

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
SOUTHERN DISTRICT OF MISSISSIPPI**

**IN RE:**

**CHAPTER 11**

**CONDERE CORPORATION  
D/B/A SERVIS FLEET TIRE  
COMPANY, D/B/A FIDELITY  
TIRE MANUFACTURING CO.**

**CASE NO. 9702549EE**

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**FINDINGS OF FACT AND CONCLUSIONS OF LAW  
ON THE MOTIONS TO ENFORCE AGREED ORDER**

This matter came before the Court on the June 11, 2010, trial on the *Second Amended Motion to Enforce Agreed Order (#3232)* and the *Third Amended Motion to Enforce Agreed Order (#3257)*(collectively, Motions) both filed by Billy Joe Frazier and Shirley Frazier (Fraziers) and the *Answer and Response to Second Amended Motion to Enforce Agreed Order* and the *Answer and Response to the Third Amended Motion to Enforce Agreed Order* (collectively, Responses) both filed by Condere Corporation (the Debtor).

At the conclusion of the trial, the Court instructed the Debtor and the Fraziers to submit briefs. After considering all testimony and evidence presented, the arguments of the parties, the pleadings on file, and the briefs, the Court finds that the Motions should be granted.

### **FINDINGS OF FACT**

The Debtor manufactured tires at a plant in Natchez, Mississippi. Several different tire companies had manufactured tires at this plant beginning in the 1960's. The plant primarily produced bias tires for cars which are the low margin portion of the tire market. The plant became known as Condere Corporation d/b/a Servis Fleet Tire Company, d/b/a/ Fidelity Tire Manufacturing Company when it was bought by an investor group, including various plant managers, in early 1987. Condere continued to make the same type of tires, and profitability and manufacturing operations continued to decline.

Condere filed a petition under Chapter 11 of the United States Bankruptcy Code on May 13, 1997. For a more detailed history of the Debtor, see this Court's opinion found at *In re Condere Corporation*, 228 B.R. 615 (Bankr. S.D. Miss. 1998). Following the filing of the bankruptcy, a creditors' committee of nine creditors was appointed.

On September 4, 1998, this Court approved the Debtor's *Amended Motion for an Order Pursuant to 11 U.S.C. § 363 to Sell All Assets of the Debtor*<sup>1</sup> in which the Debtor's assets were sold to Titan Tire Corporation of Natchez (Titan Tire). The sale essentially provided for Titan Tire to purchase all of the assets of the Debtor for a purchase price which was the sum of (a) all secured debt; (b) all allowed priority claims, including expenses of administration, professional fees and tax claims; and (c) 65% of the allowed, unsecured, non-priority claims, including, but not limited to, any

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<sup>1</sup>See *In re Condere Corporation*, 228 B.R. 615 (Bankr. S.D. Miss. 1998)

claims arising under § 502(h). In accordance with the terms of the sale, Titan Tire posted a \$15,000,000 letter of credit to cover the allowed administrative expense claims, allowed professional fees, allowed priority tax claims, and 65% of the allowed unsecured claims.

On July 30, 1999, this Court entered an *Order Confirming Plan*. This order approved the December 23, 1998, *Amended Joint Plan of Liquidation of Condere Corporation and the Official Unsecured Creditors' Committee*<sup>2</sup> (the Confirmed Plan).

In regard to contested claims, the Confirmed Plan provided the following:

8.1 Objections to Claims. Debtor and the Committee<sup>3</sup> shall have the right to contest and file objections to Claims. Debtor shall not object to any claim other than for an improper amount. All objections to Claims shall be filed with the Clerk of the Bankruptcy Court on or before thirty (30) days after the Confirmation Order becomes a Final Order (“the Objection Date”), . . . . All Claims as to which no objections have been filed by the Objection Date shall be deemed finally Allowed for all purposes including distributions under this Plan. The Committee shall have the right and duty to file and litigate objections to certain claims of former employees of the Debtor.

8.2 Contested Claims. No payment or distribution shall be made with respect to a Contested Claim until and unless the Contested Claim becomes an Allowed Claim. Debtor will pay the undisputed and uncontested portion of all Claims in accordance with the Plan.

