Conseco alleges breach of contract due to the fact that Conseco charged interest to Calvary from the "manufacturer date" or "shipment date" printed on the invoice, rather than the invoice date itself, that Conseco charged interest on funds prior to their disbursement, and that Conseco continued to charge interest after the balance was due. This section of Calvary's complaint references an attached portion of an inventory billing statement -- I'm going to skip that -- but Calvary contends that this constitutes a breach of contract because Conseco charged interest from the invoice date but "did not transfer funds to the manufacturer until July 30th. I

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probably shouldn't have skipped what I did trying to alleviate the pain of this oral opinion.

But although the court finds that billing from date of the invoice is entirely consistent with the contract, Calvary also asserts that Conseco breached the contract by charging interest on loans for each unit purchased by Calvary prior to the date of receipt of the manufacturer's invoice.

Calvary is not submitting any evidence to support this assertion, which was a fairly dangerous move, but the court is not willing to disallow its claim at this stage of the proceedings. Instead, whether there is evidence to support this claim must be determined on a motion for summary judgment or a trial.

Conseco also alleges that Calvary waived any claim for breach of contract. However, the court is not willing to disallow a claim at what is in effect a motion to dismiss stage based on an affirmative defense. This issue too must await summary judgment or trial.

Section 4: North Carolina's Usury statute.

Calvary next contends that Conseco violated a portion of North Carolina's statute against usury which provides, in part, that "nothing in the section shall be construed to authorize the charging of

interest on committed funds prior to the disbursement of said funds." N.C.G.S., Section 24-1.1(b).

Calvary alleges that Conseco violated this provision by charging interest from the time Conseco received an invoice from the mobile home manufacturer rather than from the time the funds were actually disbursed. Conseco does not dispute that it charged interest from the invoice date. However, this claim fails as a matter of law for two reasons: (1) the usury statute does not apply to corporations; and (2) the loan between Conseco and Calvary is a transaction exempt under North Carolina law from rate and fee limitations.

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Regarding the first issue, North Carolina courts have held that "North Carolina's usuary statute does not apply to business loans between corporations." In re Summit Place, 298 B.R. 62, 75 (Bankr. W.D.N.C. 2002); see also Anton A. Vreede, M.D. v Koch, 94 N.C.App. 524, 380 S.E.2d 615 (1989).

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Calvary seeks to distinguish its cases on the ground that "the interest at issue was merely that which had been agreed upon which between the parties" from their memorandum, at Page 7. However, neither the cases nor the statute provides for the exception that Calvary suggests, namely that the usury law may apply

to corporations when a contract is breached.

Even if the above cases were factually distinguishable from this one, which they are not, the fundamental law would be the same. A corporation cannot sue for usury in North Carolina.

In its final brief, Calvary points to N.C.G.S., Section 24-2, which outlines penalties for usury and merely provides that a corporation may collect if it has paid usurious interest on behalf of an individual. That statute in no way contradicts the well settled law discussed or changes the standard on who may sue for usury.

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The second reason that Calvary's usury claim fails as a matter of law is that North Carolina has a statutory provision entitled "Loans exempt from rate and fee limitations," which exempts certain transactions from the usury statute, including those in which "the borrower is a person other than a natural person." N.C.G.S., Section 24-9. The statute provides in relevant part that "Notwithstanding any other provision of this Chapter or any other provision of State law, any borrower in an exempt loan transaction may agree to pay, and any lender, including a bank, may charge and collect from the borrower, interest at any rate and fees and other charges in any amount that the

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borrower agrees to pay. *A claim or defense of usury is prohibited in an exempt loan transaction."* N.C.G.S. Section 24-9 (emphasis added). North Carolina law thus specifically prohibits what Calvary seeks to do, namely bringing a claim of usury against a corporation for breach of an exempt loan contract.

Case law supports the principle that "in North Carolina, any foreign or domestic corporation...and any lender may charge and collect interest at any rate to which the parties agree in writing." NCNB Nat'l Bank of North Carolina v. Williamson Bros. Fertilizer and Grain, 814 F.2d 931, 937 (4th Cir. 1987), overruled on other grounds, Busby. v. Crown Supply, Inc., 896 F.2d 833, 840 (4th Cir. 1990) (emphasis added); see also West Raleigh Group v. Massachusetts Mutual Life Insurance 809 F.Supp. 384, 390 (E.D.N.C. 1992).

Contrary to the assertion of Calvary, the parties here did agree in writing to the terms by which Conseco charged interest on the mobile home loans. Calvary thus does not have a colorable claim for usury against Conseco because corporations may not sue under the usury statute and are free to contract for any terms and rate of interest.

Calvary cites a number of cases from other

jurisdictions, none of which address North Carolina law. The only case they cite from North Carolina, Hill v. Lindsay concerns a loan to an individual and notes that usuary statutes are "designed to protect the borrower whose necessity and importunity may place him at a disadvantage with respect to the exactions of the lender." That is at 188 S.E., 406, 409.

