

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In Re:)	Chapter 11
)	
EXIDE TECHNOLOGIES, <i>et al.</i> ,)	Case No. 02-11125 (KJC)
)	
Debtors.)	Objection Deadline: September 16, 2003 at 4:00 p.m.
)	Hearing Date: September 23, 2003 at 9:30 a.m.
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**MOTION OF CERTAIN LEAD CONTAMINATED CLAIMANTS FOR AN ORDER
GRANTING TEMPORARY ALLOWANCE OF CLAIMS SOLELY FOR VOTING
PURPOSES, PURSUANT TO BANKRUPTCY RULE 3018(a)**

Certain Lead Contaminated Claimants (hereinafter collectively referred to as the “Lead Contaminated Claimants”)¹, by and through their undersigned co-counsel, hereby move this Court for an order granting the temporary allowance of the proofs of claim filed by the Lead Contaminated Claimants, for the limited purpose of voting to accept or reject the plan of reorganization of Exide Technologies, et. al., and in support thereof, aver as follows:

BACKGROUND

1. On April 15, 2002 (the “Petition Date”), Exide Technologies and certain of its subsidiaries and affiliates (hereafter collectively referred to as the “Debtors”) commenced their respective reorganization cases by filing voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”). The Debtors’ cases have been consolidated for procedural purposes only and are being jointly administered. The Debtors continue to operate their respective businesses and manage their properties as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

¹ A complete list of the Lead Contaminated Claimants and their claims is attached hereto as Exhibit “A”.

2. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. The statutory predicate for the relief sought herein is § 502 of the Bankruptcy Code and Rule 3018(a) of the Federal Rules of Bankruptcy Procedure. This Motion is a core matter pursuant to 28 U.S.C. § 157(b)(2).

THE HISTORY AND CLAIMS OF THE LEAD CONTAMINATED CLAIMANTS

3. The Lead Contaminated Claimants are 165 individuals, more or less, who have claims for either personal injury or property damage relating to lead exposure suffered as a result of the negligent, willful and reckless conduct of the debtor, Exide. (A complete listing of all clients is attached hereto and incorporated herein, as Exhibit “A.”) The largest concentration of personal injury claims occurred as a result of Exide’s operation of a lead battery manufacturing facility in Greer, South Carolina – 84 claims. The Greer claims involve children who suffered permanent brain damage as a result of lead poisoning willfully and intentionally caused by Exide’s unlawful operation of the plant.

4. In the aggregate, the claims of the Lead Contaminated Claimants total in excess of \$135,000,000, making these creditors the second-largest creditor class after the Exide noteholders.

5. As of the Debtors’ Petition Date, 44 children from Greer had instituted suit in State Court in Greenville, South Carolina. In these lawsuits, extensive liability and damages discovery has been taken prior to the filing of bankruptcy. A careful review of the evidence confirms the potential for a recovery of over \$2,000,000 in actual compensatory damages in each individual case. A detailed summary of the claims and background of the Lead Contaminated Claimants is set forth in the Declaration of Douglas F. Patrick, being filed contemporaneously

herewith, (hereinafter, the “Patrick Dec.”), in support of the stay relief motion also being filed by the Lead Contaminated Claimants with respect to their claims. Furthermore, the evidence of Exide’s reckless and intentional conduct is so compelling that there exists a significant likelihood for punitive damages in each lawsuit. The remaining Greer cases yet to be filed (40 cases) also have significant value in excess of \$500,000 per claim. Additionally, the remaining personal injury and property damage claims emanating from locations other than the Greer facility have substantial merit and have the potential for recovery in excess of \$100,000 per claim.

6. Pursuant to the Contaminant Claims Bar Date established in these cases, which was fixed as August 15, 2003, the Lead Contaminated Claimants’ co-counsel timely filed approximately 165 proofs of claims (the “Proofs of Claim”) on behalf of the Lead Contaminated Claimants. These claims were filed as unliquidated claims, but are supported by a huge and extremely persuasive body of evidence, in each case furnished on CD-ROM to the Debtors’ claims agent. By their nature, the personal injury claims filed by the Lead Contaminated Claimants can only be liquidated by a jury as the trier of fact, under the Seventh Amendment to the United States Constitution.

7. As of the filing of this Motion, no Objection has been filed to the Lead Contaminated Claimants’ Proofs of Claim.

THE PLAN AND VOTING PROCESS

8. On August 25, 2003, the Debtors filed their Second Amended Joint Plan of Reorganization (the “Plan”) [Docket No. 2256].

9. On August 25, 2003 the Debtors filed their First Amended Disclosure Statement Dated August 24, 2003 for the Debtors' Second Amended Joint Plan of Reorganization (the "Disclosure Statement") [Docket No.2259].

