

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

In re:

LandAmerica Financial Group, Inc.,
LandAmerica 1031 Exchange, Inc., et al

Debtors.

Case No. 08-35994-KRH
Case No. 08-35995-KRH
Jointly Administered
(Chapter 11)

**OBJECTION OF UNITED STATES TRUSTEE
TO CONFIRMATION OF DEBTORS'
PLAN OF REORGANIZATION**

W. CLARKSON MCDOW, JR., the United States Trustee for the Eastern District of Virginia (the "U.S. Trustee"), through the undersigned counsel, in furtherance of his duties as stated in 28 U.S.C. § 586, and also pursuant to §§ 1129 and 1141 of the United States Bankruptcy Code, 11 U.S.C. §§ 101, et seq. (the "Bankruptcy Code") and Rule 3020 of the Federal Rules of Bankruptcy Procedure (the "Rules" and each a "Rule"), hereby objects to confirmation of the plan of reorganization (the "Plan")¹ of the debtors (the Debtors") and in support thereof, states as follows:

1. These jointly administered chapter 11 cases were commenced on November 26, 2008.
2. Since the initial filing date, several other of these Debtors' first and second tier subsidiaries have also filed cases under chapter 11 and have been added to the joint administration of the above-captioned cases.

¹ To the extent certain capitalized terms are not defined herein, such terms shall have the meanings given to them in the Plan.

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3. As of the date of the filing of the replacement Plan on October 24, 2009, the Debtors included in this jointly administered case were: LandAmerica Financial Group, Inc., LandAmerica 1031 Exchange Services, Inc., LandAmerica Assessment Corporation, LandAmerica Title Company, Southland Title Corporation, Southland Title of San Diego, Southland Title of Orange County, LandAmerica Credit Services, Inc., and Capital Title Group, Inc.

4. The bankruptcy court can confirm a plan only if all the requirements of 11 U.S.C. § 1129(a) are met.

5. The plan proposed by the Debtors does not comply with the provisions of 11 U.S.C. §1129(a)(1) and fails in three ways: a) by releasing direct, independent causes of action and claims against prepetition officers or directors of the Debtors to the extent that prosecution of such suit, action, investigation or other proceeding may deplete any insurance policy owned or purchased by one or more of the Debtors (or their predecessors), b) by exculpating nearly all the people associated with the cases from any negligence they may have committed during the chapter 11 cases themselves, and c) by treating certain creditors in the same class differently depending on whether or not they vote in favor of the Plan.

These problems are analyzed further below.

I. Releasing Direct Independent Causes of Actions and Claims Against Prepetition Officers and Directors

6. In Section 1.60 of the Plan, an “Enjoined Action” is defined as:

1.60. *Enjoined Action* means any suit, action, investigation or other proceeding of any kind (including, without limitation, any proceeding in a judicial, arbitral, administrative, or other forum) against a prepetition officer or director of a Debtor to the extent that prosecution of such suit, action, investigation or other proceeding may deplete any insurance policy owned or purchased by one or more of the Debtors (or their predecessors). Notwithstanding the foregoing, an Enjoined Action shall not include any suit, action, or other proceeding to the extent, but only to the extent, such suit, action, or other proceeding: (a) is the subject of either a (i) written agreement of the LFG Trustee and the LES Trustee, or (ii) Bankruptcy Court order, and in each of (i) and (ii), which agreement or order states or determines that such suit, action or other proceeding will not deplete proceeds of an insurance policy which proceeds would otherwise be available to satisfy a judgment, settlement or other payment that could be made to the Trusts with respect to the Trust Causes of Action; (b) is brought after the ARS Litigation and the

Other

Litigation have been fully and finally resolved; or (c) is brought against a prepetition officer or director of a Debtor who is not a Tolling Party; provided, however, that (i) prior to the commencement of such suit, action, or other proceeding, the Person(s) commencing such action has provided the LFG Trustee and the LES Trustee with ten (10) Business Days notice in writing of the intended commencement of such action, (ii) such action may not be commenced if the subject of such action becomes a Tolling Party prior to the expiration of such ten (10) Business Day period, (iii) such action shall be commenced no earlier than thirty (30) days prior to the expiration of the applicable statute of limitations, and (iv) such action shall be immediately stayed after its commencement until such time as subsection (a) or (b) above has been satisfied as to such action.