In other words, the purpose of the North Carolina usury law is to protect vulnerable individual borrowers. The law is not applicable to lending contracts between corporations such as the one at issue. Based on Calvary's own pleadings, it is undisputed that Calvary is a corporation and that there is a contract between the parties. Because Calvary has failed to call into question the settled law in North Carolina its cause of action for usury can not be sustained.

Section 5: Unfair or deceptive trade practices.

Calvary's allegation that Conseco perpetrated unfair and deceptive trade practices in violation of N.C.G.S. Section 75-1.1 cannot, however, be dismissed on the pleadings alone. The elements of a claim for unfair or deceptive trade practices in North Carolina are "(1) an unfair or deceptive trade practice

or an unfair method of competition; (2) in or affecting commerce; (3) that proximately causes an actual injury to the plaintiff or his business." RD&J Properties v. Lauralea-Dilton, which I cited earlier. A practice is unfair "when it offends public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." Walker v. Branch Banking and Trust. I am just going to cite 515 S.E.2d 727, 729 (1999).

11:53AM While Conseco points out that Calvary has alleged a breach of contract by Conseco which "does not constitute an unfair or deceptive trade practice," Horack v. Southern Real Estate Company of Charlotte, 563 S.E.2d 47, 51, it is simply too early to make a final determination that Calvary could prove no set of facts consistent with a claim for unfair or deceptive trade practices. See Graehling v. Village of Lombard 58 F.3d 295, 298 (7th Cir. 1995).

11:53AM Neither is the court prepared to determine that Calvary will be unable to demonstrate the "substantial aggravating circumstances" necessary to prove this cause of action. See Horack, at 563 S.E. 2d, at 729.

Conseco may bring a motion for summary judgment on this count or may take its case to trial,

but the court is not willing to disallow this claim at this time.

The last one is Unjust Enrichment.

However, Calvary's claim for unjust enrichment must be dismissed. "The doctrine of unjust enrichment is based on 'quasi-contract' or a contract 'implied in law' and this will not apply...where a contract exists between two parties." From Atlantic and East Carolina Railway Company v. Wheatly Oil Co., Inc., 163 N.C.App 748, 753, 594 S.E. 2d 425, 429 (2004). In such cases, "an action for breach of contract, rather than unjust enrichment, is the proper cause of action." Delta Environmental Consultants of North Carolina, Inc., v. Wysong & Miles, 132 N.C. at 160, 165, 510 S.E. 2d 690, 694.

Thus, because there is a contract - the Financing Agreement and its addendums - between Conseco and Calvary, the proper cause of action is for breach of contract and not unjust enrichment.

11:55AM Calvary points to cases in which a North Carolina court has allowed a plaintiff to proceed on claims of unjust enrichment and breach of contract at the same time. Both are distinguishable. In Harris-Teeter Super Markets v. Watts, 392 S.E.2d 123, a claim of unjust enrichment was allowed where the

contract at issue was implied and not an express written agreement between the parties. In Jackson v. Carolina Hardwood, 463 S.E. 2d 571 the claim of unjust enrichment was not pled, as it is here, as an alternative breach of contract. Rather, it was pled as a set of facts separate from those underlying the breach of contract claim.

In addition, Jackson does not address the "well established" law that "where an express contract concerning the same subject matter is found, no contract will be implied." Maxwell v. Michael P. Doyle, Inc., 595 S.E.2d 759, 765 (2004).

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Calvary is therefore unable to state a claim for unjust enrichment or quasi contract against Conseco because the parties have an express written agreement.

Conclusion.

For the reasons stated, Calvary's claims will be disallowed to the extent it seeks in Counts 2 and 4 of its underlying complaint to recover based on the North Carolina usuary statute or unjust enrichment.

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With regard to Calvary's allegations of breach of contract or unfair deceptive trade practices, however, the court is unwilling to make a final determination based on the pleadings alone. Discovery may therefore continue with regard to those counts to

the extent necessary and we should set a schedule.

So that is the end of my oral opinion. And I'm sorry about its length, but there we have it.

So there was a 2004 exam request which I think the parties served as moot. I think what the response of the debtor was that we don't have anything. But I just have to say that doesn't make a discovery request inappropriate. They always can and should ask their opposing counsel for any relevant discovery. And if the response is we don't have it, that's the response. But there is nothing inappropriate about the pursuing discovery from the estate to the extent that they have anything.

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So having said that, I don't know where the parties are in terms of anything further or any discovery that would be necessary.

MR. HIGGINS: I would think at this point, your Honor, we would be planning to file a motion for summary judgment fairly shortly. But we're reserving to determine what our next best step is at this point.

11:57AM

THE COURT: All right.

MR. OLIVER: I would need to take some discovery, your Honor. I would need to find out who does have these documents if they don't have any.

I think there is some indication in the

affidavit that we got as to where they may be. They may have been sold. We heard about these sales earlier. Maybe one of those parties has the documents. Certainly Fleetwood (phonetic) would have records of also when they were paid and disbursements were made, and I have one witness that my client has talked to about that. So I would probably take a few depositions and make some document requests.

