

Hearing Date: January 5, 2005, at 10:00 AM
Objections Due Date: December 31, 2004 by 4:00 PM

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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re	:	Chapter 11
	:	
RCN CORPORATION, et al.,	:	Case No. 04-13638 (RDD)
	:	
	:	(Jointly Administered)
	:	

**CREDITOR DEBRA K. CRAIG'S
MOTION FOR LIMITED RELIEF FROM PLAN INJUNCTION**

I. Introduction and Relief Requested

1. Creditor Debra K. Craig, on behalf of the RCN Savings and Stock Ownership Plan (the "Savings Plan") and its participants and beneficiaries (collectively, the "participants"), moves for limited relief from the anti-suit injunction contained in Debtors' Joint Plan of Reorganization (the "POR") and Order confirming the POR.

2. The purpose of this motion is to enable Craig and similarly situated participants of the Savings Plan to consolidate all related litigation under the Employee Retirement Income Security Act of 1974 (“ERISA”), as amended, 29 U.S.C. §§ 1001, *et seq.* in a manner consistent with the POR. Specifically, Craig requests permission to sue RCN by name for the purpose of recovering against its insurers (as the law and the POR permit). In addition, if Craig is successful in her appeal of the denial of her motion to permit filing of late proof of claim, such litigation will also adjudicate and liquidate her claim against RCN – however, any recovery from RCN in excess of insurance coverage would be as governed by the POR.

II. Facts

3. Debra Craig is a participant in the Savings Plan. Debtor RCN Corporation (“RCN”), and others, are fiduciaries of the Savings Plan within the meaning of ERISA. Craig on October 5, 2004 filed on behalf of the Savings Plan and its participants a Class Action Complaint (the “Complaint”) in the United States District Court for the Southern District of New York, captioned *Craig v. Filipowicz, et al.*, Case No. 1:04-CV-07875 (JSR) (S.D.N.Y.). The Complaint is brought against various Savings Plan fiduciaries, other than the reorganized debtor RCN, for alleged breaches of fiduciary duty under ERISA that resulted in losses to the Savings Plan.¹ *See* Complaint, attached to this Motion as Exhibit A.

4. Three other similar ERISA complaints on behalf of the Savings Plan and its participants are also pending. These cases are *Thomas v. McCourt*, Case No. 3:04-CV-05068

¹ Under ERISA, an individual plan participant (as well as the U. S. Secretary of Labor) may sue to recover, on behalf of the pension plan, the losses to the plan resulting from a breach of fiduciary duty. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140-44 (1985) (interpreting ERISA 29 U.S.C. §§1109 & 1132(a)(2)).

(SRC) (D.N.J.), *Maguire v. Filipowicz*, Case No. 1:04-CV-08454 (JSR) (S.D.N.Y.), and *Hill v. McCourt*, Case No. 3:04-CV-05368 (SRC) (D.N.J.). The New York actions, including Craig's Complaint, have since been transferred to the District of New Jersey, where it is expected that all of the actions will be consolidated.

5. The complaints allege that the Savings Plan fiduciaries failed to take appropriate steps with respect to the Savings Plan investments in RCN stock once that stock ceased to become a prudent retirement investment because of RCN's mounting debt and other financial problems that eventually led to its filing for Chapter 11 bankruptcy petition on May 27, 2004. Craig's Complaint includes claims against Savings Plan fiduciaries for both their pre-petition conduct relating to Savings Plan administration and their post-petition conduct in failing to protect the Savings Plan's claims in this bankruptcy.

6. Craig also sought to file, on behalf of the Savings Plan and its participants, a proof of claim against RCN in these proceedings relating to the same matters set forth in her Complaint. This proof of claim was the subject of Craig's September 22, 2004 "Motion for Leave to File Proof of Claim" in this Court. That motion was denied by Order dated November 3, 2004. Craig's appeal of this Order is currently pending before the District Court.

7. On December 8, 2004 this Court entered an order confirming the POR in this case. (Dkt.# 483). The POR provided, pursuant to 11 U.S.C. § 524, a general discharge of all pre-petition claims against the debtors as well as an anti-suit injunction "against the commencement or continuation of any action, employment of process, or act to collect, offset, or recover" on the claims discharged. (POR,² Art. XIV, §F). Pursuant to 11 U.S.C. §§105(a) &

² See Exhibit A to the December 8, 2004 confirmation order. (Dkt.# 483).

1142, this Court retained jurisdiction in its order confirming the POR over “all matters arising out of, and related to, the Chapter 11 Cases and the Plan to the fullest extent permitted by law.” (Dkt.# 483, ¶ 62).

II. ARGUMENT

8. Craig now seeks relief from the anti-suit injunction to name RCN as a defendant in the ERISA litigation specified herein but where any recovery would be limited. The POR explicitly provides for recovery against insurance coverage, stating “[n]otwithstanding any provisions of the Plan, nothing in the Plan shall in any way limit or abrogate any available insurance coverage or rights to recover insurance proceeds available to pay any claims for the settlement or satisfaction of a judgment.” (POR, Art. XIV, §I). This provision is in accordance with established Second Circuit law holding that discharge of a debtor under the Bankruptcy Code does not prevent a creditor from bringing suit against the debtor as a predicate to recovery from the debtor’s insurer. *See Green v. Welsh*, 956 F.2d 30, 33-35 (2d Cir. 1992).

9. It is well settled that a creditor need not have filed a proof of claim in order to bring suit against the debtor for the purpose of collecting from the debtor's insurer. *Royal Ins. Co. of Am. v. McCrory Corp.*, No. 94 Civ. 5734, 1996 WL 204482 at *1 (S.D.N.Y. April 25, 1996) (the “case law is clear...that a plaintiff need not file a proof of claim in order to bring a civil action to collect from the debtor's insurance company”); *In re Agway, Inc.*, 313 B.R. 22, 31 (Bankr. N.D.N.Y. 2003) (same); *Prudential Lines, Inc. v. Jordan* (In re *Prudential Lines*), No. 91 Civ. 7073, 1992 WL 205642 at *2 (S.D.N.Y. Aug. 11, 1992) (same). “Failure to file a proof of claim bars a plaintiff only from asserting rights against the estate and from participating in a reorganization plan.” *Royal Ins. Co. of Am.*, 1996 WL 204482 at *1. The reason for the rule

permitting suit against the debtor to collect insurance proceeds is that bankruptcy law is meant to provide a “fresh start” to the debtor, but not to protect third parties such as insurance companies and grant them a windfall by immunizing them from their obligations. *Id.* at *2.

10. Permitting RCN to be named as a defendant in this manner is also in the interests of judicial economy, and creates no prejudice to the reorganized Debtor. In fact, consolidating all related issues before a single judge, so that the merits of the ERISA claim are determined only once, will avoid duplicative legal proceedings, and also, will conserve available insurance coverage to defend and pay such claims. It also eliminates any possibility of duplicative discovery. Granting relief from stay will assure that Craig and other Savings Plan participants can recover their losses from the insurer, pursuant to *Green v. Welsh* and other cases, to the extent they otherwise establish their right to recovery under ERISA.

11. In addition, Craig seeks limited conditional relief from the anti-suit injunction. If Craig's appeal of her “Motion to File Proof of Claim” is successful, and her proof of claim is deemed valid, such claim should be adjudicated in the ERISA proceedings. Since the New Jersey District Court will adjudicate Craig’s claims with respect to the ERISA litigation, it would promote judicial economy to adjudicate both liability and the amount of loss in that Court. Any recovery in excess of the insurance would remain subject to the POR.³

³ We note that ERISA matters are outside the normal expertise of bankruptcy courts, and could, in any event, be heard by a district court through the use of withdrawal of reference procedures. *See* 28 U.S.C. § 157(d). Accordingly, there can be no expectation by the Debtor or its insurers that such proceeding be adjudicated in this court.

WHEREFORE, Creditor Debra K. Craig, on behalf of the Savings Plan and its participants, requests that this Court enter an Order similar to the proposed order attached hereto.

Dated: New York, New York
December 20, 2004

Respectfully submitted,

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