8.3 Distribution in Respect to Contested Claims. When a Contested Claims (*sic*) in Class 2 is ultimately or partially allowed by Final Order of the Bankruptcy Court, Debtor shall, within five Business Days of the time in which the order becomes a Final Order, issue to

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<sup>2</sup>As modified by the June 18, 1999, *Modification to Amended Joint Plan of Liquidation*.

<sup>3</sup>The *Order Confirming Plan* provided for the establishment of a Post Confirmation Committee. This Committee consists of the representatives of Sid Richardson Carbon Company, Solutia, Inc. and Flexsys American, L.P. or their designees. Any references to the Committee, refers to the Post Confirmation Committee unless otherwise noted.

the holder of the Allowed Class 2 Claim a distribution of 65% of the amount of the Allowed Claim.

*Amended Joint Plan of Liquidation of Condere Corporation and the Official Unsecured Creditors' Committee*, pp. 17-18, December 23, 1998.

On March 10, 1998, a *Proof of Claim*<sup>4</sup> was filed on behalf of the Fraziers.<sup>5</sup> The *Proof of Claim* was filed as an unliquidated, unsecured, nonpriority claim. Pursuant to the Confirmed Plan, the deadline for filing objections to claims was September 8, 1999.<sup>6</sup> On September 8, 1999, the Debtor filed an objection to the proof of claim of the Fraziers.

The Fraziers and several of their neighbors had filed a lawsuit against the Debtor in the United States District Court for the Southern District of Mississippi in 1992. The suit arose out of a naphtha<sup>7</sup> spill on the Debtor's premises in July of 1989. The naphtha mixed with water in a shallow perched aquifer and migrated beyond the plant's premises and under the homes of nearby landowners. The Fraziers were one of these homeowners. The District Court referred to parties like the Fraziers as "on plume plaintiffs."<sup>8</sup> The claims of the "on plume plaintiffs" were tried in the District Court in 1995. In 1996, final judgments against the Debtor in favor of the "on plume

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<sup>4</sup>Claim Registry No. 749.

<sup>5</sup>The *Proof of Claim* was filed in the names of all of the plaintiffs in the lawsuit discussed in the paragraph below. The Fraziers were one of these plaintiffs. For purposes of this opinion, the proof of claim will simply be referred to as the Fraziers' proof of claim.

<sup>6</sup>As the *Order Confirming Plan* was entered on July 30, 1999, the order became a final order on August 9, 1999, pursuant to Federal Rules of Bankruptcy Procedure 8002 and 9006. Therefore, the thirty days ran on September 8, 1999.

<sup>7</sup>Naphtha is a broad term which covers a number of different flammable liquid mixtures of hydrocarbons—a distillation product from petroleum.

<sup>8</sup>Other parties to the lawsuit whose homes were not located above the plume were referred to as "off plume plaintiffs." The District Court dismissed all of the claims of the "off plume plaintiffs."

plaintiffs” were entered in the District Court. After appeals and cross-appeals to the United States Court of Appeals for the Fifth Circuit, the matter was remanded to the District Court.

Thereafter, the “on plume plaintiffs” agreed to a compromise and settlement with the Debtor. On January 13, 2000, the Debtor filed its *Motion for an Order Approving Settlement of Claims Asserted Against Debtor in the United States District Court for the Southern District of Mississippi, Jackson, Division* (Settlement Motion). The Settlement Motion resolved not only the litigation pending in District Court, but it also resolved the Debtor’s objection to the Fraziers’ proof of claim and several motions filed by the “on plume plaintiffs” relating to the filing of additional/amended proof of claims.

On April 13, 2001, the Court entered an *Agreed Order* approving the settlement (Settlement Order). The agreed upon treatment of the Fraizers in the Settlement Order is as follows:

1. The Motion of the Debtor-in-Possession to Settle and Compromise the disputed claim of BILLY JOE FRAZIER and SHIRLEY FRAZIER should be, and is hereby granted and sustained, so that BILLY JOE FRAZIER and SHIRLEY FRAZIER have an allowed unsecured claim in the Chapter 11 case in the sum of \$ 29,615.38, which is the amount due to them and prior to the reduction of this amount under the terms and provisions of the Confirmed Plan of Reorganization. That BILLY JOE FRAZIER and SHIRLEY FRAZIER shall receive \$ 19,250.00 which said amount represents sixty-five percent (65%) of the actual claim of \$ 29,615.38. The sum of \$ 19,250.00 is a net payment to BILLY JOE FRAZIER and SHIRLEY FRAZIER after the reduction of their claim to sixty-five percent (65%), as set out under the Confirmed Plan of Reorganization

