

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re US FIDELIS, INC.,	)	
	)	Case No. 10-41902-705
	)	Chapter 11
Debtor.	)	
	)	Hearing Date: October 20, 2010
	)	Hearing Time: 10:00 a.m.
	)	Location U.S. Bankruptcy Court,
	)	St. Louis, MO, Courtroom 7-S

STATE OF MISSOURI'S OBJECTION TO SETTLEMENTS

COMES NOW the State of Missouri, by and through Missouri Attorney General Chris Koster, and for its Objection to Settlements states as follows:

Following the commencement of these Chapter 11 proceedings, on April 28, 2010 the Debtor filed adversary case no. 10-04225, alleging among other things that brothers Darain and Cory Atkinson¹ had received over \$100 million in fraudulent transfers under both the Bankruptcy Code and Missouri state law. As has been acknowledged by counsel for the Debtor, the Creditors' Committee, and this Court, this cause of action and its eventual proceeds are the core asset of this bankruptcy estate. Trial was set for September 15, 2010, but was continued so that settlements with the Defendants (hereinafter, the "Settlements") could be completed and filed. Although the Missouri Attorney General's Office was generally kept apprised of the progress of settlement negotiations and was afforded some opportunities to express its views on those proceedings, neither the State of Missouri nor, upon information and belief, any other state was directly involved in the negotiation or crafting of the Settlements. Before the Court is a joint motion of the Debtor and the Creditors' Committee to approve the Settlements, docket no. 410 (hereinafter, the "Settlement Motion").

¹ Mia Atkinson and Heather Atkinson, Darain and Cory's wives, were added to the adversary shortly thereafter in an amended petition.

The Settlement Motion correctly states the legal standard to be applied: the settlement must be fair and equitable and in the best interests of the estate. *E.g., Tri-State Financial, LLC v. Lovald*, 525 F.3d 649, 654 (8th Cir. 2008). The four factors to be considered in making this determination are:

- (A) the probability of success in the litigation;
- (B) the difficulties, if any to be encountered in the matter of collection;
- (C) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and
- (D) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

Id. The probability of success in the litigation is not seriously in dispute. In the Settlement Motion’s own words, there “would have been a successful conclusion to the litigation.” Settlement Motion at par. 15. This factor weighs against approving the Settlement in light of the additional issues discussed below.

The Paramount Interest of the Creditors and a Proper Deference to Their Reasonable Views in the Premises

Among the many aspects of the Settlements that give the State of Missouri pause, two stand out: the total compensation to the Defendants and the third party releases that will be required.

Nowhere aggregated in the Settlement Motion is this fact: the Defendants walk away from this deal with \$1,525,000.00 in cash, accounts, and hard assets. Not included in that amount are rent-free living for one of the Defendant’s relatives and retainers for personal criminal representation that the Debtor paid for each of the brothers. The Debtor’s schedules suggest that the full amount of these retainers was at least \$1 million, meaning the total value going to the Defendants likely exceeds \$2.5 million. While completing litigation and collecting

in this matter would not be without cost, the State of Missouri doubts that said costs would exceed \$2.5 million.

On top of the aforementioned consideration, the Settlements are also set up to ensure that the Defendants will receive substantial third party releases. Proceeds from the Settlements will be put in a segregated account, not poured into the estate generally. The Settlements obligate the Debtor and the Creditors' Committee to pursue a plan whereby "creditors of USF that also assert a claim against one or both of the Atkinsons may choose to release such claims." If these releases or their treatment in the plan are not "in a form acceptable to the Atkinsons in their sole discretion," then the Defendants are no longer bound by the major terms of the Settlements. Although never stated outright, it is clear what is being set up here: creditors of the estate who wish to share in the settlement proceeds will be required to give a release to the non-debtor Defendants. Of course, there would be no such releases if the litigation proceeded to judgment.

One problem with this arrangement is that the Defendants unjustifiably receive, in effect, \$20+ million worth of leverage that they can use to convince their creditors to grant them releases from various personal liabilities. Another problem is that it leads to inequities as between creditors. Those creditors who only have claims against the Debtor will lose nothing by granting the Defendants a release, but those creditors who happen to have claims against both the Debtor and the Defendants will likely have to choose between releasing non-debtor third parties from otherwise perfectly valid obligations or receiving nothing.

Difficulties to be Encountered in the Matter of Collection

The State of Missouri does not dispute that there will be challenges to collection in this matter. The Defendants have assets in more than one state and even some assets abroad. There are no doubt certain exemptions the Defendants would attempt to use to thwart collection.

Yet the challenges to collection are likely surmountable. Judgment would be entered against the brothers and their wives jointly and severally as Missouri's fraudulent transfer law applies equally to the original fraudulent transferee and "[a]ny subsequent transferee other than a good-faith transferee who took for value." § 428.044.2(2), RSMo. This would greatly aid in collection, especially in light of the Creditors' Committee's work ascertaining assets.

Furthermore, while Missouri law does provide certain exemptions to judgment debtors, those exceptions are miniscule in comparison to the allowances granted to the Defendants in the Settlements. For example, Missouri allows each debtor to exempt one motor vehicle worth up to \$3,000. § 513.430.1(5), RSMo. The Settlements call for the Defendants to keep up to \$125,000 worth of automobiles, more than ten times the exemption. The primary asset being surrendered by the Defendants are two homesteads. Missouri's homestead exemption is \$15,000 per homestead. § 513.475, RSMo. The Defendants here are receiving \$1,000,000 in cash – more than thirty times the exemption – plus more than a million dollars in other value.

In short, while there certainly would be challenges and costs associated with collection in this case, those challenges could be overcome and those costs would likely be substantially less than the amounts the defendants are being allowed to retain.

The Complexity of the Litigation Involved, and the Expense, Inconvenience and Delay
Necessarily Attending It

Prosecuting this adversary would, in relative terms, be pretty straight forward: the Defendants received the funds, they didn't provide any significant value in exchange, and they left the Debtor grossly undercapitalized with no or almost no reserves despite the near certainty of massive liabilities. The Debtor has all of the necessary records to prove this, and the Defendants have no apparent defense.

No doubt there would be significant costs associated with litigating this case, but many of those costs have already been sunk. After months of preparation, trial in this matter was less than two weeks away when it was continued. While the costs of the final week and a half of preparation and the actual costs of trial would be saved by the Settlements, the several months of earlier preparation are a cost that is already lost to the estate. Similarly, there would be no major delay attending litigation in this matter. Indeed, a final trial on the merits could have been completed weeks ago.

WHEREFORE, because the Defendants would retain more than \$2.5 million in value, because many creditors would be coerced into releasing valid obligations of non-debtors, because the difficulties and costs of collection can be overcome, and because many of the costs of litigation have already been incurred, the State of Missouri objects to the Settlements and prays this Court decline to approve them.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing document was electronically filed with the United States Bankruptcy Court, Eastern District of Missouri, on October 15, 2010, and thereby electronically served on debtor's counsel, the Bankruptcy/U.S. Trustee, and other parties in interest.

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