10. In connection with the proposed Plan and Disclosure Statement, the Debtors filed a Motion for the Entry of an Order (A) Approving the Debtors' Disclosure Statement; (B) Scheduling a Hearing to Confirm the Debtors' Plan; (C) Establishing A Deadline For Objecting to the Debtors' Plan; (D) Approving Form of Ballots, Voting Deadline and Solicitation Procedures; and (E) Approving Form and Manner of Notices. [Docket No. 2106]. To the best of the Lead Contaminated Claimants' knowledge, this Court has provisionally approved the Disclosure Statement and voting procedures, although it appears that no order has yet been entered as of the date hereof. In any event, this Court has scheduled confirmation proceedings to begin on October 21, 2003, and a balloting deadline will be established for creditors, including the Lead Contaminated Claimants, to vote upon the Plan.

RELIEF REQUESTED

11. By this Motion, the Lead Contaminated Claimants request that their proofs of claim be temporarily allowed, solely for voting purposes, in an amount not less than \$135 million. Given the very large volume of evidence, and the unique issues presented, the Lead Contaminated Claimants submit that the Court should conduct an initial hearing or scheduling conference to determine the mechanism for carrying out this temporary allowance determination. The Movants respectfully request that the Court conduct a preliminary hearing on such scheduling and procedural matters in advance of the September 23 omnibus hearing. The Movants will attempt to confer with counsel to the Debtors to reach a consensus as to such a status conference, as well as a protocol for a reasonable and manageable estimation proceeding.

If the parties cannot reach an agreement, the Movants will request this Court to conduct such preliminary hearing, either in Court or by teleconference.

BASIS FOR RELIEF

12. Bankruptcy Rule 3018(a) grants the bankruptcy court authority to estimate and temporarily allow a creditor's claim for the limited purpose of voting on a plan of reorganization. *See In re Stone Hedge Properties*, 191 B.R. 59, 66 (Bankr. M.D. Pa. 1995) (noting that the bankruptcy court may estimate the amount of the creditor's claim without concern for *res judicata* or estoppel effects).

13. In the unique context of how a bankruptcy court should treat the voting amount issue for an unliquidated personal injury tort claim, the case of *Matter of Federal Press Co.*, 116 B.R. 650 (Bankr. N.D. In. 1989) is directly on point.

14. In *Federal Press*, the bankruptcy court for the Northern District of Indiana held that it was appropriate to estimate for voting purposes the unliquidated personal injury claim of a products liability plaintiff. The court then carried out the estimation using the standards applicable to estimation for voting purposes generally. The court held that estimation of the personal injury tort claim pursuant to section 502 of the Bankruptcy Code "does not require that a bankruptcy judge be clairvoyant." *Federal Press* at 653. Instead, the court held, a court only needs to reasonably estimate the "probable value of the claim." *Id.* The purpose of estimating a personal injury claim permits the case to go forward and without undue delay. *Id.* The court in *Federal Press* held that bankruptcy courts have several options in estimating claims; *i.e.*, taking the claims at face value or "utilizing a jury trial to obtain an accurate estimation." *Id.* (citing the leading Third Circuit case of *Bittner v. Borne Chemical*, 691 F.2d 134 (3d Cir.) which held that

the option of a jury trial is available only in ‘rare and unusual cases.’). The court further held that, consistent with Congress’ intent in drafting section 502(c)(1), “bankruptcy courts are better equipped to evaluate the evidence supporting a particular claim [within] the context of a particular bankruptcy proceeding. *Id.*, citing *In re Lane*, 68 B. R. 609, 612 (Bankr. D. Hawaii 1986).

15. Ultimately, the *Federal Press* court concluded that although the court could not determine whether the debtor would be ultimately liable to the claimant, it could allow both the claimant and the debtor a “quick but fair way to estimate the various tort claims before it.” *Id.* at 654. The court then reviewed the personal injury claim’s probable value if successful, through careful review of the claimant’s medical bills, additional expenses and loss of employment. Subject to a pragmatic discussion in these cases of how to address the mountain of evidence possessed by the Lead Contaminated Claimants, the kind of threshold analysis undertaken by the court in *Federal Press* serves as a model for how this Court could undertake to estimate the Lead Contaminated Claimants claims for voting purposes, absent a resolution of the voting amount issues among the parties.

16. The Lead Contaminated Claimants present a special situation, even more deserving of having their vote counted than the single tort creditor at issue in *Federal Press*. Clearly a summary proceeding is merited, in order to estimate the claims and temporarily allow them, solely for purposes of voting. Absent such relief, this unique and compelling group of creditors will be disenfranchised, to their severe detriment.