7. Section 14.4 states the following:

14.4. Injunction.

(a) Except as otherwise provided in this Plan or the Confirmation Order, as of the Confirmation Date, but subject to the occurrence of the Effective Date, all Persons who have held, hold or may hold Claims against or Interests in the Debtors or the Estates are, with respect to any such Claims or Interests, permanently enjoined after the Confirmation Date from: (i) commencing, conducting or continuing in any manner, directly or indirectly, any suit, action or other proceeding of any kind (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against or affecting the Debtors, the Post-Effective Date Entities, Post-Effective Date LFG, the Estates, the Trusts or any of their property (including insurance proceeds), or any direct or indirect transferee of any property of, or direct or indirect successor in interest to, any of the foregoing Persons or any property of any such transferee or successor; (ii) enforcing, levying, attaching (including, without limitation, any pre-judgment attachment), collecting or otherwise recovering by any manner or means, whether directly or indirectly, any judgment, award, decree or order against the Debtors, the Post-Effective Date Entities, Post-Effective Date LFG, the Trusts, or the Estates or any of their property, or any direct or indirect transferee of any property of, or direct or indirect successor in interest to, any of the foregoing Persons, or any property of any such transferee or successor; (iii) creating, perfecting or otherwise enforcing in any manner, directly or indirectly, any encumbrance of any kind against the Debtors, the Post-Effective Date Entities, Post-Effective Date LFG, the Trusts, or the Estates or any of their property, or any direct or indirect transferee of any property of, or successor in interest to, any of the foregoing Persons (iv) acting or proceeding in any manner, in any place whatsoever, that does not conform to or comply with the provisions of this Plan to the full extent permitted by applicable law; and (v) commencing or continuing, in any manner or in any place, any action that does not comply with or is inconsistent with the provisions of this Plan; provided, however, that nothing contained herein shall preclude (i) such Persons from exercising their rights, or obtaining benefits, pursuant to and consistent with the terms of this Plan, including Section 1.60 of the Plan, or commencing, enforcing, collecting or otherwise recovering on any suit, action or other proceeding that is not an Enjoined Action against Persons other than Debtors, the Post-Effective Date Entities, Post-Effective Date LFG, the Estates, or the Trusts, (ii) the Trustees from pursuing Causes of Action pursuant to the terms of this Plan which may deplete proceeds of one or more of the Debtors' insurance policies, or (iii) the Securities and Exchange Commission from pursuing actions against any Persons, provided, further, nothing herein shall constitute a waiver of any rights or defenses of such Persons with respect with such actions, including, but not limited to, defenses related to validity, priority, amount and timeliness of such Claims.

(b) Except as otherwise provided in this Plan or the Confirmation Order, as of the

Confirmation Date, but subject to the occurrence of the Effective Date, all Persons who have held, hold or may hold Claims against or Interests in the Debtors or the Estates, other than the Debtors, the Post-Effective Date Entities, or the Trustees and the Trusts on behalf of the Debtors or the Post-Effective Date Entities, are enjoined after the Confirmation Date from: (i) commencing, conducting or continuing in any manner, directly or indirectly, any Enjoined Action; (ii) enforcing, levying, attaching (including, without limitation, any pre-judgment attachment), collecting or otherwise recovering by any manner or means, whether directly or indirectly, any judgment, award, decree or order against any prepetition officer or director of any Debtor, solely in their capacity as such, or any property of any such transferee or successor, each solely in their capacity as such arising from an Enjoined Action; and (iii) creating, perfecting or otherwise enforcing in any manner, directly or indirectly, any encumbrance of any kind against any prepetition officer or director of any Debtor, or any direct or indirect transferee of any property of, or successor in interest to, any of the foregoing Persons, arising from an Enjoined Action; provided, however, that nothing contained herein shall preclude the Securities and Exchange Commission from pursuing actions against any Persons, provided, further, nothing herein shall constitute a waiver of any rights or defenses of such Persons with respect with such actions, including, but not limited to, defenses related to validity, priority, amount and timeliness of such Claims.

