

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

RODERICK W. RUSSELL, on Behalf of  
Himself and a Class of Persons Similarly  
Situating, and on Behalf of the ConsecoSave  
Plan,

Plaintiff,

v.

CONSECO SERVICES, L.L.C., ROLLIN M.  
DICK, GARY C. WENDT, STEPHEN C.  
HILBERT, WILLIAM J. SHEA, CHARLES B.  
CHOKEL, JOHN J. SABL, THOMAS J.  
KILIAN, RICHARD H. KREMER, EDWARD  
M. BERUBE, ELIZABETH C.  
GEORGAKOPOULOS, DAVID K. HERZOG  
and JOHN DOES 1-30,

Defendants.

No. 1:02-CV-1639 LJM

FILED  
U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS  
05 OCT 14 PM 2:22  
LAW OFFICES  
OF  
LAW A. A. BERUBES  
CLERK

**ORDER AND FINAL JUDGMENT**

This Action came on for a Fairness Hearing on a proposed settlement ("Settlement").

The issues having been duly heard and a decision having been duly reached,

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED:**

Except as otherwise defined herein, all capitalized terms used herein shall have the same meanings as are ascribed to them in the Stipulation and Agreement of Settlement between Russell, et al. and Conseco Services, L.L.C. et al., dated as of June 15, 2005 ("Settlement Agreement").

1. The Court has jurisdiction over the subject matter of the Action and over all Parties to the Action, including all members of the Settlement Class (as defined below).
2. Pursuant to Fed. R. Civ. P. 23(e)(1)(A) and (C), the Court hereby approves and confirms that the settlement embodied in the Settlement Agreement is fair, reasonable and an adequate settlement and compromise of the Claims asserted in the Action.
3. The Court hereby approves the Settlement Agreement and orders that the Settlement Agreement shall be consummated and implemented in accordance with its terms and conditions.
4. Subject to the provisions of this Order and for settlement purposes only, the Court hereby grants class certification to the class of persons defined as “All current and former Participants in the Conseco Savings Plan in all of its iterations including the ConsecoSave Plan, the ConsecoSave *Plus* Plan, and the Conseco Savings Plan, individually or collectively (“Conseco Savings Plan” or “Plan”) for whose account the Conseco Savings Plan purchased and/or held shares or interests in Conseco Stock Fund at any time from April 28, 1999, through and including September 9, 2003 , or the beneficiaries of such current and former Participants and the Plan itself (“Settlement Class”). Excluded from the Settlement Class are Defendants herein, their immediate families, and the heirs, successors or assigns of any of the Defendants. Roderick W. Russell (“Named Plaintiff”) is appointed as Class representative, and Named Plaintiff’s Counsel are appointed as Class Counsel pursuant to Fed. R. Civ. P. 23(g).
5. Subject to the provisions of this Order and for settlement purposes only, the Court finds that the Settlement Class is properly certified under Fed. R. Civ. P. 23(a)(1-4), (b)(1), (c)(1)(B), (e), and (g), and makes the following findings of fact, conclusions of law and determinations of mixed fact/law questions.

A. The Settlement Class is so numerous that it is impractical to bring all Class Members before the Court individually. The size of this group satisfies Fed. R. Civ. P. 23(a)(1).

B. The Settlement Class allegations present common questions of law or fact in satisfaction of Rule 23(a)(2). Questions of law and fact that are common to the Class include:

- whether the Defendants breached fiduciary obligations to the Plan and Plan Participants;
- whether as a result of any alleged fiduciary breaches by the Defendants, the Plan and/or its Participants and beneficiaries suffered losses;
- whether any portion or portions of the Claims in this Action are barred because they were settled and released in the Prior Securities Litigation Settlement.

C. Fed. R. Civ. P. 23(a)(3) requires that the Claims of the proposed representative plaintiff be typical of the Claims of the proposed Class. In the present case, the Named Plaintiff alleges, among other things, that he was a Plan Participant during the Class Period, that the Plan's fiduciaries treated him and all other Plan Participants alike and that Plan-wide relief is necessary and appropriate under ERISA. Under these circumstances, the Claims asserted by the Named Plaintiff are sufficiently typical of the Claims asserted by the Settlement Class as a whole to satisfy Fed. R. Civ. P. 23(a)(3).'

D. The requirements of Fed. R. Civ. P. 23(a)(4) are also satisfied. The Named Plaintiff has no conflicting interest with members of the Settlement Class. The Court is satisfied that Plaintiff's Counsel are qualified, experienced and prepared to represent the Class Members to the best of their abilities.

E. The Settlement Class not only satisfies each requirement of Fed. R. Civ. P. 23(a), but also the requirements of Fed. R. Civ. P. 23(b)(1). Given the nature of ERISA claims

which authorizes plan-wide relief, there is a risk that failure to certify the Settlement Class would leave future plaintiffs without relief. There is also a risk of inconsistent dispositions that might prejudice the Defendants. Contradictory rulings as to whether various Defendants had, in this context, acted as fiduciaries, or whether the Plan's continued investment in the Conseco Stock Fund was prudent, would create difficulties in implementing such decisions. This is an appropriate case for class certification under Fed. R. Civ. P. 23(b)(1).

F. The Court has also considered each of the elements required by Fed. R. Civ. P. 23(g) in order to ensure that Plaintiff's Counsel will fairly and adequately represent the interests of the Settlement Class. Plaintiff's Counsel who seek to represent the Settlement Class in this matter have done substantial work to identify or investigate potential Claims in the Action. Plaintiff's Counsel have experience in handling class actions and Claims of the type asserted in this Action. Plaintiff's Counsel have also demonstrated knowledge of the applicable law. Finally, Plaintiff's Counsel have devoted considerable resources to this Litigation. The Court concludes that Plaintiff's Counsel have efficiently used the various resources available to them to sufficiently represent the interests of the Settlement Class.