17. Several other factors justify and mandate that the Lead Contaminated Claimants have a fair opportunity to vote on the Plan. As personal injury claims, the claims cannot be

adjudicated in any substantive manner whatsoever by this court. This fact strongly supports allowance for voting purposes. By their very nature, such tort claims are utterly at the mercy of the automatic stay. They can only be tried following stay relief and then only before a state court or an Article III court. When they do have the opportunity to resume on a trial track, it is a given that they will face opposition from Exide and/or its insurers, and otherwise could take months or years to be resolved. Consequently, there are insurmountable functional barriers to reaching a determination of such claims before the balloting deadline. The only redress at this stage, given the rush by the Debtors and the prepetition lenders to exit chapter 11, is to temporarily allow the claims of this important constituency prior to any balloting deadline. It should go without saying, but voting on a chapter 11 plan is one of the fundamental rights conferred to creditors under the Bankruptcy Code. *See In the Matter of Huckabee Auto Co.*, 33 B.R. 141, 147 (Bankr. M.D. Ga. 1981).

18. Turning then to the well-settled principles that apply to estimation for voting purposes in general, it is plain that there is substantial authority for granting the Lead Contaminated Claimants' requested relief. Estimation and temporary allowance of a creditor's claim for the limited purpose of voting on a plan of reorganization is appropriate where no objection to the claim has been filed or an objection to a creditor's claim is filed too late to resolve the dispute on the merits prior to confirmation of the plan of reorganization. *See In re Stone Hedge Properties*, 191 B.R. 59, 64 (Bankr. M.D. Pa. 1995).

19. In considering whether to allow a claim and, if allowed, determining the amount of such claim, a court should consider the following factors: (a) the manner in which the claim was initially scheduled by the debtor; (b) the proof of claim filed by the creditors; and (c) the objection, if any filed by the debtor. *In re Stone Hedge*, 191 B.R. at 65. Absent any substantive

objection by the debtor, the claim should be temporarily allowed in its entirety. *See Lundell v. Anchor Construction Specialists, Inc.* 223 F.3d 1035, 1039 (9th Cir. 2000) (holding that proof of claim is strong enough to carry over mere formal objection, without more).

20. A proof of claim supported by a factual and legal basis is *prima facie* valid. *See In re Allegheny Int'l., Inc.* 954 F.2d 167, 173-74 (3rd Cir. 1992) (stating that where claimant has alleged facts and law supporting its claim, such claim is *prima facie* valid and burden shifts to debtor to present argument discounting or dismissing claim); *In re FRG, Inc.*, 121 B.R. 451 (Bankr. E.D. Pa. 1990) (burden of proof under Rule 3018(a) is same as for deciding objections to proofs of claim). Absent factual evidence or legal argument of the debtor discounting a creditor's proof of claim, the bankruptcy court should estimate and temporarily allow a creditor's claim in the amount stated in the proof of claim. *See Lundell v. Anchor Construction Specialists, Inc.*, 223 F.3d at 1039; *In re Hemingway Transport, Inc.*, 993 F.2d 915, 925 (5th Cir. 1993) (refusing to reduce amount of proof of claim where debtor provided no explanation as to how its evidence contradicted the claim). *Cf. In re Kovalchick*, 175 B.R. 863 (Bankr. E.D. Pa. 1994) (reducing amount of claim to a "compromise figure" where both claimant and debtor presented evidence regarding the value of the claim).

21. In this case the Lead Contaminated Claimants have done as much as is possible in the context of filing proofs of claim. They have virtually submitted all their potential trial exhibits, at least for the most well-developed of the cases that were in suit prior to the Petition Date. The claims are absolutely entitled to *prima facie* validity on the two critical components of personal injury tort claims: liability and damages. Under these circumstances, the Court should entertain a summary proceeding, using an appropriate protocol to consider the evidence submitted by the claimants, in order to temporarily allow the claims for voting purposes.

CONCLUSION

22. For the reasons stated herein, and in light of the evidence and legal support of the Lead Contaminated Claims provided in the Proofs of Claim filed with this Court, the Lead Contaminated Claimants respectfully request that this Court establish a summary procedure to carry out the estimation of the Lead Contaminated Claimants' claims for voting purposes, and further temporarily allow such claims for voting purposes in an amount not less than \$135,000,000.

WHEREFORE, the Lead Contaminated Claimants respectfully request entry of an order (i) temporarily allowing the Personal Injury Claims in an amount not less than \$135,000,000 for the limited purpose of voting to accept or reject the Plan and (ii) granting such other and further relief appropriate under the circumstances.

Dated: September 5, 2003
Wilmington, Delaware

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