(c) By accepting distributions pursuant to this Plan, each holder of an Allowed Claim or Interest will be deemed to have specifically consented to the Injunctions set forth in this Section.

8. Section 14.4(a) permanently enjoins creditors and equity holders from, among other things, commencing or continuing any action or proceeding against or affecting the Debtors, their estates, the Trusts or any of their property, including proceeds from insurance coverage. This approach assumes that proceeds of insurance policies are property of the estates and need to be protected for the benefit of the creditors of these estates. It also assumes that the Bankruptcy Court is jurisdictionally able to block third parties from making a claim against these policies. The Court should not grant an injunction through the confirmation process that affects third party rights to property that has not yet been determined to be property of the estate (and may never be so determined.)

9. More generally, the interaction of the definition of “Enjoined Actions” in Section 1.60 and the provisions of Section 14.4 has the effect of releasing direct, independent causes of action by a non-debtor creditor against another non-debtor. This has the effect of granting a discharge to a non-debtor, the officer or director, who has not otherwise complied with the filing and case maintenance requirements imposed by the Bankruptcy Code. This virtual discharge appears to violate §524(e) of the Bankruptcy Code.

10. Section 524(e) of the Bankruptcy Code specifically provides that “discharge of a

debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.” Notwithstanding this language, the Debtors’ Plan does affect the liability of other entities by releasing and insulating former officers, directors and employees from any claims that might be brought against them arising out of their post petition work with the Debtors. The result is to discharge persons “who have not formally availed themselves of the benefits and burden of the bankruptcy process.” In re Continental Airlines, 203 F.3d 203, 211 (3d Cir. 2000). See also Metromedia Fiber Network, Inc., 416 F.3d 136, 142 (2d Cir. 2005).

11. Several circuits ban such non-debtor releases outright. See e.g., Resorts International, Inc. v. Lowenschuss (In re Lowenschuss), 67 F.3d 1394, 1401-02 (9th Cir. 1995) (Section 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors); Landsing Diversified Properties-II v. First Nat’l Bank & Trust Co., (In re Western Real Estate Fund, Inc.) 922 F.2d 592 (10th Cir. 1991) (a post-confirmation permanent injunction improperly insulates a nondebtor in violation of 524(e)).

12. Other circuits, including the Fourth Circuit, do not interpret § 524(e) to prohibit third party releases, but neither do they endorse a wholesale use of such releases. In Menard-Sanford v. Mabey (In re A.H. Robins Co.), 880 F.2d 694 (4th Cir. 1989), the Fourth Circuit upheld a plan provision which allowed for the release of third party liability noting, in the context of the parties affected by that provision that “since they have chosen opt-out rather than payment in full, they may have no complaint about a restriction placed on their ability to sue others. Permitting a suit by them in violation of the Plan is a defeat of the Plan and a resulting defeat of the other creditors.” Id. at 702. The court found that §524(e) did not limit the court’s power in that case where the “entire reorganization hinges on the debtor being free from indirect claims such as suit against parties who would have indemnity or contribution claims against the debtor. . . .” Id. At this point, no such showing has been made in the cases now before the court.

13. The limited form of non-debtor release allowed in Robins was only in the context of a channeling injunction that gave the claimants another entity from which to seek recovery of their claim. There is no analogous alternate source of recovery in the Plan. For this reason, even the limited release of third party liability should not be allowed in these cases.

14. In determining when it may be appropriate to exercise jurisdiction to enjoin nondebtors, courts have elicited a number of factors from Robins, to wit:

- (a) there is an identity of interests between the debtor and the third party such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete estate assets;
- (b) the nondebtor has contributed substantial assets to the reorganization;
- (c) the impacted class or classes has voted overwhelmingly to accept the plan;
- (d) the injunction is essential to the reorganization, namely, the reorganization hinges on the debtor being free from indirect suits;
- (e) the impacted class or classes has voted overwhelmingly to accept the plan;
- (f) the plan provides a mechanism to pay for all or for substantially all of the class or classes affected by the injunction;
- (g) the plan provides an opportunity for those claims who choose not to settle to recover in full; and
- (g) there is a record of specific factual findings that support court's conclusion

