

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

IN RE:	§	
	§	Administratively Consolidated under
ABC UTILITIES SERVICES, INC., et al.,	§	Case No. 89-41420-BJH-7
	§	
Debtors.	§	

MEMORANDUM OPINION

Before the Court is Frank A. Wolfe’s Motion for Order Permitting Creditor to Initiate Litigation (the “Motion”). The Court has jurisdiction to decide the Motion pursuant to 28 U.S.C. §§ 1334 and 157. The Motion presents a core proceeding pursuant to 28 U.S.C. § 157(b)(2). This Memorandum Opinion constitutes the Court’s findings of fact and conclusions of law. FED. R. CIV. P. 52; FED. R. BANKR. P. 7052.

I. Contentions of the Parties

In the Motion, Frank A. Wolfe, Jr. (“Movant” or “Wolfe”) seeks authority to file an “independent action” in the District Court on behalf of ABC Utilities Services, Inc. (“Services”); ABC Asphalt, Inc. (“Asphalt”); and Utilities Equipment Leasing Company, Inc. (“Uelco”) (collectively, the “ABC Entities” or the “Debtors”) against ORIX Financial Services, Inc. f/k/a/ORIX Credit Alliance, Inc. (“ORIX”). In that independent action, the ABC Entities would seek to set aside an Order (granting ORIX’s motion for summary judgment and denying the ABC Entities’ motion for leave to amend their complaint) and a Final Judgment (dismissing a prior lawsuit between those parties with prejudice) signed by the District Court on May 26, 1993. Movant contends that he should be granted authority to bring the independent action to rectify a “fraud on the court” that was perpetrated by ORIX

and to correct a “grave miscarriage of justice.” *See* Motion, Exhibit A (the “proposed Complaint”) at 2.

While ORIX objects to the merits of the proposed independent action (and disputes that it has perpetrated a fraud on the court or that a grave miscarriage of justice needs to be corrected), as relevant here, ORIX objects to Movant being authorized to bring file the proposed Complaint on behalf of the ABC Entities’ bankruptcy estates and contends that Wolfe has not established the required elements for such relief to be proper. Specifically, ORIX contends that Wolfe is not a proper creditor who can be granted authority to sue on behalf of the ABC Entities’ estates; that the proposed Complaint does not state a colorable claim on behalf of the estates; and that the chapter 7 trustee for the ABC Entities has not unjustifiably refused to file the proposed Complaint.

II. Factual and Procedural Background

The relationship and history of disputes between and among Wolfe, the ABC Entities, and ORIX is complicated. These bankruptcy cases were filed well over a decade ago and have resulted in numerous decisions on a variety of related issues from this Court, the District Court, and the Fifth Circuit Court of Appeals. The relevant facts are set forth below.¹

Movant was the principal and controlling shareholder of the ABC Entities. Prior to their bankruptcy filings, the ABC Entities entered into a series of secured lease and finance transactions with ORIX.

¹The Court believes that substantially all of the facts set forth herein are not disputed by the parties as they are well established by reference to pleadings on file in either this Court or the District Court. Because the Court does not believe that there is a dispute about these facts, the Court will not burden this Memorandum Opinion with record cites to filed pleadings. To the extent the Court believes a stated fact may be disputed, the Court will cite to the basis for its factual finding.

In April 1989, Wolfe caused the ABC Entities to file for protection under Chapter 11 of the Bankruptcy Code. In October 1989, while the ABC Entities were debtors in possession, Wolfe caused the ABC Entities to file suit in the District Court against ORIX (the “First Suit”) alleging that the contracts between ORIX and the affected ABC Entity were usurious as a matter of law under Texas law and that ORIX had violated the Texas Deceptive Trade Practices Act (“DTPA”). The ABC Entities were represented in the First Suit by Bryon Powers (“Powers”) of White, Huseman, Pletcher & Powers and by its bankruptcy counsel, St. Clair Newbern III (“Newbern”).

Discovery closed in the First Suit in July 1991. ORIX and the ABC Entities filed cross motions for summary judgment which were denied by the District Court without opinion. Trial of the First Suit was scheduled for the summer of 1993. In the spring of 1993, the ABC Entities filed a motion for leave to amend their complaint so that additional claims could be asserted against ORIX. About that same time, ORIX sought reconsideration of the District Court’s decision denying ORIX a summary judgment. On May 26, 1993, the District Court (Means, J.) signed an order granting ORIX’s motion for summary judgment and denying the ABC Entities’ motion for leave to amend and signed a final judgment dismissing the First Suit with prejudice.

