

ORIGINAL
UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
FILED

JUN 04 2004 JS

MICHAEL N. MILBY, CLERK OF COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES)
LITIGATION)

MDL Docket No. 1446

This Document Relates To:)

Civil Action No. H-01-3624
(Consolidated)

MARK NEWBY, *et al.*, Individually and On)
Behalf of All Others Similarly Situated,)

Plaintiffs,)

vs.)

ENRON CORP., *et al.*,)

Defendants.)

CONSECO ANNUITY ASSURANCE)
COMPANY, Individually and on Behalf)
of All Others Similarly Situated,)

H-03-CV-2240

Plaintiff,)

v.)

CITIGROUP, INC., CITIBANK, N.A.,)
CITICORP, SALOMON SMITH)

BARNEY, SALOMON BROTHERS)
INTERNATIONAL LIMITED, *et al.*,)

Defendants.)

CONSECO ANNUITY ASSURANCE COMPANY'S MOTION AND MEMORANDUM
OF LAW IN SUPPORT OF CONSECO'S MOTION FOR RECONSIDERATION OF
THE COURT'S JUNE 1, 2004 ORDER GRANTING THE REGENTS OF THE
UNIVERSITY OF CALIFORNIA LEAVE TO GIVE NOTICE TO CERTAIN CLASS
MEMBERS PURSUANT TO RULE 23(d)(2)

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Conseco Annuity Assurance Company (“Conseco”), by its counsel, respectfully submits this Motion And Memorandum Of Law In Support Of Conseco’s Motion For Reconsideration Of The Court’s June 1, 2004 Order Granting The Regents Of The University Of California’s (“The Regents”) Leave To Give Notice To Certain Class Members Pursuant To Rule 23(d)(2).

INTRODUCTION

By this motion (“Conseco’s Motion For Reconsideration”), Conseco moves this Court for expedited reconsideration of its Order Granting The Regents’ Motion For Leave To Give Notice dated June 1, 2004 (the “June 1st Order”) pursuant to Federal Rule of Civil Procedure 59(e)(“Rule 59(e)"). “A motion under Rule 59(e) may be granted to correct manifest errors of fact or law upon which a judgment is based, to allow the moving party to present newly discovered evidence, to prevent manifest injustice, or to recognize an intervening change in controlling law.” Great Pines Water Co. v. Liqui-Box Corp., 962 F. Supp. 990, 991 (S.D. Tex. 1997)(emphasis added).

Here, reconsideration is warranted in order to prevent a manifest injustice to purchasers of \$ 750 million of Yosemite I Citigroup Credit Linked Notes (“Yosemite I Citigroup CLNs”). Specifically, by the June 1st Order, this Court would permit the dissemination of The Regents’ Notice Of Dismissal Of Certain Claims (“The Regents’ Notice”), which is misleading. The Regents’ Notice misinforms purchasers of Yosemite I Citigroup CLNs that The Regents may pursue Section 10(b) claims on their behalf when, based on prior Court orders, the claims asserted in the Newby Action on behalf of purchasers of \$ 750 million of Yosemite I Citigroup CLNs are completely time-barred due to the applicable three-year statute of repose. To permit the dissemination of The Regents’ Notice will greatly prejudice purchasers of Yosemite I

Citigroup CLNs who may wrongly rely on The Regents' Notice only to eventually discover that their claims are time-barred in the Newby Action.

Additionally, The Regents Notice states, "unless a class member to whom this notice is directed steps forward to serve as a class representative on the Section 12(a)(2) claims, those Section 12(a)(2) claims on behalf of a putative class may be dismissed." Notice at 2. This statement could mislead purchasers of Yosemite I Citigroup CLNs, Citigroup CLN I, and Citigroup CLN II Credit Linked Notes into believing that they must intervene in order to preserve their Section 12(a)(2) claims, when in fact, Conseco is pursuing their Section 12(a)(2) claims in the Conseco Action. Purchasers of these three Citigroup CLNs should not be asked to intervene into the Newby Action when claims, on their behalf, are already being aggressively pursued in the Conseco Action, where there are no conflicts of interest.¹ Accordingly, Conseco respectfully requests that, in order to prevent manifest injustice, this Court grant Conseco's Motion For Reconsideration.