These points of analysis were used in In re Dow Corning Corp. 280 F.3d 648, 658 (6th Cir. 2002)(enjoining a nonconsenting creditor's claim against a non-debtor is not consistent with the Code; although such an injunction is not precluded, it is a dramatic measure that is only appropriate in "unusual circumstances" identified by the seven factors; if those factors are present, the bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor); in Metromedia Fiber., 416 F.3d at 142 ("[T]his is not a matter of factors and prongs. No case has tolerated nondebtor releases absent the finding of circumstances that may be characterized as unique."). See also In re Continental Airlines, 203 F.3d at 215 (overturning plan release of officers and directors, where there was only, at most, 5% consideration in exchange for permanently enjoined lawsuit.)

15. The LandAmerica cases do not bear the hallmarks of "unique circumstances" such that a release of third parties may be appropriate, nor is the release at issue limited to parties who consented to the plan terms. (It is noted however, that the Plan filed on October 24, 2009 does include a provision (c) of Section 14.4 that deems any holder of an Allowed Claim or Interest that accepts a distribution pursuant to the Plan to have consented to these injunctions. In this regard, it should also be noted that since it is extremely unlikely that any Interest Holder will ever receive any distribution from this Estate, they will not be deemed to have consented to these injunctions, but will be bound by them nonetheless)

16. Another issue which warrants careful consideration is the bankruptcy court's ability

to authorize a release that does not impact property of the estate and which does not involve “unusual circumstances.” See In re Zale Corp., 62 F.3d 746 (5th Cir. 1995).

II. Release and Exculpation Provisions for Acts Occurring During the Case

17. The United States Trustee also objects to Section 14.5 and Section 14.6 of the plan which releases, enjoins and exculpates various parties including officers, directors, employees, agents, attorneys, and many others, as those provisions do not comply with applicable provisions of the Bankruptcy Code. The provisions objected to are as follows:

14.5. Exculpation.

As of the Effective Date, the following parties, entities and individuals (in each case, solely in their capacity as such) shall have no liability for any postpetition act taken or omitted to be taken in connection with, or related to the Chapter 11 Cases or formulating, negotiating, preparing, disseminating, implementing, administering, confirming or effecting the consummation of the Plan, the Disclosure Statement, or any contract, instrument, release or other agreement or document created or entered into in connection with the Plan or any other act taken or omitted to be taken in connection with or in contemplation of the Chapter 11 Cases of the Debtors (other than liability determined by a Final Order of a court of competent jurisdiction for actions or failure to act or disclose amounting to gross negligence, willful misconduct, intentional fraud or criminal conduct): (i) the Debtors, their directors, officers and employees, and the agents, financial advisors, investment bankers, professionals, accountants and attorneys of the Debtors and their respective partners, owners and members; (ii) the LFG Governor, and the agents, financial advisors, investment bankers, professionals, accountants and attorneys of the LFG Governor and their respective partners, owners and members (iii) the Creditors Committees, the respective members thereof, and the agents, financial advisors, investment bankers, professionals, accountants and attorneys of the Creditors Committees and their respective partners, owners and members; (iv) the Trustees, and the agents, financial advisors, investment bankers, professionals, accountants and attorneys of the Trustees and their respective partners, owners and members; and (v) the Trust Committees, the respective members thereof, and the agents, financial advisors, investment bankers, professionals, accountants and attorneys of the Trust Committees and their respective partners, owners and members; provided, however, nothing in this Section 14.5 of the Plan shall be deemed to release any act or omission that arose prior to the Petition Date.

14.6. Injunction Related to Exculpation.

The Confirmation Order shall permanently enjoin the commencement or prosecution by any Person or entity, whether directly, derivatively or otherwise, of any claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action or liabilities released pursuant to Section 14.5 of this Plan.

18. Paragraph 14.5 of the Plan sets forth a broad, non-consensual release that any person might have against, in general terms, the Debtors and all personnel involved with the Debtors during this case, including their attorneys; the LFG Governor and all the personnel associated with him or her, including the attorneys; the Creditors' Committees, and all the personnel associated with them, including their attorneys; the Trustees, and all the personnel associated with them, including their attorneys; and the Trust Committees and all the personnel associated with them, including their attorneys. Notwithstanding that exceptions to exculpation have been carved out for intentional fraud, gross negligence, wilful misconduct, and criminal acts, the release and injunction are broad and should not be favored by this Court for many of the same reasons set forth above in the discussion of the releases of direct independent causes of actions and claims against prepetition officers and directors.

19. In In re PWS Holding Corp., 228 F.3d 224 (3d Cir. 2000) the Third Circuit allowed a similar exculpation clause reasoning that it did not change or limit anyone's liability but merely restated the applicable standard of liability. The court found that some cases interpreting 11 U.S.C. § 1103(c), created both a fiduciary duty to committee constituents and a limited grant of immunity to committee members. It then extrapolated from that analysis to allow the exculpation to apply to attorneys, financial advisors, officers, and directors, etc. Even if the court were correct in stating that the provision only described the standard of liability as opposed to being a release, by allowing the provision, the Court effectively created the standard. While this may have been sensible in connection with its analysis of 11 U.S.C. § 1103(c), it is not clear how the court could have adopted the same standard for all the other persons without a similar corresponding statutory linchpin. Moreover, aside from possible jurisdictional concerns, it is not clear why such a "comfort order" provision is necessary or appropriate to include in a plan.

20. At the very least, standards of professionalism dictate that attorneys should not shield themselves from liability potentially resulting from carrying out their duties. Rule 1.8(h) of the Virginia Rules of Professional Conduct is representative of this standard:

A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice, except that a lawyer may make such an agreement with a client of which the lawyer is an employee as long as the client is independently represented in making the agreement.

21. The effect of Section 14.5 of the plan is to provide a release of potential liability for the lawyers serving the Debtors and the Creditors' Committee, and unlike the situation contemplated by the Virginia Rules of Professional Conduct, i.e. the prohibition of a limitation of liability between the lawyer and the client, this release of potential liability extends to everyone including potential third party beneficiaries and Interest Holders.

22. When the Virginia Rules of Professional Conduct state that an attorney may not be granted a release of liability prospectively, it is implied that such a release can be granted retrospectively, after the services have been rendered and after any malpractice has been committed. However, in the instance of an attorney and a client, that client would have to be informed of the malpractice and would be in a position to judge whether to release the attorney or not. This is not the case in Section 14.4 of the Plan, and this Court should not allow this broad release to take place at least as it applies to attorneys.

III. Treating Certain Creditors Differently Depending on Whether they Vote in Favor of the Plan.

23. Section 14.9 of the Plan states:

14.9. Release of Certain Avoidance Actions:

Upon, and subject to, the Effective Date, any avoidance or recovery actions under sections 544, 547, 548, 549 and 550 of the Bankruptcy Code against an Exchange Customer who ultimately holds an Allowed Claim and who timely and properly voted to accept the Plan shall be released.

24. This provision of the plan has the effect of treating differently an Exchanger who may be a potential preference defendant and who votes in favor of the plan and an Exchanger, similarly situated, who votes against the plan. This violates 11 U.S.C. §1123(a)(4) and renders this plan unconfirmable as it does not comply with "the applicable provisions of this title" as required by 11 U.S.C. § 1129(a)(1).

25. Provision 14.9 of the plan also has the appearance of attempting to purchase votes for the plan by providing more favorable treatment to those who vote in favor of confirmation and should not be a part of this Plan.

WHEREFORE, for all the reasons stated above, U. S. Trustee asks that the Court deny confirmation of the Debtors' proposed Plan, and for such other and further relief as the Court may find to be appropriate and just.

Dated: November 12, 2009

W. Clarkson McDow, Jr.
United States Trustee

By: /s/ Robert B. Van Arsdale
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Objection was duly served on all necessary parties on this the 12th day of November 2009.

/s/Robert B. Van Arsdale
Robert B. Van Arsdale
Assistant U.S. Trustee