In June, 1993, the ABC Entities (still represented by Powers and Newbern) filed their motion for a new trial in the First Suit (the “Motion for New Trial”). Thereafter, the ABC Entities discharged Powers and retained Frank Hill (“Hill”) and the firm of Hill, Gilstrap, Heard, Goetz & Moorehead as their counsel in the First Suit (along with Newbern). On August 2, 1993, the ABC Entities (now represented by Hill and Newbern) filed their motion pursuant to Rule 60(b)(3) and 60(b)(6) of the Federal Rules of Civil Procedure (the “Rule 60(b) Motion”) to set aside the judgment in the First Suit.

The basis of the Rule 60(b) Motion was an allegation that when the District Court dismissed the First Suit, it “did not have all the facts” because of an undisclosed conflict of interest of Powers.²

On October 25, 1993, the District Court (McBryde, J.) denied the Motion for New Trial stating:

As for its merits, the motion [for leave to amend] contained only speculation that another cause of action could be stated if discovery were to be reopened so that plaintiffs [the ABC Entities] could undertake a fishing expedition.

On October 27, 1993, the District Court (McBryde, J.) denied the Rule 60(b) Motion stating:

The exhibits to the [Rule 60(b)] motion reflect that plaintiffs [the ABC Entities] had knowledge of the facts giving rise to their request long before judgment was granted in this action. Moreover, plaintiffs make no assertion that their counsel failed to allege any facts that could have been urged to raise a genuine issue for trial. Nor do they argue that their counsel failed to take any legal position that would have affected the outcome of the motion for summary judgment. In sum, there is no reason to believe that the judgment was obtained by fraud on any party or on the court, no matter how reprehensible the conduct of plaintiffs’ counsel.

Joseph Colvin was appointed as the Chapter 11 trustee for each of the ABC Entities and, after all three cases were converted to Chapter 7, the Chapter 7 trustee (the “Trustee”). On or about July 28, 1993, while the post-judgment motions were pending in the First Suit, the ABC Entities, acting through the Trustee, commenced a second action – an adversary proceeding in this Court (the “Second Suit”) – asserting the same claims that had been the subject of the proposed amended complaint in the First Suit.

²The undisclosed conflict resulted from a “consulting agreement” that Powers and his firm had entered into with ORIX pursuant to which they agreed not to represent any party, other than the ABC Entities, in usury suits against ORIX. This consulting agreement was part of the settlement of an unrelated suit in which Powers and his firm represented a different client in a usury suit against ORIX. The ABC Entities alleged that they were unaware of the “consulting agreement” Powers had with ORIX until June 1993.

The District Court granted ORIX's motion to withdraw the reference with respect to the Second Suit. ORIX then moved to dismiss the Second Suit. The District Court denied the motion to dismiss, but ordered that the complaint in the Second Suit be amended to state detailed facts in support of the RICO count. The District Court's order provided that the failure to amend the complaint would result in the dismissal of the RICO count. The ABC Entities did not amend the complaint or seek additional time to amend. On January 4, 1994, the District Court (McBryde, J.) granted ORIX's motion for summary judgment dismissing the Second Suit on the grounds of *res judicata*. In entering final judgment against the ABC Entities, the District Court held:

There is no question that the claims asserted in this action [the Second Suit] are the same claims asserted in Civil Action No. CA4:89-720-A styled "ABC Asphalt, Inc., ABC Utilities Services Inc. and Utilities Equipment Leasing Company, Inc. v. Credit Alliance Corporation, First Interstate Credit Alliance, Inc. and Leasing Services Corporation" [the First Suit] which was decided adversely to the Plaintiffs therein.

Thereafter, the ABC Entities changed counsel again, this time discharging Hill and Newbern and substituting three sets of attorneys: Ron Norwood of Taylor & Norwood, the firm of Porter & Hedges, and the firm of Baker & Botts. The ABC Entities then appealed the judgments and orders of the District Court entered in the First Suit and the Second Suit to the Fifth Circuit (the "Appeal").

On May 15, 1995, the Fifth Circuit rendered its opinion on the Appeal, affirming the judgments and orders of the District Court. In its opinion, the Fifth Circuit disposed of the appeal of the denial of the Motion for New Trial stating:

As the district court found, the record does not support ABC's contention that Powers' misconduct prevented the company from fully and fairly litigating its case: the district court did not clearly err in finding that Powers neither failed to allege facts that could have been urged to raise a genuine issue for trial nor eschewed legal positions that could have affected the outcome of ABC's motion for summary judgment.

The Fifth Circuit also denied any relief based on the “consulting agreement” between ORIX and Powers stating that “[t]he record makes clear that ABC knew or should have known of the attorney client relationship between Powers and OCAI [ORIX] possibly as early as 1990, probably by March 1991 and certainly not later than March 23, 1993.” The Fifth Circuit concluded that “[b]y lying behind the log until after it received an adverse judgment to play its alternative ‘conflict card,’ ABC failed to protect its own interests in a timely fashion.” The Fifth Circuit expressly affirmed the findings of the District Court that the Motion for Leave to Amend was both “untimely and unmeritorious,” noting that “either of which standing alone would suffice to justify the district court’s decision to deny ABC’s motion for leave to amend its complaint.” Finally, the Fifth Circuit expressly affirmed the District Court’s determination that res judicata applied to bar the Second Suit and all of the claims stated therein – “[t]he Trustee has failed to explain - and we discern no logical reason why res judicata would not likewise apply to the instant cases.”