I. THE COURT SHOULD GRANT CONSECO'S MOTION FOR RECONSIDERATION BECAUSE DISSEMINATION OF THE REGENTS' NOTICE WILL RESULT IN MANIFEST INJUSTICE

A. A Manifest Injustice Would Occur If The Regents' Notice Is Disseminated To The Purchasers Of \$ 750 Million Of Yosemite I Citigroup CLNs

The Regents' Notice completely ignores the fact that both the Section 10(b) and the 12(a)(2) claims purportedly asserted on behalf of purchasers of Yosemite I Citigroup CLNs in

¹ The issue of conflict has already arisen in the Newby Action and is not nearly theoretical. The conflict has been resolved by institutional investors who purchased millions of dollars of Citigroup CLNs consciously deciding to pursue their claims in the conflict-free context of the Conseco Action. IHC Health Plans, Inc., ("HPI") withdrew its motion to intervene in the Newby Action after learning of the conflicts of interest that were present in the Newby Action, namely that, according to counsel for The Regents, any recovery obtained in the Newby Action would be allocated equally among class members, despite the relative strength of class members' claims. See Declaration of HPI, dated October 16, 2003 at ¶ 11. Such conflicts are not present in the Conseco Action, in which the interest of purchasers of Citigroup CLNs will be better served, because Conseco has brought suit solely on behalf of purchasers of Citigroup CLNs and solely against the principal wrongdoers, namely Citigroup and its subsidiaries. The actions of these sophisticated institutional investors are highly instructive.

the Newby Action are time-barred and that, no intervention now into the Newby Action by a Yosemite I Citigroup CLN purchaser would resuscitate these time-barred claims. Instead of alerting purchasers of \$ 750 million of Yosemite I Citigroup CLNs to this irreparable defect, The Regents' Notice affirmatively misstates, "...The Regents may, on your behalf, pursue § 10(b) claims, which are fraud claims" and "unless a class member to whom this notice is directed steps forward to serve as a class representative on the Section 12(a)(2) claims, those Section 12(a)(2) claims on behalf of a putative class may be dismissed." The Regents' Notice at 2. Those statements are inaccurate and directly contradict previous rulings of this Court.

This Court has previously established that the one/three year statute of limitations/repose set forth in Lampf² and 15 U.S.C. § 77m governs the claims asserted by The Regents against Citigroup. See Order Re Citigroup's Motion To Dismiss dated April 1, 2004 ("April 1st Order") at 5. This Court has also held that, in determining whether The Regents timely filed claims against certain bank defendants, including Citigroup, the operative date is January 14, 2003 -- the date on which The Regents indicated its intention to amend the Consolidated Complaint so as to add certain bank subsidiaries. See id. Based on the three-year statute of repose which this Court has held to be controlling, the latest date on which The Regents would have been able to assert federal securities law claims on behalf of purchasers of Yosemite I Citigroup CLNs was November 4, 2002 -- three years after the date of their issuance. The Regents, however, did not assert such claims until January 14, 2003, at the earliest. Therefore, based on the law of the case, the claims on behalf of purchasers of Citigroup CLNs issued prior to January 14, 2000 are time barred in the Newby Action.³ That critical fact is absent from The Regents' Notice. Should

² Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991) ("Lampf").

³ Defendant CIBC similarly argued that The Regents' §§ 10(b), 11, and 15 claims against CIBC based on a 1999 offering were barred by the statute of repose. See Order RE CIBC Defendants' Motion To Dismiss at 4. In

purchasers of \$ 750 million of Yosemite I Citigroup CLNs, in reliance on the misleading Regents' Notice, intervene in the Newby Action, the claims of such intervenors will be dismissed and forever extinguished, resulting in a manifest injustice.

In The Regents' Sur-Reply To Conseco's Motion For Appointment Of Lead Plaintiff In03-H-2240, dated May 27, 2004, The Regents attempted to mask this fatal defect by arguing that this Court held that '[T]he [Regents'] Amended Consolidated Complaint was timely filed for limitations purposes.' The Regents' Sur-Reply at 3 (quoting April 1st Order at 5). In fact, a reading of this Court's April 1st Order reflects that it was only addressing whether the claims regarding the "Foreign Debt Securities" had been timely filed under the applicable one-year statute of limitations. See April 1st Order at 5-6.

Furthermore, in the April 1st Order this Court held:

...the Court has found good cause for construing the January 14, 2003 letter from Lead Plaintiff's counsel as a motion to amend to name the subsidiaries of the Bank Defendants and finds that the January 14, 2003 was therefore the date that the Amended Consolidated Complaint was timely filed for limitations purposes.

April 1st Order at 5 (emphasis added).