G. The Settlement Class has been given proper and adequate notice of the Settlement Agreement, the Plan of Allocation, the Fairness Hearing, Class Counsel's application for attorneys' fees and expenses and for Named Plaintiff's additional compensation, such notice having been carried out in accordance with the Preliminary Approval Order. Such notice included individual notice to all members of the Settlement Class who could be identified through reasonable efforts and provided valid, due and sufficient notice of these proceedings and of the matters set forth therein and included information regarding the procedure for the making

of objections. Such notice fully satisfied the requirements of Fed. R. Civ. P. 23 and the requirements of due process.

H. The parties have agreed to stipulate to the certification of a Class for purposes of settlement only and for no other purpose than as set forth in and to effectuate this Settlement. Defendants have not taken any position with regard to whether a class can, should or would be certified, in the absence of the Settlement, if that question were fully litigated before the Court. In approving this Settlement, neither the Court nor Plaintiff has relied on any position taken or argument made by the Defendants with respect to class certification.

I. Neither Plaintiff nor the Defendants have, for the purposes of any form of estoppel, “prevailed” upon any argument or position related to class certification in this Action. Neither Plaintiff nor Defendants will be prejudiced if (i) this Settlement is not approved or such approval is reversed on appeal and (ii) Defendants later object to the certification of any proposed class in this Action.

6. Subject to the provisions of this Order, the Court finds that the Settlement embodied in the Settlement Agreement is fair, reasonable and adequate, based on the following findings of fact, conclusions of law and determinations of mixed fact/law questions.

A. The Settlement was negotiated vigorously and at arms-length by the Named Plaintiff and experienced Attorneys on behalf of Plaintiff and the purported Class seeking plan-wide relief for the Plan pursuant to ERISA §§ 409 and 502(a)(2).

B. This case settled after the Court granted Defendants’ motion to dismiss the case. Because the case had been dismissed on the merits, Attorneys for Plaintiff and the Class, the Named Plaintiff, Defendants and Defendants’ Counsel were well positioned to evaluate the settlement value of the Action.

C. If the Settlement had not been achieved, Plaintiff and Defendants faced the expense, risk and uncertainty of extended litigation.

D. The amount of the Settlement (\$9,975,000.00) and the allocation terms of the Settlement (Plan of Allocation as set forth in the Settlement Agreement) are fair, reasonable and adequate. The Settlement amount is within the range of settlement values obtained in similar cases and is within the range of reasonable settlements appropriate in this case.

E. At all times, the Named Plaintiff has acted independently.

F. The Court has duly considered each objection to the Settlement that was filed, and the Court overrules each objection.

7. Subject to the provisions of this Order, the Action is hereby dismissed with prejudice, each party to bear his, her, or its own costs, except as expressly provided herein.

8. Subject to the provisions of this Order, by operation of this Order and Final Judgment, the members of the Settlement Class, each on their own behalf and on behalf of their respective heirs, executors, administrators, past and present partners, officers, directors, agents, attorneys, predecessors, and assigns, finally and forever release the Released Parties (as defined in the Settlement Agreement) from all Released Claims (as defined in the Settlement Agreement). The Defendants, each on their own behalf and on behalf of their respective heirs, executors, administrators, past and present partners, officers, directors, agents, attorneys, predecessors, and assigns, finally and forever release the Settlement Class from all Claims relating to the institution or prosecution of the Action or the settlement of any Released Claims (as defined in the Settlement Agreement). The Settlement Class finally and forever releases the Defendants from all Claims relating to the institution or prosecution of the Action or the

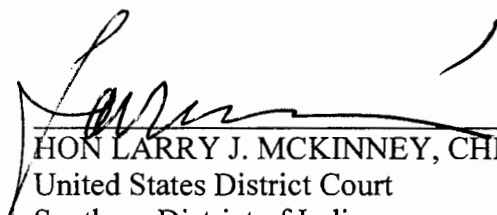
settlement of any Released Claims (as defined in the Settlement Agreement). The Court hereby approves and incorporates the releases contained in the Settlement Agreement.

9. The Court shall retain exclusive jurisdiction to resolve any disputes or challenges that may arise as to the performance of the Settlement Agreement or any challenges as to the performance, validity, interpretation, administration, enforcement or enforceability of the Class Notice, this Order and Final Judgment, or the Settlement Agreement or the termination of the Settlement Agreement. The Court shall also retain exclusive jurisdiction over and rule by separate order with respect to (i) the Plan of Allocation proposed by the Parties and (ii) all applications for awards of attorneys' fees and reimbursements of expenses made pursuant to sections IV.D and IV.E of the Settlement Agreement.

10. In the event that the Settlement Agreement is terminated and/or cancelled in accordance with its terms, (i) this Order and Final Judgment shall be rendered null and void and shall be vacated *nunc pro tunc*, (ii) the Action shall proceed as provided in sections IV.J(2), IV.J(3) and IV.J(4) of the Settlement Agreement, (iii) the Defendants shall be permitted to object to the certification of any proposed class in this Action, and (iv) the Defendants shall not be judicially or equitably estopped from arguing against the certification of any class in this Action.

11. This Order and Final Judgment shall not be construed or used as an admission, concession, or declaration by or against Named Plaintiff or Defendants of any fault, wrongdoing, breach or liability.

SO ORDERED this 14 day of October, 2005.

  
HON LARRY J. MCKINNEY, CHIEF JUDGE  
United States District Court  
Southern District of Indiana