The ABC Entities did not seek further relief from the Fifth Circuit or seek review from the United States Supreme Court. Thus, the judgment in the First Suit (including the denial of the motion for leave to amend) and the judgment in the Second Suit are final, non-appealable judgments.

On May 20, 1989, ORIX filed its Motion for Relief from the Automatic Stay or for Adequate Protection (the “1st Lift Stay Motion”) in the ABC Entities’ bankruptcy cases. Asphalt and Uelco both opposed the 1st Lift Stay Motion. In its response, Uelco stated :

The allegations contained in Paragraph 22 of the Motion [the 1st Lift Stay Motion] can neither be admitted nor denied at this time because Debtor believes the amount to be approximately \$769,000 and cannot reconcile the balance asserted by FICA [ORIX] with Debtor’s books and records.

The 1st Lift Stay Motion was denied on the ground that ORIX had sufficient equity in its collateral to be adequately protected.

ORIX later filed a second motion for relief from the automatic stay or for adequate protection (the “2nd Lift Stay Motion”) which was similarly denied in March, 1991 on the ground that ORIX still had sufficient equity in its collateral to be adequately protected.

On or about November 25, 1991, ORIX filed its third motion for relief from the automatic stay or for adequate protection (the “3rd Lift Stay Motion”) in the ABC Entities’ bankruptcy cases. The 3rd Lift Stay Motion was contested by Colvin (as the Chapter 7 trustee of Uelco), by Uelco (as the debtor), and by Asphalt (as a debtor-in-possession).

On or about February 3, 1992, this Court (Tillman, B.J.) conducted an evidentiary hearing on the 3rd Lift Stay Motion. The ABC Entities were represented at the Lift Stay Hearing by Joseph Colvin (as Trustee) and by Newbern (as the Debtors’ bankruptcy counsel). The Creditors’ Committee of Asphalt was represented at the hearing by Nick Pappas. Miller & Miller Auctioneers, Inc. (“Miller & Miller”), another creditor claiming a security interest in the same collateral which was the subject of the 3rd Lift Stay Motion, was represented at the hearing by James C. Gordon. Wolfe was also present at the hearing.

After hearing testimony and receiving documentary evidence, this Court terminated the automatic stay and entered a finding of fact as to the principal balances owed to ORIX by the respective debtor on each of the three then-outstanding promissory notes. Specifically, finding of fact 22 stated:

On February 22, 1992, the amounts due and owing [to ORIX] on the notes computing interest at the default rates were as follows:

First Note [an Asphalt Note]	\$ 156,424.86
Second Note [an Asphalt Note]	526,562.11
Uelco Note	<u>1,240,594.84</u>
	\$ 1,923,581.81

No party appealed the order terminating the automatic stay or the findings of fact and conclusions of law issued by this Court in connection with that order.

While the Appeal was *sub judice* in late 1994 and early 1995, Wolfe, Lexie Wolfe (Wolfe's mother), and Miller & Miller (represented by Gordon) filed and litigated objections to ORIX's proofs of claim in the bankruptcy cases (the "Claim Objections"). The stated basis for the Claim Objections was the same as the stated basis for the Second Suit and the stated basis for the Motion for Leave to Amend in the First Suit, including the allegations that ORIX had fraudulently overcharged the ABC Entities.

Wolfe and Miller & Miller decided to work in concert on the Claim Objections. *See* Transcript of 10/19/98 hearing at 43-44. Wolfe has acknowledged that one of his primary goals in the Claim Objections was to obtain certain documents from ORIX. Specifically, Wolfe testified "I think – but the whole purpose [of the Claim Objections] was to – for other documents. I think – I'm not sure exactly. I haven't seen it in quite a while, but we were wanting [document] production." *See* Transcript of 10/19/98 hearing at 43. Wolfe was represented by Norwood and the Simon, Anisman law firm in connection with the Claim Objections.

Since the Appeal was pending at the time the Claim Objections were filed, and the stated bases for the Claim Objections were identical to those stated in the First Suit and the Second Suit, ORIX filed

a motion to withdraw the reference to the District Court. Wolfe opposed that motion and filed the sworn affidavit of Norwood in support of his opposition. Thereafter, Wolfe filed his amended opposition to the motion to withdraw the reference. The Norwood affidavit and Wolfe's opposition and amended opposition explicitly identified the documents that Wolfe now claims are the critical ORIX ledger cards. The District Court denied the motion to withdraw the reference.