The Court's finding that January 14, 2003 was the date that the Amended Consolidated Complaint was filed, is of utmost significance because it was on this date that The Regents, for the very first time, purportedly asserted claims on behalf of purchasers of Citigroup CLNs, including Yosemite I Citigroup CLNs. Because the January 14, 2003 Amended Consolidated Complaint filing date is more than three years after the issuance of the \$ 750 million of Yosemite

agreeing with CIBC Defendants, this Court found those claims to be time-barred. Id. at 9. In light of this ruling, Lehman Brothers Holdings, Inc. ("LBHI") and Lehman Brothers, Inc. ("LBI") moved for reconsideration of this Court's decision on a prior motion to dismiss, stating that The Regents' claims against LBI concerning securities issued in May 1999 were likewise time-barred. See Lehman Brothers Holdings, Inc.'s and Lehman Brothers, Inc.'s Partially Unopposed Motion To Reconsider Order Regarding The Lehman Defendants' Motion To Dismiss, filed April 13, 2004. The Regents *did not oppose* dismissal of claims against LBI on those grounds. Id. at 3. (The motion is still pending).

I Citigroup CLNs, the claims asserted on behalf of purchasers of \$ 750 of Yosemite I Citigroup CLNs are time-barred in the Newby Action based on this Court's April 1st Order.

Because The Regents' Notice misrepresents the viability of all federal securities law claims asserted on behalf of purchasers of \$ 750 million of Yosemite I Citigroup CLNs in the Newby Action, this Court should grant Consecos Motion For Reconsideration, and upon reconsideration, deny The Regents' Motion For Leave To Give Notice to the extent that it seeks leave to send any notice to Yosemite I Citigroup CLN purchasers.

B. The Regents' Notice Would Mislead Purchasers Of Yosemite I, CLN I And CLN II Citigroup Credit Linked Notes Into Believing That They Must Intervene In The Newby Action In Order To Preserve Their Section 12(a)(2) Claims

The Regents' Notice would mislead purchasers of Yosemite I, CLN I, and CLN II Citigroup Credit Linked Notes into believing that "unless a class member to whom this notice is directed steps forward to serve as a class representative on the Section 12(a)(2) claims, those Section 12(a)(2) claims on behalf of a putative class may be dismissed." Notice at 2. This statement is misleading because Consecos has standing to assert Section 12(a)(2) claims on behalf of the purchasers of those Citigroup CLNs, and has been pursuing those claims in the Consecos Action. Misleading purchasers of these Citigroup CLNs to intervene in the Newby Action would work a further manifest injustice. Accordingly, Consecos respectfully requests that this Court grant Consecos Motion For Reconsideration, and upon reconsideration, deny The Regents' Motion For Leave To Give Notice to the extent that it seeks leave to send any notice to Yosemite I Citigroup CLN, CLN I and CLN II Credit Linked Notes purchasers.

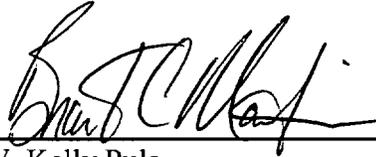
CONCLUSION

For the foregoing reasons, Consecos respectfully requests that this Court issue an order: (i) granting Consecos Motion For Reconsideration; and (ii) upon reconsideration, amend the

Court's June 1st Order so that it does not authorize The Regents to give any notice to the purchasers of to Yosemite I Citigroup CLN, CLN I and CLN II.⁴

Dated: June 4, 2004

Respectfully submitted by the Attorneys
For Consecos Annuity Assurance Company,



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⁴ Consecos Cross Motion For Leave To Give Notice To Purchasers Of Yosemite II, Sterling And Euro Citigroup CLNs filed on May 27, 2004 remains sub judice. For the reasons set forth therein, Consecos respectfully requests that such motion be granted.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June 2004, I caused a true and correct copy of the foregoing instrument to be served on all counsel of record by posting in PDF format to www.esl3624.com.



Brant C. Martin

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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**[Proposed] ORDER GRANTING CONSECO ANNUITY ASSURANCE
COMPANY'S MOTION FOR RECONSIDERATION OF THE
COURT'S JUNE 1, 2004 ORDER GRANTING THE REGENTS OF THE
UNIVERSITY OF CALIFORNIA LEAVE TO GIVE NOTICE TO CERTAIN
CLASS MEMBERS PURSUANT TO RULE 23(d)(2)**

On the ____ day of June, 2004 came on to be considered Conseco Annuity Assurance
Company's ("Conseco") Motion For Reconsideration Of The Court's June 1st, 2004 Order

Granting The Regents Of The University Of California (“The Regents”) Leave To Give Notice To Certain Class Members Pursuant To Rule 23(d)(2) and the Court having considered same is of the opinion that it should be granted; it is therefore

ORDERED that:

- i) Consecos Motion For Reconsideration is GRANTED; and
- ii) the Courts June 1st Order is hereby amended to provide that The Regents is not authorized to give any notice to the purchasers of Yosemite I Citigroup CLN, CLN I, and CLN II Citigroup Credit Linked Notes.

Signed on this ____ day of June, 2004

THE HONORABLE MELINDA HARMON
UNITED STATES DISTRICT JUDGE