2. IT IS FURTHER ORDERED that the Motion of BILLY JOE FRAZIER and SHIRLEY FRAZIER to file a Late Proof of Claim should be, and is hereby granted, and BILLY JOE FRAZIER and SHIRLEY FRAZIER should be, and hereby is (*sic*) authorized to file a late proof of claim, in the sum of \$ 29,615.38, which said sum represents the total amount due to BILLY JOE FRAZIER and SHIRLEY FRAZIER and said claim shall be allowed as a general unsecured claim, which amount stated on the Proof of Claim shall represent their actual claim, and said sum so set out on the Proof of Claim shall be calculated consistent with the terms of the confirmed Plan of Reorganization so that after reducing the actual claim to sixty-five percent (65%), the net amount due to BILLY JOE FRAZIER and SHIRLEY FRAZIER shall

be \$19,250.00.

3. IT IS FURTHER ORDERED that the Motion of BILLY JOE FRAZIER and SHIRLEY FRAZIER for authority to file a Proof of Claim should be, and is hereby granted and sustained, so that BILLY JOE FRAZIER and SHIRLEY FRAZIER shall have an approved, allowed unsecured claim in the amount of \$ 29,615.38 which claim shall be reduced to sixty-five percent (65%) of its value, so that the net proceeds to BILLY JOE FRAZIER and SHIRLEY FRAZIER shall be \$ 19,250.00.

4. The actual net proceeds of \$ 19,250.00 owing and due to BILLY JOE FRAZIER and SHIRLEY FRAZIER shall be paid to them within ten (10) calendar days after the entry of this order.

5. That Condere's Objection to the Proof of Claim filed by BILLY JOE FRAZIER and SHIRLEY FRAZIER is sustained in part and denied in part in that it is sustained and limited only to that part of the proof of claim in excess of the allowed amount of the proof of claim and the objection is denied in part, in that it does not affect the actual amount of money or net proceeds to be received by BILLY JOE FRAZIER and SHIRLEY FRAZIER which is in the amount of \$19,250.00 under this the agreed order.

*Agreed Order*, pp. 1-3, April 13, 2001.

While the Fraizers testified at the trial that they were unaware of the Settlement Order and unaware that the Debtor had tendered a check to their then attorney, Edward E. Kerstine, they did not dispute the Debtor's assertions that the Debtor did comply with the Settlement Order and tender a check in the amount of \$19,250.00 to Mr. Kerstine within ten days of the entry of the order. It is also undisputed that the 2001 check was never negotiated.

At trial, the Fraizers testified that at some point in 2009, they learned that some of their neighbors had settled with the Debtor and had received checks from the Debtor. At that point, they contacted another attorney who on September 15, 2009, filed the Fraizers' first *Motion to Enforce Order*. As stated above, the Fraizers subsequently filed their second and third motions to enforce the April 13, 2001, order.

On June 11, 2010, the Court held a trial on the Motions and the Responses. At the

conclusion of the trial, the Court took the Motions and Responses under advisement and instructed the parties to submit to the Court briefs supporting their respective positions.

## CONCLUSIONS OF LAW

### I.

This Court has jurisdiction of the subject matter and of the parties to this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(A) and (B).

### II.

#### A.

The Debtor asserts that the Fraziers are not entitled to payment on their claim according to the Settlement Order because the three (3) year statute of limitation has run. The Debtor states that the Settlement Order “is a contract and the rights and duties of the Debtor and Frazier to the Agreed Order are determined by the local laws. . . .”<sup>9</sup> The Debtor further states that “Frazier’s (*sic*) failure to accept the funds tendered under the Agreed Order constituted a breach of the contract, and, accordingly, began the ‘running’ of the statute of limitations in connection therewith. Frazier’s (*sic*) action against the Debtor eight (8) years later to enforce the terms of the Agreed Order is clearly a violation of the prescribed three (3) year statute of limitation.”<sup>10</sup>

The Fraziers assert that the automatic stay of 11 U.S.C. § 362<sup>11</sup> “has not been lifted or

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<sup>9</sup>*Memorandum Brief in Support of Debtor’s Objection to Third Amended Motion to Enforce Order Filed by Billy Joe and Shirley Frazier*, p. 2, June 10, 2010.