THE COURT: Okay. Do you think 90 days be good for concluding fact discovery? Do you think that is enough?

11:58AM

MR. OLIVER: I think that should be fine.

THE COURT: Conseco is free to file a motion if they want, you know, recognizing that -- it used to be 356(f). I can't remember what it is now, but the one that says, hey, we're going to -- discovery, so we can't respond.

So let's set a discovery cutoff of 90 days which goes to --

11:59AM

November 4th, that's a Friday. We were hoping that we wouldn't need any more omnibus dates. But how about November 9th, Mr. Higgins? Do you think that would work for an omnibus date?

MR. HIGGINS: I think that would be fine, Judge.

THE COURT: In the morning?

MR. HIGGINS: Yes.

THE COURT: So let's continue it to the -- we'll continue this Calvary claim objection to the November 9th omnibus date. So that will be at 11:00.

And then if you haven't resolved it, which I always encourage the parties to do, then we can set a schedule or you can file a motion for summary judgment if you want; but, otherwise, we will set a schedule for summary judgment or trial and we'll get it resolved soon after that.

11:59AM

MR. OLIVER: Your Honor, if I may. And I thank you very much for ruling, I appreciate that.

May I make one point regarding a portion of your ruling or should I -- I'm not...

THE COURT: Save it for the appeal.

MR. OLIVER: Right, I understand. I understand.

The only thing that I wanted to point out, your Honor, is that your rationale on the usury was based on law that did not exist at the time. The statute was amended in 2003. And the exempt loan transaction, that's all part of the amendment. Everything we're talking about was before that, which was a different statute. And so I just wanted to say that for the record. The "may agree to pay" language was in the statute prior to the amendment in 2003.

12:00PM

THE COURT: Well, I don't remember you making that argument in --

MR. OLIVER: I did, your Honor.

THE COURT: Did you make it in there?

MR. OLIVER: Yes, ma'am.

THE COURT: Maybe somehow it didn't sink in. But in any event, I think the case law that I discussed, then assuming that you're correct that that amendment came later, is still there and is still the same and I stand on my ruling on usury.

12:01PM

MR. OLIVER: Okay.

THE COURT: That's why there are sort of two different rulings -- two different bases for the ruling. One is the courts have said this is for individuals and not corporations and then there was a specific provision.

MR. HIGGINS: I am sorry, your Honor, just as a point of clarification, the cases that you did cite came out under the previous statute. So we would submit that there would be no change in the outcome.

12:01PM

THE COURT: All right, that explains it. I did miss that in here if that is correct. I thought that I read it pretty carefully but I guess that I must not have which explains why there would be both common law and then the statutory provision which makes it

abundantly clear that you can't do it. But there are definitely North Carolina case law in any event.

MR. OLIVER: And my only reason for bringing it up, your Honor, was because the cases that interpreted the earlier law which have the "may agree to pay" language, they did all have to do with actions where the corporations had agreed to pay the interest.

THE COURT: I understand.

MR. OLIVER: There is now prohibition in the statute, but before --

12:02PM

THE COURT: But you're still trying to -- I mean you're still trying, as far as I am concerned, say any time someone breaches a contract and so therefore you imply that the interest rate is higher there's usury, I reject that concept. Without that concept, you'd lose anyway.

But I will stick to my -- I'm going to stick to my whole ruling. But to the extent you're right and that statute is a specific provision, I relied on it and it doesn't apply, I think the common law, as far as I am concerned, still makes it a claim is not available to corporations as a matter of law. So my ruling on what I am treating as a motion to dismiss will still stand.

12:02PM

MR. HIGGINS: Thank you, your Honor.

MR. OLIVER: Thank you, your Honor.

MR. BROM: Good morning, your Honor. John Brom. We at one time were the attorneys for Calvary and then Seyfarth Shaw came in. For whatever reason they didn't have a signed substitution of counsel, so we just filed our motion to withdraw. I assume there is not going to be any objection.

THE COURT: When did you file this motion?

MR. BROM: Back on June 20th, it looks like.

12:03PM MR. RIECKE: Your Honor, I believe that when I checked the record that they were weren't on record. And I did contact counsel about this before we made our appearance.

MR. BROM: We've got it showing up on here.

MR. OLIVER: Well, maybe there's confusion with the different cases that were involved. There were some -- there's a number of different --

MR. BROM: If we can just withdraw for the record.

12:03PM THE COURT: All right. As long as you filed this -- and, of course, I don't have any kind of an order.

MR. BROM: Do you need one?

THE COURT: Yes.

MR. BROM: I can have one here this afternoon.

THE COURT: Okay. With every motion in

bankruptcy court you need to submit a draft order or else your motion --

If you ever do it again, you'd want to have an order. But somehow we didn't get it on the agenda. But it certainly seems noncontroversial, so if you will get me an order, I will sign it.

MR. BROM: Thank you.

MR. HIGGINS: Thank you, your Honor.

(Which were all the proceedings had in the above-entitled cause, August 3rd, 2005.)

I, CAROL RABER, C.S.R., DO HEREBY CERTIFY THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT OF PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE.