

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

In Re:)	Chapter 11
)	
CONSECO, INC.,)	Case No. 02 B 49672
Debtor.)	
_____)	Honorable Carol A. Doyle
)	
STEPHEN C. HILBERT,)	
Plaintiff,)	
v.)	Adv. No. 03 A 04283
)	
CONSECO, INC., et al.,)	
)	
Defendants.)	
_____)	
)	
CONSECO, INC.,)	
Counterclaim-Plaintiff,)	
v.)	
STEPHEN C. HILBERT, et al.,)	
Counterclaim and)	
Third-Party Defendants.)	

MEMORANDUM OPINION

This matter is before the court on Stephen C. Hilbert’s Motion to Abstain and Remand State Court Action.¹ For the reasons stated below, the motion is denied.

I. Issue

Hilbert filed a two-count complaint in the circuit court of Cook County, Illinois on September 15, 2003, seeking a declaratory judgment against Conseco, Inc.

¹Hilbert filed this motion on behalf of himself, the plaintiff, as well as seven family trusts that have been named as third party defendants by Conseco, all of which are represented by Hilbert’s counsel.

(“Conseco”) and Conseco Services, L.L.C.² In Count I, Hilbert asks the court to declare that, pursuant to his pre-petition Termination Agreement, he must receive the same rights and benefits that other employees enjoyed under the Directors & Officers Loan Program (“D&O Program”). Count II seeks a declaration that certain changes at Conseco constituted a “change of control” under the D&O Program that required Conseco to purchase Hilbert’s stock at his purchase price plus interest. Conseco answered the complaint and filed a counterclaim seeking to recover approximately \$155 million in unpaid loans from Hilbert. On October 15, 2003, Conseco removed this action from Illinois state court to this court as an adversary proceeding. The issue presented by Hilbert’s motion is whether the court is required to abstain under 28 U.S.C. §1334(c)(2) and, if not, whether the court should abstain on a permissive basis. The court concludes that neither mandatory nor permissive abstention is appropriate. The issues raised in this adversary include matters within the court’s core jurisdiction, so mandatory abstention does not apply. Permissive abstention is also inappropriate because of the significant bankruptcy issues presented in this case. Hilbert’s motion to abstain and remand is therefore denied.

²Conseco Services, L.L.C. is an affiliate of Conseco that has never been a debtor in the Conseco-related bankruptcy cases. Apparently, it is the entity that paid interest on behalf of participants in the D&O Program. It has filed suit against Hilbert in state court in Indiana to pursue its alleged rights against Hilbert in connection with the D&O Program loans.

II. Background

Hilbert was the CEO of Consecos until his employment was terminated on April 20, 2000. On June 17, 2003, Consecos rejected Hilbert's Termination Agreement to the extent it could be deemed an executory contract. While he was employed at Consecos, Hilbert participated in the D&O Program. Under this program, Consecos arranged, guaranteed, and advanced the interest payments on loans from various banks. Hilbert's loans became due on the day that Consecos filed for bankruptcy (December 17, 2002) because bankruptcy was an "event of default" under the loan documents. As part of the reorganizing debtors' Sixth Amended Plan of Reorganization ("Plan"), the banks assigned their rights in the promissory notes to the reorganized Consecos ("New Consecos"). Consecos's counterclaim seeks to collect on the notes and loan agreements assigned by the bank, and to recover under certain agreements between Hilbert and Consecos (relating primarily to loans given to Hilbert's family members). A portion of any money collected from Hilbert will be paid to the holders of Trust Original Preferred Shares of Consecos (referred to as TOPrS) who participated in a settlement with the TOPrS that was incorporated into the Plan.

Consecos's confirmed Plan discharged all individual claims against Consecos and the other reorganizing debtors. However, prior to confirmation, Hilbert, Consecos and CIHC, Inc. (another reorganizing debtor) entered into an agreement regarding Hilbert's claims against Consecos ("Stipulation"). This Stipulation provided that, in exchange for Hilbert withdrawing his claims against the debtor, "nothing in the discharge of claims against Consecos and CIHC... under the Debtors' plan of reorganization shall constitute a waiver, discharge, or release of any of [Hilbert's] valid rights or defenses to any claim of

Conseco.” Stipulation, ¶2. The parties disagree over whether the Stipulation preserved Hilbert’s defenses and rights of set-off against a second Conseco, Inc., referred to as New Conseco, which was formed to serve as the post-confirmation corporate vehicle, or whether the Stipulation applied only to claims against Old Conseco and CIHC. The parties also disagree over whether the discharge injunction bars Hilbert from asserting the causes of action alleged in his declaratory judgment action if the Stipulation is determined not to apply to New Conseco.

Hilbert argues that this case is fundamentally a contract action that falls only within the “related to” jurisdiction of this court, and is therefore subject to mandatory abstention under 28 U.S.C. §1334(c)(2). In the alternative, he asserts that the court should abstain under principles of permissive abstention. Conseco argues that the issues Hilbert raises fall with the court’s core jurisdiction, so that mandatory abstention does not apply, and that the court should not abstain on a permissive basis because of the importance of the bankruptcy issues raised.

III. Abstention

A. Mandatory Abstention under §1334(c)(2)

Section 1334(c)(2) mandates abstention where: 1) the suit is based on a state law cause of action related to, but not arising under or in, a case Under Title 11; 2) there is no separate basis for federal jurisdiction apart from the bankruptcy; 3) an action has already commenced in state court; and 4) the case could be timely adjudicated in state court. 28 U.S.C. §1334(3)(2).

The first issue to be determined is whether the issues raised in this case are within the core jurisdiction of this court. Hilbert concedes that this case is within the “related to” jurisdiction of the court, because the amount recovered will affect the amount of money distributed to the TOPrS under the Plan. He also concedes that at least one issue is within the core jurisdiction of the court. In Count II of his complaint, Hilbert claims that there has been a change of control at Conseco that triggers an obligation by Conseco to purchase his now worthless Conseco stock back from him at the price he paid for it. Conseco contends that Paragraph 47 of the confirmation order nullifies this alleged right. Hilbert acknowledges that the court has core jurisdiction to interpret its own confirmation order, and the court agrees. In re Chicago, Milwaukee, St. Paul and Pacific R.R. Co., 6 F.3d 1184, 1194 (7th Cir. 1993) (“the reorganization court is clearly in the best position ... to interpret the consummation order...”); In re Kewanee Boiler Corp., 270 B.R. 912, 917 (Bankr. N.D. Ill. 2002) (bankruptcy courts have core jurisdiction to interpret and enforce their orders); In re Forty-Eight Insulations, Inc., 212 B.R. 938, 941 (Bankr. N.D. Ill. 1997) (“Bankruptcy courts have inherent authority to interpret their own confirmation orders.”), citing In re Weber, 25 F.3d 413, 416 (7th Cir. 1994) (bankruptcy court’s interpretation of own confirmation order entitled to deference).

The court also has core jurisdiction to determine whether the debtors’ discharge and the discharge injunction prohibit Hilbert from asserting defenses and set-off rights against New Conseco. Conseco argues that the Stipulation preserves Hilbert’s right to raise these issues against Old Conseco, not New Conseco. It alleges that, under the Plan and the discharge injunction in 11 U.S.C. §524(e), Hilbert’s affirmative claims against Old Conseco cannot be asserted against New Conseco. Hilbert, on the other hand,

argues that the Stipulation preserves his right to assert defenses and set-offs against both Old Conseco and New Conseco. The parties dispute whether Hilbert's claims are defenses or affirmative claims of set-off. Count II, in which Hilbert contends that Conseco is obligated to purchase his stock back from him at his purchase price plus interest, is clearly an affirmative claim of a set-off. Count I, in which Hilbert asserts he must be treated the same as other employees whose loans were forgiven, is more difficult to characterize. However, whether Count I is considered a defense or a claim for set-off, significant bankruptcy issues are raised.

To decide the merits of either of Hilbert's claims, the court must first decide whether the Stipulation preserves his right to raise them against New Conseco. Interpretation of the Stipulation may determine the extent to which the Plan and discharge injunction bar Hilbert's claims, and is therefore within the core jurisdiction of the court. If the Stipulation does not preserve Hilbert's right to assert these claims, the court will then need to determine whether the confirmed plan and discharge injunction bar Hilbert from proceeding, or whether defenses and set-off rights survive the discharge.³ It is beyond dispute that a bankruptcy court has core jurisdiction to determine whether a plan or the discharge injunction bars claims against a debtor. Cox v. Zale Delaware, Inc., 239 F.3d 910, 917 (7th Cir. 2001); In re Kewanee Boiler Corp., 270 B.R. at 917, 920 ; In re Forty-Eight Insulations, Inc., 212 B.R. at 941; Pettibone Corp. v. Payne (In re Pettibone Corp.), 151 B.R. 166, 169 (Bankr. N.D. Ill. 1993). The court

³ Courts are divided on the question of whether set-off rights survive a discharge. See In re Bare, 284 B.R. 870, 873 (Bankr. N.D. Ill. 2002) (discussing cases on both sides of issue).

therefore has core jurisdiction to determine the effect of the Stipulation, the Plan and the discharge injunction on Hilbert's claims in this case. Because the court has core jurisdiction, mandatory abstention under 28 U.S.C. §1334(c) does not apply.

B. Permissive Abstention under 28 U.S.C. §1334(c)(1)

Even though abstention is not mandatory, the court has discretion to abstain under 28 U.S.C. §1334(c)(1), which provides:

Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under Title 11 or arising in or related to a case under Title 11.

Federal courts consider a number of factors in determining whether permissive abstention is appropriate. These include: (1) the effect or lack thereof on the efficient administration of the estate; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable law; (4) the presence of a related proceeding commenced in state court or another non-bankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. §1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than the form of an asserted "core" proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court; (9) the burden on the bankruptcy court's docket; (10) the likelihood that the commencement of proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a

right to a jury trial; and (12) the presence in the proceeding of non-debtor parties. E.g., In re Kewanee Boiler Corp. 270 B.R. at 922-23, quoting Matter of Chicago, Milwaukee, St. Paul & Pacific R.R. Co., 6 F.3d 1184, 1189 (7th Cir. 1993).

However, when the court has core jurisdiction it should construe these factors narrowly and abstain only in unusual circumstances. Chicago, Milwaukee, 6 F.3d at 1194; Kewanee Boiler, 270 B.R. at 923. The court recognizes that state courts are also capable of interpreting the discharge injunction and bankruptcy court orders. E.g., In re McGhan, 288 F.3d 1172, 1180 (9th Cir. 2002) (validity of bankruptcy court order cannot be attacked in state court, but state court has jurisdiction to construe bankruptcy orders and discharge). However, important bankruptcy issues within the court's core jurisdiction are at the center of this dispute. These issues include interpretation of the Stipulation, the confirmation order, the Plan, and the discharge injunction. This court should decide these issues unless there are compelling circumstances favoring a state court adjudication. Here, there are no such compelling circumstances. In addition, the court's familiarity with the complicated history of the underlying bankruptcy cases weighs in favor of exercising jurisdiction over this case. Although the dispute may also involve questions of contract interpretation under state law, the mere presence of state law issues is insufficient to warrant permissive abstention. Matter of L&S Indus. Inc., 989 F.2d 929, 935 (7th Cir. 1993); Kewanee Boiler, 270 B.R. at 923. The court therefore denies Hilbert's motion to abstain on a permissive basis.

III. Conclusion

For all of these reasons, the court denies Hilbert's motion to abstain and remand this action to state court.

Dated: January 28, 2004

ENTERED:

CAROL A. DOYLE
United States Bankruptcy Judge

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Third-Party Defendants.)	

ORDER

IT IS ORDERED that, for the reasons set forth in the Memorandum Opinion dated January __, 2004, Stephen C. Hilbert's Motion to Abstain and Remand State Court Action is hereby denied.

Dated: January 28, 2004

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CAROL A. DOYLE
United States Bankruptcy Judge

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CERTIFICATE OF SERVICE

The undersigned certifies that on January __, 2004 copies of the Memorandum Opinion and Order dated January __, 2004 were faxed and/or mailed to the parties on the attached service list.

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