ORIX also filed a motion to abate the Claim Objections pending the resolution of the Appeal. Wolfe opposed the motion to abate. This opposition once again attached a sworn affidavit from Norwood that was substantially identical to the affidavit attached to Wolfe's opposition to the motion to withdraw the reference.

ORIX propounded interrogatories to Wolfe as part of the contested matter represented by the Claim Objections. Wolfe responded, alleging that ORIX had overcharged the ABC Entities. It appears that by November of 1994, Wolfe was aware of the potential significance of the ledger cards to the ABC Entities' claims against ORIX and that those documents had not been produced by ORIX.

Despite the fact that those ledger cards were significant and had not yet been produced, it appears that Wolfe made no efforts to seek discovery from ORIX in the Claim Objections contested matter. Instead, Wolfe testified that he and his counsel made the decision to let Miller & Miller pursue discovery from ORIX. *See* Transcript of 5/30/01 hearing at 113, 175-76.

Miller & Miller did propound discovery to ORIX in the Claim Objections contested matter. ORIX responded by opposing any discovery as redundant. Miller & Miller filed a motion to compel production of documents. ORIX opposed the motion to compel. This Court (Tillman, B.J.) issued a discovery control order in which the parties were directed to prepare a joint status report on the

discovery dispute. ORIX and Miller & Miller filed a joint report which stated that “counsel join in requesting the Court to defer further proceedings with respect to the scope of discovery until after a determination is made of Orix’s Motion for Summary Judgment.”

As indicated by the joint report in connection with the discovery control order, ORIX had moved for summary judgment denying the Claim Objections. Wolfe and Miller & Miller opposed the summary judgment in part through the affidavit of David Morrow. Neither Wolfe nor Miller & Miller alleged in their oppositions to ORIX’s motion for summary judgment that they needed further discovery before they could prepare a complete response. In fact, Miller & Miller admitted in the joint report in connection with the discovery control order that discovery should be deferred until after the summary judgment motion was decided. In February 1996, this Court (Tillman, B.J.) granted ORIX’s motion for summary judgment and dismissed the Claim Objections, concluding that the decisions of the District Court in the First Suit and the Second Suit (as affirmed by the Fifth Circuit) barred the Claim Objections on the grounds of *res judicata*. Neither Wolfe nor Miller & Miller appealed the final summary judgment in favor of ORIX on the Claim Objections.

Thus, after their bankruptcy filings, the ABC Entities (acting either through Wolfe or the Trustee) asserted numerous claims against ORIX. However, over the ten-plus year history of these cases, ORIX succeeded in: (i) obtaining final judgments dismissing all of the claims asserted against it by the ABC Entities; (ii) securing relief from the automatic stay by final order to execute on its liens; and (iii) obtaining allowed claims against the ABC Entities by final order after objections to its proofs of claim were filed.

After attempting, unsuccessfully, to assert claims against ORIX, Wolfe believed that the ABC Entities should sue their former attorneys for malpractice in the handling of the ORIX claims. Because the Trustee refused to bring those malpractice claims (the “Malpractice Claims”), Wolfe sought, and obtained, permission from this Court (Tillman, B.J.) to bring such a lawsuit in state court (the “Malpractice Suit”) on behalf of the Debtors’ estates. The basis for the Malpractice Suit was the contention that counsel for the ABC Entities had impermissible conflicts of interest while representing the ABC Entities in connection with their claims against ORIX, and that the ABC Entities suffered damages as a result of those conflicts.

The Malpractice Suit was filed in state court in February 1996 by the Court approved counsel, Bruce Budner (“Budner”). Although ORIX was not a party to the Malpractice Suit, the ABC Entities sought extensive discovery from ORIX, including production of various documents (the “ORIX Documents”). Eventually, ORIX was ordered by the state court to produce the ORIX Documents under the protection of a confidentiality order (the “State Court Confidentiality Order). Among other things, the State Court Confidentiality Order provided that the ORIX Documents were to be “used solely for the prosecution or defense of the claims asserted in the [Malpractice Suit] and shall not be used for any other purpose. . . .” The State Court Confidentiality Order further provided that it would “survive the termination of [the Malpractice Suit]” and that upon the termination of the Malpractice Suit, the parties were to “return to OCAI [ORIX] all documents produced by OCAI, including all copies, prints and other reproductions of such information.”

ORIX and the ABC Entities had continuing discovery disputes in the Malpractice Suit. While these discovery disputes were pending, the parties to the Malpractice Suit successfully mediated their

disputes and in July 1998, a Compromise Settlement Agreement was executed by the parties, subject to this Court's approval (the "Malpractice Settlement"). As a result of the Malpractice Settlement, only one issue remained in the Malpractice Suit – the ABC Entities' motions for sanctions for discovery abuses against ORIX and to lift confidentiality of the ORIX Documents. By letter agreement dated July 23, 1998, ORIX and the ABC Entities agreed to settle their discovery disputes, subject again to this Court's approval (the "ORIX Settlement").