<sup>10</sup>*Id.*

<sup>11</sup>Hereinafter, all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code unless specifically noted otherwise.

modified with regard to the claims of Billie Joe Frazier and Shirley Frazier herein and therefore the running of any statute of limitation that might be applicable to their claim has been tolled.”<sup>12</sup>

**B.**

The Court finds it unnecessary to address the Debtor’s contention that the three (3) year statute of limitation has run which would then bar the Fraziers from receiving payment on their claim. The Court finds that in bankruptcy, the basis for the Fraziers’ entitlement to receive payment is their proof of claim and not the Settlement Order.

In bankruptcy, an *allowed claim* is a term of art. Pursuant to Federal Rule of Bankruptcy Procedure 3002(a),<sup>13</sup> an unsecured creditor must file a proof of claim or interest for the claim to be allowed. A proof of claim filed by a creditor pursuant to § 501 is “deemed allowed, unless a party in interest . . . objects. [I]f such objection to a claim is made, the court. . .shall determine the amount of such claim . . . as of the date of the filing of the petition.”<sup>14</sup> Therefore, once the court determines a claim to be an allowed claim and has determined the amount of the allowed claim, the creditor is then permitted to share in the distribution of the debtor’s assets.

In the case at bar, the Fraziers’ filed a proof of claim. The Debtor objected to the proof of claim. The parties reached an agreement which resulted in the Settlement Order being entered by the Court.

The Settlement Order does not state that the Fraziers have a contract for a claim. Rather, the

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<sup>12</sup>*Post-Trial Memorandum in Opposition to Condere Corporation’s Claim that the Statute of Limitations has Run*, p. 3, July 15, 2010.

<sup>13</sup>Hereinafter all rules refer to the Federal Rules of Bankruptcy Procedure unless specifically noted otherwise.

<sup>14</sup> 11 U. S. C. § 502(a) and (b) .

Settlement Order liquidated the Fraziers' proof of claim. The Settlement Order specifically states that the Fraziers "shall have an approved, *allowed unsecured claim* in the amount of \$ 29,615.38 which claim shall be reduced to sixty-five percent (65%) of its value, so that the net proceeds to BILLY JOE FRAZIER and SHIRLEY FRAZIER shall be \$19,250.00."<sup>15</sup> Pursuant to its Confirmed Plan, once a claim is adjudicated to be an allowed claim, the Debtor is obligated to pay the claim.

The Debtor has not cited a code section or case law which states that there is a statute of limitation on the payment of an allowed claim. As the Settlement Order was not appealed by either party, the Settlement Order is a final order. Therefore, the Court finds that the Fraziers have an allowed claim in the amount of \$29,615.38. Pursuant to the Confirmed Plan, the Fraziers shall be paid sixty-five percent (65%) of their allowed claim. Therefore, the Debtor shall tender to the Fraziers \$19,250.00.

### **CONCLUSION**

The Fraziers filed a proof of claim to which the Debtor objected. The agreement reached between the parties liquidated the Fraziers' claim and granted the Fraziers an allowed unsecured claim. In bankruptcy, there is not a statute of limitation on the payment of an allowed unsecured claim.

Therefore, the Motions are well taken and should be granted. Pursuant to § 502 the Fraziers have an allowed unsecured claim in the amount of \$29,615.38, of which the Debtor shall tender to the Fraziers sixty-five percent (65%) or \$19,250.00.

A separate final judgment consistent with this opinion will be entered in accordance with Rule 9021 of the Federal Rules of Bankruptcy Procedure.

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<sup>15</sup>*Agreed Order*, p. 3, April 13, 2001. (emphasis added).

This the 7<sup>th</sup> day of October, 2010.

**/s/ EDWARD ELLINGTON**  
**UNITED STATES BANKRUPTCY JUDGE**