The state court reviewed and approved the Malpractice Settlement and the ORIX Settlement. Thereafter, on August 20, 1998, Budner filed a motion seeking this Court's approval of the Malpractice Settlement and the ORIX Settlement (the "Settlement Motion"). The Settlement Motion contained notice to creditors as required by Local Bankruptcy Rule 9007.1, which notice provides that unless a timely response to the motion is filed, the motion will be deemed unopposed and an order may be entered by the court granting the relief requested. Wolfe filed a response to the Settlement Motion on September 10, 1998. In his response Wolfe objected to the proposed settlements "to the extent approval [of the settlements] would arguably bar him or any party in interest from seeking disclosure of [the ORIX Documents]." The Settlement Motion was set for hearing on October 7, 1998.

At the October 7, 1998 hearing on the Settlement Motion, the Court (Tillman, B.J.) found that while Wolfe was objecting to the ORIX Settlement, he had no objection to the Malpractice Settlement. Thus, the Court entered an order approving the Malpractice Settlement (the "Malpractice Settlement Order") and "reserved for later determination" the ORIX Settlement. Wolfe approved the Malpractice Settlement Order "as to form and substance."

On September 28, 1999, this Court considered the ORIX Settlement and Wolfe’s objections to that settlement. On October 22, 1999, this Court entered an order approving the ORIX Settlement (the “ORIX Settlement Order”), finding that “the settlement agreement between debtors and Orix Credit Alliance, Inc. is fair and equitable and in the best interest of the bankruptcy estate.”

On November 1, 1999, Wolfe filed his Motion for Additional Findings of Fact and asked the Court to “make an explicit finding of fact that the parties agreed that the records could be made available by the Bankruptcy Court, free of the restrictions of the confidentiality order, and that the Court has done so by its order denying OCAI’s [ORIX’s] motion to quash the deposition.” Wolfe’s motion for additional findings was denied by Order entered on February 11, 2000.

On July 11, 2000, Wolfe filed a malpractice suit in Texas state court against Budner – the attorney who had successfully represented the Debtors’ estates in the malpractice actions against Newbern and Powers. Wolfe’s suit against Budner was removed to this Court. The Court (Houser, B.J.)³ denied Wolfe’s motion to remand at a hearing held on November 8, 2000. In a Memorandum Opinion dated December 20, 2000, the Court denied a Rule 12(c) motion for judgment on the pleadings filed by Budner, finding that a question of material fact existed with respect to Wolfe’s personal relationship with Budner. However, because a resolution of the issue of whether Wolfe, individually, had an attorney-client relationship with Budner could dispose of the suit in its entirety, the Court concluded that a separate trial of that issue was appropriate. Thus, this Court ordered separate trials of: (i) the issue of whether Wolfe, individually, had an attorney-client relationship with Budner in connection with the ORIX documents and the ORIX Settlement (“Phase I”), and (ii) all remaining

³The ABC Entities’ bankruptcy cases were reassigned to the undersigned judge on March 20, 2000.

issues, including liability, causation, and damages (“Phase II”). The Phase I trial was held on March 6, 2001. On April 17, 2001, this Court concluded that Wolfe did not have an attorney-client relationship with Budner and dismissed the complaint against Budner with prejudice.

On January 16, 2001, Wolfe filed the Motion. The Court held hearings on the Motion over several days and concluded them on May 30, 2001. The parties requested time to file post-hearing briefs, the last of which was filed on August 13, 2001.

III. Legal Analysis and Authority - Wolfe’s Standing to Initiate Litigation

Many courts have recognized that a party can be authorized to sue on behalf of a debtor’s estate under certain circumstances. For example, in *Louisiana World Exposition, Inc. v. Federal Insurance Co.*, 858 F.2d 233 (5th Cir. 1988), reh’g den., 864 F.2d 1147 (5th Cir. 1989), the Fifth Circuit stated:

While the circumstances under which a creditors’ committee may sue are not explicitly spelled out in the Code, the bankruptcy courts have generally required that the claim be colorable, that the debtor-in-possession have refused unjustifiably to pursue the claim, and that the committee first receive leave to sue from the bankruptcy court. “We agree that these are relevant considerations, though not necessarily a formalistic checklist.”

Id. at 247. *See also, In re Monument Record Corp.*, 71 B.R. 853, 863 (Bankr. M.D. Tenn. 1987); *In re Nicolet*, 80 B.R. 733, 738-39 (Bankr. E.D. Pa. 1987); *In re Curry & Sorensen, Inc.*, 57 B.R. 824, 838 (B.A.P. 9th Cir. 1986); *In re Evergreen Valley Resort*, 27 B.R. 75, 76 (Bankr. D. Maine 1983); *In re Chem. Separations Corp.*, 32 B.R. 816, 819 (Bankr. E.D. Tenn. 1983); *In re Parrot Packing Co.*, 42 B.R. 323, 329-30 (N.D. Ind. 1983); *In re Monsour Med. Ctr.*, 5 B.R. 715, 717-18 (Bankr. W.D. Penn. 1980).

Each consideration will be addressed below.

A. Is Wolfe a Creditor Who Can Seek Authority to Sue on Behalf of the Estates?

ORIX contends that Wolfe is not a proper creditor of the ABC Entities and thus, Wolfe cannot be authorized to bring suit against ORIX on behalf of the ABC Entities. The Court considered Wolfe's status as a creditor earlier this summer when two of the ABC Entities' bankruptcy cases were closed by the clerk's office while the Motion was pending. Wolfe moved to reopen the cases and ORIX opposed such a reopening, repeating its contention that Wolfe was not a proper creditor to seek such relief.

Consistent with the Court's prior conclusion in connection with the motion to reopen, upon review of the relevant claim documents, the Court again concludes that Wolfe is a creditor with standing to bring the Motion. To the extent that there are any irregularities in connection with the recent assignments of claims to Wolfe, a matter not properly before the Court and upon which the Court expresses no opinion, ORIX lacks standing to make an objection to the assignment. *See* Fed. R. Bankr. P. 3001(e)(2), (4) (providing means of noticing and/or objecting to a transfer of claims only for the transferor and transferee); *Troy Sav. Bank v. Travelers Motor Inn, Inc.*, 215 B.R. 485, 491 (N.D.N.Y. 1997) ("The bankruptcy judge correctly informed the Appellant that (e)(2) only permits the transferor to object to the transfer. Likewise, only the transferor is entitled to notice and hearing under (e)(2)."); *see also In re Crosscreek Apartments, Ltd.*, 211 B.R. 641 (Bankr. E.D. Tenn. 1997) (finding that failure to comply with rule governing transfer of claims does not affect validity of transfer where there is no prejudice to estate or any party in interest). Moreover, Wolfe's motivation in acquiring the claims is not relevant. *Cf. In re Embrace Sys. Corp.*, 178 B.R. 112, 121 (Bankr. W.D. Mich. 1995) ("Denying standing to purchasers of claims, however, would effectively discourage

postpetition transfers of claims, in contravention of the intended purpose of Bankruptcy Rule 3001. In addition, no other Bankruptcy Rule provides or implies that the postpetition purchaser of a claim lacks standing to participate in the bankruptcy case in which it has purchased a claim.”); *In re First Humanics Corp.*, 124 B.R. 87 (Bankr. W.D. Mo. 1991) (finding that a party which purchased a claim of the Debtor post-petition for the sole purpose of acquiring standing to propose a competing plan of reorganization was “party in interest” with standing to file such a plan).

Wolfe holds claims in the cases and, as such, is a party in interest with standing to bring the Motion.

B. Is the Claim Wolfe Seeks to Assert on Behalf of the Debtors’ Estates Colorable?

The parties disagree over the proper interpretation of this requirement. ORIX contends that to be colorable, the proposed Complaint that Wolfe seeks authority to file must be legally sufficient to satisfy a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. In contrast, Wolfe contends that the proposed Complaint need only raise a serious question. Wolfe further contends that a motion for authority to initiate litigation should not become a “mini-trial” of the merits of the proposed Complaint – the merits of the suit can and will be tested by the court before whom the litigation is actually filed if the motion for authority to file the suit is granted.

This Court agrees with Wolfe’s interpretation of the colorable claim requirement. In *Louisiana World Exposition, Inc. v. Federal Insurance Co.*, 832 F.2d 1391 (5th Cir. 1987), the Fifth Circuit found, after reciting the requirements set forth above (colorable claim, unjustifiable refusal, and leave to sue being granted), that “[t]he Committee is pursuing a colorable claim that raises a serious question of

bankruptcy law.” *Id.* at 1397. However, of significance here, after concluding that the claim was a colorable one, the Circuit went on to affirm the dismissal of the complaint on the merits for its failure to state a claim upon which relief could be granted. In its complaint, the Committee had sought to enjoin further payment by the insurance companies of the legal expenses the directors and officers were incurring in connection with another suit the Committee had been granted leave to bring on behalf of the estate against the officers and directors for gross negligence, breach of fiduciary duty and mismanagement. The Circuit affirmed the dismissal of the suit for injunctive relief after concluding that it failed to state a claim upon which relief could be granted – “we determine that the liability proceeds, which belong only to the directors and officers, are not property of the estate, and on that basis we hold that the Committee’s complaint was correctly dismissed.” *Id.* at 1398-1401.

Based upon the Fifth Circuit’s analysis in *Louisiana World*, 832 F.2d 1391, a colorable claim is one that raises a serious question even if the claim ultimately fails to survive a Rule 12(b)(6) motion to dismiss. Thus, Wolfe’s proposed Complaint need not be tested against a Rule 12(b)(6) standard to determine if the claims presented are colorable. Rather, the claims are colorable if they raise serious issues for determination.

Wolfe alleges that ORIX filed false claims in the Debtors’ bankruptcy cases and has perpetrated a fraud upon both the District Court and this Court. While those allegations must survive a

number of tests on the merits,⁴ if the allegations can be proven, they clearly raise extremely serious issues. Thus, the Court concludes that Wolfe has stated a colorable claim in the proposed Complaint.

C. Has the Trustee Unjustifiably Refused to Bring the Claim?

The Trustee filed a response to the Motion in which the Trustee states that he “does not oppose” the Motion. In his written response, the Trustee observes that if Wolfe prevails in the independent action, “there is a probability the Estate will be significantly benefitted and funds will be provided to pay creditors.” Finally, while the Trustee declines to express an opinion on the validity of the claims to be asserted in the independent action in his written response, the Trustee states that he is “unwilling to bring this suit for a number of reasons” including the fact that the Debtors’ estates have “no money with which to finance the litigation.”

At the hearing on the Motion, the Trustee testified that in addition to the reasons articulated in his written response, he was reluctant to bring the independent action because of the litigation history

⁴If the Motion is granted and the proposed Complaint is filed in the District Court, ORIX has stated that it will file a Rule 12(b)(6) motion to dismiss and will seek sanctions for the filing of what it considers a frivolous lawsuit. In its briefs in opposition to the Motion, ORIX has fully briefed the reasons why it believes the proposed Complaint fails to state a claim upon which relief can be granted. Although this Court disagrees with ORIX’s contention that to present a colorable claim, the proposed Complaint must be one that is capable of surviving a Rule 12(b)(6) motion, the Court has reviewed the Rule 12(b)(6) issues in some detail. If that were the correct standard against which to measure a colorable claim, it is unlikely that the Court would have concluded that a colorable claim was presented here. ORIX has raised extremely serious issues about the enormous delay that has occurred in the prosecution of these claims against ORIX. Moreover, ORIX has raised extremely serious issues of estoppel – when pursuing the Malpractice Claims, the claims against ORIX were “lost.” As soon as disputes surrounding the settlement of the Malpractice Claims were resolved and Wolfe received his share of the settlement proceeds (as a creditor of the Debtors), the “lost” claims against ORIX were “found” in the form of the proposed independent action recognized by Rule 60(b). Whether Wolfe’s proposed Complaint can survive either a Rule 12(b)(6) motion to dismiss or a Rule 56 motion for summary judgment is far from clear. However, these are merits issues that must be left to the trial court to decide if leave to pursue the litigation is granted.

here – the dismissal of the First Suit and the Second Suit by the District Court and the strongly worded affirmance of the District Court by the Fifth Circuit on Appeal. Specifically, the Trustee testified that “[a]s trustee, I have already been to the Fifth Circuit once in this case. . . . And I am not too anxious to go back because of the ruling in the prior case.” See Transcript of 5/30/01 hearing at 191.

As the Fifth Circuit noted in *Louisiana World*, 858 F.2d 233, “[i]t is clear from reviewing our decisions in *Coral Petroleum* and *Fuel Oil Supply* that in determining whether a debtor-in-possession’s refusal was unjustified, we must look to whether the interests of creditors were left unprotected as a result. As the interests of creditors are imperilled where valid and profitable state law causes of action are neglected by the debtor-in-possession, the unjustified refusal calculus will generally amount to little more than a cost-benefit analysis.” *Id.* at 253, n.20 (citations omitted). In denying the petition for rehearing in *Louisiana World*, 864 F.2d 1147, the Fifth Circuit “made one final point to emphasize our complete agreement with the cost-benefit analysis mandated by the Second Circuit in *In re STN*, 779 F.2d 901, 905 (2d Cir. 1985).” *Id.* at 1153.

In *STN*, the Second Circuit had stated that:

The court’s inquiries will involve in the first instance not only a determination of probabilities of legal success and financial recovery in event of success, but also a determination as to whether it would be preferable to appoint a trustee in lieu of the creditors’ committee to bring suit (bearing in mind any fees imposed on the estate by such an appointment, the wishes of the parties, and other relevant factors) and the terms relative to attorneys’ fees on which suit might be brought. The creditors who compose the committee may agree themselves to be responsible for all attorneys’ fees, but if they would seek to impose such fees on other creditors or the chapter 11 estate, whether by contingent fee arrangement or otherwise, that would obviously affect the cost-benefit analysis the court must make in determining whether to grant leave to sue. Hence, fee arrangements should not only be made a matter of record but should be carefully examined by the court as it makes that determination.

779 F.2d at 905 (footnote omitted).

Here, potentially valid state law causes of action were not neglected by either the Debtors or the Trustee. In fact, those claims were asserted against ORIX once before – unsuccessfully – by the Debtors in the First Suit and the Trustee in the Second Suit. The required cost-benefit analysis is complicated by, in the words of the counsel who Wolfe seeks authority to hire to file and prosecute the proposed Complaint, the “formidable legal obstacle” of the Fifth Circuit’s prior decision in connection with the Appeal. *See* Transcript of 5/30/01 hearing at 191, line 7. The cost-benefit analysis is further complicated by ORIX’s stated intention to seek sanctions for the filing of what it contends would be a frivolous complaint in light of the litigation history here – *i.e.*, the District Court’s prior dismissal of the First Suit and the Second Suit, and the Fifth Circuit’s strongly worded decision affirming the District Court in connection with the Appeal. Finally, the cost-benefit analysis is complicated by this Court’s concern that if the “formidable legal obstacle” of the Fifth Circuit’s prior decision cannot be overcome, the Debtors’ estates could be held liable for significant sanctions that the District Court might choose to impose for the improvident filing of the independent action to set aside those prior decisions.

Moreover, even if successful in overcoming motions to dismiss or for summary judgment, it is not clear to what extent the Debtors were overcharged by ORIX. After over a decade in which the Debtors could have calculated how much they think they owed ORIX on their secured loans (as opposed to the amounts claimed by ORIX in its filed proofs of claim), the Debtors still have not made their own calculation of the extent of the debt (and the resulting amount of potential overcharges by ORIX). Why the Debtors must have ORIX’s ledger cards in order to make their own calculations is inexplicable. Presumably, the Debtors have copies of the loan documents and the Debtors know when

they made payments on the debt. From the Debtors' own documents, a calculation could be performed that would quantify the potential significance of the alleged overcharges. Rather than do this calculation, the Debtors continue to complain about ORIX's failure to turn over the ledger cards. While those ledger cards could well confirm the extent of any potential overcharge, it seems clear to the Court that the Debtors could and should have made their own calculations by now. Without some ability to assess the potential upside of the proposed litigation against ORIX, the Court cannot conclude that it is in the interests of the Debtors' estates to pursue the litigation.

On this record, and after considering all of the circumstances, the Court cannot conclude that the Trustee has unjustifiably refused to bring the proposed independent action. There are serious legal obstacles that would have to be overcome before the proposed Complaint would be permitted to proceed to trial in the District Court. In the face of these serious legal obstacles, and in light of the estates' present financial circumstances, the Trustee's reluctance to proceed here is understandable. If Wolfe was authorized to file the proposed Complaint on behalf of the Debtors' estates and sanctions were awarded against the estates, the Trustee would likely have to sue creditors to whom distributions of funds have already been made – including Wolfe and Wolfe's mother – to recover some or all of those distributions in order to satisfy the sanctions award in ORIX's favor. To authorize the filing of litigation, when that authorization might subject the estates to further liability and even further litigation is not appropriate.

While the Motion recites Wolfe's agreement to "pay all cost of suit and attorney's fees" and states that "[t]he estate will not bear any expense,"⁵ unless Wolfe would agree to indemnify the Debtors' estates for any sanctions that might be awarded to ORIX, the estates would be unable to respond to a sanctions award (unless the Trustee successfully recovered funds previously distributed to creditors). As the Trustee testified, the Debtors' estates do "not have any funds. The fact is, zero funds at the present time." *See* Transcript of 5/30/01 hearing at 188. Wolfe has not offered to indemnify the Debtors' estates and has made no showing of his financial ability to do so. In fact, from Wolfe's testimony at the hearing, it appears that Wolfe's financial circumstances are limited. For example, Wolfe and his attorneys decided that Miller & Miller would take the lead in connection with the Claim Objections because at that point in time Wolfe "was pretty well out of money." *See* Transcript of 05/30/01 hearing at 113. When asked why he did not do more with regard to ABC's contest of ORIX's claims, Wolfe responded that he "was out of money" and that "they don't take claims contests, to my knowledge, on a contingency." *See* Transcript of 05/30/01 hearing at 119. When asked on cross-examination about his decision not to file a motion for rehearing after the unfavorable Fifth Circuit decision, Wolfe responded that "[t]here was money situation [sic], again." *See* Transcript of 05/30/01 hearing at 163.

Because the Court cannot conclude that the Trustee has unjustifiably refused to bring the proposed independent action against ORIX, the Court concludes that the Motion should be denied.

⁵Wolfe also testified that he can and will pay the costs associated with the proposed Complaint out of his own pocket and that his new attorney, Mr. Martin, has agreed to represent the estates on a contingent fee basis.

An Order denying the Motion will be entered concurrently with this Memorandum Opinion.

Signed this 9th day October, 2001.

Barbara J. Houser
United States Bankruptcy Judge